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# ANNOTATED CASES

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WILLIAM M. MCKINNEY AND H. NOYES GREENE

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EDWARD THOMPSON COMPANY  
NORTHPORT, L. I., N. Y.  
1916

BANCROFT-WHITNEY COMPANY  
SAN FRANCISCO  
1916

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# ANN. CAS.

## 1916 E.

**STATE EX REL. MEERK**

v.

**KANSAS CITY.**

Kansas Supreme Court—November 14, 1914.

*93 Kan. 420; 144 Pac. 218.*

**"Any"—Legal Meaning of Term.**

Section 1220, General Statutes of 1909, which authorizes cities of the first class by ordinance to extend their corporate limits so as to include any tract of unplatted land not exceeding 20 acres whenever the same "is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city," means whenever two-thirds of any single boundary line or side of such tract lies upon or touches the boundary line of such city; the word "any" being construed as used in the sense of one indifferently, out of an indefinite number.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Wyandotte county: HUTCHINGS, Judge.

Action by State, on relation of James M. Meek, plaintiff, against City of Kansas City, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*James M. Meek, J. E. McFadden and O. Q. Claftin, Jr.,* for appellant.

*Richard J. Higgins and W. H. McCamish* for appellee.

[420] PORTER, J.—In this case the state, on the relation of the county attorney of Wyandotte county, questions the validity of certain ordinances passed by the city of Kansas City, for the annexation of certain territory to the city. The court sustained a demurrer to the petition and rendered judgment.

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ment in favor of the city, from which the plaintiff has appealed.

The sole question involves the proper construction to be placed upon the language of section 1220 of the General Statutes of 1909, authorizing the extension of the limits and boundaries of cities of the first class. [421] The portion of the statute to be construed reads:

"Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or whenever any unplatted piece of land lies within (or mainly within) any city, or any tract not exceeding twenty acres is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary-line of such city, said lands, platted or unplatted, may be added to, taken into and made a part of such city by ordinance duly passed."

Our attention has been called to an error in the printed statute which is not of much consequence. The word "or" is substituted for the word "of," as appears from the original draft of the act, which was House bill No. 116. The statute should read: "two-thirds of any line of boundary," instead of "two-thirds of any line or boundary." It is the contention of appellant that the statute should be construed to mean two-thirds of the entire boundary of any unplatted tract not exceeding twenty acres; that is to say, that the legislature meant two-thirds of the entire boundary or perimeter of such tract. The trial court upheld the city's contention and construed the statute to mean the same as if it had read: "Having any one side or boundary, two-thirds of which lies upon or touches the boundary-line of such city."

The precise question has never been before the court. Both plaintiff and defendant quote from the language of the court in the opinion in the case of *Chaves v. Atchison*, 77 Kan. 176, 93 Pac. 624, where, in speaking of the provision for annexing territory to cities of the first class, it was said:

"In this act, . . . provision is made for annexing three classes of lands: . . . third, a tract of platted or unplatted land, not exceeding twenty acres in area, having a *boundary-line* two-thirds of which lies upon or touches the *boundary-line* of the city." (p. 177.) (Italics ours.)

The defendant attaches some importance to the use by the court of the expression "a boundary-line two-thirds [422] of which," etc., while the plaintiff emphasizes the use of the expression, "the boundary-line of the city," as indicating a construction favorable to the contention of the state. As remarked, the question here presented was not before the court at that time. Tracts of land in Kansas are usually four-sided; sometimes, but not often, they are three-sided. The several tracts annexed by the ordinances in this case are each four-sided. None of the tracts, however, forms a square or parallelogram. Ordinance No. 11,965 annexed a tract the western boundary of which is a straight line adjoining the city for a distance of 1340 feet. Ordinance No. 11,979 annexed a tract the western boundary of which is a straight line 1750 feet in length, lying upon and touching the boundary-line of the city. Ordinance No. 11,996 annexed a tract the western boundary of which is a straight line 2040 feet in length, touching the boundary-line of the city. The Missouri river forms the north boundary-line of each tract; the south boundary of each being the right-of-way of the Missouri Pacific railway, which runs in a northwesterly direction.

We think the contention of the city must be sustained, and that the only reasonable construction to be placed upon the language of the statute is that the legislature meant two-thirds of any single boundary where the tract contains less than twenty acres. "Any line of boundary," means, of course, the same thing as "any boundary-line." The construction contended for by appellant requires us to ignore entirely the use of the word "any." In construing statutes the courts have given different meanings to this word, according to the sense in which it is used, as determined by the context. In many cases "any" has been construed to mean the same as "every." On the other hand, "any" has often been held to mean any one out of a number. (See 1 Words and Phrases, pp. 412 et seq.) The first definition given by Webster's International Dictionary is: "One indifferently, out of an indefinite number; one indefinitely whosoever or whatsoever it [423] may be." It was undoubtedly used, we think, in the latter sense in the statute under consideration. Had it seen fit, the legislature might have provided that a tract of this character should not be annexed unless two-thirds of its entire boundary touched the boundary-

lines of the city; but had that been the intention, it would doubtless have used language more appropriate, and would not have used the word "any" in reference to boundary-lines. Besides, if such had been the intention, the legislature would hardly have made provision for a third classification of tracts of land, because it seems apparent that where two-thirds of the entire boundary of a tract of land adjoins a city, the tract must lie mainly within the city, and it would then fall within the second class, which provides that "whenever any unplatted piece of land lies within (or mainly within) any city," it may be taken into the city by ordinance. Aside, therefore, from the force which must be given to the words "any boundary-line," the fact that the legislature saw fit to make a separate classification for tracts of land not exceeding twenty acres satisfies us that the construction given to the statute by the trial court is the correct one.

The judgment is affirmed.

#### NOTE.

##### Legal Meaning of "Any."

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### I. Introductory.

The present note in discussing the meaning of the word "any" not only considers the construction which has been judicially given to that term and the meaning which its use imports to the phrases in which it is used, but collates in alphabetical order the phrases introduced by the word "any" which have been judicially defined, so far as the use of that word has affected their definition.

A discussion of the meaning of the word "anything" will be found in the note to the case of *In re Arnold*, Ann. Cas. 1915A 23.

### II. Meaning of "Any" Construed Alone.

#### 1. GENERALLY.

The word "any" has been said generally to be a term of inclusion, excluding any exception or qualification. Thus in denying the right of the state to collect a license tax for carrying on a banking business from a bank,

the charter of which provided that "the capital of the bank shall be exempt from any tax," it has been held that the word "any" excluded selection or distinction, and declared the exemption without limitation. *Citizens' Bank v. Parker*, 192 U. S. 73, 24 S. Ct. 181, 48 U. S. (L. ed.) 346. So in construing a Canadian Liquor License Act (R. S. O. 1897, c. 245, sec. 20), providing that the council of every city, town, village or township may limit the number of tavern licenses to be issued therein for the then ensuing license year, "or for any future license year," it was held that the expression "any future license year," plainly meant "all" future license years, there being nothing to restrict the generality of the word "any," and it being a word which excluded limitation or qualification. *In re Brewer*, 19 Ont. L. Rep. 411, 13 Ont. W. Rep. 954, 1087.

In other cases it has been held to convey a limited meaning by reason of the context. Thus in an action on a note instruction No. 1 in substance told the jury that, if the defendant set up a failure of consideration of the note, either in whole or in part, he must establish that failure by a preponderance of the evidence, and that the burden in proving "any defense" to the note was on the defendant, and the word "any" in this instruction appeared to have been underscored. Instruction No. 2 told the jury that "by a preponderance of the evidence is meant the greater weight of the evidence." The complaint was that there were other defenses than the failure of consideration, and that the word "any" must have been understood by the jury as synonymous with "every." The court held that instruction No. 1 spoke of no other pleas or defenses, and that the jury were not misled by the word "any" to believe that it referred to every other defense than those talked about in the instructions. *Ewen v. Wilbor*, 208 Ill. 492, 70 N. E. 575. So in *Indiana, etc. Coal Co. v. Neal*, 186 Ind. 458, 9 Ann. Cas. 424, 77 N. E. 850, in holding that in an action by a servant against his master for negligence under an Indiana statute (Acts 1891, p. 57, § 7478, Burns 1901), the servant could not recover by virtue of the provisions of the 18th section of the statute on which he relied, the court declared that in announcing this conclusion they deemed it proper to state that they had not been unmindful of the provision of section thirteen of the same act (§ 7473, Burns 1901), that for "any injury to person or persons occasioned by any violation of this act" a right of action should accrue, and held that while it was true that the word "any" might be taken distributively as including all, it was common in statutory construction so to restrain a universal word, as "all" or "every," as to make it comport

with the general scheme of the statute in which it was found, and that the appellant was not within the purview of the statute.

It has been held that the distributive word "any" as applied to the several grantees in a deed indicates the creation of an estate in common rather than a joint tenancy and is to be given controlling effect in determining the estate to be a tenancy in common. *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254; *Galbraith v. Galbraith*, 3 Serg. & R. (Pa.) 392. Thus, in the case last cited wherein it appeared that the land was given to certain grantees "or any of them, their or any of their heirs or assigns," the court said: "To them or any of them, their or any of their heirs," that is, them and each of them, their and each of their heirs; any heir which either of them might have; because if either of them had an heir which took nothing, the word 'any' would not be satisfied in its full extent."

The use of "any" does not necessarily imply a plural number. Thus under a Pennsylvania statute, providing that the "robbery or larceny of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of all or any of the United States of America, shall be punished in the same manner as robbery or larceny of any goods or chattels," it has been held that while if the expression in the act in question had been "any bonds," etc., the construction must have included one bond, because the word "any" was put in opposition to none, the word "any" might with equal propriety be applied to a substantive in the singular or in the plural number; and where it was joined to a substantive in the plural, it certainly had in strict construction a plural signification. In the same case it was said that under a later act providing that any person who should be convicted of printing, signing, or passing any counterfeit notes of the banks of Pennsylvania, North America, or the United States should be punished as is therein prescribed, it had never been doubted that the printing of one counterfeit note was an offense within the act. *Com. v. Messinger*, 1 Bin. (Pa.) 275, 2 Am. Dec. 441. So in *Partridge v. Strange*, 1 Plowd. 77, 75 Eng. Rep. (Reprint) 123, it was said: "So the statute of 5 R. 2, cap. 7, ordains, 'that none shall make entry into any lands and tenements except in case where entry is given by law,' yet if a man enters into one tenement, he shall be punished, notwithstanding the statute is in the plural number, as in divers books it is holden. So that the plural number contains in it the singular number. And if one right or title should not be con-

tained here, the effect of the statute would be set aside, and also every right or title is contained in the last branch by this word (any). And therefore, for this reason, a right or title in the singular number, is within the statute." Similarly it has been held that a constitutional provision that persons possessing certain qualifications should be eligible to hold "any office" does not authorize the holding of more than one office. *State v. Buttz*, 9 S. Car. 156. In 2 Hale's Pleas of the Crown 365, it was said: "There arose a doubt, whether, if there were one horse, mare, or gelding stolen, the offender should have had clergy; and the reason of the doubt was not singly, because the statute of 1 E. 6 was in the plural number, horses, mares, or geldings, for then it might as well have been a doubt, whether upon the statute of 23 H. 8, cap. 1, he, that had wilfully burned one house, should not have had his clergy, because the words of that statute are in the plural number, dwelling houses or barns; and so for robbing any churches or chapels. But the reason that made the scruple was, because the statute of 37 H. 8, cap. 8, was expressly penned in the singular number, If any man do steal any horse, mare or filly: and then this statute of 1 E. 6, thus varying the number, and yet expressly repealing all other exclusions of clergy introduced since the beginning of H. 8, made some doubt, whether it were not intended to enlarge clergy, where only one horse was stolen. To remove this doubt was the statute of 2 & 3 E. 6, cap. 33, whereby clergy is excluded from him that steals one horse, gelding or mare in all the cases of attainder, conviction, standing mute, or not directly answering." And see *Rex v. Hassel*, 2 East P. C. (Eng.) 597, 1 Leach 1, wherein it was held that the statute (2 Geo. II. c. 25, sec. 3) enacting that "whoever shall steal or take by robbery any Exchequer orders, or tallies, or other order entitling any other person to any annuity or share in any parliamentary fund; or any Exchequer bills, bank-notes, South-Sea bonds, East-India bonds, dividend-warrants, etc., etc., shall be deemed guilty of felony," covered the taking of one note as well as two or more. The words "if any" have been held not to be restrictive, but to be words of contingency. Thus under the Alabama statute (Pub. Acts 1903, sec. 50), which authorized the creditors and stockholders of a corporation to apply to the court for the appointment of a receiver, and authorized the court, after being satisfied from the affidavits and after such notice to the corporation, "if any," as the court might prescribe, to proceed, it has been held that it might be that the words "if any," in reference to the notice, did not dispense with notice, in any other cases than

those excepted by previous decisions. *Ensley Development Co. v. Powell*, 147 Ala. 300, 40 So. 137. So in proceedings under a Farm Drainage Act (Laws Illinois 1885, section 20) providing that the jury "shall return as their verdict the amount of damages found, if any, in favor of the owner or owners and against the commissioners," it has been held that the words "if any" did not authorize the jury to return a verdict that appellee was entitled to no damage for the land actually taken for the ditch. *Drainage Com'rs v. Volke*, 163 Ill. 243, 45 N. E. 415, affirming 59 Ill. App. 283. In a case where the court charged the jury that they should take into consideration "the physical pain and mental anguish, if any," which the plaintiff has suffered or will hereafter suffer in consequence of his injuries, it was held that the words "if any" were words of qualification and contingency and were to be read and implied in all parts of the instruction, and were not an improper comment on the evidence tending to mislead the jury, as assuming that there were permanent injuries and future pain and anguish. *Wells v. Missouri-Edison Electric Co.* 108 Mo. App. 607, 84 S. W. 204. The Lord Chancellor, in *Ex p. Wynch*, 5 De G. M. & G. 188, 43 Eng. Rep. (Reprint) 842, said: "Just on the same principle was decided the case of *Elton v. Eason*, 19 Ves. Jr. 73: the gist was this—the testatrix left all her moneys and effects whatsoever and wheresoever to hold to trustees, their heirs, executors, administrators and assigns, upon the following trusts subject to her debts, legacies, etc., 'to apply the residue of the rents and profits of my estates and effects for my son during his life and afterwards for the heirs of his body if any.' Sir William Grant held that to be an absolute interest in the first taker, and his expressions are (19 Ves. 78-80)—'Whatever disposition would amount to an estate tail in land gives the whole interest in personal property which is incapable of being entailed,' and subsequently, 'the words, "if any," have no restrictive effect and then it is a mere limitation over after a general failure of heirs of the body which the rules of law will not permit to take effect.'" In *Buckwalter v. Black Rock Bridge Co.* 38 Pa. St. 281, wherein it appeared that the charter of a bridge company provided that the damages caused by the erection of their bridge were to be ascertained by referees mutually to be chosen by the company and the plaintiff, and who were to "go upon the premises and view and receive such other testimony as they may desire, and assess the damages, if any, which the said David R. Buckwalter may and shall sustain by reason of the erection of the bridge," it was held that the words here required the payment of damages, "if any,"

by reason of the erection of the bridge; that this last expression, in the connection in which it stood, was the same thing as "on account of," or "because of," the erection of the bridge, and in this sense the paragraph meant any damage on account of its erection; and that the subjunctive or contingent form "if" did not lessen the import of the word "any," which meant indefinite results or amounts, and consequently meant all damages.

In construing the New Jersey Act (Pamph. L. p. 244) creating Union county and providing "it shall have and enjoy all the jurisdiction, powers, rights, privileges, liberties and immunities, which any other county in this state doth or may enjoy," etc., the court said: "The word 'any' has several meanings according to the subject which it qualifies. In synonyms it is distinguished from 'some.' Thus, it is said, "'some' applies to one particular part in distinction from the rest; 'any,' to every individual part without distinction. The former is altogether restrictive in its sense, the latter is altogether universal and indefinite." Crabb's English Synonyms. This is more noticeable when it is joined with another word, as 'anything,' 'anywise,' etc. Webster says: 'Although the word "any" is formed from "one," it often refers to many.' " *Stiles v. Union County Freeholders*, 50 N. J. L. 9, 11 Atl. 143.

Under an Idaho statute (Idaho Rev. Codes, § 2315, as amended by the Sess. Laws of 1909, p. 174), providing "every city . . . shall have power and authority to issue municipal coupon bonds . . . for any or all of the following purposes," and section 2316, providing "whenever the common council of such city or the trustees of such town . . . shall deem it advisable to issue the coupon bonds of such city or town for any of the purposes aforesaid, the mayor and common council may," etc., it has been said that the word "any" should not receive a technical or limited construction, and that as used it indicated that it was the intention of the law-making power that the municipal authorities of any city or town could, by proper ordinance, provide for as many of the necessary improvements in any of the cities or towns of our state as they, the council, deemed advisable. *Platt v. Payette*, 19 Idaho 470, 114 Pac. 25.

## 2. AS MEANING "ALL."

### a. Generally.

In a number of cases "any" has been construed to mean "all." Thus where it appeared that a corporate meeting was called by a notice which specified as one of the ob-

jects thereof "to remove, if deemed necessary or expedient, any of the directors," *Cotten, L. J.*, said: "Then there is a second object, 'To remove (if deemed necessary or expedient) any of the present directors, and to elect directors to fill any vacancy in the board.' The learned judge below thought that too indefinite, but in my opinion a notice to remove 'any of the present directors' would justify a resolution for removing all who are directors at the present time; 'any' would involve 'all.' I think that a notice in that form is quite sufficient for all practical purposes. If when the recommendations of the committee were known, or when the committee had been appointed, the directors or some of them were to say, 'We will not act any longer if you insist upon this. We will not follow out the recommendations whatever they may be,' then very likely the general meeting would say, 'If that be so we do not wish to have you as directors any longer, and we will remove you.' That shows why the words 'any of' were put in." *Isle of Wight R. Co. v. Tahourdin*, 25 Ch. D. (Eng.) 332, 53 L. J. Ch. 359, 50 L. T. N. S. 132, 32 W. R. 297.

So where it appeared that a building contract provided that for "any" additions required, the price was to be agreed on, it was held that the word "any" included "all" additions that might be required to be made, and that it was not open to the contractor to say that the stipulation in question referred to some only and not to all of the additions. *McBean v. Kinnear*, 23 Ont. 313.

Similarly on a prosecution under a Federal statute (Act of Congress of March 1, 1895, c. 145, 28 Stat. 697, 3 Fed. St. Ann. 424), forbidding the sale in Indian Territory of "any vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not," the court said: "The Century Dictionary defines the word 'any' to 'imply unlimited choice as to the particular unit, number, or quantity, and hence, subordinately as to quality, whichever, of whatever quantity or kind.' . . . And, in connection with the use of this word, the very fact that it is followed by the words 'other intoxicating drinks' seems to us to evidence the fact that Congress intended to use the word 'any' in its full meaning, and to emphasize the fact that its intention was to include all forms of malt and fermented liquors sold to be used as drinks or as a beverage in the Indian Territory." *U. S. v. Cohn*, 2 Indian Ter. 474, 52 S. W. 38. In a case wherein it appeared that a will gave express power to the executors to sell "any property, real or personal" of which the testator died possessed, the court held that evidently the word "any" was used in the place of the



word "all" and was meant to include, besides the personal property, all of his real estate except his residence. *Thomas v. Thomas* (Ky.) 110 S. W. 853.

Under a Kentucky statute (Acts 1910, ch. 106, § 14, p. 296) providing that where any property, subject to taxation, has been omitted for assessment for any year or years, the city may, by direct action brought in the name of the city by its city solicitor, etc., recover judgment against the person liable for the payment of taxes on such property, etc., it has been held that the word "any" was used in the sense of "all" and that the act included all property subject to taxation that had been omitted from taxation, no matter in what manner it was assessed. *Covington v. Cincinnati, etc.* R. Co. 144 Ky. 646, 139 S. W. 854.

So of a statute providing that the defendant in libel or slander may allege "any mitigating circumstances," it has been said that the words "any facts and circumstances" were used in their enlarged sense, and should not receive a limited construction; that the word "any" meant "all" and "facts and circumstances" were to be contradistinguished from reports and rumors; and that therefore a defendant in slander might, under an answer properly setting forth the matter in mitigation, give in evidence to reduce the amount of damages any or all facts and circumstances which had a legitimate tendency to disprove malice, or show that the truth of the charge was probable or properly inferable, and even the truth of the charge itself. *Heaton v. Wright*, 10 How. Pr. (N. Y.) 79.

The language of a law of Minnesota [1881, c. 148, § 1, as amended (G. S. 1894, § 4240)] providing that "any" debtor having become insolvent, or against whom garnishment proceedings had been instituted, or whose property had been levied on by virtue of a writ of attachment, execution, or other legal process, might make an assignment, has been held to indicate that it was designed to reach and provide for all insolvents who voluntarily or involuntarily made preferences, and also for all insolvent debtors whose property was being appropriated by legal process to the payment of debts, and therefore included a non-resident whose business dealings and connections within the state were of such a nature and character as warranted and required him to make an assignment under the laws of this state within the period specified by statute after the levy of an attachment on his property. *Rollins v. Rice*, 60 Minn. 358, 62 N. W. 325.

Under an Illinois statute (Act of April 21, 1899, § 1) which provides "that any number of persons not less than thirteen, may, in the manner hereinafter prescribed, form a

corporation for the purpose of issuing policies for any of the following kinds of insurance business," the court said in *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422: "'Any,' as here used, means 'all' or 'every.' . . . Bouvier, in his Law Dictionary, says that the word 'any' is given the full force of 'every' or 'all.' . . . The word 'any' is frequently used in the sense of 'all' or 'every,' and when thus used has a very comprehensive meaning.'"

(b) *As Meaning "All" or "Every."*

In some cases it has been said that the natural and ordinary meaning of "any" is "all" or "every." Thus under a statute of Missouri (Rev. St. 1899, sec. 5859, as amended by Laws 1901, p. 65) which provides that when the council shall deem it necessary to pave, etc., the road of any street, etc., the council shall, by resolution, declare such work or improvement necessary to be done. The court said: "It is claimed that the statute quoted required a separate resolution for each named street. It will not be necessary to determine whether the expression used, 'improve the roadway of any street,' is of such a character as to limit the power of the city by a single resolution to determine the necessity for the improvement of a single named street. Webster's International Dictionary gives the word 'any' as having the same derivation as the word 'one,' but states that 'it is often used, either in the singular or the plural, as a pronoun.' It is frequently used as synonymous with 'every' or 'all.'" *St. Avit v. Kettle River Co.* 216 Fed. 872, 133 C. C. A. 76.

So in an action under the Alabama Code of 1907, providing that no woman, or boy under the age of fourteen years, "shall be employed to work or labor in or about any mine in this state," the court said: "As employed in sections 2933 and 1035, 'any' must be given its usual, ordinary significance in such circumstances. It means all, every, as there used. The very fact that the expression 'any mine' was substituted by the codifications for the expression 'the mines,' when the latter expression in the act could only refer to coal mines, manifests, without any fair basis for doubt a legislative intent to subject to the inhibition of the statute every mine in Alabama. It is not conceivable that the change of phraseology thus made could have been adopted without that purpose in view. . . . It is urged in brief that, because the codifications were of the act of 1897, which by its title and context was confined to coal mines, the irrefragable implication is that coal mines only were intended to be subjected to the inhibition of Code 1896, § 2933, and Code 1907,

§ 1035. This contention is, of course, worthy of presentation—an argument that should be and has been considered and carefully weighed—but our conclusion is that, though according a fair influence thereto, it is not sufficient to overcome the clear effect of the very comprehensive and unequivocal term ‘any mine’ as employed in the codifications. To conclude to the contrary would require the court to ascribe to the word ‘any’ no more comprehensive significance than to the word ‘the’—an interpretation that cannot be justified or approved.” *Cole v. Sloss-Sheffield Steele, etc. Co.* reported in full, post, this volume, at page 99.

Similarly the words “any kind of insurance” and “any of the following kinds of insurance,” as used in the Illinois Acts of May 31, 1879, and April 21, 1899, respectively, which govern the incorporation and conduct of insurance companies, have been held to mean “all” or “every.” *People v. Fidelity, etc. Co.* 153 Ill. 25, 38 N. E. 752, 26 L.R.A. 295; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422.

Under an Indiana statute (Ind. Act 1895, § 9; § 7281, Burns 1901) conferring the right on a legal voter to remonstrate against the granting of a license to “any applicant” for the purpose of vending intoxicating liquors in the township, etc., it has been held that the words “any applicant” as used in the statute and as used in a power of attorney given by a majority of the legal voters of a town directing the attorney therein designated to remonstrate in their names and for them, should be construed to mean “all” or “every” applicant. *Ludwig v. Cory*, 158 Ind. 582, 64 N. E. 14; *White v. Furgeson*, 29 Ind. App. 144, 64 N. E. 49. And likewise, the phrases “any township” and “or ward in any city” as used in the same statute wherein it was declared that, to defeat an application for a license, it required a majority of the legal voters of “any township,” “or ward in any city” to remonstrate, have been held to mean every township, and every ward in every city, in the state. *White v. Furgeson*, 29 Ind. App. 144, 64 N. E. 49.

It has been held that the force of the word “any,” as used in each of the following guaranties, was to create a continuing guaranty, and that it should be construed as synonymous with “all” or “every.” “In order to save you from harm in so doing, we do hereby bind ourselves, etc., to be responsible to you at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail so to do.” *Douglass v. Reynolds*, 7 Pet. 113, 8 U. S. (L. ed.) 626. “I will be responsible for any bill that my son James will make, thank you for the same.” *Newcomb v. Kloeblen*, 77 N. J. L. 791, 74 Atl. 511, 39 L.R.A. (N.S.) 724. “Any

demands the Merchants’ National Bank may, from time to time, have or hold.” *Merchants’ Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434. “Gentlemen, I have been applied to by my brother William Wells, jeweler, to be bound to you for any debts he may contract, not to exceed one hundred pounds (with you) for goods necessary in his business as a jeweller. I have wrote to say by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweller not exceeding one hundred pounds after this date. (Signed) John Wells.” *Merle v. Wells*, 2 Campb. (Eng.) 413. “I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap supplied by Mr. Bastow to France & Bennett, provided they shall neglect to pay in due time.” *Bastow v. Bennett*, 3 Campb. (Eng.) 220. A written guaranty “for any goods he hath or may supply my brother W. P. with, to the amount of £100.” *Mason v. Pritchard*, 12 East 227, 104 Eng. Rep. (Reprint) 89. “Sir,—In consideration of your supplying my nephew, A. L. Vogel, with china and earthenware, I hereby guarantee the payment of any bills you may draw upon him on account thereof, to the amount of £200, G. Isaac.” *Mayer v. Isaac*, 6 M. & W. 605, 151 Eng. Rep. (Reprint) 554. “All liabilities incurred” wherein “all” was held to be equivalent to “any.” *Agawam Bank v. Strever*, 18 N. Y. 502. “Let Mr. H. Fordonski have as many shoes and boots as he want, and I see that you are getting paid for,” wherein it was held that, as the subsequent practical construction of the letter showed, the defendant agreed that he would be responsible for as many, that is, any boots and shoes they might furnish Fordonski, until further notified, and that as the words “any goods,” when used in letters of credit, had repeatedly been construed as affording evidence of a continuing guaranty, where the order contained no limitation as to time, the same construction must be placed upon the words “as many shoes and boots.” *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370.

### 3. AS MEANING “EACH.”

It has been held that “any” may be a word of severance, meaning “each.” Thus under the North Carolina Code (§ 1966) providing that “It shall be unlawful for any railroad corporation operating in this state, to charge for the transportation of any freight of any description over its road a greater amount, as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of the

same railroad of equal distance; and any railroad company violating this section shall forfeit. . . . Nothing in this chapter shall be taken in any manner, as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight, to be of not less in quantity or bulk than a car load;" it has been held that the statute plainly embraced all railroad corporations, whether incorporated by the laws of this state or not, "operating," that is, doing the business of transporting freights over their respective railroads in this state, and that the word "any" was used in the sense of each, every and all. *Hines v. Wilmington, etc. R. Co.* 95 N. C. 434, 59 Am. Rep. 250.

So under the New York Mechanics' Lien Law (Laws 1885, ch. 342) providing that any lienor may enforce his lien by a civil action in a court of record (§ 7), or in a court not of record, if the amount for which the lien is claimed does not exceed the jurisdictional limit of the court (§ 9), and such lienor shall be the plaintiff in such action (§ 17), it was held in *Egan v. Laemmle*, 5 Misc. 224, 25 N. Y. S. 330, that the words "any lienor" meant "each" or "every" lienor, and that there might be as many actions as there were lienors.

#### 4. AS MEANING "EITHER."

The charter (§ 11) of the city of Paris, Texas, provides that the offices of assessor and collector and city secretary, as heretofore combined by the city council under the name of city secretary, may so continue at the option of the council, and said city secretary shall perform all the duties of said offices, and shall devote his whole time to the same, to which is added the following: "provided, further, that the city council may combine or abolish any of the offices above named." In *Fenet v. McCuiston*, 105 Tex. 299, 147 S. W. 867, reversing 144 S. W. 1155, it was held that the use of the word "any" was of no consequence in this construction; that it had the sense of "either" or "any one," and would not be permitted to destroy the evident intention of the legislature.

#### 5. AS MEANING "EVERY."

The meaning of "every" has been given to the word "all" as used in the provision of the Georgia Code (§ 798), that "all poor-houses, almshouses, houses of industry, and any house belonging to any charitable institution," are exempt from taxation. It was accordingly held that as a masonic lodge was a charitable institution it necessarily followed from the express words of the statute, that any house belonging to it was exempt from taxation. *Savannah v. Solomon's*

*Lodge, No. 1, etc.* 53 Ga. 93. So under a Maryland statute (Code of Public Gen. Laws (Md.) art. 47, § 27), providing that if "any father or mother" shall be dead the children shall take by representation, it has been held that the words "any father or mother" employed could not be restricted to mean any father or mother dead, leaving brother or sister surviving, and that the word "any" meant every, and embraced as well the case where all of a class have died in the lifetime of the intestate, as where some one or more only might have died. *McComas v. Amos*, 29 Md. 132.

Similarly in construing a Michigan statute (Act No. 267, Pub. Acts 1911) providing that before "any suit at law or in chancery" shall be commenced in any circuit court or in the superior court . . . a certain fee shall be paid to the clerk or register of said court, and that before the entry of any final judgment by default a certain other fee shall be paid; it was held that in broad language it covered "any final decree" in "any suit at law or in chancery," in "any circuit court," and that "any" meant "every," "each one of all," and, by its general significance, in this connection included the circuit court for the county of Wayne. *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709.

Likewise a statute of New Jersey (Rev. Laws 403, sec. 2), providing that a defendant might plead the general issue, and give in evidence "any special matter" which, if pleaded, would be sufficient to bar the action; giving notice with the plea of the special matter so intended to be offered in evidence, it was held that the notice might present as many independent defenses as could be set up by way of special pleading; for the word "any" special matter, would comprehend every special matter which could be pleaded. *Tillou v. Britton*, 9 N. J. L. 120.

Of the word "any" as used in the Constitution of New York (art. 7, § 9), providing: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering, or renewing, any body politic or corporate," it has been said: "The construction contended for is the reverse of what the constitution plainly imports.—'Every bill continuing, altering, etc., any body politic,' etc. Johnson says the word 'every' means each one of all, and gives this example: 'All the congregation are holy, every one of them. Numbers.' The same lexicographer defines 'any' to mean every, and says, 'it is, in all its senses, applied indifferently to persons or things.' Now, the construction contended for by the defendants in error would make the

words 'every bill altering or renewing any body politic or corporate,' mean some bills and some corporations, instead of all bills and all corporations. But, to my mind, the words are so plain that, in the language of Story and Rutherford, there is no necessity of resorting 'to other means of interpretation.'" *Purdy v. People*, 4 Hill (N. Y.) 384.

Of a South Dakota statute (Act of 1893, 1), providing that "any city shall have full power to construct systems of sewerage in such manner and under such regulations as the city council shall deem expedient," it has been held that the term "any" as there used, evidently meant "every." *Heyler v. Watertown*, 16 S. D. 25, 91 N. W. 334.

In construing a Canadian Public Schools Act [33 Vict. c. 3, § 22 (D. 1870)], providing that "nothing in the law shall prejudicially affect 'any right or privilege with respect to denominational schools which any class of persons may have by law or practice in the Province at the Union,'" the court said: "In *Ex p. Renaud*, 14 N. Bruns. 273, the court in New Brunswick dealt with section 93 of the British North America Act, to which section 22 of the Manitoba Act is similar. In that case the learned Chief Justice, now Chief Justice of the Supreme Court, held that the words of sub-section one were not intended to distinguish between Roman Catholics on the one hand and Protestants on the other. The sub-section means, he said, just what it expresses—that 'any,' that is every 'class of persons' having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants or Roman Catholics, should be protected. If that is the true reading of sub-section one of section 93 of the British North America Act, and I do not see how any other reading can be given to it, the same construction must be put upon the corresponding sub-section of the Manitoba Act. The words Protestant and Catholic are used in the British North America Act as in the Manitoba Act. That being so, there can, I think, be no doubt that under the decision of the Supreme Court in *Barrett v. Winnipeg* [19 Can. Sup. Ct. 374, reversing 7 Manitoba 273], the members of the Church of England are a class of persons who had at the time of the Union a right or privilege by law or practice which is prejudicially affected." *Logan v. Winnipeg*, 8 Manitoba 3.

However, under an Act of Arkansas (Act of March 22, 1881, § 5), providing that if "any tract" of school land is offered and not sold, it may be offered again without a new petition, it has been held that "any" did not mean "every" and that the proper construction of the act authorized the sale of any tract, if it was not sold at the time

it was first offered, on the first day of any succeeding term of the county court. *Brown v. Rushing*, 70 Ark. 111, 66 S. W. 442.

## 6. AS MEANING "ONE."

### a. Generally.

The reported case construes the language of a Kansas statute (Gen. Stat. 1909, § 1220) authorizing the extension of the limits and boundaries of cities of the first class, which provides, in part: "Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or whenever any unplatted piece of land lies within (or mainly within) any city, or any tract not exceeding twenty acres is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary-line of such city, said lands, platted or unplatted, may be added to, taken into and made a part of such city by ordinance duly passed." It is held that "any line of boundary" means the same thing as "any boundary-line," and that following the first definition given by Webster's International Dictionary which is: "One indifferently, out of an indefinite number; one indefinitely, whosoever it may be," the only reasonable construction to be placed on the language of the statute is that the legislature meant two-thirds of any single boundary where the tract contains less than twenty acres.

With respect to a provision in a note waiving "all defenses on the ground of any extension of the time of its payment" it has been held that there was nothing in the contention that but one extension of time was intended, that the use of "any" before "extension" indicated that any one of an indefinite number was intended, and that in the connection found the word was analogous to "every." *Winnebago County State Bank v. Hustel*, 119 Ia. 115, 93 N. W. 70. So in construing a bequest of income to be applied for the purchase of books for the Young Men's Institute, "or any public library which may from time to time exist in said city," it has been held that the provision did not require the trustee to purchase the books exclusively for the Institute, but that in its discretion it might purchase books for any other public library that might from time to time exist, and that the word "any" as used therein meant "one out of several or many." *New Haven Young Men's Institute v. New Haven*, 60 Conn. 32, 22 Atl. 447.

In an English case wherein it appeared that a lease contained a covenant that the lessees should within the space of six months next after the decease of "any of the said three persons," for whose lives the said prem-

93 Ken. 480.

ises were granted, give notice to the said lessor of the decease of such person or persons, etc., the Master of the Rolls said: "I admit, the subsequent words may have given rise, as they certainly did in the minds of some persons, perhaps lawyers, to a misunderstanding: but there may be a case to satisfy them; viz., if a second life should drop within the twelve months after the expiration of the first. There is therefore a possible case, to which those words may apply. One of the counsel did attempt to insist, that the word 'any' grammatically means any two: that it is a plural word, unless the word 'one' is added to it; and as an authority to prove that the language of the decrees of this court is referred to: an authority, which Dr. Johnson would hardly have admitted: but even that is mistaken; for it is quite the reverse. If there are three executors, the language of the decree is to take an account of what has come to the hands of them or any of them, or (which is certainly a very incorrect expression) to their or any of their use: the Master may under those words take an account of what has come to the hands of any one of them. The other counsel admitted, that it is singular or plural according to the context; and put it upon that; whether it must not be considered in this case as a plural word. Upon the first part of this covenant I am of opinion, that if upon the death of the first life notice is not given, the covenant is not performed: but it is said what follows will control or rather enlarge the preceding part; and the Court must conclude, the lessor meant to give an option to wait till the death of the second life. That would be a more absurd construction than the other. It is not a necessary implication most unquestionably. Common sense dictates the reverse. The lessor must be sure, he never would have a renewal at the end of one life." *Eaton v. Lyon*, 3 Ves. Jr. 694, 30 Eng. Rep. (Reprint) 1223.

*b. As Meaning "One or More."*

The significance of "one or more" has been ascribed to the word "any" as used in the Act of Assembly of South Carolina, 1785, which, after enumerating the various coins, provides that "any person who shall counterfeit, or utter or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold or silver coins," etc. *State v. Antonio* 3 Wheel. Crim. (N. Y.) 508, 3 Brev. (S. C.) 562.

So the language of the law (Rev. St. U. S. § 5347, 6 Fed. St. Ann. 922) forbidding cruelty on the part of the officers of a vessel to "any of the crew," has been held to mean any one or more of the crew. *U. S. v. Harriman*, 1 Hughes 525, 26 Fed. Cas. No. 15,311.

Similarly under an Indiana statute (Acts 1899, p. 128) providing that the county commissioners of "any county" in the state, when petitioned therefor by fifty freeholders, voters of any township or townships contiguous to each other, . . . inhabitants in such county, where road or roads are to be improved . . . shall submit the proposition to vote, it has been held that the words "fifty freeholders, voters of any township or townships contiguous to each other, . . . where such road or roads are to be improved," showed that but fifty freeholders are required from one or more of the townships, and that the contention of the appellants that the words "any township" when applied to a district composed of two or more townships, had the meaning of "every township," did not apply. *Davern v. Decatur County*, 34 Ind. App. 44, 72 N. E. 268.

Under a New Jersey Act (supp. of March 11th, 1872) providing "that the Camden Horse Railroad Company be and they are hereby authorized and empowered to build, maintain and use a railroad or railroads on any public road or highway in the city of Camden, or any public road or highway extending from said city into the county of Camden," it has been held that since the language of the Act of 1872, contemplated the building of more than one railroad, the word "any" therein, in connection with the words "railroad or railroads," did not have the force of one, but in connection with the plural of "railroads," must be construed as giving the right to use more than one public road. *West Jersey Traction Co. v. Camden Horse R. Co.* 52 N. J. Eq. 452, 29 Atl. 333. And in a later construction of the same statute, it was said that although the words "any highway" more aptly denoted the selection of a single highway than the selection of several, yet it was not incapable of the latter signification, and to accord with the context in this statute, which authorized the building of railroads, it must have the broader meaning, or else it must be supposed that the legislature contemplated the construction of several railroads on the same highway by the same company,—a supposition that could not be entertained. *West Jersey Traction Co. v. Camden Horse R. Co.* 53 N. J. Eq. 163, 35 Atl. 49.

In construing a bequest of income to be applied as directed in "any memorandum amongst my papers," *Cozzens-Hardy, M. R.*, said: "Now it is admitted, I think—and if it is not admitted it could not really be disputed—that the respondents must fail if, according to the true construction of the will, the £10,000 is to be held as if the testator had said 'upon such trusts and conditions, and subject to such rules and regulations, as shall be found contained and specified in any existing or future memo-

random amongst my papers written or signed by me.' That, in my view, is the true meaning and construction of this gift. I cannot read it as meaning 'upon the trusts and upon the terms specified in any one existing document unless and until I may alter it by some other document which I may execute at some future time.' Whether such a gift would or would not be valid I do not pause to consider, but I am entirely unable to accept that view of the construction. The word 'any' presupposes the possibility of more than one, and the fact that the second gift does not necessarily as a matter of construction refer to the same memorandum as is mentioned in the first gift—although the document which is admitted to probate relates to both—greatly assists and helps this view." *North Wales University College v. Taylor* [1908] P. (Eng.) 140.

#### 7. AS MEANING "OTHER."

"Any" has been construed as meaning "any other" in its use in a Nebraska statute providing, in part, as follows: "The mayor and city council may order such improvement, except repaving, by ordinance, and cause it to be made, when it is embraced in any district the outer boundaries of which shall not exceed a distance of three thousand feet from any of the streets surrounding the courthouse grounds of the county within which city is located. The mayor and city council may order such improvement, except repaving, and cause it to be made upon any street or alley within any district in the city, but if a protest signed by persons representing a majority of the taxable feet fronting on any street or alley ordered to be so improved in the improvement district shall have been filed . . . then such improvement shall not be authorized." It was held that the draughtsman of the act and the legislature used the word "any" in the second clause as meaning "any other," a sense in which it was not infrequently used colloquially, and that it was clear that the legislature by the enactment in question intended to make a special regulation with respect to the specified area adjacent to the court house. *Kountze v. Omaha*, 63 Neb. 52, 88 N. W. 117.

#### 8. AS MEANING "SOME."

In construing an Illinois statute (Act of 1879, Ill.) giving the park board the power "to connect any public park, boulevard or driveway under its control, with any part of any incorporated city, town or village, by selecting and taking any connecting street or streets, or parts thereof, leading to such park," it has been held that by the phrase "with any part of any incorporated city," any connecting street or streets, or parts of streets, might be taken to connect the park

with any part of any incorporated city; that the word "any," as applied to the parks under the control of the park commissioners, could not be construed as limiting the power to connect by a street or streets only one park with the city, but it was apparent that the power to connect any parks under their control was intended to mean, all parks under their control might be so connected. So, also, the language employed, that they might connect with "any incorporated city," did not mean with one incorporated city, necessarily, but was intended to apply to all cities having a park or parks within their territorial limits, and therefore the word "any," as used in the sentence, "with any part of any incorporated city," was intended to confer power to connect the parks under such control with such parts of the city as the public convenience might demand, and was used in the second sense given by Worcester and Webster,—i. e., "some; . . . an indefinite number or quantity." *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L.R.A. 215.

Similarly under the provisions of a Vermont statute (Stat. Vt. § 1183) the purpose of which was to enable execution creditors of a firm to satisfy, out of the assets of any or all of the partners, their judgments obtained against the partnership, it has been held that the term "any," as there used in the phrase "any or all," should not be given its limited sense, but its enlarged and plural sense, meaning "some," however few or many, an indefinite number, and that under this construction, such a supplemental suit might be brought against one, or more, or all of the partners, associates, or shareholders. *Tarbell v. Gifford*, 79 Vt. 369, 65 Atl. 80.

However in *Miller v. Munson*, 34 Wis. 579, 17 Am. Rep. 461, an affidavit for attachment stating that the defendant was about to dispose of "any" of his property was held to be insufficient, the court refusing to give to the word "any" as so used the meaning of "some."

#### 9. AS MEANING "TO ANY EXTENT."

In construing a Louisiana statute (Act No. 134, 1890, p. 175, § 1), providing "that any person who shall . . . take any woman of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution or for any unlawful sexual intercourse . . . shall on conviction be punished," etc., it has been held that the word "any" meant "to any extent; in any degree; at all," so that unlawful sexual intercourse "to any extent," even if it were a single act, was covered by the statute of Louisiana. *State v. Sanders*, reported in full, post, this volume, at page 105.

**III. Meaning of "Any" Construed with Other Words.****1. ANY ACT.****a. Generally.**

It has been held that the manifest purpose of the legislature in using the words "any act" in the third section of the act creating the township of Montclair (Act April 15, 1868)—declaring in force, as to that township, "the provisions of any act or acts from the operation of which the township of Bloomfield has by any proviso or exception contained therein been specially excepted"—which was construed as taking Montclair out of the exception in the first section of the Act of April 9, 1868, and adding it to the class of townships which, by that act, were authorized to raise money upon bonds, to be invested in bonds of the railway company, was to relieve the new township from the disabilities imposed by the bonding act on the township of Bloomfield as then established. *Montclair v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 U. S. (L. ed.) 431.

Under the Quebec statute (Revised Statutes, Art. 5719) enacting "that this section does not extend or apply to any action or prosecution for the recovery of any penalty imposed by any act respecting the sale of intoxicating liquors," etc., it has been held that the words "any act," meant any act of the legislature of Quebec, and not any act of any other parliament either Imperial or Canadian, and that the plaintiff's action must be dismissed for the want of the affidavit required by the law of that province in popular actions before the issue of the writ. *Timmis v. Lewis*, 15 Queb. Super. Ct. 233.

A Canadian Criminal Procedure Act (32-33 Vict. c. 29) declares that divers acts had been passed assimilating, amending, and consolidating certain provisions of the statute law of the several provinces, and extending them to all Canada, and that it was expedient to assimilate, etc., the provisions of the statute law respecting procedure and other matters not included in said acts. In the interpretation clause (sec. 1, sub. 6), it is declared that the expression, "any act" or "any other act," in this act, shall include any act passed or to be passed by the parliament of Canada, or by the legislature of the late provinces of Canada, or passed or to be passed by the legislature of any province of Canada unless there is something in the subject or context inconsistent with that construction. *Reg. v. O'Rourke*, 1 Ont. 464.

**b. Any Act, Neglect or Default.**

The words "any act, neglect or default whatsoever," in a clause of a bill of lading,

and a clause which stated that the company was not accountable for leakage or breakage, "when properly stowed," when taken together, has been held not to exempt the company from responsibility for leakage and breakage occurring as the result of bad stowage by the master or the mariners. *The Colon*, 9 Ben. 354, 6 Fed. Cas. No. 3,023.

**2. ANY ACTION.**

It has been held that the words "any action" as used in a Connecticut statute (Gen. Stat. tit. 1, sec. 95, revision of 1866), providing that where one of the parties in any action pending in the superior court should die, his executor or administrator might enter and continue the suit, included an appeal from a decree of a court of probate refusing to admit to probate the last will of a deceased testator. *Stiles' Appeal*, 41 Conn. 329.

Under a statute of Illinois (Rev. Stat. c. 51, § 9), which provides "the several courts shall have power in any action pending before them upon motion, . . . to produce books or writings in their possession or power, which contain evidence pertinent to the issue," and which was intended to obviate the necessity for a bill of discovery in actions at law, it has been held that the words "in any action, pending before them," excluded the idea that the evidence sought to be obtained can only be acquired by a bill of discovery, and that "any action" included a suit at law, as well as a bill in chancery, *Swedish-American Tel. Co. v. Fidelity, etc. Co.* 208 Ill. 562, 70 N. E. 768.

**3. ANY ADDITIONS THERETO.**

In 1873 the city of Seattle, by an ordinance (No. 39), granted a franchise authorizing the predecessors of the respondent to "lay down gas pipes and extend the service of gas throughout the city of Seattle and throughout any additions that may hereafter be made to the said city of Seattle." This ordinance was amended in the year 1881, which amending ordinance recited the authority as follows: "To lay down gas pipes and extend the service of gas throughout the said city of Seattle and throughout any additions thereto." Subsequently, in the year 1901, the city, by Ordinance No. 6,968, granted a franchise to R. H. Malone and others, for a period of fifty years, to erect and maintain a gas factory in the corporate limits of the city of Seattle, "for the purpose of selling and supplying gas in the city of Seattle as the boundaries thereof are and may hereafter be," of all of which franchises the respondent was the successor in interest. Construing those ordinances it was held that the grant was a general grant, "throughout the city of Seattle and throughout any addi-

tion thereto," and "as the boundaries thereof are or may hereafter be," and that it was clear from the language there used that the city intended to grant the right throughout the whole city, as it then was and as it might thereafter be extended, and that though at that time there were large unplatted areas within the city limits, the phrase "any addition thereto" was not intended to cover such unplatted areas within the city limits, as a reasonable construction of the language of the grant required the court to hold that the city intended the grant to be a general continuing one, expanding with the city, and not one limited to a particular district. *Seattle Lighting Co. v. Seattle*, 54 Wash. 2, 18 Ann. Cas. 1117, 102 Pac. 767.

#### 4. ANY ADJOINING MUNICIPALITY.

Under the Borough Act of New Jersey of 1897 (Pamph. L. p. 323, § 76, as amended by Pamph. L. 1899, p. 159), making it lawful for a borough to make a contract with the governing body of "any adjoining municipality," or with any water company in this state, for a term not exceeding ten years, etc., and Act of April 16, 1897 (Pamph. L. p. 232), wherein it is provided that it shall be lawful for the board of aldermen or other governing body of any municipal corporation in this state owning or controlling water works to make contracts with "any adjoining municipal corporation," or with any private corporation therein, to furnish a supply of water for public or private uses, etc., it has been held that the phrases "any adjoining municipality" and "any adjoining municipal corporation" did not refer to municipalities the boundaries of which did not touch each other. *Bayliss v. North Arlington*, 80 N. J. L. 124, 76 Atl. 1024.

#### 5. ANY ADVANTAGE.

Under a provision of the Iowa constitution (art. I, § 18), that "private property shall not be taken for public use without just compensation first being made or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken," it has been held that the expression, "any advantage," was used to cover all benefits of every kind that might result, that incidental, indirect, consequential and remote benefits were meant as well as direct and immediate; also that those benefits that resulted to the land itself, as the improvement of the soil, the drainage of ponds, etc., which increased its intrinsic value, were included in the expression as well as other consequences attending the location of highways

which increased the value of real estate. *Frederick v. Shane*, 32 Ia. 254.

#### 6. ANY AGENT.

In *State v. Bancroft*, 22 Kan. 170, the court construed a Kansas statute (Laws 1873, p. 177, § 1) providing as follows: "If any clerk, apprentice, or servant of any private person, or any copartnership, . . . or if any officer, agent, clerk, or servant of any incorporation, or any person employed in such capacity, shall embezzle or convert to his own use . . . any goods, rights in action, or valuable security or effects whatsoever belonging to any person, copartnership, or corporation, which shall have come into his possession or under his care by virtue of such employment or office, . . . or if any agent shall neglect or refuse to deliver to his employer or employers, on demand, any money, promissory notes, evidences of debt, or other property which may have come into his possession by virtue of such employment, after deducting his fees as attorney, charges as agent, or stipulated commission for making collection of such money, . . . he shall, upon conviction thereof, be punished." It was held that the expression "any agent" therein, included every agent, whether of an individual, a partnership, a corporation, or a state, who did the acts thereafter named, and that the statute was doubtlessly aimed at lawyers and such other collecting agents as were not liable to even a civil action until after demand, and its language was purposely made general, to include all such agents, for whomsoever they were acting.

And in *Missouri, etc. R. Co. v. Demere*, 145 S. W. 823, there was construed a Texas statute (§ 1223a McIlwaine), providing: "Service may be had on foreign corporations having agents in this state in addition to the means now provided by law by serving citation upon any train conductor . . . if said conductor handles trains . . . across the state line of Texas . . . or upon any agent who has an office in Texas and who . . . makes contracts for the transportation of passengers or property over any line of railway . . . of any such foreign corporation or company." It was held that the appellants' contention that under that article the words "any agent" meant any agent of the foreign corporation rendered nugatory the statute, and that the proper interpretation of the statute was as follows: That as article 1223 provided for service on any agent of the foreign corporation, and as article 1223a provided that "service may be had in addition to the means now provided," and as every person who sold tickets or made contracts for transportation over



the lines of a foreign corporation was, in one sense, the agent of such corporation, that the statute made such person, for the purpose of service of citation, the agent of the foreign corporation, when it was doing business in the state; and that the words "any agent" meant any agent of any road who sold tickets or made contracts of transportation over the line of the foreign road.

#### 7. ANY ALIEN.

The words "any alien who has declared his intention," as used in the Naturalization Act of June 29, 1906 (c. 3592, § 4, cl. 6, 34 Stat. 596, Fed. St. Ann. 1909 Supp. 369) providing that "when any alien who has declared his intention, etc., dies before he is actually naturalized," his widow and minor children may be naturalized without previously declaring their own intention, have been construed to include the same persons who were included in the words "any alien who has complied with the first condition" used in the earlier statute (Rev. St. U. S. § 2168, 5 Fed. St. Ann. 207). In *re Shearer*, 158 Fed. 839.

Under a Federal statute (Act of February 20, 1907, c. 1134, § 3, 34 Stat. 898, Fed. St. Ann. 1909 Supp. 161, as amended by Act of March 26, 1910, c. 128, 36 Stat. 263, Fed. St. Ann. 1912 Supp. 89) providing "that the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden," etc., it has been held that the alien need not be a woman or girl, that conclusion being reached from the changes made by Congress in section 3 when amending it in 1910. The section as it stood in the 1907 act (34 Stat. 898, 899, c. 1134, Fed. St. Ann. 1909 Supp. 161) forbade and rendered felonious the importation or attempt to import "any alien woman or girl for the purpose of prostitution, or for any other immoral purpose;" the phrase "alien woman or girl" being repeated in other clauses of the section; and one of the principal changes made in 1910 (36 Stat. 263, 264, c. 128, Fed. St. Ann. 1912 Supp. 89, 90) was to eliminate the words "woman or girl," so that the section prohibited the importation of "any alien" for the purposes referred to, and declared that whoever shall import or attempt to import "any alien for the purpose," etc., or should hold or attempt to hold "any alien" for any such purpose, etc., or should keep, etc., in pursuance of such illegal importation "any alien," should be deemed guilty of a felony. *Lewis v. Frick*, 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967.

#### 8. ANY ALLOTMENT.

In construing the Original Seminole Agreement of December 16, 1897 (Act July 1, 1898, Ann. Cas. 1916E.—2.

c. 542, 30 St. at L. 567) which provided that all contracts for sale, disposition, or incumbrance of any part of "any allotment" made prior to date of patent should be void; that each allottee should designate one tract of forty acres which should by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity, it has been held that the words "any allotment" had reference to any and all allotted lands whether set apart directly to the allottee, or that which descended to the heirs of the allottee upon his or her death, and were intended to apply either to the homestead or surplus allotment. *Stout v. Simpson*, 34 Okla. 129, 124 Pac. 754.

#### 9. ANY ANIMALS.

It has been held that the words "any of the animals, wild fowls or birds mentioned in section one (1) of this act," as used in an Illinois statute (Laws 1899, c. 61, § 6), were not limited to such animals, wild fowls or birds as were killed or taken within the state of Illinois, but included those killed or taken without the limits of the state. *Merritt v. People*, 169 Ill. 218, 48 N. E. 325.

#### 10. ANY APPRECIABLE EXTENT.

In *Chaffin v. Fries Mfg. etc. Co.* 136 N. C. 364, 48 S. E. 770, in reviewing an instruction that the plaintiffs were entitled to recover nominal damages if water was ponded on their land to "any appreciable extent," the court said: "We think they were so entitled if it was ponded on the land to any extent. If the land was covered by water at all, however inappreciable the extent of the invasion of the plaintiffs' right, they are entitled to nominal damages, provided, however, it was caused by the erection of the dam. . . . It certainly cannot be said that the term 'appreciable extent' is precisely synonymous with the words 'any extent' in scope and meaning, for if so, as we have said, the use of the word 'appreciable' was superfluous. It can make no difference how very small or how much less than any assignable quantity or value the injury to another's right may be, and we use the word 'injury' now, as we did before, in its technical sense, the injured party is entitled to nominal damages, for they are based not upon any idea of damage however trivial, but are solely predicated on the infraction of a right when there has been no damage proved, and they are awarded because of the distinct legal wrong committed, however imperceptible, from which the law conclusively presumes that there has been some damage, in the absence of proof of any kind of damage."

## 11. ANY ARTICLE.

In a case wherein it appeared that the collector, besides imposing the regular duty on lemons and the boxes containing them, assessed on the boxes the additional duty provided by the Customs Administrative Act (Act of June 10, 1890, c. 407, § 7, 26 Stat. 134, 2 Fed. St. Ann. 615), for the undervaluation of "any article of imported merchandise," it was held that the boxes used as containers of lemons were treated by the tariff act as a separate commodity or article of imported merchandise and that the same reasoning that led to the exaction of additional duties on other articles of imported merchandise when undervalued applied with equal force to the imposition of such duties on the containers. *Phelps v. U. S.* 142 Fed. 213.

In *State v. Chicago, etc. R. Co.* 95 Ark. 114, 128 S. W. 555, in determining that a railroad corporation which entered into an agreement with certain other railroad corporations to fix the value of the services of railroads in the carriage of freight and passengers did not violate the Arkansas statute (Act Ark. 1905, p. 1) prohibiting the formation of combinations to regulate or fix either in this state or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, it was held that the words "or any article or thing whatsoever," did not include passenger and freight rates, but by the application of the doctrine of ejusdem generis, those words should be held to include only such things or objects as were of the same kind as those specifically enumerated. And in *State v. Frank*, 114 Ark. 47, 169 S. W. 333, 52 L.R.A.(N.S.) 1149, a later case brought under the same statute, it was held that an agreement to fix the price of laundering was not an agreement to fix the price of "any article of manufacture, mechanism or merchandise;" nor could it be contended that the business of laundering was included in the terms "any article or thing whatsoever."

## 12. ANY ATTEMPT.

In the case of *In re White*, 163 Pa. St. 388, 30 Atl. 192, it appeared that by a codicil to his will the testator directed, that "should any attempt at law or otherwise be made during the minority of my said grandson to withdraw his person from the charge or custody of my executors by his father or any other person, then and in such case I hereby direct my executors to suspend all further payments aforesaid, and in such case I hereby revoke all provisions for such grandson by my said will." It was held that by the words

"any attempt," the testator did not mean to include unsuccessful and abandoned attempts.

## 13. ANY ATTORNEY.

In *McClure v. Bowles*, 5 Ohio Dec. 288, wherein it appeared that a promissory note authorized "any attorney" to confess judgment on it, it was said that the phrase "any attorney" indicated no particular attorney as distinguished from all other attorneys, and therefore failed to identify any person at all as the one clothed with authority; that a grant to "any attorney" was a grant to no one any more than to another one, and hence was not of such definiteness as to constitute any grant at all, but that the court concluded that the question was foreclosed by the custom of courts of last resort in their dealings with such cases, and therefore the confessed judgment was held not to be void for want of jurisdiction.

In *Cooper v. Shaver*, 101 Pa. St. 547, wherein it appeared that an instrument provided "I authorize any attorney or prothonotary to enter judgment against me," it was held that the word attorney as certainly meant an officer of the court as did prothonotary, and that the warrant authorized any attorney of any court of common pleas in Pennsylvania to confess judgment, or the prothonotary of any such court to enter judgment, as clearly as if written in so many words.

## 14. ANY BANK.

The phrase "any bank" as used in the amendatory bankrupt act (Act of June 22, 1874, § 12, 18 Stat. 178) with respect to involuntary bankruptcy, has been held to mean a banking institution owned by a natural person, partnership, or joint stock company, and to include such an institution when it has been incorporated. In *re Leavenworth Sav. Bank*, 4 Dill. 363, 14 Nat. Bankr. Rep. 92, 3 Cent. L. J. 207, 15 Fed. Cas. No. 8, 165.

In *Baldwin v. Hitchcock*, 12 N. Bruns. 310, it appeared that a promissory note made in Boston was as follows: "Four months after date we promise to pay to the order of John Sears, or bearer, one thousand dollars, value received, payable at any bank, with interest. L. A. Hitchcock, Francis Howard." And was endorsed—"I order Mr. Thomas D. Baldwin to collect this note. Boston, July 15th, 1867, John Sears." It was held that the words "any bank" therein must be taken to mean any bank in the place where the note was made; for it would be absurd to suppose that the makers are required to keep funds for the payment of the note in banks all over the world.

## 15. ANY BANKING INSTITUTION.

In *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838, the court construed a statute of Missouri (Rev. St. § 1350), providing that "If any president, director, manager, cashier or other officer of any banking institution doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, . . . after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny," etc., which followed literally the language employed in section 27 of the constitution. It was held that the words "any banking institution" as used in section 27 of the constitution referred and were intended to refer to incorporated banks only, and not to private banks; and that it followed necessarily that the same words used in the same connection by the legislature in passing section 1350 to put in force said section 27 must be construed the same way and as meaning the same thing.

## 16. ANY BENEFIT.

Under a Minnesota law (Gen. Laws, c. 34, § 19) providing that the commissioners in eminent domain should make due allowance for "any benefit" that the owners derived, it has been held that the phrase "any benefit" should be taken to mean any benefit such as was in its nature proper to be deducted; that was to say, any benefit special to the land owner and not shared by the community in common with him. *Weir v. St. Paul*, etc. R. Co. 18 Minn. 155.

In a Delaware case it appeared that in her application for membership in the defendant association, the deceased member stipulated as follows: "32. Do you understand that no sick benefits are paid for childbirth or any disease occasioned by a pregnant state, or any diseased condition of any female organ or its appendages?" (Answered) "Yes." "33. I hereby agree that the association shall not be liable to pay any benefits because of the results of any confinement due to pregnancy, occurring during the first nine months of my membership." (Answered) "Yes." It was provided by the by-laws that "no female member shall be entitled to weekly benefits during childbirth or for any disease occasioned by a pregnant state or for any disease peculiar to the female sex." It was held, in a suit to recover funeral benefits for death due to a fall by the deceased member while pregnant, that the term "any benefits" in said paragraph 33 of the application meant weekly or sick benefits and had no application to funeral benefits. *Rose v. Commonwealth Beneficial Assoc.* 4 Boyce (Del.) 144, 86 Atl. 673.

## 17. ANY BOND, OBLIGATION OR CONTRACT.

Construing a statute (Act April, 19, 1873) providing that "all actions . . . upon any bond, obligation, or contract, under seal, . . . shall be commenced within seven years," etc., it has been held that the terms "any bond, obligation, or contract, under seal," were comprehensive enough to embrace all bonds of every sort. *Furlong v. State*, 58 Miss. 717.

## 18. ANY BOOK.

In construing the English Copyright Act of 1842, which made provision for a situation in which a publisher might be disposed to make a bargain with an intended author of any book for the composition by him of a work, and to pay him for that work when composed, the court said in *Ward v. Long* [1906] 2 Ch. (Eng.) 550: "On first reading it the section seems to provide only for such a case as a periodical work. It begins by enumerating encyclopaedia, review, magazine, periodical work, but it goes on to say 'or any book whatsoever.' One may guess that those words were introduced by amendment at some time without sufficient regard to the context, but it is impossible to my mind to cut the words down. It has been argued that they may mean any book whatsoever ejusdem generis—of the same kind as those before mentioned. I think it would puzzle anyone to say what is ejusdem generis with encyclopaedia, review, magazine, periodical work, or words published in a series of books or parts, except this, that a single volume would not be ejusdem generis certainly. Yet the Act says 'or any book whatsoever;' a single volume is just the 'any book whatsoever;' it just fills up and corresponds to that description; it takes more in a good deal, but I cannot conceive that any limitation ought to be put upon that standing alone. . . . It seems to me that the section applies to any book that may be composed on a bargain between any publisher and any author. To bring a particular case within the section three things must be observed. In the first place, there must be an employment by the publisher of the composer; secondly, that employment must be on the terms that the copyright shall belong to the publisher; and thirdly, in order to give him the copyright under the section, it must be paid for."

## 19. ANY BOROUGH.

The provisions of the Pennsylvania Act of April 3, 1851, authorizing the burgess and town council of "any borough" to admit additional territory, have been held to be applicable to a borough thereafter incorporated. *Com. v. Montrose*, 52 Pa. St. 391.

## 20. ANY BORROWER.

In *Fidelity Ins. etc. Co. v. Scranton*, 102 Pa. St. 387, the court construed the Pennsylvania Act of March 27, 1865 (Purd. Dig. 804, pl. 6; P. L. 57), providing that "it shall be lawful for any borrower, whether by mortgage security or otherwise, to contract," etc., and giving most ample power to all coming within the category of borrowers, to contract for the payment of taxes, and held that the act applied to corporations other than municipal.

## 21. ANY BRIDGE.

Under an Ohio statute providing that any person who shall perform labor or furnish machinery or materials for . . . erecting, altering, repairing or removing "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure," shall have a mechanic's lien to secure the payment of the same, . . . it has been held that the words "any bridge" included a railroad bridge. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 66. And the same construction has been applied to a like phrase in a similar statute in Wisconsin (R. S. Wis. § 3314). *Purtell v. Chicago Forge, etc. Co.* 74 Wis. 132, 42 N. W. 265.

## 22. ANY BUILDING.

In *Jackson v. Knutsford Urban Council* [1914] 2 Ch. 686, 111 L. T. N. S. 982, 79 J. P. 73, 58 Sol. J. 756, 84 L. J. Ch. (Eng.) 305, the court construed the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), providing that "if a medical officer of health finds that any building within his district, although not in itself unfit for human habitation, is so situate that by reason of its proximity to or contact with any other buildings it causes one of the following effects," etc. It was argued that the parenthetical phrase at the beginning of the section, "although not in itself unfit for human habitation," was an indication that the words "any building" ought not to be read in their widest sense, but ought to be limited to buildings capable of being used for human habitation, that is to say, as equivalent to the words "any dwelling house." But it was held that the expression "any building" was wide enough to cover buildings of all descriptions, dwelling houses, manufactories, places of worship, and even statues and monuments, and all these came within the section, and it therefore included a brick building which was used by the plaintiffs as a cycle makers' and mechanics' workshop and for no other purpose.

Under a Connecticut law (Gen. Stat. §§ 4135-4138) providing for the creation, un-

der certain conditions, of a mechanic's lien in favor of any original contractor or subcontractor having a claim for over \$10 for material furnished or services rendered in the construction of "any building or any of its appurtenances," it has been held that the expression "any building or any of its appurtenances" covered only private buildings, and could not be construed to embrace buildings belonging to the state or any public buildings belonging to corporations or communities created by the state as governmental agencies for purely public purposes. *National Fireproofing Co. v. Huntington*, 81 Conn. 632, 71 Atl. 911, 129 Am. St. Rep. 228, 20 L.R.A. (N.S.) 261.

## 23. ANY BUSINESS.

In *Missouri, etc. R. Co. v. Mott*, 98 Tex. 91, 81 S. W. 285, 70 L.R.A. 579, it was held that a conveyance giving to a railroad the right to maintain on the land conveyed "any business connected with said railway or incident thereto" did not authorize the construction of stock pens at a place where they constituted a nuisance.

## 24. ANY BUSINESS OFFICE.

A statute of Missouri (Rev. Stat. 1899, § 995) provides as follows: "When any such summons shall be issued against any incorporated company, service on the president or other chief officer of such company, or in his absence, by leaving a copy thereof at any business office of said company with the person having charge thereof shall be deemed a sufficient service," etc. It has been held that the term "any business office" does not mean the office where the greatest volume of business is transacted, nor one where the business is of a particular character, but that any office where any business affairs of the corporation are conducted is a place where service may be made, when the person in charge thereof may be presumed to be reasonably certain to forward the papers to his superior officer. In the same case it was held that "any business office" referred not to the room or building but to the nature of the activity conducted in it, and a fixed place where any of the affairs of the corporation were made a subject of regular attention was a business office, so that a place established for the transmission of train orders, whether it was that occupied by the chief dispatcher or by one of his subordinates, was a business office. *State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146.

## 25. ANY CANAL.

It has been held that the proviso in the constitution of Illinois (separate sec. 3; *Stair & Cur. Stat. 1896*, p. 206) which de-

83 Kan. 480.

clares that "the general assembly shall never loan the credit of the state, or make appropriations from the treasury thereof, in aid of railroads or canals: Provided, that any surplus earnings of any canal may be appropriated for its enlargement or extension," had reference only to the canal owned by the state, the Illinois and Michigan canal, though the words "any canal" were employed therein, those words being used in the proviso in an excess of caution, in order that the proviso might apply as well to any other canal of which the state might possibly afterward become the owner, in order that the restriction might be general and uniform. *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327.

#### 26. ANY CANDIDATE.

Under a Michigan law (Act No. 208, Laws 1887) providing for the presentation to certain boards therein mentioned of a petition for a recount of ballots cast at any election by any candidate voted for at such election, it has been held that the term "any candidate voted for at any election" was limited by the other language of the act, and that it did not cover village, school district, and possibly some other elections, and therefore did not provide for the recount of votes in elections for village boards or councils. *Johnson v. Board of Canvassers*, 101 Mich. 187, 59 N. W. 412.

#### 27. ANY CAPTAIN OR MARINER.

It has been held that the words "any captain or mariner of any ship or other vessel," in a Federal statute (Act of April 30, 1790, c. 36, § 8, Rev. St. U. S. § 5373, 7 Fed. St. Ann. 91, Penal Law § 373, Fed. St. Ann. 1909 Supp. 489) relating to piracy, while apparently comprehending all captains and mariners, did not apply to the captain or mariner of a foreign ship. *U. S. v. Palmer*, 3 Wheat. 610, 4 U. S. (L. ed.) 471.

#### 28. ANY CAR.

In construing the Safety Appliances Act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531, 6 Fed. St. Ann. 753) providing that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," it has been held that as tested by context, subject-matter and object, the words "any car" meant all kinds of cars running on the rails, and were intended to embrace and did embrace, locomotives. *Johnson v. Southern Pac. R. Co.* 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363. And in a later case it was held that the act applied to shovel cars. *Schlem-*

*mer v. Buffalo, etc. R. Co.* 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681. It has also been held that it is not important whether the car contain at the time any commodity being carried as freight or not, if the car is one being used in moving interstate traffic; not in the sense that at the particular time it is loaded or partially so with a commodity being shipped from one state into another, or others, but that it is being employed in a service that is moving interstate traffic. *Voelker v. Chicago, etc. R. Co.* 116 Fed. 867; *U. S. v. Northern Pac. Terminal Co.* 144 Fed. 861; *U. S. v. Chicago, etc. R. Co.* 157 Fed. 616; *Central Vermont R. Co. v. U. S.* 205 Fed. 40, 123 C. C. A. 308. And the burden of bringing itself within the proviso by which four-wheel standard logging cars are excepted from the requirements of the act has been held to rest on the defendant. *U. S. v. Atlantic Coast Line R. Co.* 153 Fed. 918.

#### 29. ANY CARRIAGE.

In *State v. Collins*, 16 R. I. 371, 17 Atl. 131, 3 L.R.A. 394, it was held that a bicycle was a vehicle, within the meaning of a statute requiring one traveling on a highway, with "any carriage or other vehicle," to turn to the right. But in *Fox v. Clarke*, 25 R. I. 515, 1 Ann. Cas. 548, 57 Atl. 305, 65 L.R.A. 234, it was held that while a bicycle might well be held to be a vehicle, it could not be held that it was a carriage.

#### 30. ANY CASE.

Construing a Federal statute (Rev. St. U. S. § 866, 3 Fed. St. Ann. 20) providing that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage . . .," it has been said: "Under the terms of the statute a *dedimus* may issue 'in any case where it is necessary, in order to prevent a failure or delay of justice,' not in any civil case, nor in any case at common law, in equity or in admiralty, but in 'any case' which includes criminal as well as civil proceedings." *U. S. v. Cameron*, 15 Fed. 794. And in a later case, under the same statute, the court said: "It is very clear that the words 'in any case' do not mean broadly any case where one of the parties to a controversy desires the evidence of a foreign witness, but any case of which the court, granting the commission, has jurisdiction. The cause must be one pending in the court and not before some other tribunal or officer over whom the court has no power or control." *U. S. v. Hom Hing*, 48 Fed. 635.

Under the Virginia code (§ 3167) providing that the jury may "in any case" be

permitted to view the premises, it has been held that the phrase "any case" covers all cases to be tried by a jury, there being nothing in the phraseology of the statute confining its operation either to civil or to criminal cases. *Litton v. Com.* 101 Va. 833, 44 S. E. 923.

The Act of Congress of March 4, 1891, establishing a court of private land claims for the purpose of confirming the title of holders of land claims under Mexican grants in that portion of land acquired by the Gadsden Purchase, which provided that "if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid notwithstanding such decree." Construing that act it has been held that the words "in any case" had reference to those cases only in which a claimant was seeking a decree, and not to a proceeding by the United States. *Richardson v. Ainsa*, 218 U. S. 289, 31 S. Ct. 23, 54 U. S. (L. ed.) 1044, *affirming* 11 Ariz. 359, 95 Pac. 103.

### 31. ANY CATHEDRAL OR COLLEGIATE CHURCH.

Under a provision of the English Charitable Trusts Act, 1853, that "this act shall not extend to . . . any cathedral or collegiate church," it has been held that the exception of "any cathedral or collegiate church" should not be interpreted so as to exclude from the operation of the act every endowment in which any minister or officer of the cathedral was interested, nor so as to exclude from the operation of the act a particular endowment of the minor canons. *In re Dod* [1905] 1 Ch. (Eng.) 442.

### 32. ANY CAUSE.

#### a. Generally.

Where a Michigan statute (Act No. 309) provided that "each of said courts may change the venue of any criminal action pending therein, upon good cause shown, and shall change the venue of any civil action pending therein, upon the application," etc., and the amendment of 1907 provided that "each of the said courts, upon good cause shown, may change the venue in any cause pending therein," etc., it was held that the words "any cause" were intended to embrace and have the same meaning as the words "any criminal action" and "any civil action;" both classes of actions being brought under the same rule as to the character of the showing to be made and that manifestly the proviso was not intended to enlarge the juris-

diction, since it merely continued in force "any and all suits, proceedings, causes, or actions" pending under the Act of 1905, which this court had held did not apply in condemnation proceedings. *Grand Rapids, etc. R. Co. v. Kalamazoo Circuit Judge*, 154 Mich. 493, 117 N. W. 1050.

In a case wherein it appeared that a contract of employment provided that the refusal to go on a second year could be justified only by "written notice . . . of any cause of dissatisfaction on or before January 1, 1893," it was held that the words "any cause" meant "any existing cause," or "any cause relied on." The defendants, therefore, could not be allowed to prove other causes. *Hughes v. Gross*, 186 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L.R.A. 620.

Under the Missouri statute (Local Acts 1855, p. 59, § 15) establishing a court of probate and common pleas in Greene county and providing that, "whenever the circuit judge of said county shall be disqualified from trying any cause, the same shall be transferred to the common pleas court," also established by the act, it has been held that the term "any cause," contained in the thirteenth section, was broad enough, at least, to embrace any civil cause and therefore included a suit by attachment to recover the value of certain personal property of the plaintiff alleged to have been taken from him by the defendants. *Logan v. Small*, 43 Mo. 254.

A general expression "or any cause not within the power of the railroad company to prevent" in an exception to a demurrage law, being preceded by "strikes, public calamities, accident," and followed by "inclement weather" and by "any cause not in the power of said shipper or consignee to prevent," has been limited to causes *ejusdem generis*, that is, to the class of causes of delay over which the railroad company had no control and for the effects of which it could not reasonably be held accountable. *Hardwick Farmers' Elevator Co. v. Chicago, etc. R. Co.* 110 Minn. 25, 19 Ann. Cas. 1088, 124 N. W. 819; *Gray v. Minneapolis, etc. R. Co.* 110 Minn. 547, 19 Ann. Cas. 1022, 124 N. W. 1100, 136 Am. St. Rep. 527.

Under the Montana Code of Civil Procedure (§ 2500) providing that "when there is delay in granting letters testamentary or of administration, from any cause, . . . the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate," it has been held that the phrase "from any cause" meant from any legal cause. *State v. District Ct.* 34 Mont. 226, 85 Pac. 1022.

The English Assessment Act of 1869 provided that for a period of five years the assessment, once made, should continue in force, and that it should not be competent to raise again the question of the alteration in value. It further provided that if there was any alteration in value in one particular hereditament, and the hereditament was either increased in value by the addition or erection of any building "or from any cause," the rule that the assessment was to last for five years was not to be so inflexible as to prevent an inquiry into that circumstance. It was held that the words "from any cause" could not be confined to structural alteration but were to be read as ejusdem generis in this sense—that it must be a cause which affected the value of the particular property, that it was not sufficient to say that there had been an alteration in value, but there must also be pointed out some definable cause to which that alteration was due, and that cause must be one which affected the assessable value of the particular property, and which might affect the assessable value of other properties as well. *Camberwell v. Ellis* [1900] A. C. (Eng.) 510, 69 L. J. Q. B. 828, 83 L. T. N. S. 201.

#### b. Any Cause or Matter.

In a prosecution under the Canadian Criminal Code (§ 154) providing that every one is guilty of an indictable offense and liable to imprisonment who dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means, from giving evidence in "any cause or matter, civil or criminal," etc., it has been held that the expression "any cause or matter, civil or criminal," was intended to cover every proceeding, of whatever character in any court, of whatever kind, and, therefore, would cover a proceeding to establish the right of a voter in a court of revision. *Rex v. Lake*, 6 N. W. Ter. 345, 11 Can. Crim. Cas. 37.

#### c. Any Cause or Proceeding.

The Illinois Practice Act of 1907 (§ 120, Laws 1907, p. 478) provides that "if any final determination of any cause or proceeding whatever except in chancery shall be made by the appellate court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the finding of the court from which such cause or proceeding was brought by appeal or writ of error, etc. . . . provided, in actions at law where the appellate court reverses the judgment of the trial court without awarding a trial de novo, as the result wholly or in part of finding the facts different from the finding of the trial court," etc. In *Hackett v. Chicago City R. Co.* 235 Ill.

116, 85 N. E. 320, it was held that the language of the proviso did not include all the causes and proceedings covered by the preceding language of the section, and that the words "any cause or proceeding whatever," which preceded the proviso, were of wider significance than the words "actions at law," which, alone, were included in the first clause of the proviso.

#### d. Any Cause Whatever.

In *Sherwin v. Shakspear*, 5 De G. M. & G. 517, 43 Eng. Rep. (Reprint) 970, it appeared that a clause of certain conditions of sale of land provided that if, from any cause whatever, the purchase should not be completed by a certain date, the purchaser should pay interest thereafter until the completion of the purchase. Lord Justice Knight Bruce said: "Upon a large purchase of land in this country, considering the nature of the titles to land according to our institutions and the present course of practice, I think it in general not reasonably to be expected that at the time appointed for the delivery of the abstract an abstract shall be delivered at once, clear of all difficulty, of all doubt, or even of all objection. Such a case has perhaps never, or has certainly seldom occurred. My conception of the rule applicable to a case of that description I find expressed by Lord St. Leonards, in his smaller publication upon the Law of Vendors and Purchasers (page 486), where he says, 'But where the delay is occasioned by the state of the title, and is not wilful, that seems to fall within the provision of "any cause whatever."' The learned author afterwards proceeds to qualify the proposition, or to intimate a degree of hesitation upon it, arising out of some authorities to which he refers. I, however, speaking for myself, agree in the proposition as there stated, without any qualification. I refer only to the case of a contract, where the provision is that interest shall be paid in case of delay arising from any cause whatever, without restriction or qualification, as in the present case." And in *De Visme v. De Visme*, 1 Macn. & G. 336, 41 Eng. Rep. (Reprint) 1295, it was held that in all cases of provision for unforeseen events, the words "from any cause whatever" were intended to include only that which was not expressly provided for by the contract.

In construing a clause of an insurance policy providing that "should any mill insured in the company be shut down or remain idle, from any cause whatever, more than twenty days continuously, it shall be the duty of the insured to notify the secretary of the company of such fact, and of the length of time such stoppage will probably continue, giving the cause thereof," etc., it has been

held that the words "from any cause whatever" included and covered any and every cause that might have the effect of stopping the operation of the mill, and that it was impossible to exclude a stoppage for the purpose of making repairs from the operation of the provision, without doing violence to the plain meaning of the language in which it was expressed. *Day v. Mill-Owners' Mut. F. Ins. Co.* 70 Ia. 710, 29 N. W. 443.

In *Hill v. Duluth*, 57 Minn. 231, 58 N. W. 992, it appeared that a clause in a contract for the grading of an avenue required the contractor if he desired an extension of time to complete his contract, by reason of "any hindrance or delay from any cause whatever," to give notice of the cause of detention to the engineer, to be reported to the council, it to "determine the amount of time that may compensate for the detention." It was held that the phrase "from any cause whatever" must be held to refer to any other cause than the act of the city.

In *Sun Fire Office v. Hart*, 14 App. Cas. (Eng.) 98, 58 L. J. C. Pl. 69, it appeared that an insurance policy provided that if by reason of a change of risk, or "from any other cause whatever," the society or its agents should desire to terminate the insurance effected by the said policy, it should be lawful for the society or its agents so to do, by notice to the insured, or to the authorized representatives of the insured, and to require the policy to be given up, for the purpose of being canceled; and provided that in any such case the society should refund to the insured a ratable proportion, for the unexpired time thereof, of the premium received for the insurance. It was held that the condition must be read in the literal and natural sense of the language which the contracting parties had chosen to employ, and that it included any and every cause which could reasonably induce an insurer to desire the termination of the policy.

#### *e. Any Cause Whatsoever.*

In *Buchanan, etc. Lumber Co. v. East Jersey Coast Water Co.* 71 N. J. L. 350, 59 Atl. 31, it appeared that a provision of a contract to supply water for fire protection was that "the company reserves the right to shut off the water for alterations, extensions and repairs, and to stop and restrict the supply of water whenever it may be found necessary, and the company shall not be liable under any circumstances for a deficiency or failure in the supply of water, whether occasioned by shutting off water to make repairs or connections, or for any cause whatsoever." It was held that while it might well have been considered that the parties intended that the defendant should

be relieved from responsibility only when the failure of water was due to some cause similar to those specifically mentioned, yet "any cause whatsoever" embraced every possible cause, not only those arising out of the exigencies of the defendant's business but those resulting solely from the defendant's negligence; and the plaintiff having agreed that the defendant should not be responsible for damages sustained by it, resulting from the failure of the latter to furnish it with sufficient water for fire protection, even though such failure was due to the negligence of the defendant, a verdict in its favor was without legal justification.

#### 33. ANY CERTAIN KIND.

Under an Indiana statute (Acts 1905, p. 219, § 107, § 8710 Burns 1908) providing for the paving of streets, wherein it was declared that on the filing of a petition by the requisite number of resident freeholders affected, "requesting that said street . . . be paved with any certain kind of the accepted kinds of modern city pavement," the board should not have power to provide for the use of any other kind, it has been held that the words "any certain kind of the accepted kinds" of pavement, meant one the character of which was fixed and determined beforehand, when the specifications were placed on file for bids. In so holding the court negatived a contention that bitulithic pavement was a particular kind of the general kind known as tar or bituminous macadam, and that under open specifications for a bituminous macadam pavement the bitulithic could be acquired subject to proper competition. *Tousey v. Indianapolis*, 175 Ind. 295, 94 N. E. 225.

#### 34. ANY CHANGE.

An Ohio statute (Rev. St. § 3643) provides that "any person . . . hereafter insuring any building or structure against loss or damage by fire or lightning, . . . shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy . . . shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid." Under that statute it has been held that the words "any change increasing the risk" meant a change in the "building or structure" which was insured and valued, because that was the subject-matter of the statute and of the whole sentence in which the phrase "any change" oc-



curred. *Germania F. Ins. Co. v. Werner*, 76 Ohio St. 543, 81 N. E. 980, 118 Am. St. Rep. 891, 12 L.R.A.(N.S.) 456. So, it has been held that a stipulation in a policy that it should become void by the taking of additional insurance without the consent of the insurer, and a stipulation that a policy should become void if any part of the property insured should be incumbered by mortgage without the consent of the company, were not within the meaning of the phrase "in the absence of any change increasing the risk" as used in the foregoing statute. *Sun Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L.R.A. 562; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 42 N. E. 546, 53 Am. St. Rep. 658, 30 L.R.A. 719; *Henderson v. Ohio Farmers' Ins. Co.* 2 Ohio Dec. 189, 2 Ohio N. P. 17.

In *Gorham v. New Haven*, 76 Conn. 700, 58 Atl. 1, wherein it appeared that some five years after a highway had been legally laid out, the city began to construct the highway to the grade indicated on the profile map, it was held that there could be no recovery under the Connecticut statute (Gen. St. Conn. § 2051) providing that "when the owner of land adjoining a public highway" should sustain special damages to his property "by reason of any change in the grade of such highway," he should be entitled to the amount of such special damages, since the statute clearly contemplated the existence of a worked highway, completed and in actual use, or opened and made ready for use, and not a mere layout on paper, or a mere tract of land taken for a highway but not yet made fit for public use, and furthermore, the statute contemplated a used or usable highway, having an actual existing grade, to which it was constructed, or at which it is actually used, the words "any change in the grade of such highway," clearly implying an already existing grade.

### 35. ANY CHILD.

Under an English statute (39 and 40 Vict. c. 61, § 35) providing in part that "if any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born," it has been held that the words "any child" included a legitimate as well as an illegitimate child, since there was nothing to confine the expression to any particular class of children. *Manchester v. St. Pancras*, 4 Q. B. D. (Eng.) 409.

In *Douglas v. James*, 66 Vt. 21, 28 Atl. 319, 44 Am. St. Rep. 817, it appeared that a will read "I give, devise, and bequeath all the remainder of my estate, real and personal, in equal shares, to my children who may be living at the time of my decease, during their respective natural lives, and after their respective deaths, in equal shares to their respective children; and if any child shall have died previous to my decease, leaving children, the share of such child shall go to his or her children in equal shares; provided that if any of my said children shall die after my decease, without children, the share of such child shall be equally divided among my other children in the same manner as my other estate." The court held that the words "any child," in the clause next before the proviso, meant any child of either class of children previously named, that is, any of the testator's own children or any of his grandchildren.

### 36. ANY CHILDREN.

In construing a will providing that "in the event of my said wife having any child or children at the time of her death, I will and devise the whole of my said estate to said child or children, equally to be divided, if more than one," it was held that the testator's intention was not that the property should go to "any child or children" of hers by him, thus confining the gift to her immediate children, but that the words "any children" showed that it was his purpose to extend it to her more remote issue and would embrace children of his wife by any second marriage. *Schapiro v. Howard*, 113 Md. 360, 78 Atl. 58, 140 Am. St. Rep. 414.

In the case of *In re Edwards* [1906] 1 Ch. (Eng.) 570, the court construed a will providing that "in the event of my death without leaving any children surviving me, I give all my property between my brothers and sisters," naming them, "in equal shares as tenants in common." It was argued that in the event of the death of the testatrix "without leaving any children surviving" her, the words ought to be read as meaning "without leaving any such children surviving" her, and so make it into a gift over to the brothers and sisters in case there was no child of the testatrix who attained a vested interest under the prior gift. The court held that as the words were clear and free from ambiguity, they would be adhered to, in the absence of any authority compelling the adoption of a contrary holding.

### 37. ANY CLAIM.

Under an English statute (50 and 51 Vict. c. 16) defining and enlarging the jurisdic-

tion of the exchequer court, section 23 of which provides "any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises, and if any such claim is so referred no fiat shall be given or any petition of right in respect thereof," it has been held that the words "any claim against the Crown" were sufficiently comprehensive to include claims for tort. *Quebec v. Reg.* 24 Can. Sup. Ct. 420.

By certain Wisconsin statutes it is provided that "no action shall be maintained by any person, against any city organized under the provisions of this act, upon any claim or demand of any kind or character whatsoever, until such person shall have first presented his claim or demand to the common council for allowance, and the same shall have been disallowed, in whole or in part:" "no action shall be maintained by any person against the city, upon any claim or demand of any kind whatsoever, whether arising from contract or otherwise:" "no suit of any kind, or any claim of any character, shall be brought against the city, but the claimant shall file his claim with the city clerk." It has been held that the amendments to the statutes extended the words "any claim or demand" (held in *Kelley v. Madison*, 43 Wis. 638, not to include causes of action in tort) to claims or suits "of any kind" or "of any character" or "of whatsoever nature," and that as so enlarged and expanded the terms "any claim or demand" included causes of action in tort. *Sheel v. Appleton*, 49 Wis. 126, 5 N. W. 27; *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674; *Van Frachen v. Ft. Howard*, 88 Wis. 570, 60 N. W. 1062; *McCue v. Waupun*, 96 Wis. 625, 71 N. W. 1054; *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357.

### 38. ANY CITY.

An Iowa statute (Acts of 32nd Gen. Assem. c. 48, § 1) provides that "any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over, . . . may become organized as a city under the provisions of this act by proceeding as hereinafter provided." It has been held that the words "any city," as used therein, showed that there was no attempt to make an individual selection and therefore there was no force in the contention that the act should be condemned as local or special; also, that their use was tantamount to saying that the act was intended to have application to every city in the state, then existing or thereafter to come into existence, which had the prescribed qualifications. *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177.

In *Com. v. Heller*, 219 Pa. St. 65, 67 Atl. 925, construing a statute of Pennsylvania (Act of 1889, art. XII, § 2), providing that "Any city which now has the title to any water, gas or electric light works by a conveyance to the same in its corporate name, or which may hereafter erect or purchase water, gas, or electric light works under the provisions of this act are (is) hereby empowered to create a department to be called the Water and Lighting Department," etc., it was held that the language of the section was altogether permissive, and while the words "any city," which primarily referred to cities individually, might include all, they did not necessarily do so, and that the legislative intent that the section was not intended to apply to all cities of the third class was found in the language "any city which now has the title to any water, gas or electric light works by conveyance to the same in its corporate name," which clearly showed that there were, or might be, cities of the class, which would not come under this section although they had water or gas works.

### 39. ANY COMMODITIES.

In *Atlantic City v. Associated Realities Corp.* 72 N. J. Eq. 634, 67 Atl. 937, it appeared that a deed conveyed to a city the control and substantial ownership of all the shore front, reserving, however, to the grantors, a right to build a pier on the property conveyed, and to connect it with the boardwalk, on condition that the pier should be at least one thousand feet in length and constructed of iron or steel, and upon the further condition that they should not permit the sale of "any commodities" on the pier. It was held that hiring a pair of skates for a limited period to a person going on to the pier did not fall within the description of a sale of "any commodities."

### 40. ANY COMMUNICATION.

The Iowa Code (§ 4607) provides that "neither husband nor wife can be examined in any case as to any communication made by the one to the other while married," etc. In *Sexton v. Sexton*, 129 Ia. 487, 105 N. W. 314, 2 L.R.A.(N.S.) 708, it was held that the expression "any communication" as used in the statute should be construed to embrace only the knowledge which the husband or wife obtained from the other, which, but for the marital relation and the confidence growing out of it, would not have been communicated, or which was of such nature or character as that, to repeat the same, would tend to unduly embarrass or disturb the parties in their marital relations. It was accordingly held that words spoken by the

husband to the wife, or vice versa, in the presence and hearing of one or more third persons, and hence in the very nature of things not to be construed as in any marital sense private or confidential, should not be held to be within the protection of the privilege, although clearly within the letter of the statute.

Under a Washington statute (Rem. & Bal. Code, § 1214, P. C. 81, § 1033) providing that a husband or wife shall not be examined "as to any communication made by one to the other during marriage," it has been held that "any communication," as mentioned in the statute, meant confidential communications, or such as were induced by the marriage relation. *State v. Snyder*, 84 Wash. 485, 147 Pac. 38.

#### 41. ANY CONSIDERATION.

Under a statute of South Dakota (Rev. Penal Code, § 618) providing in part that "every person who buys or receives in any manner upon any consideration any personal property of any value whatsoever, except as hereinafter provided, that has been stolen from any other, knowing the same to have been stolen, . . ." is guilty of the offense, the court in *State v. Pirkey*, 22 S. D. 550, 18 Ann. Cas. 192, 118 N. W. 1042, held that the words "upon any consideration" were to be treated as synonymous with "any motive" or "for any cause," and said that it was to be observed that these words in the statute were preceded by the words "in any manner," showing the intention of the lawmaking power that every person who bought or received in any manner, or on any consideration, or, in effect, for any motive, property known to him to have been stolen should be deemed guilty of the offense.

#### 42. ANY CONTRACT.

In considering an English statute (Act of 1900, § 6) providing that "any contract" made before a company is entitled to commence business "shall not be binding on the company until that date," the court in the case of *In re Otto Electrical Mfg. Co.* (1906) 2 Ch. 390, 75 L. J. Ch. 682, 95 L. T. N. S. 141, 54 W. R. 601, said: "Sect. 6 is one which provides that 'a company shall not commence any business'—it is not shall not commence 'its business,' but 'any business'—unless certain conditions are complied with. . . . Now this company never did become entitled to commence business; therefore any contract made by the company was provisional and not binding on the company. But Mr. Coldridge has argued that the Act of Parliament does not mean what it says, that it does not mean any contract, but any contract of a certain kind; and his next diffi-

culty is to define of what kind. He says that it means any contract entered into for the purpose of carrying on its business, and that there are some contracts which are not entered into for the purpose of carrying on the business, but which are what he calls 'preliminary'—as for expenses incurred with a view to the future carrying on of business. I think that argument is altogether unsound. A company of this kind has no purpose of existence other than the carrying on of its business, and every contract which it enters into must be a contract entered into for the purposes of its business in some form or other; whether it is preliminary or final, or one in the course of carrying on its business, makes no difference. All its contracts must be with relation to its business; and I repeat that the language of the section is that 'the company shall not commence any business' until certain conditions have been complied with."

Under the provisions of the Act of Congress of February 2, 1859 (11 Stat. at L. 376) providing that "persons who perform labor upon, or furnish materials, etc., for the construction or repairing of a building, by virtue of any contract with the owner of the same, or his agent," have a right to the benefit of a lien, it has been held that the words "any contract" are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the materialman is secured by a deed of trust, or mortgage, or some other form of security repugnant to the theory that he ever intended to hold a lien under the mechanic's lien law. *McMurray v. Brown*, 91 U. S. 257, 23 U. S. (L. ed.) 321, 3 Cent. L. J. 158.

In *Wilson v. Taylor*, 89 Ala. 368, 8 So. 149, in defining the words "any contract" as used in the Alabama Code (§ 3078) which declared that "agricultural laborers and superintendents of plantations shall have a lien upon the crops grown during the current year, in and about which they are employed, for the hire and wages due them for labor and services rendered by them in and about the cultivation of such crops, under any contract for such labor and services," the court said: "The statute does not require that the contract shall be express. Its words, any contract, are comprehensive enough to include implied, as well as express contracts. Giving to the words of the statute their fair and plain import and scope, any contract is sufficient to originate the lien, which, if the labor is rendered, is sufficient to create a debt or liability. The lien may be based on an implied contract."

In *Norman v. Carroll*, 35 Ia. 22, the court construed the Iowa Mechanic's Lien Law (Revision of 1860, § 1846), providing that "every mechanic, builder, artisan, workman,

laborer or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, including contractors, sub-contractors, material furnishers, mechanics and laborers engaged in the construction of any railroad or other work of internal improvement, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor on which the same is situated." It was held that, inasmuch as the plaintiffs who were laborers on a railroad for day's wages performed labor on the improvement on which the lien was sought to be established under and by virtue of a contract to work thereon for day wages, their contracts came within the meaning of the term "any contract" as used in the statute, and that they were entitled to a lien on the railroad for such wages. The case last cited was followed in *Richardson v. Norfolk, etc. R. Co.* 37 W. Va. 641, 17 S. E. 195, in the construction of the West Virginia statute (§ 7, c. 64, Act W. Va. 1882, Warth's Code 1887, c. 75), which provided that "every workman, laborer, or other person, who shall do or perform any work or labor by virtue of any contract for any incorporated company doing business in this state, shall have a lien for the value of such work or labor upon all the real estate and personal property of said company." It was held that the words "any contract" did not mean anybody's contract with the company, but referred to the kind of contract, whether written or verbal, express or implied, following *Norman v. Carroll, supra*, and giving a similar lien.

It has been held that the words "any contract for the sale of real estate," as used in the statute of frauds, includes every agreement by which one promises to alienate an existing interest in land on a consideration either good or valuable, and accordingly that a contract to convey land in consideration of labor or services to be rendered, is within the statute. *Dowling v. McKenney*, 124 Mass. 478; *Baxter v. Kitch*, 37 Ind. 554; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Helm v. Logan*, 4 Bibb (Ky.) 78; *Jack v. McKee*, 9 Pa. St. 235; *Sprague v. Haines*, 68 Tex. 215, 4 S. W. 371.

The first clause of a Wyoming statute (Rev. St. 5095) forbids officers from being interested as contractors with the public where certain kinds of work are involved,

and the second clause forbids such officers from receiving "any percentage, drawback, premium, or profits, or money whatever on any contract, or for the letting of any contract." It has been held that the words, "money whatever on any contract" must be construed to mean any money by way of percentage, drawback, premium, or profits on any contract of others with the public. *Baker v. Crook County*, 9 Wyo. 51, 59 Pac. 797.

#### 43. ANY CORPORATION.

An Arkansas statute (Acts 1899, p. 50, § 1) provides that "any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual, . . . who shall create, enter into, become a member of or party to any pool, trust, agreement, combination, . . . the price or premium to be paid for insuring property against loss or damage by fire, . . . shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act." In *State v. Lancashire F. Ins. Co.* 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348, it was held that the words "any corporation," as used therein, while general words, did not have the wide extraterritorial construction which the counsel for the state imputed to them, and did not apply to foreign corporations doing business within the state, whose acts were done or whose agreements were entered into in another state or country and which acts or agreements had reference only to persons, property or pieces of insurance in such foreign state or country.

In holding that a railroad corporation was not included in the words "any corporation" as used in another Arkansas statute (*Kirby's Dig.* § 957) providing that any corporation may surrender its charter by resolution, and a certified copy of which shall be filed in the office of the secretary of state, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized, the court in *Freeo Valley R. Co. v. Hodges*, 105 Ark. 314, 151 S. W. 281, said: "As we have seen, manufacturing and business corporations alone are required to file their articles of association and certificate with the Secretary of State and also with the clerk of the county court of the county in which they are organized. Therefore, the phrase 'in which such corporation is organized' limits the words 'any corporation' to corporations which are required to file a copy of their articles and certificate with the clerk of the county in which the incorporation is to

have its principal place of business, and such corporations, being corporations formed for manufacturing and other business purposes, alone have the right to surrender their charters without the consent of the State."

A statute of Connecticut (Rev. Stat. of 1888, § 1954, which is part of chapter 120 of that revision, entitled Joint-Stock Corporations), provides that "every such [joint-stock] corporation may increase or reduce its capital and the number and par value of the shares therein, at any meeting of the stockholders specially warned for that purpose, [etc.] . . . and provided further, that in case of the reduction of the capital stock of any corporation by any mode which shall render such corporation insolvent, the stockholders assenting thereto shall be jointly and severally liable for all debts of the corporation existing at the time of such reduction," etc. Construing that statute it has been held that the legislature clearly had in mind when they used the words "any corporation" therein, the joint-stock corporations with which they were dealing, and for the reduction of whose stock provision was made in the same section and sentence in which these words are found, and that it could not be presumed that they intended to make a provision applying to chartered corporations (many of whose charters make provision for the reduction of their stock and provide for the liability of officers or stockholders, if reductions prejudicial to creditors are made) in a section and sentence of a joint-stock corporation act which provides for the reduction of capital in such corporations only. *Barber v. Morgan*, reported in full, post, this volume, at page 102.

Under the Michigan franchise tax act of 1891 (Comp. Laws 1897, § 8574) which requires, inter alia, that "no foreign corporation shall begin any business in the state with the purpose of carrying it on until it shall have paid the franchise tax required by the law," and further declares that "all contracts made in this state after January 1, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void," the court held in *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* 118 Fed. 239, 55 C. C. A. 93, that the words "any corporation" manifestly meant any of the corporations required to pay the franchise tax by the preceding parts of the act, and these corporations consisted of two classes, (a) domestic corporations thereafter organized or created by consolidation, or who should thereafter increase their capital stock, (b) foreign corporations thereafter "permitted to transact business in this state," or which should thereafter increase their capital stock.

Construing a will which authorized the trustees to invest moneys, inter alia, in the

stocks, funds and securities of "any corporation or company, municipal, commercial or otherwise," etc., it has been held that there was no reason why a corporation or company formed or registered in the United Kingdom should not be within the words "any corporation or company, municipal, commercial or otherwise," merely because it carried on its business abroad, and that the clause in question extended to any corporation or company formed or registered in the United Kingdom, but carrying on business abroad, and also to any corporation or company formed or registered outside the United Kingdom. In *re Stanley* [1906] 1 Ch. (Eng.) 131, 75 L. J. Ch. 56, 54 W. R. 103, 93 L. T. N. S. 661.

In *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, the question was whether the two months limitation in the 8th section of chapter 319, Laws of 1848, which prohibited bequests to "any corporation formed under this act," applied to a bequest to the defendant, a corporation of another state. It was held that it did not, because the prohibition was confined to bequests to corporations organized under the Act of 1848, and for the reason that no public policy existed which required its extension to bequests to foreign corporations. See to the same effect *In re Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L.R.A. 713.

In construing the Washington Constitution (Art. 1, § 16) providing that "no private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money," etc., it was held in *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477, that the words, "any corporation other than municipal," as used therein, were intended to exclude public or political corporations, as distinguished from private corporations, and therefore that a county, in the state of Washington, should be considered a municipal corporation.

The General Corporation Law of New York which classifies and relates to all kinds of corporations, and the provisions of which define how the powers and privileges of corporations may be exercised, whether organized as a stock corporation or a nonstock corporation, whether a moneyed corporation, a business corporation, or a membership corporation, has been held to give the Supreme Court power to review the elections "of any corporation" without any limitation as to its application, it being said that no good reason appeared why the powers of review conferred should not be exercised to correct an election held by an assessment insurance company, as well as that of a stock corporation. *Matter of Empire State Supreme Lodge*,

53 Misc. 344, 103 N. Y. S. 465. The provision of the same law (Consol. Laws chap. 23; Laws of 1909, chap. 28, § 36) that, "If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease," has been held to apply to any corporation, whether incorporated under general statute or by special enactment. *People v. Stilwell*, 157 App. Div. 839, 142 N. Y. S. 881.

#### 44. ANY COUNTY.

It has been held that the expression "any county," as used in a Georgia statute [Act of 1908], which provides that any county may obtain convicts for employment by it on its roads, bridges, farms and other public works, meant every county in the state, and its effect was not limited to counties having any particular system of road laws. *Garrison v. Perkins*, 137 Ga. 744, 74 S. E. 541.

Under a statute of Missouri (Wag. Stats. Mo. 408, § 7) providing that "in all actions brought by or against any county, the inhabitants of the county so suing or being sued may be jurors or witnesses, if otherwise competent and qualified," it was held in *O'Brien v. Vulcan Iron-Works*, 7 Mo. App. 257, that the city of St. Louis was as much a county as was any other municipal subdivision of the state, and was included within the meaning of the words "any county."

A Nebraska statute (Comp. St. 1891, ch. 18, art. I, sec. 9) provides that "when any unorganized territory lies adjoining to and is not embraced within the boundaries of any county, and a majority of the inhabitants of said territory petition the commissioners of said adjoining county to be attached to the same, the county board of said county shall within sixty days order an election as provided for in sections 4, 5 and 6 of this act, and said territory shall become attached to and be a part of said county by a majority vote of the same, and be subject in all other respects to the provisions of this act." In *State v. Hawkins*, 95 Neb. 740, 146 N. W. 1044, it was held that the words "any county," in the sense used in the statute quoted, comprehended both organized and unorganized counties.

In *State v. St. John*, 21 Kan. 591, the foregoing definition was applied to the phrase "any county" in section 1, art. 9 of the Kansas Constitution (art. 9, § 1) which provided "nor [shall] any county [be] organized, or the lines of any county changed, so as to include an area of less than four hundred and thirty-two square miles."

#### 45. ANY COURT.

##### a. Generally.

In construing the phrase "any court" as used in the English Arbitration Act, 1889 (§ 4), providing that if any party to a submission commenced any legal proceedings "in any court," that court or a judge thereof might stay the proceedings, it has been held that it was not limited to the High Court of Justice, but meant any court, and therefore the judge of a county court had jurisdiction of an application to stay proceedings. *Morriston Tinplate Co. v. Brooker* [1908] 1 K. B. 403.

The Federal statute (Rev. St. U. S. § 3224, 3 Fed. St. Ann. 600) providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," should, it has been held, be limited to those courts over which Congress has jurisdiction and has no application to state courts. *Wells v. Central Vermont R. Co.* 14 Blatchf. 426, 29 Fed. Cas. No. 17,390.

The words "any court," as used in a Federal statute (Rev. St. U. S. § 4284, 4 Fed. St. Ann. 849) which expressly allows the owner of a vessel to institute appropriate proceedings in any court for the purpose of apportioning among the proper parties the sum for which he was liable have been held to mean "any court" of competent jurisdiction. *Ex p. Slayton*, 105 U. S. 451, 28 U. S. (L. ed.) 1066; *Ex p. Phenix Ins. Co.* 118 U. S. 610, 7 S. Ct. 25, 30 U. S. (L. ed.) 274.

Under a statute which provided that "every person who shall, in presence of any court, either by words or actions, behave contemptuously, or disorderly, may be punished by said court by fine and imprisonment as said court shall judge reasonable," etc., it was held in *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650, that the language, "any court," was comprehensive enough to embrace the court of common pleas, although the statute existed before that court was created.

The amendment of the Act of Congress of 1864 (§ 163) contained in the Act of 1866 (p. 149, § 9; 3 Fed. St. Ann. 773) providing: "That hereafter no deed, instrument, document, writing, or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be received or admitted, or used in evidence in any court, until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto as prescribed by law." In *Chartiers, etc. Turnpike Co. v. McNamara*, 72 Pa. St. 278, 13 Am. Dec. 673, it was held that the words "any court" meant state as well as federal courts, as the provision was

not a rule for the regulation of evidence, but was a disqualification attached to the document making it incompetent to fulfil its purpose as an instrument of evidence until the stamp duty was paid, and that it was a provision to enforce the payment of the tax of the most necessary kind, and binding on all courts.

Construing the words "in any court" as used in section 19 of the Act of July 13, 1866 (see Rev. St. U. S. § 3227, 3 Fed. St. Ann. 603), which provided among other things, that no suit except under certain conditions not existing in the case before the court "shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of International Revenue, and a decision shall be had thereon," except in certain cases therein specified, it has been held that they include state as well as federal courts. *Brainard v. Hubbard*, 12 Wall. 1, 20 U. S. (L. ed.) 272.

In holding that the Governor had no right to appoint the judge of a city or municipal court under the Indiana statute (*Burns Ind. 1908, § 8845 Act 1905, p. 219*) providing that "in case of a vacancy in the office of city judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term," and the Constitution (Art. 5, § 18) providing among other things, that the Governor should, by appointment, fill any vacancy that might occur "in the office of judge of any court; . . . which shall expire when a successor shall have been elected and qualified," the court in *State v. Gerdink*, 173 Ind. 245, 90 N. E. 70 said: "At the time of the adoption of the Constitution, the Supreme Court and the circuit courts were all the courts that existed in the state that were recognized as such. We had the courts of the justices of the peace at that time, and have had them since the organization of the state, but there is every reason for believing that the framers of the Constitution did not regard them as belonging to the same class with the Supreme Court, circuit courts, and 'such other courts as the general assembly may establish' (Const. Art. 7, § 1); that is, courts that the legislature might create of like dignity and of a general and state character, similar to the circuit courts, such as the courts of common pleas, criminal and superior courts, and as contradistinguished from inferior tribunals of a local character, and that it was not meant to include justices of the peace, or any other inferior officer or body endowed with judicial power for local purposes, as courts within the meaning of the phrase 'judge of any court,' contained in article 5, § 18, of the Constitution."

#### b. Any Court of Competent Jurisdiction.

In *James Freeman Brown Co. v. Harris*, 139 Fed. 105, 71 C. C. A. 303, wherein it appeared that the judge of a state court (in which the original case was pending) had signed an order authorizing the plaintiff to bring suit to enforce whatever right he claimed to the property in question against the receiver "in any court of competent jurisdiction," it was held that it was no invasion of the rule of comity to bring the action in the circuit court of the United States.

Under a Massachusetts statute (R. L. c. 167, § 126) declaring that "an attachment of property on mesne process shall be dissolved by the appointment of a receiver to take possession of such property," it has been held that, while the language of the statute, "by any court of competent jurisdiction in this Commonwealth," standing alone, was broad enough to include the federal courts, nevertheless it would be held to mean any court which was subject to the legislation of the Commonwealth. *Reynolds v. Enterprise Transp. Co.* 198 Mass. 590, 85 N. E. 110.

#### c. Any Court of Record.

In *Mattler v. Schaffner*, 53 Ind. 245, it was held that an Indiana statute (2 G. & H. 329, § 777) providing that "any court of record may suspend an attorney from practising therein" meant any court of record having jurisdiction, and that a criminal court having no jurisdiction of a proceeding in the name of a private person, and authorized to "try criminal cases alone" could not proceed under the statute.

It has been held that the term, "any court of record" as used in a New York statute (Act N. Y. 1886, c. 496) conferring on "any court of record" power to issue writs of mandamus against the board of excise, in certain cases, meant any such court having power to issue the writ, and not a court of record such as the city court possessing no authority whatever in such proceedings. *People v. B'd of Excise*, 3 N. Y. St. Rep. 253.

In a case wherein it appeared that a warrant of attorney authorized judgment by confession "by any attorney of any court of record" and the note was made payable at a particular place in the city of Chicago, in the state of Illinois, it was held that the words "any court of record" did not authorize the entering of a judgment in an Ohio court. *Davis v. Packer*, 4 Ohio Cir. Dec. 347.

In *Keith v. Kellogg*, 97 Ill. 147, wherein it appeared that a power of attorney authorizing the confession of judgment, subjoined to a note, empowered any attorney at law of the state of Illinois to appear before any

court of record in said state and confess judgment, it was held that the expression "before any court" of record did not, *ex vi termini*, import an appearance in term time, and, therefore, by implication, negative the right to confess the judgment in vacation.

*d. Any Court of This State.*

Under a statute of Indiana (Acts of 1872, pp. 57, 122, § 269) providing for the bringing of suits by the Auditor of State in the name of the state for the collection of the state taxes "in any court of this state," it has been held that the legislature meant "in any court of this state having competent jurisdiction" and that this expression included courts of justices of the peace, court of county commissioners, the court of common pleas, then in existence, the circuit courts, criminal courts, superior courts and the supreme court of the state. *State v. Vanderburgh County*, 49 Ind. 457.

A new Jersey Act (Act of 1881) provided that whenever the property, rights, powers, immunities, privileges and franchises of any turnpike, bridge, plank-road, gas, water or gas and water corporation created by or under any law of this state should be or had been sold and conveyed under and by virtue of any process or decree of any court of this state, or of the circuit court of the United States, the persons for whose account such rights and franchises might be purchased, should and they were constituted a body politic and corporate and be vested with all the rights, property, privileges and franchises of the corporation whose property and franchises were so sold. In *State v. Middletown Turnpike Co.* 65 N. J. L. 73, 46 Atl. 569, it was held that the language "by virtue of any process or decree of any court of this state" could not be held to include every court of this state, because that would give the power to justices' courts and courts of common pleas; that therefore, a narrower meaning must be attributed to the enactment by restricting its operation to such process or decree and such proceedings as could at the time of the passage of the act vest a title to franchise in the purchaser.

An Idaho statute (Rev. St. 1887, § 2653, as amended by the Act March 10, 1903 (Laws 1903, p. 49)) provided that foreign corporations must comply with certain conditions before doing business in the state, and further provided that "no contract or agreement made in the name of, or for the use or benefit of, such corporation, prior to the making of such filings as first herein provided, can be sued upon or be enforced in any court of this state by such corporation," etc. In *Colby v. Cleaver*, 169 Fed. 206, it was held that the phrase "in any court of this state" did not deprive a foreign corporation,

which had not complied with the conditions of the statute, of the right to resort to the federal courts for the purpose of foreclosing a mortgage on property in the state.

*e. Any Court of the United States.*

Under a Federal statute (Rev. St. U. S. § 1042, 3 Fed. St. Ann. 99) providing that "when a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, . . . has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost," etc., it was held in *U. S. v. Mills*, 11 App. Cas. (D. C.) 500, that the expression "any court of the United States" did not include the police court of the District of Columbia, and that the fact that the police court was a court of the United States, created by the Congress of the United States under the authority of the Constitution of the United States, did not necessarily make applicable to it all laws enacted for the courts of the United States, as it was not a court of the United States in the sense of the Federal Constitution.

In *U. S. v. Crawford*, 47 Fed. 561, the phrase "in any court of the United States" as used in another Federal statute (Rev. St. U. S. § 2103, 3 Fed. St. Ann. 367) declaring that a suit such as is provided for in that section may be brought "in any court of the United States," held to mean any court having jurisdiction in the district of which the defendant was an inhabitant, or in which he was found at the time of the service of the writ.

**46. ANY CREDITOR.**

Under the English Bankruptcy Rule 295, 1870, providing that on presentation of resolutions for registration the registrar "may hear any creditor who shall have given him notice of his desire to be heard thereon," it has been held that the words "any creditor" include a creditor who has not proved his debt. *Ex p. Bagster*, 24 Ch. D. 477, 53 L. J. Ch. 124.

In *Wells v. Greenhill*, 5 B. & Adl. 869, 106 Eng. Rep. (Reprint) 1409, wherein it appeared that the proviso of a composition deed declared that the deed was to be void in case any creditor whose debt amounted to 100£ or upwards, or any two creditors whose debts should amount to 150£, should not join therein, it was held that the words "any creditor," while broad enough to comprise all those to whom the defendant owed money, were used in a limited sense, to mean only those who



were to receive the composition under the deed, and did not include a mortgagee.

The words "any creditor," as used in section 26 of the Bankruptcy Act of 1867 (14 Stat. 529, see Fed. St. Ann. 1912 Supp. 524) which provided that before any creditor could apply for an order to examine the bankrupt, he must prove his claim, have been held to mean any creditor who has proved his claim. *In re Ray*, 2 Ben. 53, 7 Am. L. Reg. (N. S.) 283, 1 Nat. Bankr. Reg. 203, 6 Int. Rev. Rec. 223, 20 Fed. Cas. No. 11,589.

Under a Kentucky statute (St. § 1908) providing that "every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, . . . for the county where the alienor or person creating the charge resides," etc., the court held in *Toof v. City Nat. Bank*, 206 Fed. 250, 124 O. C. A. 118, that the statutory term "creditors" included only those who had affirmatively fastened a lien on the property, and not those who had only a right to obtain a lien.

It has been held that, under the Alabama Code (Code 1896 § 4104), which permits "any creditor" to object to the allowance of a claim against the estate of an insolvent corporation which had made an assignment for the benefit of its creditors, it is immaterial whether the objecting creditor is a preferred or a nonpreferred creditor. *Taylor v. Hutchinson*, 145 Ala. 202, 40 So. 108.

The language of the Bankrupt Act of 1841 [ch. 9, § 6, 5 Stat. L. 445, which was repealed by the Act of March 3, 1843, ch. 82, 5 Stat. L. 614 (See Fed. St. Ann. 1912 Supp. 457)], where it referred to "any creditor, or creditors, who shall claim any debt or demand under the bankruptcy," was in *Ex p. City Bank*, 3 How. 292, 11 U. S. (L. ed.) 603, held not to be limited to such creditors as came in and proved their debts under the bankruptcy, but to apply to creditors of the bankrupt whose debts constituted present subsisting claims in the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether secured by way of pledge or mortgage therefor or not.

In *Livermore v. Swasey*, 7 Mass. 213, under the 52nd section of the Bankruptcy act, providing "that it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of such bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge

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or commissioners relative to the subject-matter before them," etc., it was held that the words "any creditors" include all creditors, as well those who had not come in under the commission, as those who had, because creditors, before they come in under the commission, have as great an interest in many respects, and particularly in the question of the bankruptcy, as those who have come in.

#### 47. ANY CRIME.

The Illinois Criminal Code (div. 13, sec. 6) provides that "no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility." In *Burke v. Stewart*, 81 Ill. App. 506, it was held that the conviction of "any crime" meant by the statute was a conviction of such a crime as at common law worked a disability to testify, that is to say, conviction of an infamous offense.

Under the New York statute (Laws 1877, p. 179, ch. 167, § 1) providing that "when any crime or offense shall have been committed in respect to any portion of the freight of any railroad train making a trip on a railroad in this state, an indictment for the same may be found in any county through which such train shall have passed in the course of the same trip," etc., in *People v. Dowling*, 84 N. Y. 478, it was held that the words "any crime or offense" therein meant any crime already known to the law, and that the receiving of stolen goods with guilty knowledge was such a crime.

#### 48. ANY CRIMINAL CASE.

An investigation by a grand jury is a criminal case within the 5th amendment to the U. S. Constitution providing that "no person shall be compelled in any criminal case to be a witness against himself." *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 U. S. (L. ed.) 1110.

Under the constitution of New York (art. I, § 6) providing that no person "shall be compelled, in any criminal case, to be a witness against himself," it has been held that the words "any criminal case" meant a criminal case against the witness. *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

And in a later case under the same constitutional provision the court said: "The phrase 'in any criminal case' as so used has been judicially applied to proceedings under the executive, legislative or judicial

powers of government directed against the person invoking the provision, or against co-offenders with such person, or against unrelated third parties, to such as are preliminary, collateral or independent, and both to such as are pending and not pending at the time of the assertion of the privilege.

. . . In a word, the phrase 'nor shall he be compelled in any criminal case to be a witness against himself' has been adjudicated to mean that no man shall be compelled to an utterance of any fact by word or pen which utterance might then or afterward be used as evidence against him in proceedings then pending or afterward to be brought." *People v. Rosenheimer*, 70 Misc. 433, 128 N. Y. S. 1093, *affirmed* 209 N. Y. 115, Ann. Cas. 1915A 161, 102 N. E. 530, 46 L.R.A.(N.S.) 977, *reversing* 146 App. Div. 875, 130 N. Y. S. 544.

#### 49. ANY CRIMINAL PROCEEDINGS

The words "in any criminal proceedings," as used in the Bankruptcy Act (Act July 1, 1898, c. 541, § 7, subd. 9, 30 U. S. Stat. at L. 547, St. Ann. Supp. 1912, p. 524) providing "any person at the first meeting of his creditors and at such other times as the court shall order [the bankrupt shall] . . . submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and in addition, all the matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding," have been held to relate to such criminal proceedings only as might arise out of the conduct of the bankrupt's business, the disposition of his property, and other past transactions, about which alone the statute authorized the examination in question to be made. *Edelstein v. U. S.* 149 Fed. 636, 79 O. C. A. 328, 9 L.R.A.(N.S.) 236.

#### 50. ANY DAMAGE DONE

As used in a proviso in a lease imposing on the lessee the duty to repair, the words "any damage done to the said buildings by negligence of its (lessee's) employees, careless usage," etc., have been held not to mean damage due to neglect to repair. *Herboth v. American Radiator Co.* 145 Mo. App. 484, 123 S. W. 533.

In *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474, it appeared that the plaintiffs were chartered under the Pennsylvania Act of 1836 and authorized to erect a lock navigation in the river Monongahela, making amends for the damages thereby occasioned; and later a supplemental act

was passed in which new privileges were granted, the last section reserving to the legislature "the right to alter, amend, or annul, the charter, in such manner as to do no injustice to the stockholders," and in 1844, it was enacted "that the company shall make amends for any damage done, or that may be done, to lands and property in the Monongahela river, or its branches or tributary streams, by overflowing the same," etc. It was held that the act of incorporation made the company liable for consequential damage on the principles of the common law, in that it made it liable for any damage whatever.

#### 51. ANY DANGEROUS CONDITION.

It has been held that the words "any dangerous condition," as used in the Illinois Mining Act (§ 18) providing that no one should be allowed to enter the mine to work, except under the direction of the mine manager, "until all conditions have been made safe," and that when any dangerous condition is discovered to exist in the mine, the mine examiner shall place a notice to all men to keep out of the mine, are not, under the doctrine of *ejusdem generis*, limited to the dangers specified in the statute in express terms and to the same kind of dangers as are expressed in the statute in specific terms, but that the words "any dangerous condition" as found therein extend the scope of the statute so as to cover all dangerous conditions found in the mine. *Dunham v. Black Diamond Coal Co.* 239 Ill. 457, 88 N. E. 216.

#### 52. ANY DEBT.

In construing the term "any debt" as found in the Federal statute (Rev. St. U. S. § 2296, 6 Fed. St. Ann. 307) which provides that "no land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," the court said, in the case of *In re Parmeter*, 211 Fed. 757: "Inasmuch as all of the bankrupt's debts were incurred prior to the issuing of the patent, he claims that he holds the property exempt from such debts, by reason of this section. The case turns upon whether the exemption mentioned in the statute is confined to the debts of the patentee, to whom the government issues the patent, or runs with the land, and inures to the benefit of the patentee's heirs and assigns, so as to be exempt also from their debts contracted before the issuance of the patent. . . . Section 2296 has not been literally construed by the courts. It has been uniformly held that the homestead is liable, at least after final proof, for liens voluntarily impressed

thereon by the homesteader, and subject to sale for the payment of the debt secured by such liens. It has been the practice for more than a generation for homestead entrymen to borrow the money with which to make their final proofs, and pay the commutation price for the land, and give back a mortgage upon the homestead as security, and such mortgages have been sustained by the courts, and enforced against the homestead, although they were created frequently years before the issuance of the patent. In this way an exception has been built up to the general language of section 2296, and the words 'any debt,' contained in the section, have been held to mean general contract debts as to which no specific lien was voluntarily impressed upon the homestead by the entryman. . . . If the exemption follows the land beyond the patentee of the government, then there is no rule prescribed by the statute to determine how far we shall go in allowing the exemption. It must therefore be confined to the debts of the patentee or extend to the debts of all holders prior to the issuance of patent."

And in *Shelby v. Ziegler*, 22 Okla. 799, 98 Pac. 989, in an action under the same statute, it was held that liability for a tort committed, independent of any contract, for which an action would lie at common law for the recovery of damages, was within the purview of the term "any debt contracted."

### 53. ANY DEBTOR.

Under the Minnesota insolvent law of 1881 (sec. 1, as amended by Laws 1889, c. 30), providing that whenever "any debtor" shall have become insolvent, . . . he may make an assignment of all his unexempt property for the benefit of his creditors, it has been held that the term "any debtor" comprehends anyone who is capable of contracting a debt, and has done so, and therefore includes a married woman. *Kinney v. Sharvey*, 48 Minn. 93, 50 N. W. 1025.

### 54. ANY DEBTS DUE.

In construing a Tennessee statute (Acts 1875, p. 237, ch. 142, sec. 5; M. & V. Code, § 1708), providing that "the amount of any unpaid stock due from a subscriber to the corporation shall be a fund for the payment of any debts due from the corporation," it has been said that the clear and plain meaning of the statute is, that all unpaid stock, whenever subscribed, should be a fund for the payment of all corporate debts, whenever created. *Shields v. Clifton Hill Land Co.* 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L.R.A. 509; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

### 55. ANY DECEASED CHILD.

It has been held that the phrase "any deceased child," as used in a will which provided that "upon the death of either of said children of said testator without issue, to pay his or her one-third share of said net income to the survivors of them, share and share alike, and to the children of any deceased child by right of representation," referred only to children predeceasing the testator but who were living at the time of the execution of the will. *Cookson v. Hamilton*, 160 Cal. 743, 118 Pac. 116.

### 56. ANY DECISION.

In *Weiser Irr. Dist. v. Middle Valley Irrigating Ditch Co.* 28 Idaho 548, 155 Pac. 494, it was held under the constitution of Idaho (art. 5, sec. 9), which provides that the supreme court shall have jurisdiction to review, on appeal, "any decision of the district courts, or the judges thereof . . ." that the phrase "any decision" did not mean all decisions made by that court or the judges thereof during the progress of a trial, but such decisions only as were final or were by virtue of a statute appealable.

### 57. ANY DECREE OR ORDER.

The English Trustee Extension Act of 1852 provides that "when any decree or order" shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of the land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) on a trust within the meaning of the Trustee Act of 1850. In *Beckett v. Sutton*, 19 Ch. D. (Eng.) 646, 51 L. J. Ch. 432, 46 L. T. N. S. 481, it was held that the act applied to all sales under the Partition Acts of 1868 and 1876 and that the words of the section applied to "any decree or order" by which the court directed a sale.

### 58. ANY DEER.

In *State v. Weber*, 205 Mo. 36, 12 Ann. Cas. 382, 120 Am. St. Rep. 715, 102 S. W. 955, 10 L.R.A. (N.S.) 1155, it was held that the words "any deer" as used in the Missouri Game Law (Acts 1905, p. 158 § 13) meant any and all kinds of deer.

### 59. ANY DEFTOT.

In *Wilson v. New York, etc. R. Co.* 18 R. I. 598, 29 Atl. 300, it was held that the provision of the Rhode Island Judiciary

Act (chap. 15, § 4), that the court may at any time permit either of the parties to amend "any defect" in the process or pleadings, with or without terms, in the discretion of the court, or in pursuance of general rules, was broad enough to include substantial as well as merely formal defects, and that the provision was merely declarative of the rule theretofore obtaining that the court in its discretion might permit amendments, even in matters of substance, which did not go to the length of changing the form of action or introducing a new or different cause of action.

As used in a Montana statute (Revised Codes Mont. § 3289) requiring the giving of notice in order to hold a municipality liable for any injury or loss suffered by reason of "any effect in any . . . sidewalk," . . . that phrase has been held to mean "any and every defect, deficiency, or obstruction which would interfere with the proper use of the walk." *Tonn v. Helena*, 42 Mont. 127, 111 Pac. 715, 36 L.R.A. (N.S.) 1136.

Under the New York Tax Law (§ 132) providing in substance that tax deeds shall be subject to cancellation on a direct application to the comptroller or in any appropriate action for "any defect in the proceedings affecting the jurisdiction upon constitutional grounds," etc., it has been held that the phrase "any defect in the proceedings affecting the jurisdiction upon constitutional grounds" was intended to include every jurisdictional defect. *People v. Lewis*, 127 App. Div. 107, 111 N. Y. S. 398.

#### 60. ANY DEFENDANT.

A right to remove the case to a federal court given to "any defendant who is a non-resident has been held to inure to a nonresident defendant though he is joined with a resident. *Cochran v. Montgomery County*, 199 U. S. 260, 4 Ann. Cas. 451, 26 S. Ct. 58, 50 U. S. (L. ed.) 182; *Fisk v. Henarie*, 32 Fed. 417, 13 Sawy. 38.

"No other conclusion can be reached than that Congress intended, in cases where it appeared that from prejudice or local influence a nonresident defendant would not be able to obtain justice in the state courts, such defendant, notwithstanding the fact that other defendants were joined with him in the suit, should have the right to remove 'such suit' into the circuit court of the United States." *Haire v. Rome R. Co.* 57 Fed. 321. "Where the right of removal is based on the ground of prejudice or local influence, it must not only appear that the defendant is a nonresident, and that the jurisdictional amount is involved, but it must also appear that the defendant cannot secure a fair and impartial trial in the state court, on account of prejudice or local influence; and, when it is made

to appear that prejudice or local influence exists, then any defendant is guaranteed the right of removal, by the express language of the statute, even though a resident defendant may be joined with him in the same action." *Parker v. Vanderbilt*, 136 Fed. 246.

In *Mt. Olive Coal Co. v. Hughes*, 45 Ill. App. 566, in holding that service on a corporation by publication must be in the county where it had its residence, under the Illinois Practice Act (§ 2), providing that "it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law," etc., the court declared that a defendant who did not come within either of the exceptions mentioned could not be sued out of the county where he resided or might be found.

In *Steinhardt v. Baker*, 20 Misc. 470, 46 N. Y. S. 707, affirmed 25 App. Div. 197, 49 N. Y. S. 357, it was held that the words "any defendant" as used in a New York statute (Laws N. Y. 1876, c. 449, § 5) providing for substituted service indicated an intent to include infants.

#### 61. ANY DEFICIENCY.

In *Crouse v. Owens*, 49 Hun 610 mem. 3 N. Y. S. 863, affirmed 117 N. Y. 629 mem. 22 N. E. 1128, it appeared that there was endorsed on a bond assigned to the plaintiff a guaranty of payment of the bond "or any deficiency which should arise upon enforcing the mortgage security then delivered to the plaintiff." It was held that, inasmuch as the mortgaged premises had been sold at a judicial sale, by virtue of the foreclosure of a prior mortgage, and no surplus had arisen at that sale, the contingency mentioned in the guaranty, to wit, "any deficiency," covered the whole amount due on the mortgage assigned to the plaintiff.

In *Osterhoudt v. Rigney*, 98 N. Y. 222, it was held that under a provision that an estimate of poor funds might include "any deficiency in the preceding year" an estimate may include the entire expenditure of a preceding year in which no funds were provided.

#### 62. ANY DEGREE.

In *Harvey v. Chicago, etc. R. Co.* 221 Ill. 242, 77 N. E. 569, in reviewing an instruction that the duty devolving on a carrier did not "in any degree" excuse passengers from the duty of exercising ordinary care for their own safety, it was held that the words "in any degree" were equivalent to "in any way" or "in any manner," and did not impose on the passenger the duty to use extraordinary care.

## 63. ANY DEPOSIT.

Under a statute of Mississippi (Code of 1892, § 1089) forbidding any bank employee to receive "any deposit" with knowledge that the bank is insolvent, without informing the depositor of its condition, it has been held that every single act of receiving any deposit is a separate and distinct offense. *State v. Walker*, 88 Miss. 592, 41 So. 8.

## 64. ANY DESCRIPTION.

In an action for the violation of a law of Maine (Public Laws 1901, c. 240) prohibiting the packing or canning of sardines of any description between the first day of December and the 10th day of the following May, it was held in *State v. Kaufman*, 98 Me. 546, 57 Atl. 886, that the words "of any description" were of wide application, and clearly prohibited all sardine canning within the time limits fixed by the statute.

In *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204, construing a clause whereby a deed was made subject "to existing mortgages, liens, taxes, and claims of any and every description, which the party of the second part assumes and agrees to pay," the court held that the words in the assumption clause, "and claims of any and every description," were evidently intended to have a larger meaning than the words "mortgages, liens, taxes, and claims;" in other words, that the assumption clause intended to include not only claims which were liens, but also claims of any and every description connected with the property and improvements conveyed.

## 65. ANY DETERMINATION.

A statute of New York (Laws 1905, c. 724, § 22) provides that "from any determination of the special term an appeal may be taken to the appellate division, and from any determination of the appellate division, either party, if aggrieved, may take an appeal which shall be heard and determined by the court of appeals." In *Matter of Simmons*, 203 N. Y. 241, 96 N. E. 456, reversing 144 App. Div. 255, 128 N. Y. S. 1071, it was held that "any determination of the special term" meant any or every order of the special term, and that "any determination of the appellate division" meant any order of the appellate division.

## 66. ANY DEVICE.

An Oklahoma statute (*Snyder's Comp. Laws* 1909, § 2422) provides "that every person who deals, plays or carries on, or opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, poker, roulette, craps, or any banking or per-

centage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor." In *James v. State* (Okla.) 113 Pac. 226, 33 L.R.A.(N.S.) 827, it was held that by the use of the words "or any device" the legislature meant to include every scheme or plan or conception by which the person who opened or conducted a house, room, or place for betting, induced and enabled persons to bet or lay wagers upon any kind of game whatsoever; and that the purpose of the statute was not aimed exclusively at any particular game or species of games, but was intended more effectually to suppress every kind of public gaming in the state of Oklahoma, not only those then in existence, but also those that might subsequently be devised and practiced.

As used in the *Elkins Act* (Act Feb. 19, 1903, c. 708, 32 Stat. 847, 10 Fed. St. Ann. 170) forbidding the receiving of any concession in respect of the transportation of any property in interstate or foreign commerce, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed," as required by the interstate commerce act and its amendments, it has been held that the phrase "by any device" means directly or indirectly, in any way whatever, and that the purpose of its use is to emphasize the scope of the law so that it will clearly include the solicitation or receipt of every concession, however obtained, whereby property in interstate or foreign commerce shall be transported at less than the regular filed and published rate. *Armour Packing Co. v. U. S.* 153 Fed. 1, 82 C. C. A. 135, 14 L.R.A.(N.S.) 400, affirmed 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681.

## 67. ANY DEVISE.

In *Kent v. Kent*, 106 Va. 199, 55 S. E. 564, under the Virginia Code (§ 2524), providing that "unless a contrary intention shall appear by the will, such of the real estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will," it was held that the words "any devise" were to be limited to any devise other than the residuary clause.

## 68. ANY DIFFERENCE.

In *Midland R. Co. v. Loseby* [1899] A. C. (Eng.) 133, the court construed the provisional order, confirmed by act of Parliament, which authorizes a company to make charges, reasonable charges, in respect to certain specified services, and provides that

"any difference" arising under the act shall be determined by an arbitrator to be appointed by the board of trade at the instance of either party." Lord MacNaghten said: "I cannot imagine wider words than those. 'Any difference'—of course it must be one arising under the section—is to be referred to the arbitrator, and by him determined. I understand that to mean 'finally determine,' determined once for all. In coming to his determination it must be open to the arbitrator to investigate and to determine any question incidental to that referred to him—any question which must be determined in order to determine finally the point in difference. I agree with what A. L. Smith, L.J., said, that the duty of the arbitrator is 'to adjudicate upon the whole matter once and for all, and that it is not the true reading of the sections to say that a court of law is to be invoked as regards some matters, and that the arbitrator is to be called in with regard to others.' As Chitty, L.J., observed: 'All the matters which are material for the decision of a difference arising under the section, whatever the difference may be, are within the competence of an arbitrator appointed by the board of trade to decide.' I think it would be very much to be regretted if some of these questions were referred to one tribunal, and some to another."

#### 69. ANY DIFFICULTY.

A testamentary direction that in case of "any difficulty" the matter should be submitted to an eminent member of the bar, named in the will, has been held to extend to the determination of questions of interpretation, the court saying that the language used in this will was of the broadest, most comprehensive character. *Phillips's Estate*, 10 Pa. Co. Ct. 378, 28 W. N. C. 229.

#### 70. ANY DISEASE.

In *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180, it appeared that an accident policy in suit provided that the company should not be liable "for injuries resulting directly or indirectly, in whole or in part, from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, orchitis or any disease or bodily infirmity." It was held that the latter clause, "any disease or bodily infirmity" was not limited by the preceding exceptions, there being no such relation between the matters enumerated as to admit of the application of the rule of *eiusdem generis*.

#### 71. ANY DIVIDEND DECLARED.

In *Philadelphia v. Ridge Ave. Pass. R. Co.* 102 Pa. St. 190, the court construed a Penn-

sylvania act [Act of 1872, § 3] making the defendant liable for the payment annually, to the city of Philadelphia, of "a tax of six per centum, upon so much of any dividend declared, which may exceed six per centum upon the capital stock." It was held that the dividend referred to was either a dividend declared within the year, or annually, and most undoubtedly not one declared in any former year, or without qualification.

#### 72. ANY ELECTION.

The words "any election," in the Illinois constitution (art. 7, § 1), which prescribes the qualifications essential to entitle a person to vote, have been held not to embrace every election at which any political office was to be filled, but to refer to elections to fill offices created by the constitution. *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L.R.A. 131; *Scown v. Czarnecki*, 264 Ill. 305, Ann. Cas. 1915A 772, 106 N. E. 276, L.R.A. 1915B 247.

A like interpretation has been given to the same words in the Kansas bill of rights (§ 7), which provides: "No religious test or property qualification shall be required for any office or public trust, nor for any vote at any election" (Gen. Stat. 1901, § 89). *State v. Monahan*, 72 Kan. 492, 7 Ann. Cas. 661, 84 Pac. 130, 115 Am. St. Rep. 224.

Under the Mississippi statute (*Hutch. Code*, Miss. 951) declaring a penalty against betting on "the result of any election," it has been held that the phrase was intended to embrace all elections which might be held in the state but did not embrace betting on the result of an election to be held in another state. *Sharkey v. State*, 33 Miss. 353.

The Mississippi Code of 1906 (§ 1122), imposing a penalty on any person who shall vote "at any election," not being legally qualified, has been held to include a municipal election. *Sample v. Verona*, 94 Miss. 264, 48 So. 2.

It has been held that the words "any election held in this state," as used in the Alabama statute (*Ala. Code* § 4289) prohibiting illegal voting, included a special or local election held under the authority of the state law to ascertain the sense of the people on the subject of prohibiting the sale of intoxicating liquors. *Gandy v. State*, 82 Ala. 61, 2 So. 465.

In *Com. v. Wells*, 17 W. N. C. (Pa.) 164, it was held that a primary election was not within an act prohibiting wagers on the result of "any election within the state." The effect of that decision was said in *Leonard v. Com.* 112 Pa. St. 607, 4 Atl. 220, 16 Am. & Eng. Corp. Cas. 136, to be to confine the statute to the election of public officers at a general election.

## 73. ANY ELECTION LAW.

In *Leonard v. Com.* 112 Pa. St. 607, 4 Atl. 220, 16 Am. & Eng. Corp. Cas. 136, the provision of the Pennsylvania constitution (Art. VIII, § 9), penalizing any person who shall, while a candidate for office, "be guilty of bribery, fraud, or wilful violation of any election law," was held to embrace a violation law relating to elections, including one designed to prevent fraud at a primary election.

## 74. ANY EQUITABLE INTEREST.

It has been held that the words "any equitable interest whatever" as used in the Canadian Land Registry Ordinance 1870 (§ 20), were not intended to include an equity of redemption in fee simple, but were intended to include lesser interests or estates, e. g., legacies charged on land, equitable mortgages, in short, all charges on the land which could not be recovered by ejectment or in any action at law, but for which the beneficiary must file his bill on the equity side of the court. In *re Douglas*, 1 British Columbia 84.

## 75. ANY ESTATE.

In *Millard v. Hall*, 24 Ala. 209, in construing the provision of an Alabama statute (Clay's Dig. p. 56, secs. 7 & 8) that when "any estate" attached shall be certified to be likely to waste, or be destroyed by keeping, etc., it was held that the phrase "any estate" as used therein comprehended all property on which a levy might be made and that as there was nothing in the phraseology which, in itself, necessarily excluded slave property, such property was not exempt from attachment.

In *Bernards Tp. v. Warren Tp.* 15 N. J. L. 447, in determining that the words "freehold estate" in the New Jersey statute for the settlement of paupers were not confined to legal estates of freehold, the court cited the following English cases: *King v. Mattingley*, 2 T. R. (Eng.) 12, wherein it was held that, under the English statute (9 Geo. 1, c. 7) enacting that no person should acquire a settlement "by virtue of any purchase of any estate," whereof the consideration did not amount to thirty pounds, bona fide paid etc., the purchaser of an equity of redemption had been held to give a settlement, provided the pauper had actually and in good faith paid thirty pounds for the estate; *Rex v. Offchurch*, 3 T. R. (Eng.) 117, wherein it was held that, under a statute providing that "every person who shall become seized of any freehold estate, etc." was meant "any estate" of freehold, whether for life or in fee, legal or equitable, and *Rex v. Geddington*, 2 B. & C. 129, 6 E. C. L. 47, wherein it was decided

that the words "any estate or interest" in a statute meant either a legal or equitable estate or interest.

Under the English statute (9 G. 1, c. 7, s. 5) providing "That no person shall be deemed to acquire or gain any settlement in any parish, for or by virtue of any purchase of any estate or interest in such parish whereof the consideration for such purchase does not amount to the sum of 30*l.*, bona fide paid," it has been held that while an equitable estate will satisfy the words "any estate or interest" in the statute, it must be a clear and absolute equitable estate, such an estate as a court of equity would protect. *Rex v. Geddington*, 2 B. & C. 129, 9 E. C. L. 47, 107 Eng. Rep. (Reprint) 331.

In *Mechanics' etc. Bank's Appeal*, 31 Conn. 63, in construing the Connecticut Insolvent Act, providing that "If any creditor shall present a claim against any estate in settlement under the provisions of this act, who has any security for such claim, by any mortgage, pledge, attachment, or other lien upon any property belonging to said estate, it shall be the duty of the commissioners on such estate to inquire into the cash value of such security, and report the same to the court," etc., it was held that the words "any estate in settlement" meant any estate then in settlement as well as estates thereafter to be settled.

## 76. ANY EVIDENCE.

In cases wherein it has been held that the court should submit the case to the jury when there is "any evidence," "any evidence whatever" and "any evidence at all" to sustain the issue, it has been declared that the foregoing terms all mean evidence legally sufficient to warrant a verdict, no matter when or how it arose. And that it is the duty of the court to instruct a verdict, though there is slight testimony, if its probative force is so weak as to raise only a mere surmise or suspicion of the existence of the fact sought to be established, such testimony in legal contemplation falling short of being "any evidence." *Catlett v. St. Louis*, etc. R. Co. 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Wittkowsky v. Wasson*, 71 N. C. 451; *Citizens' Pass. R. Co. v. Foxley*, 107 Pa. St. 537; *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *Cahill v. Benson*, 19 Tex. Civ. App. 30, 46 S. W. 888; *Cobb v. Bryan*, 37 Tex. Civ. App. 339, 83 S. W. 887; *Berry v. Osborn* (Tex.) 52 S. W. 623.

## 77. ANY FALSE PRETENSE.

In *State v. Simpson*, 10 N. C. 620, the phrase "any false pretense whatever" in a penal statute was limited to false pretenses

ejusdem generis with false tokens, false contrivances and the like.

#### 78. ANY FEMALE.

In *State v. Phillips*, 26 N. D. 206, Ann. Cas. 1916A 320, 144 N. W. 94, 49 L.R.A. (N.S.) 470, the words "any female" as used in a statute forbidding prostitution was held to include a married woman.

#### 79. ANY OF THE FOLLOWING CAUSES.

In *Thurston v. State*, 3 Cold. (Tenn.) 11b, it was held that the provision of the Tennessee Code (§ 5242), that a person who has been tried on the merits of his case, on a plea of "not guilty" and convicted, shall not be entitled to a new trial, an arrest of judgment or a reversal of the judgment "for any of the following causes," must be construed as though it read "for any one of the following causes" and, consequently, that if more than one of the causes mentioned, existed, and such causes would, but for the provisions of that section, entitle the party to a new trial, or to an arrest of judgment, or to a reversal of the judgment, he was entitled to the relief, notwithstanding the provisions of that section.

#### 80. ANY FOREIGN PATENT.

In construing the Canadian Patent Act (R. S. C. 61, 55-6 Vict. c. 24, s. 1, § 8) providing "and under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires," it was held in *Auer Incandescent Light Mfg. Co. v. Dreschel*, 6 Can. Exch. 55, that the words "any foreign patent" therein should be held to be limited to foreign patents in existence at the time the Canadian patent was granted.

#### 81. ANY FORM.

In *Connecticut Mut. L. Ins. Co. v. Akens*, 150 U. S. 468, 14 S. Ct. 155, 37 U. S. (L. ed.) 1148, in construing an exemption in an insurance policy in case of "self destruction in any form" it was said: "The added words 'in any form' clearly relate only to the manner of killing."

In *Kahn v. St. Joseph Bank*, 70 Mo. 262, construing the by-law of a company providing that "no transfer of stock shall be allowed or valid so long as the holder is in arrears to the bank or in any form indebted to it," it was held that the words "in any form indebted to it" referred to debts due the bank by a stockholder outside of his original subscription to its stock.

In *Harper v. Com.* 93 Ky. 290, 19 S. W. 737, the instructions defining the offense in a prosecution for gaming followed the

language of the statute making the setting up, conducting and carrying on a game of cards, called poker, for compensation or commission, whereby money was won and lost, a crime, and added the words "in any form whatever." It was held that the addition of those words was not error, since they added nothing to the meaning conveyed by the statutory words.

#### 82. ANY FORMER DECEASED HUSBAND.

It has been held that the term "any former deceased husband," in the Ohio statute (Rev. Stat. § 4162), referred to any husband who had died leaving a widow to whom any real estate or personal property had passed by virtue of the provisions of the statute, and was not confined in its application to cases where the widow had had two or more husbands who were deceased. *Anderson v. Gilchrist*, 44 Ohio St. 440, 8 N. E. 242.

#### 83. ANY FRANCHISE.

In *Cooper v. Utah Light, etc. Co.* 35 Utah 570, 102 Pac. 202, 136 Am. St. Rep. 1075, in construing the Utah constitution (Art. XII, § 7), providing that no corporation shall lease or alienate "any franchise," so as to relieve the franchise or property held thereunder from certain liabilities, it was held that the word "any" here meant any one of a number, and the words "any franchise" included all franchises, both primary and secondary.

#### 84. ANY FRAUD, UNFAITHFULNESS, ETC.

The Minnesota law (G. S. 1894, sec. 2800, subd. 3) provides that an officer of a corporation is liable for "corporate debts" when he "is guilty of any fraud, unfaithfulness or dishonesty in the discharge of any official duty." In *Merrill First Nat. Bank v. Harper*, 61 Minn. 375, 63 N. W. 1083, it was held that the foregoing provisions were intended to apply only where the unfaithfulness of the official caused some loss peculiar to the individual creditor, not where the loss was a mere corporate loss, common to all the creditors.

#### 85. ANY FURTHER TAX.

A Maryland statute of 1821 contained the following provision: "Upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." In *Gordon v. Appeal Tax Ct.* 8 How. 133, 11 U. S. (L. ed.) 529, the court said: "Not to impose any further tax or burden," when used in reference to some tax already



imposed, means no other tax besides that to which reference is made. Those words, so used, cannot be limited by a refinement upon the etymology of the word 'any,' out of or beyond its meaning in common discourse, to any like; and the words 'any further tax,' used with relation to some other tax, will, by common consent, as it always has been, be intended to mean any additional tax besides that referred to, and not any further like tax."

#### 86. ANY FUTURE EXTENSION.

In *Morris, etc. R. Co. v. Sussex R. Co.* 20 N. J. Eq. 542, the court construed a contract between two railroad companies for joint transportation over their roads and "any future extensions or branches of the same." It appeared that the contracting companies had at the time of making the contract legislative authority for certain extensions. It was held that the contract applied to those only and not to extensions thereafter authorized.

#### 87. ANY FUTURE LICENSE YEAR.

In *Re Brewer*, 19 Ont. L. Rep. 411, 13 Ont. W. Rep. 954, 1087, in construing the Canadian Liquor License Act (R. S. O. 1897, c. 245, § 20), providing that a municipal council may limit the number of tavern licenses to be issued therein for the then ensuing year, "or any future license year," it was held that the expression "any future license year" plainly meant "all" future license years, there being nothing to restrict the generality of the word "any," and it being a word which excludes limitation or qualification.

In *Bourgon v. Cumberland Tp.* 22 Ont. L. Rep. 256, 16 Ont. W. Rep. 582, it was said that the words "for any future license year" admitted of two interpretations; they might mean "for any year future as regards the date of the by-law," or they might mean "for any year future as regards the then ensuing license year" mentioned in the section.

#### 88. ANY GAMING TABLE.

In *State v. Leaver*, 171 Mo. App. 371, 157 S. W. 821, it was held that the term "any gaming table" used in the Missouri statute (R. S. 1909, § 4753) meant any table that might be used for playing games of chance for money or property.

#### 89. ANY GAMING WHATSOEVER.

Under a license providing that the party licensed "do not knowingly suffer any unlawful games or any gaming whatsoever therein," in a public house, it has been held that the words "any gaming whatsoever" did not include the playing of the game of dominoes, as

that was not an unlawful game in itself. *Reg. v. Ashton*, 1 El. & Bl. 286, 72 E. C. L. 286, 118 Eng. Rep. (Reprint) 444, 22 L. J. M. C. 1.

In construing an English statute (8 G. 4, c. 61, § 21) which imposed penalties on persons licensed under that act, who were convicted of offending against the form of the license, and in that form there was a proviso against knowingly suffering "any unlawful games or gaming whatsoever," it was held in *Foot v. Baker*, 5 M. & G. 335, 44 E. C. L. 335, 6 Scott N. R. 306, 11 J. P. 444, 134 Eng. Rep. (Reprint) 593, that playing at skittles for less than £10 was gaming within the meaning of the statute.

#### 90. ANY GARNISHEE.

Under a statute of Texas (Rev. Stat. § 245) providing "that if the garnishing plaintiff is dissatisfied with the answer of any garnishee, he may controvert the same," it has been held that the words "any garnishee" include both a resident and a non-resident garnishee. *American Surety Co. v. Bernstein*, 101 Tex. 189, 105 S. W. 990.

#### 91. ANY GAS COMPANY.

In *Cline v. Springfield*, 10 Ohio Dec. 389, 7 Ohio N. P. 626, the court construed an ordinance providing that "in order to enable said council to determine what would be a fair and reasonable price for the gas to be furnished to the citizens, public grounds and buildings, streets, lanes, alleys and avenues of said city by the companies hereinafter mentioned, the president or other officer in charge of any gas company, or any gas light and coke company, situate in said city, shall, make and file in the office of the city clerk of said city, a report, which report shall state," etc. It was held that the phrase "any gas company," as used in the ordinance, was general, and embraced as well as described, under the term "gas," any kind or species of gas, whether made by the then known process or by a new and then unknown process; whether made in nature's laboratory or in one devised by man.

#### 92. ANY GOODS AND CHATTELS.

Under a Pennsylvania statute (Act of April 5, 1790, sec. 4) providing that "if any person shall feloniously steal, take and carry away any goods or chattels, under the value of twenty shillings, and be thereof legally convicted, he shall be deemed guilty of petty larceny," etc., it was held in *Findlay v. Bear*, 8 Serg. & R. (Pa.) 571, that by the words "any goods or chattels" were to be understood such goods or chattels only as had been esteemed subjects of larceny, and that a dog

was not the kind of property the taking of which was a felony.

In *State v. Wilson*, 63 Ore. 344, Ann. Cas. 1912D 646, 127 Pac. 980, it was held that a railroad ticket, although yet in the possession of the company and unstamped, was the subject of larceny because it was comprehended within the general term of "any goods or chattels" as used in the statute defining larceny.

#### 93. ANY GROSS NEGLIGENCE.

In *Schwartz v. Schwartz*, 6 Ohio Dec. 525, 7 Ohio N. P. 194, in construing an Ohio statute (75 Ohio L. 747), providing that "any gross neglect" when proven was a ground for divorce, it was said that no well defined line could be laid down applicable to all cases, but that the question in every instance must be left to the sound discretion of the trial court. The court further remarked that while there seemed to be a disposition among the Bar to consider extreme cruelty or habitual drunkenness as a gross neglect of duty, extreme cruelty or drunkenness was the commission of an act, while gross neglect was an omission or forbearance to perform an act which the highest ties of marital relation required should be performed.

#### 94. ANY HARNESS.

In *State v. Wortman*, 78 Kan. 847, 98 Pac. 217, in defining the term "any harness" as used in a statute enumerating articles subject of larceny, it was said that the legislature employed the phrase "any . . . harness" as descriptive of the class of articles forming the gear by which a vehicle was drawn, as it might have covered all wearing apparel by the use of the phrase "any clothing," and that to commit the interdited offense, it was not necessary to take a substantially complete harness, or what was known as a "set" of harness.

#### 95. ANY HEIR OR CREDITOR.

An Ohio statute (Lanning R. L. 9637, Rev. St. § 6098) provides as follows: "If any heir or creditor of a deceased person, or any person who has purchased, or claims to hold, by purchase or otherwise, from such heir, any lands or other property inherited by such heir from such decedent, shall file in the probate court of the county in which administration is taken out on any estate, a written requisition on the administrator or executor, to disallow and reject any claim presented for allowance," etc. In *Todd v. Todd*, 27 Ohio Cir. Ct. Rep. 224, it was held that an heir was none the less entitled to object, although he was also interested as a

devisee or legatee, and further that the words "any heir or creditor" in the statute included devisees and legatees or any other person whose property was or might be affected by the recovery of a judgment.

#### 96. ANY HOLDER OF THIS OBLIGATION.

In *Marsden v. Soper*, 11 Ohio St. 503, with respect to a warrant of attorney to confess judgment on a promissory note "in favor of any holder of this obligation," the court said that it was questionable whether the warrant of attorney authorized a judgment in favor of an indorsee of the note. In *Watson v. Paine*, 25 Ohio St. 340, the court said: "I am still wholly unable to find a reason why a power to confess judgment in favor of any holder of the note may not as well be used in favor of an indorsee as in favor of the payee." It was, however, said that the court was not agreed on the point and it was not decided.

#### 97. ANY ILLEGAL OFFICIAL ACT.

In *Hicks v. Eggleston*, 105 App. Div. 73, 93 N. Y. S. 909, construing a statute of New York (Laws 1892, ch. 30), providing that an action may be maintained "to prevent any illegal official act, . . . or to prevent waste or injury to, or to restore and make good," any public property, funds or estate, it was held that any action on the part of a sheriff, by which he procured the audit of a bill for thousands of dollars in excess of the amount which the statutes permitted him to exact of the taxpayers, was an illegal official act within the contemplation of the statute, both on his part and on the part of the members of the board of supervisors making such audit.

#### 98. ANY INCORPORATED COMPANY.

The expression "any incorporated company" as used in a Texas statute (Rev. St. art. 223), providing that in suits against any incorporated company or joint stock association the citation may be served on the president, secretary, or treasurer of the company or association, or on the local agent representing the company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours, has been held to cover all incorporated companies, whether created under the laws of the state of Texas or those of any other state or of a foreign country. *Angerhoefer v. Bradstreet Co.* 22 Fed. 305.

Under the Missouri constitution (Art. XII, § 4) providing that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the ex-

ercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of the said right," it has been held that a municipal corporation is not an incorporated company within the purview of the constitutional provision. *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. 326; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773; *St. Louis v. Roe*, 184 Mo. 324, 83 S. W. 435.

#### 99. ANY INCORPORATED MEDICAL SOCIETY.

A New York statute (Laws 1895, c. 398) provides that "when any prosecution under this article is made on the complaint of any incorporated medical society of the state, or any county medical society entitled to representation in a state society, the fines, when collected, shall be paid to the society making the complaint," etc. In *New York County Medical Assoc. v. New York*, 32 Misc. 116, 65 N. Y. S. 531, it was said that if the legislature had intended to limit the act for the exclusive benefit of three societies, the Medical, Homeopathic and Eclectic, because they were named in certain prior acts and possessed certain rights which the plaintiff did not possess, it should have expressed that intent by language referring in some manner to those three societies, instead of using the word "any," which meant an indefinite number or quantity.

#### 100. ANY INCREASE THEREOF.

In *Merchants Loan, etc. Co. v. Northern Trust Co.* 260 Ill. 86, 95 N. E. 59, 45 L.R.A. (N.S.) 411, it was held that a statutory power to trustees to hold "any increase" of the trust property authorized trustees to acquire and pay for their pro rata share of any increase of capital stock offered to them by the corporation at less than market value, by reason of their ownership of shares of stock which belonged to the testator at his death.

#### 101. ANY INCUMBRANCE.

In *Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171, referring to an allegation in a complaint in an action against abstractors for furnishing a defective title, the court said: "The phrase 'without any incumbrances' means just what it says. It means there were no incumbrances. Indeed, it means there was not a single incumbrance. It could not possibly mean there were some incumbrances, or even there was a single incumbrance. So to hold would be a strange perversion of language."

#### 102. ANY INDEBTEDNESS.

In *Simons v. Union Springs First Nat. Bank*, 93 N. Y. 269, it was held that a mort-

gage, which after reciting the consideration, stated that it was "intended as collateral security for the payment of any indebtedness of the said first parties to the said party of the second part," referred to existing debts only.

In *State v. Candland*, 36 Utah 406, 104 Pac. 285, 140 Am. St. Rep. 834, 24 L.R.A. (N.S.) 1260, in construing the provision of the Utah constitution that when the territorial indebtedness shall have been paid, "the state shall never contract any indebtedness, except as in the next section provided," etc., it was held that the phrase "any indebtedness" included any obligation which the state undertook or was obligated to pay or discharge out of future appropriations; that is, appropriations not made by the legislature creating the debt or obligation, and to be paid from moneys derived from levies other than those made by the then existing legislature, and which must necessarily be raised by levying a tax upon the property of the entire state, as contradistinguished from a mere city, county, or district levy. In other words, it was held that in order to constitute an indebtedness within the provisions of the constitutional limitation it was not necessary that the debt be evidenced by bonds, notes, or other usual evidences of indebtedness, but it was sufficient if in order to discharge the debt the state was obligated to pay it at some future time, and that it cast a future burden upon the taxpayer to the extent of a debt or obligation which must be paid by the state of Utah with funds derived from general taxation.

#### 103. ANY INDICTMENT.

In *People v. Clark*, 7 N. Y. 385, under a New York statute (Act March 22, 1852), providing that "any judgment rendered in favor of any defendant, upon any indictment for any criminal offense (except where such defendant shall have been acquitted by a jury), may be reviewed on writ of error on behalf of the people," it was held that the phrase "upon any indictment" did not limit the reviewable judgments to judgments not on verdict.

#### 104. ANY INDIVIDUAL OR COPARTNERSHIP.

In *Com. v. Real Estate Trust Co.* 26 Pa. Sup. Ct. 149, *affirmed* 211 Pa. St. 51, 60 Atl. 551, it was held that the words "any individual or copartnership" as used in a statute imposing a tax on real estate brokers did not include a corporation.

#### 105. ANY INFAMOUS CRIME.

In *Hess v. Hess*, 22 Pa. Co. Ct. 135, in construing a statute allowing a divorce if either spouse has been "convicted of forgery

or any infamous crime," the court declared that the term was to be construed in a broad and comprehensive, or popular sense and not in its technical sense, and that it was intended to include other crimes than those which make a convict incompetent to testify.

#### 106. ANY INSTRUMENT OR MEANS.

In *State v. Miller*, 90 Kan. 230, Ann. Cas. 1915B 818, 133 Pac. 878, in construing a statute of Kansas (Gen. Stat. 1909, § 2532), providing that "every physician or other person who shall wilfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, etc., shall be guilty of a misdemeanor," etc., it was said that the phrase "any instrument or means whatsoever" indicated a legislative intent to cover all the criminal machinations and devices of the abortionist and that those words were not limited by the rule of *ejusdem generis*.

#### 107. ANY INSURANCE COMPANY.

In *Fort v. State*, 92 Ga. 8, 18 S. E. 14, 23 L.R.A. 86, the words "any insurance company" as used in a statute relating to certificates of authority were held to apply to incorporated companies only.

#### 108. ANY INSURANCE CORPORATION.

In *Zell v. Herman Farmers' Mut. Ins. Co.* 75 Wis. 521, 44 N. W. 828, the words "any insurance corporation" as used in a statute (Rev. Stat. § 1977), relating to insurance agents, include a mutual insurance company.

#### 109. ANY INTEREST.

In *Storms v. Snyder*, 10 Johns. (N. Y.) 109, it was held that an agreement between the plaintiff and the defendant, that the plaintiff should open a road to its original width, and should move his fence, was held not to involve "any interest" in land within a statute relating to jurisdiction.

In *Forbes v. Hamilton*, 2 Tyler (Vt.) 356, under the Vermont statute (vol. 1, p. 189, § 4), providing that "no action shall be maintained upon any agreement hereafter to be made for the sale of lands, etc., or any interest therein, or concerning them," it was held that the words "any interest therein" involved the various tenures by which lands might be held.

#### 110. ANY INTOXICATING BEVERAGE.

In *Rush v. Com.* (Ky.) 47 S. W. 586, 20 Ky. L. Rep. 775, it was held that a statute

prohibiting the sale of "any intoxicating beverage, liquid mixture or decoction" did not apply to spirituous, vinous or malt liquors, or amend an act relating thereto, but was designed to prohibit the sale of other intoxicants, such as "bitters" and the like.

#### 111. ANY JUDGE.

In *City Bank v. Young*, 43 N. H. 457, it was held that a statute by which "any judge" in any other state was empowered to take depositions to be used in the New Hampshire courts, did not limit the authority to a judge who was authorized in his own state to take depositions.

Under the Dominion Speedy Trials Act, 1888, providing that "in British Columbia the judge in a speedy trials court may be . . . any judge of a county court," it has been held that the expression "any judge of a county court" must be taken to refer to any judge having, by force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he might hold a "speedy trial" and that this statute did not authorize a county court judge having no authority from the provincial legislature so to do to hold a "speedy trial" without the limits of his territorial jurisdiction; in other words that the expression "any judge of a county court" must be limited by the tacit condition "within his county," or words to that effect. *Piel Ke-Ark-An v. Reg.* 2 British Columbia 53; *In re British Columbia County Courts*, 21 Can. Sup. Ct. 446.

Under a New York statute (Laws 1848, p. 66, Act of 1848, § 2) providing that applications under the Act of April 26, 1831, and the acts amending the same, "may be made to any judge of a court of record in any county in which the judgment on which the complaint is grounded is docketed, and in which the defendant resides," it was held that the legislature meant by the words "any judge of a court of record" any judge of a court of record commonly called judge, and known and spoken of, as a judge of a court of record, and did not include a city recorder. *People v. Goodwin*, 50 Barb. (N. Y.) 562.

#### 112. ANY JUDGMENT.

The words "any judgment which may be rendered against him in his official capacity" in the Alabama Revenue Act (Act of Dec. 3, 1868, § 44) relating to liability on a tax collector's bond have been held not to be used in a technical or restricted sense as a judgment in an action at law, but as meaning "any judgment" of any court to which the state or county might properly resort for its coercive aid. *Dallas County v. Timberlake*, 54 Ala. 403.

Under a Colorado statute (Gen. St. sec. 85) providing that "All attorneys and counselors at law shall have a lien . . . upon any judgment they may have attained [obtained] belonging to any client, or for any fee . . . due, or any professional service rendered . . .; which said lien may be enforced by the proper civil action," it was held in *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567, that the attorney was given a lien on all kinds of judgments obtained by him and belonging to his client, regardless of the subject-matter to which they related, as the statute recognized no distinction between judgments for money or personal property and decrees or judgments awarding the ownership or possession of land to the plaintiff, or preserving his interest therein.

In construing a statute of Connecticut (Gen. St. Conn. tit. 19, p. 415, c. 5, § 15) providing that "in all civil actions except those of summary process, brought before a justice of the peace, an appeal from any judgment rendered therein upon any issue may be had and allowed to either party," it has been held that the words "any judgment" do not include a judgment of respondeat oster on a demurrer which has been overruled and therefore no appeal lies from such a judgment. *Denton v. Danbury*, 48 Conn. 368.

Where an Illinois statute (Rev. Stat. c. 77, § 6) provided that "no execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except upon the revival of the same by scire facias," etc., it was held in *Wilson v. Schneider*, 124 Ill. 628, 17 N. E. 8, that the words "any judgment" included a probated claim, which was to be considered a judgment by the terms of section 27 of the same chapter.

In *Byram v. Johnston*, 29 N. Bruns. 572, under a Canadian statute (Consol. Stat. cap. 85), declaring that "no action or scire facias upon any judgment, recognizance, bond, or other specialty shall be brought but within twenty years after the cause of action," it was said by Allen, C. J., that while the words "any judgment" might by themselves include a judgment recovered in a justice's court, yet when read in connection with the words which followed them there was no doubt that they meant judgments of courts of record only.

A law of Wisconsin (Laws 1869, c. 40, § 1, 2 Tay. Sts. 1610, sec. 123) provided that "all deeds purporting to convey real estate or any interest therein, which are duly executed, acknowledged and recorded in the office of the register of deeds of the county in which the lands described therein are situated, and purporting to be made and executed

by any sheriff, deputy sheriff, referee or other person in pursuance and by virtue of any judgment, order or decree of any court of record of this state, or in pursuance of any sale made under and in pursuance of any judgment, execution, or order or decree of any court of record of this state, shall be received in evidence in all courts and judicial proceedings in this state," etc. In *Chase v. Whiting*, 30 Wis. 544, it was held that the words "any judgment, order or decree of any court of record of this state" included the judgments, orders and decrees of a county court.

#### 113. ANY JUDGMENT CREDITOR.

It has been held that the phrase "any judgment creditor," used in section 18 of the Illinois act in regard to judgments and decrees as designating those entitled to redeem, means any creditor having a judgment on which execution might issue at the time he sought to redeem, without regard to the time when the judgment might have been recovered, and therefore includes every person who held a valid judgment, no matter when his cause of action accrued, and is not limited to one who secures a judgment on an indebtedness existing prior to the expiration of the debtor's period of redemption. *Meier v. Hilton*, 257 Ill. 174, 100 N. E. 520; *Kerr v. Miller*, 259 Ill. 516, 102 N. E. 1050.

#### 114. ANY JUDICIAL OFFICER.

In construing the Georgia penal code (sec. 957) providing that "any judicial officer, or the sheriff of the county where the accusation was found," may receive bail, it has been held that the words "any judicial officer" mean any judicial officer of the county where the accusation is found. *Weatherly v. Beavers*, 139 Ga. 122, 76 S. E. 853.

#### 115. ANY JUROR.

In *State v. Williford*, 111 Mo. App. 668, 86 S. W. 570, the words "any juror" as used in a statute relating to embracery were held to mean a qualified and acting juror, that is a man who has been summoned, sworn and impaneled and thus constituted and made a juror.

#### 116. ANY JUSTICE OF THE PEACE.

In *DuBignon v. Tufts*, 66 Ga. 59, it was held that a statute permitting proceedings to dispossess a tenant to be instituted before "any justice of the peace" authorized proceedings before a justice of another county from that wherein the tenant resided.

## 117. ANY KIND.

The words "any kind" not preceded by an enumeration are to be given a broad and comprehensive meaning. Thus in *Jolly v. U. S.* 170 U. S. 402, 18 S. Ct. 624, 42 U. S. (L. ed.) 1085, a prosecution under the federal statute (Rev. St. U. S. § 5456, 4 Fed. St. Ann. 790) providing that every person who robs another of "any kind or description of personal property belonging to the United States," or feloniously takes and carries away the same, shall be punished, etc., it was held that "any kind or description of personal property" was an exceedingly broad designation, including inter alia postage stamps in the possession of the government. So in *People v. Fidelity, etc. Co.* 163 Ill. 25, 38 N. E. 752, 26 L.R.A. 295, under the Illinois statute (Act of May 31, 1879) providing that on complying with certain conditions it shall be lawful for a foreign insurance company or association to take risks or transact "any kind of insurance business" in this state other than that of life insurance, applied to all kinds of insurance, the only implied limitation being that the insurance business transacted should be such as was authorized by the charter of the company, or by the articles of incorporation and law under which it was organized. In *Schnurr v. Quinn*, 83 App. Div. 70, 82 N. Y. S. 468, it was held that a clause in an agreement of settlement with a pregnant woman that she agreed not to make "any further claim of any kind" on the putative father of the child, was sufficient to bar a bastardy proceeding.

But the words "any kind" though not used in connection with an enumeration may be restricted by the context. *Colquhoun v. Brooks*, 21 Q. B. (Eng.) 52, 57 L. J. Q. B. 439, 59 L. T. N. S. 661, 36 W. R. 657, affirmed 14 App. Cas. 493, 59 L. J. Q. B. 53, 61 L. T. N. S. 518, 38 W. R. 289.

Under an English statute (16 & 17 Vict. c. 34, s. 2, sched. D) by which duties were imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere," it was held that the words "from any kind of property whatever" must be read with some limitation, and that the limitation to be inferred from those sections was that the duty was chargeable only on the amounts received in this country from the business carried on

abroad by the persons sought to be charged. Similarly in *Industrial Mut. Indemnity Co. v. Hawkins*, 94 Ark. 417, 21 Ann. Cas. 1029, 127 S. W. 457, 29 L.R.A. (N.S.) 635, in construing a provision of an insurance policy allowing benefits for total disability when the insured was prevented by an injury from the prosecution of "any and every kind of business," the court said: "The use of the word 'prosecution' indicates that the parties intended to mean that the insured was wholly disabled from doing that business which he had the capabilities to prosecute. Otherwise he could not recover unless he sustained an injury that rendered him absolutely helpless both mentally and physically. The plaintiff was an uneducated day laborer. He had no ability to do any business of any kind except that of manual work. He could not practice law or medicine or perform the duties of a banker or bookkeeper. He did not have the ability to follow these lines of business; and yet he was not so totally disabled that he could not follow these avocations if he had possessed the ability to do so. It is, in effect, contended by defendant that by the terms of the contract he could theoretically, if not practically, do some kind of business, and therefore he cannot recover. Such a construction of the contract would virtually make it ineffective for any purpose at its very execution. Under such an interpretation the insured would scarcely, if ever, be entitled to indemnity. But we are of opinion that it was the intention of the parties that the plaintiff should under some circumstances receive indemnity; for that protection he was making stated payments, and the defendant received such payments. It was manifestly the intention of the parties that he should receive indemnity when he was so injured that he was wholly and totally disabled and prevented from the prosecution of any business which, without the injury, he was able to do or capable to engage in; and we think this interpretation of the contract is not inconsistent with the above provision defining the nature of the disability as contemplated by the policy. We conclude that this is the reasonable and proper construction of the provision of the contract involved in this case."

When used following an enumeration of specific things the words "any kind" are restricted to things ejusdem generis. Thus under the Missouri statute (Rev. St. 1889, § 3854; 1899, § 2242) providing that "every person who shall be convicted of horse racing, cock fighting or playing cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor," etc., it has been held that the words, "or games of any kind," fell under the rule which prescribed that where general

words followed particular ones they were to be construed as applicable to things or persons of a like nature, and therefore did not forbid or punish "athletic games and sports" or games of baseball on Sunday. *St. Louis Agricultural, etc. Assoc. v. Delano*, 108 Mo. 217, 18 S. W. 1101; *Ex p. Neet*, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638, *overruling State v. Williams*, 35 Mo. App. 541. Under the Missouri statute (Rev. St. 1909, § 4750) providing that "every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property . . . shall, on conviction, etc.," it has been held that the words "any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property," etc., under the familiar rule of *ejusdem generis*, included two pool tables on each of which was chalked off what was referred to in the evidence as a "crap game layout." *State v. Wade* (Mo.) 183 S. W. 598. Likewise, the foregoing statute has been held to include a poker table, so called. *State v. Mathis*, 206 Mo. 604, 105 S. W. 604, 121 Am. St. Rep. 687.

Similarly in *Baker v. Crook County*, 9 Wyo. 51, 51 Pac. 797, the court construed a statute of Wyoming (Rev. St. § 5095), the first clause of which forbids any person holding any appointing power, or any lucrative office, to be interested in contracts "for the construction of any state building, courthouse, schoolhouse, bridge, public building, or work of any kind, erected or built for the use of the state, or any county, school district, city or town, in the state, in which he exercises any official jurisdiction." It was held that the words "or work of any kind" must be restricted to works of the kind enumerated, namely what are usually termed public works, and that they did not include the employment of a physician.

So in *Buncombe County Com'rs v. Tommey*, 115 U. S. 122, 5 S. Ct. 626, 1186, 29 U. S. (L. ed.) 308, in considering the question whether a North Carolina statute gave a lien to mechanics or contractors on the property of a railroad corporation for work performed or materials furnished in and about the construction of its road, or of its bridges constituting a part of its line, it was held that the words "any kind of property not herein enumerated" as used in connection with the words "building," "lot" and "farm," therein were too limited in their scope to

justify the conclusion that the legislature had any intention by that act, to give a lien in railroad property.

However in *Rogers v. Brown*, 20 N. J. L. 119, in construing a New Jersey statute (Elm. Dig. 458) declaring it to be unlawful for any person to erect, place or have "any booth, stall, tent, carriage, boat or vessel, for the purpose of selling, giving or otherwise disposing of, any kind of articles of traffic, spirituous liquors, wine, porter, beer, cider or any other fermented, mixed or strong drink, within three miles of any place of religious worship, during the time of holding any meeting for religious worship at such place," it was held that the words "any kind of articles of traffic" were of the most comprehensive character, that they embraced everything that was the subject of trade or traffic, whether it be dry goods, groceries, liquors, hardware or lumber, and that the specification of liquors afterwards, seemed to have been added out of abundant caution.

#### 118. ANY LANDS.

In *Matter of Board of Street Opening, etc.* 62 Hun 499, 16 N. Y. S. 894, *affirmed* 133 N. Y. 329, 31 N. E. 102, 28 Am. St. Rep. 640, 16 L.R.A. 180, under a statute of New York (Laws of 1887, c. 320), authorizing, by the board of street opening and improvement, the condemnation for public parks "of any and all lands, tenements and hereditaments" situated in the city of New York, it was held that the phrase "any and all lands" included lands devoted to private cemeteries owned by private individuals or private corporations.

#### 119. ANY LAW.

The Canadian statute (50 and 51 Vict. ch. 16), defining and enlarging the jurisdiction of the exchequer court, provides: "The exchequer court shall also have exclusive original jurisdiction to hear and determine the following matters: (d) Every claim against the Crown arising under any law of Canada or any regulation made by the governor in council." In *Quebec v. Reg.*, 24 Can. Sup. Ct. 420, the court said: "It may be said that the words 'arising under any law of Canada,' are words of limitation which confine the clause to claims in respect of which some pre-existing law had imposed a liability on the part of the Crown. Again, it may be said that a 'law of Canada' necessarily means not only some prior law of Canada, but must also exclusively refer to statute law. In support of this last proposition it might be said that there is no general common law prevailing throughout the Dominion of Canada, that each of the several provinces pos-

assesses its own private common law, and that the common law of the territories not included within any of the provinces depends on the enactments of the Dominion Parliament. . . . Were I obliged to determine this question of construction as one on which the decision of this appeal depended I should probably come to the conclusion that the clause in question ought not to be so interpreted as to exclude claims in respect of torts and delicts, not referable to any prior statute of the Dominion, but being such as would, under the law of any of the provinces of Canada, have entitled parties to relief as between subject and subject. . . . Further, I am of opinion that it would be right to hold that the words 'law of Canada' did not mean exclusively a statute of the Dominion of Canada, but might be interpreted as meaning the law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a tort or delict if it had arisen between subjects of the Crown. It would not, I think, be taking any unwarrantable liberty with the language of the legislature so to interpret the words 'any law of Canada,' for in a nontechnical and popular sense the laws of the several provinces of Canada are laws of Canada, and the rule laid down by the cases before cited requires us to give the terms used the most favorable and comprehensive construction possible." *Quebec v. Reg.*, 24 Can. Sup. Ct. 420.

#### 120. ANY LAWFUL PURPOSE.

In *Warburton v. Huddersfield Industrial Soc.* [1892] 1 Q. B. 817, 61 L. J. Q. B. 422, 67 L. T. N. S. 43, 40 W. R. 346, 56 J. P. 453, in construing a provision that the profits of a society should from time to time be applied "either to increase the capital, reserve fund, or business of the society, or to any lawful purpose," it was held that the words "any lawful purpose" should be restricted to some purpose of the society such as the previous words had relations to.

#### 121. ANY LAWS NOW EXISTING.

In *New Bedford, etc. St. R. Co. v. Achushnet St. R. Co.* 143 Mass. 200, 9 N. E. 536, it was held that a statute authorizing a municipality to contract with a railroad corporation concerning the construction, maintenance, and operation of the railroad, "any laws now existing to the contrary notwithstanding," was to be read as referring simply to laws limiting the authority of the city, and was not to be construed to mean that any general laws to which the railroad corporation was by the same act declared subject might be overridden by contract.

#### 122. ANY LEGAL CLAIM.

In *Spencer v. Kansas City Stock-Yards Co.* 56 Fed. 741, the phrase "any legal claim to real property" as used in the Kansas judiciary act (Act of 1875, § 8), providing for the bringing in by personal or substituted service of absent defendants who had any legal or equitable lien on or claim to the title to real or personal property was held to have been employed in its general, comprehensive sense, and to include an action of ejectment, which though involving primarily the issue of possession was held to be a legal claim to real property.

#### 123. ANY LIABILITY.

In *Escambia Land, etc. Co. v. Ferry Pass Inspectors, etc. Assoc.* 59 Fla. 239, 52 So. 715, 138 Am. St. Rep. 121, it appeared that the effect of a defeasance was to defeat the force or operation of a contract of lease of certain water-front property, and to release the parties thereto "from any and all liability arising therefrom," if the court should render a certain decision. It was held that the phrase "any and all liability arising therefrom," as used in the defeasance, meant any and all liability growing out of or having its origin, life and existence in the contract; that it did not release any other liability, as for instance, liability for rental after the decision of the court on the question mentioned.

#### 124. ANY LICENSE OR RIGHT.

Under the Oregon Civil Code (sec. 316), declaring that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer," it was held in *Newby v. Rowland*, 11 Ore. 133, 1 Pac. 708, that in actions to recover real property, the words "any license or right to the possession thereof" must be construed to mean only such a license or right to the possession as will constitute a legal defense, and not an equitable right merely.

#### 125. ANY LIST RETURNED.

In *Fearon Lumber, etc. Co. v. Robinson*, 34 Ohio Cir. Ct. Rep. 460, under the Ohio tax law (G. C. § 5592), providing that when an addition is ordered to be made to "any list returned under oath" a statement of the facts on which the addition was made shall be entered on the journal of the board, and that no such addition shall be made without reasonable notice to the person or persons, etc., it was held that the words "any list returned under oath" comprised lists re-



turned by corporations as well as by individuals.

#### 126. ANY LOCAL AGENT.

A statute of Texas (Rev. St. Art. 1223) prescribes the method of serving citations on foreign corporations as follows: "In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association, or acting corporation or association." In *Western Cottage Piano, etc. Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516, it was held that the phrase "any local agent within this state," as used in the statute, meant an agent at a given place or within a definite district, and that an "agent for the state," was not a local agent.

#### 127. ANY MANNER.

Under an English statute (13 Eliz. c. 5), which protects conveyances made on good consideration, without "any manner of notice or knowledge of such covyene, fraud or collusion as is aforesaid," it was held in *Schwartz v. Winkler*, 13 Manitoba 493, that the language of the act, "any manner of notice or knowledge," included constructive notice or gave the ordinary right to infer from circumstances actual notice not expressly proved otherwise.

In *Footman v. Stetson*, 32 Me. 17, 52 Am. Dec. 634, it was held that the words "in any manner pay," as used in a Maine statute (Rev. St. ch. 69, § 5), providing that "Whoever on any such loan shall in any manner pay a greater sum or value than is allowed to the creditor, may, or his personal representative may, recover of the creditor or his representatives, by action at law, the excess so received by such creditor, whether in money or other property," embraced both cash payments and payments in property.

In *Kelley v. Palmer*, 42 Neb. 423, 60 N. W. 924, under a Nebraska statute (Comp. St. c. 32, § 3), providing that "no estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, . . . etc., unless by act of operation of law, or by a deed or conveyance in writing, subscribed by the party creating, etc., . . . the same," it was held that the words "or in any manner relating thereto" applied to estates and interests in lands as well as to trusts concerning lands.

In *Myers v. The Queensmore*, 53 Fed. 1022, 4 C. C. A. 157, it was held that a provision Ann. Cas. 1916E.—4.

in a contract for the transatlantic shipment of cattle that the freight was payable irrespective of whether the cattle were "lost in any manner" covered a loss by the destruction of the ship, despite a provision that freight should be payable on the arrival of the ship at destination.

#### 128. ANY MARRIED FEMALE.

In *Zimmerman v. Schoenfeldt*, 6 Thomp. & C. (N. Y.) 142, under a statute of New York (Act of 1848, chapter 200, as amended in 1849, chapter 375), providing that "any married female may take, by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with the like effect, as if she were unmarried," it was held that the word "any" did not qualify the entire provision, and make marriage the important requirement without consideration of age other than the legal age of marriage, and therefore a married female infant had no power to make a testamentary disposition of her property.

#### 129. ANY MARRIED WOMAN.

In *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456, construing a Maine statute (Laws of 1866, c. 52), providing that "the contracts of any married woman made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole," it was held that the words "any married woman" therein, did not include married female infants, lunatics or persons non compos mentis.

#### 130. ANY MATTER OR THING.

A South Carolina statute provided that "if any person or persons whomsoever shall be convicted in any court of sessions of this state of knowingly and wilfully packing or putting into any bag, bale, or bales of cotton, any stone, wood, trash-cotton, cottonseed, or any matter or thing whatsoever, or causing the same to be done, to the purpose or intent of cheating or defrauding any person or persons whomsoever, etc., he shall for the first offense be sentenced to pay a fine," etc. In *State v. Holman*, 3 McCord L. (S. C.) 306, it was held that the term "any matter or thing whatsoever" was not limited to the things specifically enumerated before it, but that, as it was the intention of the legislature to punish frauds in packing cotton without regard to the character of the material used, it included water poured into bales of cotton.

## 131. ANY MEANS OR FORCE.

In *People v. Perales*, 141 Cal. 581, 75 Pac. 170, in construing a statute (Penal Code, § 245) relating to assault with a deadly weapon "or by any means or force likely to produce great bodily harm," the court said: "The term, however, 'or by any means of [or] force' likely to produce great bodily injury, immediately following in the section, is a general and comprehensive term designed to embrace many and various means or forces, which, aside from a deadly weapon or instrument, may be used in making an assault."

## 132. ANY MISCONDUCT OF HIS PRINCIPAL.

In *National Surety Co. v. Morris*, 111 Ga. 307, 36 S. E. 690, it was said that the words, "any misconduct of his principal in the discharge of his trust," as used in a statute relating to the discharge of a surety were obviously exhaustive of all acts, whether of commission or omission, which pertained to the principal's mismanagement of the estate or the nonperformance of any of the duties devolving on him in his office.

## 133. ANY MISMANAGEMENT.

In *Hamilton v. Des Moines Valley R. Co.* 36 Ia. 31, the following instruction was given to the jury: "It is the law of Iowa that every railroad company shall be liable for all damages sustained by any person, including employees, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation to any person sustaining such damage, provided the plaintiff does not contribute to the injury complained of by his own want of proper care or by his own negligence." It was objected that the use of the terms "any neglect," "any mismanagement," implied that the defendant was liable for the want of extraordinary care, and not for the want of ordinary care only. The court held that the word *any*, the use of which was the ground of objection, was an indefinite pronominal adjective, and was used to designate objects in a general way without pointing out any one in particular, that it indicated an indefinite number but that it was not used to describe the qualities or character of objects, and that the language of the instruction, therefore, could not be understood to lay down the rule that the defendant was liable for the want of the highest care.

## 134. ANY MODE.

In *Morgan v. State*, 54 Tex. Crim. 542, 113 S. W. 934, the court said: "The rule is universal that before dying declarations can be admitted in evidence it is essential and

is a preliminary fact to be proved by the party offering them in evidence that they were made under a sense of impending death, but Mr. Greenleaf says, section 158, it is not necessary that they should be stated, at the time, to be so made. It is enough, if it satisfactorily appears, in *any mode*, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind."

## 135. ANY MONEY.

In *Hyatt v. Taylor*, 42 N. Y. 258, it was held that a New Jersey statute exempting from liability a hotel keeper who should provide a safe for "any money, jewels or ornaments" of the guests, exempted the hotel keeper from liability for loss of all money not deposited in the safe, the court saying that the words used were aptly chosen to express the idea of "any money without any exception."

In the case of *In re Egan* [1899] 1 Ch. (Eng.) 688, wherein it appeared that the only clause by which the testatrix disposed of her residuary personal estate was: "Any money not included in the aforesaid bequests that may be in my possession at my death. . . . I give absolutely to C. T. W. Penton," it was held that it was obvious from the nature of the previous bequests that the testatrix did not there use the word "money" in the strict literal signification of the word as denoting cash, and that the true view was that by this gift the testatrix intended to dispose of her whole personal estate which was not specifically given.

Under a Massachusetts statute (Rev. Sts. c. 126, sec. 29) providing that "if any clerk, agent or servant, etc., shall embezzle or fraudulently convert to his own use, or shall take or secrete, with intent to embezzle and convert to his own use, without the consent of his employer or master, any money or property of another," etc., it was held in *Com. v. Stearns*, 2 Metc. (Mass.) 343, that the words "any money or property of another" meant that the property embezzled should belong to some other person than the master or principal, whose servant or agent was charged with the embezzlement.

A California statute (Act March 11, 1897, St. 1897, p. 106) provides as follows: "Any balance of pension money held by the board, or by its authority, upon the death of the pensioner, or any moneys belonging to the members of the Home, shall,

upon their death, be held as a trust fund, to be paid by the board, directly and without probate, or by its order, to the widow, minor children or mother or father of the pensioner or member in the order named; and should no widow, minor child, or parent be discovered within one year from the time of the death of the pensioner or of the member, said balance or moneys shall be paid to the post fund of the Home to be used for the common benefit of the members of the Home under the direction of the board, subject to future reclamation by the relatives hereinbefore designated in the order named, upon application filed by the one entitled to the same within five years after the death of said pensioner or member." In *Brownlee v. Veterans' Home*, 22 Cal. App. 207, 133 Pac. 1158, it was held that the phrase "any moneys" included a balance of pension money in the possession of a member at the time of his death and not disposed of by will, and that as it had not been devised, it was impressed with the trust created by the act, and the decedent's administrator could not recover the same.

#### 136. ANY MORTGAGE.

The Canadian Land Titles Act (§ 93, subsec. 10) provides: "In case default has occurred in making any payment due under any mortgage or in the observance of any covenant contained therein and under the terms of the mortgage by reason of such default the whole principal and interest secured thereby shall have become due and payable, the mortgagor may notwithstanding any provisions to the contrary and at any time prior to sale or foreclosure under a mortgage perform such covenant or pay such arrears as may be in default under the mortgage together with costs to be taxed by the registrar, and he shall thereupon be relieved from the consequences of such default." In *Wasson v. Harker*, 5 Sask. L. Rep. 364, 22 West. L. Rep. 609, 8 Dominion L. Rep. 88, it was held that the words "any mortgage" therein meant any mortgage in existence at the time of the passage of the act.

#### 137. ANY NECESSARY EXPENSES.

In the case of *In re Brown*, 208 Pa. St. 161, 57 Atl. 360, it appeared that the testator directed the payment of his debts and personal expenses and then provided as follows: "All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever situate, I give, devise, and bequeath unto my executors hereinafter named, in trust, to hold, invest and keep the same invested, with power to change and alter my securities or any reinvestments thereof, and to collect, recover and receive

the interest and income, rents, issues and profits thereof, as the same shall accrue, and after taking any and all necessary expenses, to divide the said net income in equal shares among" certain persons named by him. The court held that the direction in the testator's will to deduct "any and all necessary expenses" was sufficient to include the payment of the taxes charged on the legacies, viz.: the collateral tax, New York state transfer tax and United States war tax due upon the legacies of the various legatees, and that under the phraseology of the will there was no doubt as to the testator's intention that the taxes should be paid out of the gross income of the estate.

#### 138. ANY NEGLIGENCE.

In *Hamilton v. Des Moines Val. R. Co.* 36 Ia. 31, the following instruction was given to the jury: "It is the law of Iowa that every railroad company shall be liable for all damages sustained by any person, including employees, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation to any person sustaining such damage, provided the plaintiff does not contribute to the injury complained of by his own want of proper care or by his own negligence." It was objected that the use of the terms "any neglect," "any mismanagement," implied that the defendant was liable for the want of extraordinary care, and not for the want of ordinary care only. The court held that the word *any*, the use of which was the ground of objection, was an indefinite pronominal adjective, and was used to designate objects in a general way without pointing out any one in particular, that it indicated an indefinite number but that it was not used to describe the qualities or character of objects and that the language of the instruction, therefore, could not be understood to lay down the rule that defendant is liable for the want of the highest care.

In *St. Joseph, etc. R. Co. v. Grover*, 11 Kan. 302, under a Kansas statute (Laws 1870, p. 197, c. 93, sec. 1), which provided that railroads shall be liable for all damages done to person or property when done "in consequence of any neglect," the court held that ordinary negligence was embraced by the language "in consequence of any neglect."

#### 139. ANY NEGLIGENCE OR MISMANAGEMENT.

Under a statute of Kansas [Laws 1870 (sec. 28-29, c. 84, p. 784, Comp. Laws 1879, c. 93, § 1)] providing that "every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any

mismanagement of its engineers or other employees, to any person sustaining such damage," it has been held that the phrase "any negligence or mismanagement" therein should be construed to mean ordinary negligence or the want of ordinary care, or any culpable negligence or any negligence above what was permissible, and to include "slight negligence." *Kansas City, etc. R. Co. v. McHenry*, 24 Kan. 501; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; *Atchison, etc. R. Co. v. Shaft*, 33 Kan. 521, 6 Pac. 908; *Chicago, etc. R. Co. v. Brown*, 44 Kan. 384, 24 Pac. 497.

#### 140. ANY NUMBER.

In *Harris v. Allen*, 15 Fed. 106, in construing a statement by a patentee in his specifications that "any number of the springs may be removed, and rings put in their places," the court held that the words "any number," as there used, might be held to include all.

#### 141. ANY OFFENSE.

In *Mullin v. Spangenberg*, 112 Ill. 140, the jury were instructed that if, from the evidence, they believed "that the plaintiff had not committed 'any offense alleged in the defendants' pleas,' and that both of the defendants concurred in laying hands on him and arresting him, then the jury should find both the defendants guilty, and assess the plaintiff's damages." It was objected that the expression "any offense" was used in the sense of "one out of many." The court held the objection hypercritical and declared that the expression "had not committed any offense alleged in the defendants' pleas" obviously meant the same as if the language had been, "had committed no one of the offenses," etc., and that the jury, no doubt so understood it.

The English Larceny Act (§ 116), which, after providing that "in any indictment for any offense punishable under this act, and committed after a previous conviction . . . it shall be sufficient, after charging the subsequent offense, to state the circumstances," contains the following: "And the proceedings upon any indictment for committing any offense after a previous conviction or convictions shall be as follows." In *Faulkner v. Rex* [1905] 2 K. B. 76, it was held that the words "any offense" were general and ought not to be treated as limited to "any offense punishable under this act," but as extending to offenses of all kinds.

#### 142. ANY OFFENSIVE OR DISORDERLY ACT.

In *People v. Weiler*, 179 N. Y. 46, 71 N. E. 462, 1 Ann. Cas. 155, *reversing* 89 App. Div. 611, 85 N. Y. S. 1140, a private detective

who followed a person in an inoffensive manner was held not to be guilty under a statute (Penal Code § 675) penalizing one who shall by "any offensive or disorderly act" annoy or interfere with any person.

#### 143. ANY OFFICE.

In *U. S. v. Morse*, 3 Story 87, 27 Fed. Cas. No. 15,820, the question was as to the proper interpretation to be given the words "in any office or capacity" as used in the Act of Congress of May 7, 1822, c. 107 §15 (3 Stat. 695) providing "that the secretary of the treasury may from time to time limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy, of such collector, naval officer or surveyor; provided, that no such deputy in any of the districts of Boston and Charlestown, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, shall receive more than one thousand five hundred dollars, nor any such other deputy more than one thousand dollars, for any services he may perform for the United States in any office or capacity." The court held that while they might well be interpreted to mean in any one office or capacity, nevertheless they should be read as if they were "in any such office or capacity," as, where the words of a statute are loose or obscure, and admit of two interpretations, that construction should be adopted which was in favor of the officer who performed the duties of two independent offices.

It has been held that the words "any office of public trust," as used in the Kansas Bill of Rights (§ 7) which provides: "No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election" (Gen. Stat. 1901, sec. 89), relate only to the offices provided for in that instrument and have no application to officers chosen for a public corporation created by statute, such as a drainage district. *State v. Monahan*, 72 Kan. 492, 7 Ann. Cas. 661, 84 Pac. 130, 115 Am. St. Rep. 224.

#### 144. ANY OFFICER.

The Iowa Code (§ 627) provides: "If the ballots for any officer are found to exceed the number of the voters in the poll lists, that fact shall be certified with the number of the excess in the return, and if it be found that the vote of the precinct where the error occurred would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurs, and a new election ordered therein; . . . but if

the error occur in relation to a township officer, the trustees may order a new election or not, in their discretion. If the error be in relation to a district or state officer, the error and the number of the excess are to be certified to the state canvassers, and if it be found that the error would affect the result as above, a new vote shall be ordered in the precinct where the error happened," etc. In *Rankin v. Pitkin*, 50 Ia. 313, it was held that the words "any officer" referred to any district, state, county or township officer, and that "any officer" meant any officer of one or more of the several classes for whom there was found to be an excess of ballots.

In a prosecution of a chosen freeholder under the New Jersey statute (Rev. N. J. p. 253) providing that "if any officer of any city, township, ward or county of this state, shall hereafter obtain . . . any sum or sums of money," etc., "from any such city, township, ward or county, or from this state, not lawfully and justly due to said officer at the time of obtaining the same, he shall be deemed guilty of a high misdemeanor," etc., it was held in *State v. Crowley*, 39 N. J. L. 264, that as a freeholder was an officer of the county, he was included by the words of the act, "any officer" of the county and the indictment, therefore, properly charged the defendant as an officer of the county.

The charter of the city of Waco provides *inter alia* as follows: "Art. 273. The city council shall have power to remove any officer for incompetency, corruption, misconduct or malfeasance in office, after due notice and an opportunity to be heard in his defense." "Art. 274. In addition to the foregoing power of removal, the city council shall have power, at any time, to remove any officer of the corporation elected by them, by resolution declaratory of its want of confidence in said officer, provided that two-thirds of the aldermen elected vote in favor of said resolution." In *Riggins v. Richards*, 97 Tex. 229, 77 S. W. 946, it was held that the phrase "any officer" as used in article 273 did not mean the same as "any officer" in article 274, but included officers elected by the voters of the city.

In construing an English statute (12 & 13 Vict. c. 106, § 113) penalizing the arrest of a bankrupt protected by a certificate, it has been held that the words "any officer" must be confined to the officer who arrests a bankrupt, and does not include a gaoler who detains him. *Myers v. Veitch*, L. R. 4 Q. B. 649, 38 L. J. Q. B. 316.

In *Larose v. Rex*, 31 Can. Sup. Ct. 206, construing the Canadian Exchequer Court Act (50 & 51 Vict. c. 16, sec. 19, clause c.) providing that the Exchequer court shall have exclusive original jurisdiction to hear and determine claims against the Crown arising out of any death or injury to the person or

to property on any public work resulting from negligence of "any officer or servant of the Crown, while acting within the scope of his duties or employment," it was held that the words "any officer or servant of the Crown" did not include the officers or men of the militia.

#### 145. ANYONE.

In sustaining an indictment under the Federal statute (Act of March 1, 1895, c. 145, § 8, 28 Stat. 697, 3 Fed. St. Ann. 424) forbidding the sale or giving away of intoxicants in Indian territory "to anyone," the court said in *Parmenter v. U. S.* 6 Indian Ter. 530, 98 S. W. 340, that there could hardly be a more general or comprehensive description than by the word "anyone" as used in the statute.

#### 146. ANYONE APPOINTED.

In *O'Neil v. Mansfield*, 47 Misc. 516, 95 N. Y. S. 1009, it was held that the power given to a mayor to remove "anyone appointed to office by him" did not refer to an individual appointment by a particular incumbent but to those officers who were appointed by the mayor.

#### 147. ANY ONE CREDITOR.

Under an Indiana statute (2 Rev. St. 473, § 122) providing that "justices may issue writs of attachment against the personal property of a debtor," etc., "when the amount claimed by any one creditor does not exceed one hundred dollars," etc., it was held in *State v. King*, 5 Ind. 439, that the phrase "any one creditor" should be interpreted to mean any one claiming under the same bond and affidavit, and that each claim thus filed was a separate suit, but that the filing of three different claims, each within the jurisdiction, and each accompanied with a bond and affidavit, by the same party, would not be taken notice of, as of course, and in a collateral way, for the purpose of affecting the jurisdiction.

#### 148. ANY ONE MONTH.

In *In re Rabinovitch*, 31 Ont. L. Rep. 88, the court construed a lease made under the Canadian Short Forms of Leases Act, for a term of one year to be computed from the 12th April, 1912, which contained the following provision: "And it is declared and agreed that either party shall have power to terminate this tenancy at the end of any one month by giving to the other one month's notice to that effect, and on such notice being given said tenancy shall be terminated in the same manner as if the original demise had ended at said date," etc. It was held

that the words "at the end of any one month" meant at the end of any month of the tenancy and not at the end of any calendar month.

#### 149. ANY ONE YEAR.

In *U. S. v. Dickson*, 15 Pet. 141, 10 U. S. (L. ed.) 689, it was held that the words "any one year" as used in the Act of Congress of April 20th, 1818, providing that "the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed for any one year, the sum of three thousand dollars," meant any one year calculated from the date of the commission of the receivers, and not to mean any one year commencing with the calendar year.

#### 150. ANY ORDER.

By the terms of the act creating the commerce court (Act June 18, 1910, c. 309, sec. 207, 36 Stat. 539, Fed. St. Ann. 1912 Supp. 218), exclusive jurisdiction of these several kinds of cases, among others, was conferred upon it: "First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." In *Southern R. Co. v. U. S.* 193 Fed. 664, the court said: "The language which defines an order which may be affected by decree of this court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a circuit court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the circuit courts had jurisdiction is evident, for the language of section 16 of the Interstate Commerce Act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend any order of the commission. We cannot read into the clause which confers jurisdiction upon this court words of limitation other than those which formerly circumscribed the powers of the circuit courts, nor can we except from described kinds of cases where injunction, annulment, or suspension may be had orders for the payment of money. . . . We need go no further now than to hold that since the approval of the act creating this court, a carrier which is ordered to pay damages, and which could have gone to the circuit court in equity to have such an order annulled or enjoined, has

now the right to ask this court to enjoin or annul or suspend such an order, provided always it can show grounds for equitable relief. And as the jurisdiction of this court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid. . . . In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than they do under any system where separation of law and equity obtains, and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission."

A statute of Indiana [Acts 1905, p. 83, § 6 (sec. 405 and Burns 1905)] provides, among other things, that "if any such railroad company or other corporation or party in interest shall be dissatisfied with any order or regulation of said commission respecting the location or construction of sidings, switches or connections between railroads, or the crossing of one railroad by another, . . . such dissatisfied company or party may, within thirty days after any such order or regulation has been made, file a written petition," etc. In *Grand Trunk Western R. Co. v. Railroad Commission*, 40 Ind. App. 168, 81 N. E. 524, it was held that the term "any order or regulation . . . respecting . . . the crossing of one railroad by another" was broad enough to include orders made by the railroad commissions installing interlocking plants for the purpose of protecting such crossings.

In *Leduc v. Ward*, 20 Q. B. D. (Eng.) 475, 57 L. J. Q. B. 379, 58 L. T. N. S. 908, 36 W. R. 537, 4 Times L. Rep. 313, in construing the clause of a charter giving liberty to call at any ports in any order, Lord Esher, M. R. said: "I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order; and therefore the words 'in any order' . . . frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage. It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was

a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply; and therefore the shipowners are responsible for the loss of the goods."

#### 151. ANY OTHER.

##### a. Generally.

"And so if the defendant will admit an appeal to be good, which is brought by a woman of the death of her father, yet the court ought to abate it, as it is there also holden, because the statute Mag. Cha. cap. 34, says, none shall be taken or imprisoned upon the appeal of a woman for the death of any other than of her husband." Partridge v. Strange, 1 Plowd. 77, 75 Eng. Rep. (Reprint) 123.

In Sloan v. Whitman, 5 Cush. (Mass.) 532, wherein it appeared that a power of attorney gave authority "to demand my just right of dower to be assigned to me, in any and all of the before mentioned premises or any other," but did not mention the premises, it was held that it was defective and that the terms, "or any other," added nothing to its meaning, no premises being described.

##### b. Any Other Act.

The Canadian Criminal Procedure Act (32-33 Vict. ch. 29) declared that divers acts had been passed assimilating, amending, and consolidating certain provisions of the statute law of the several provinces, and extending them to all Canada, and that it was expedient to assimilate, etc., the provisions of the statute law respecting procedure and other matters not included in said acts. In the interpretation clause, sec. 1, sub. 6, it is declared that the expression, "any act" or "any other act," in this act, shall include any act passed or to be passed by the Parliament of Canada, or by the legislature of the late provinces of Canada, or passed or to be passed by the legislature of any province of Canada . . . unless there be something in the subject or context inconsistent with such construction. Reg. v. O'Rourke, 1 Ont. 464.

##### c. Any Other Action.

Under the proviso of a South Carolina statute (Code of Laws, Vol. 1, § 3096) regulating costs in any action "for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, or in any other action for damages for torts," it was held in Vassey v. Spake, 83 S. C. 566, 65 S. E. 825, that the language "in any other action for damages for torts" did not include an action of malicious tres-

pass quare clausum fregit, in which an issue of title was raised and adjudicated.

##### d. Any Other Article.

Under the English Prison Act, 1865 (§ 37), providing that every person who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison "any mask, dress, or other disguise, or any letter, or any other article or thing," shall be guilty etc., it has been held that a crowbar is included by the words "or any other article or thing." Reg. v. Payne, L. R. 1 C. C. 27.

##### e. Any Other Bailee.

It has been held that the words "or any other bailee" as used in the Georgia Code of 1882 (§ 4422 now sec. 191 of the Penal Code) are not restricted to bailees ejusdem generis with factors, commission merchants, warehousekeepers, wharfingers, wagoners, stage-drivers, common carriers, but include any person with whom money or any other thing of value is deposited. Cody v. State, 100 Ga. 105, 28 S. E. 106; Belt v. State, 103 Ga. 12, 29 S. E. 451; McCrory v. State, 11 Ga. App. 787, 76 S. E. 163. Compare Sanders v. State, 86 Ga. 717, 12 S. E. 1058.

##### f. Any Other Building.

In construing the phrase "or any other building" as used in a Wisconsin statute (Stats. 1898, § 4409) making it an offense to "break and enter in the nighttime any office, shop or warehouse 'or any other building' not adjoining to or occupied with a dwelling house, . . . with intent to commit the crime of murder, rape, robbery, larceny or any other felony," it was held in Howard v. State, 139 Wis. 529, 121 N. W. 133, that it was not intended to include a schoolhouse or other building erected or employed for public uses.

##### g. Any Other Case.

A New Hampshire statute (Rev. Stat. c. 192) granted a review as a matter of right, "in any civil action in the court of common pleas in which an issue of fact has been joined and judgment rendered" and provided that a review might be allowed "in any other case, when it shall appear that justice has not been done through any accident, mistake or misfortune." In Coburn v. Rogers, 32 N. H. 372, it was held that the authority of the court to grant a review on the ground of injustice done through accident, mistake or misfortune, was not limited to actions other than those in which a review was given as matter of right; and that the expression, "in any other case," used in that

section, was to be understood as meaning, in any other case of injustice happening through accident, mistake or misfortune than such as the party might have had opportunity to remedy by resorting to the right of review.

#### *h. Any Other Cause.*

In *Mankato v. Barber Asphalt Pav. Co.* 142 Fed. 329, 73 C. C. A. 439, it appeared that the original specifications in a contract for street improvements, read as follows: "If during that period it is found that the pavement is defective from overburning or improper mixing of material, or any other cause, or that the work has been done in an unskilful manner," the contractor shall, etc. The court held that the general words, "or any other cause," by the familiar rule of construction expressed by the maxim *noscitur a sociis*, did not enlarge the scope of the particular words in the midst of which they appeared.

In *Edson v. Hayden*, 20 Wis. 682, in construing the provisions of a Wisconsin statute (Rev. St. c. 95, § 4) providing that "any married woman whose husband, either from drunkenness, profligacy or any other cause, shall neglect or refuse to provide for her support or the support and education of her children, shall have the right in her own name to transact business, and to receive and collect her own earnings, and the earnings of her own minor children," the court held that the words "or from any other cause," following "drunkenness, profligacy," must be limited to vices *eiusdem generis*, or to conduct tending to the same result, and that mere poverty, sickness, intellectual inferiority or physical inability of the husband, not caused by vice, were not alone sufficient to enable the wife to act as a *feme sole*, or bring her within the provisions of the statute, though it might be that laziness, idleness or indolence would.

In *New York Coal Co. v. New Pittsburgh Coal Co.* 86 Ohio St. 140, 99 N. E. 198, it appeared that a clause in a lease provided as follows: "It is hereby understood and agreed by and between the parties hereto, that in case and so long as it shall be impossible to mine and remove said amount by reason of strikes, lockouts, fires, floods or any other cause beyond the control of the second party, lack of transportation facilities excepted, the said minimum shall not apply." It was held that the rule of *eiusdem generis* applied and that the words "or any other cause beyond the control" of the second party meant temporary causes interfering with the mining and removal of the coal, or to causes kindred to or of the same class as those specifically enumerated.

In *Langstaff v. Rock*, 13 Mo. 579, construing an act concerning Boats and Vessels (Code 187, sec. 36), providing that one or more joint owners of any boat, might sue the boat for supplies furnished, money advanced, etc., and later referring to the causes of action which will warrant part owners in suing, by the general phrase "any other cause of indebtedness whatever," it was held that this language must be understood as being limited to such causes of indebtedness as had been previously enumerated in the first section and no other.

In *Borthwick v. Elderslie Steamship Co.* [1904] 1 K. B. (Eng.) 319, 73 L. J. K. B. 240, affirmed [1905] A. C. 93, 74 L. J. K. B. 338, 92 L. T. N. S. 274, 53 W. R. 401, 10 Com. Law 109, it appeared that a clause in a bill of lading provided that the shipowners should not be liable "for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, . . . on or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not," and subsequently dealt with "the consequence of any act, neglect, default, or error in judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers." It was held by Lord Alverstone that, having regard to the position of the words "or from any other cause whatsoever," the language could not be regarded as framed with a view to excluding once and for all any liability for loss or damage occasioned by unseaworthiness of the ship; that since the words immediately followed part of the clause which related specially to "failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise," it was clear that they should be construed as relating to matters *eiusdem generis* with such failure or breakdown, and not as a general provision exempting the shipowners altogether from any liability for unseaworthiness.

In *Floyd-Jones v. Schaan*, 109 N. Y. S. 362, it was held that a provision in a lease permitting a surrender by the tenant if the building was so injured "by the elements or any other cause" as to be untenable, extended to injury by natural causes only and did not authorize a surrender because of vibration caused by machinery.

In *Herboth v. American Radiator Co.* 145 Mo. App. 484, 123 S. W. 533, it appeared that a proviso in a lease expressly excepted from the obligation to repair, injury due to natural wear and decay; but imposed the duty to repair damage done to the buildings by the



negligence of employees, careless usage, "or from any other cause whatever." It was held that the words "any other cause whatever" must be read in connection with the prior exception of natural wear and decay, and must mean any cause except the latter.

*i. Any Other Dangerous, etc., Establishment.*

In *Grimm v. Krahmer*, 112 App. Div. 489, 98 N. Y. S. 523, the action was on a covenant in a deed not to "erect, suffer or permit on the premises hereby granted or any part thereof any brewery, distillery, slaughterhouse, soap, candle, starch, varnish, vitriol, glue, ink or turpentine factory or any factory for tanning, dressing or preparing skins, hides, or leather or any other dangerous, noxious or offensive establishment whatsoever." It appeared that the defendant was erecting in lieu of the old building used as a veterinary hospital, a brick and stone structure of one story to be used for the same purpose, which was to be highly sanitary in its construction. The court said: "Whether or not the proposed building will be a 'dangerous, noxious or offensive establishment,' can only be disclosed when it is erected and used. . . . This covenant is not one that restricts a business which would be injurious or offensive to the neighboring inhabitants, but after specifying several specific uses to which the property is not to be put, couples with such restricted uses any other dangerous, noxious or offensive establishment whatsoever; and while the construction of this covenant would not be governed by the general laws as to nuisances, but by the force and effect of the covenant, there must be evidence to justify the finding that the building or business to be conducted by the defendant is dangerous, noxious or offensive."

*j. Any Other Dangerous Weapon.*

Under a Louisiana statute (Rev. St. § 932) prohibiting the carrying of certain weapons "or any other dangerous weapon," it was held in *State v. Brown*, 41 La. Ann. 345, 6 So. 541, that the words quoted referred to other weapons not included in the description, but of the same class.

*k. Any Other Entertainment.*

In *Matter of Hammerstein*, 57 Misc. 52, 108 N. Y. S. 197, the court construed the following provision of the New York City charter: "It shall not be lawful to exhibit on the first day of the week, commonly called Sunday, to the public, in any building, garden, grounds, concert room or other room or place, within the city of New York, any interlude, tragedy, comedy, opera, ballet, play, farce, negro minstrelsy, negro or other danc-

ing or any other entertainment of the stage, or any part or parts therein, or any equestrian circus or dramatic performance, or any performance of jugglers, acrobats or rope dancing," etc. It was held that the phrase "any other entertainment" forbade all performances of any character in a place of public amusement on a Sunday, and was not to be restricted by the rule of *ejusdem generis*.

And in *New York City v. Eden Musee Amer. Co.* 102 N. Y. 593, 8 N. E. 40, in construing a precisely similar statute, it was said that the phrase "any other entertainment of the stage" was evidently meant to include all classes of public exhibitions such as were usually conducted on a stage for the observation and amusement of the public.

*l. Any Other Estate.*

In *Miller v. Miller*, 91 Kan. 1, 136 Pac. 953, L.R.A. 1915A 671, in construing a Kansas statute (Gen. Stat. 1868, ch. 22, sec. 3), providing that conveyances of land, or of "any other estate or interest therein," may be made by deed, executed by any person having authority to convey the same, or by his agent or an attorney, and may be acknowledged and recorded as herein directed, without any other act or ceremony whatever," it was held that the words, "any other estate or interest therein," included estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor might choose to invent, consistent, of course, with public policy.

*m. Any Other Felony.*

A Federal statute (Rev. St. § 819, 4 Fed. St. Ann. 745) provides: "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges," etc. In *U. S. v. Copper-smith*, 4 Fed. 198, 2 Flipp. 546, it was held that by the words "any other felony" Congress intended to designate offenses other than capital, those being otherwise specially provided for.

A Utah statute (Rev. St. sec. 4334, as amended by Sess. Laws, 1905, p. 16, c. 19) provides: "Every person who, in the nighttime, forcibly breaks and enters, or without force enters through any open door, window, or other aperture, any house, room, apartment . . . with intent to commit larceny or any other felony, is guilty of burglary."

In *State v. Hows*, 31 Utah 168, 87 Pac. 163, it was held that the words "or any other felony" as used in the statute were equivalent to the words "or any felony other than that embraced within the larceny," and that the statute should be read as though instead of the words "to commit larceny or any other felony," it contained the words, "to commit petit larceny, grand larceny or any other felony."

#### *n. Any Other Funds.*

In *Montresor v. Montresor*, 1 Coll. Ch. Cas. 693, 63 Eng. Rep. (Reprint) 601, wherein it appeared that a codicil to a will bequeathed "whatever sum now stands in my name, or may hereafter (be they more or less), in the Dutch funds, or any other funds, including the interest arising therefrom," it was held that the words "or any other funds" included stock in British funds.

#### *o. Any Other Gambling Device.*

Under a Texas statute (art. 1477, Hartley's Dig.) providing that "if any person shall bet or be concerned in betting at any gaming table, bank, or banks mentioned in the preceding section of this act, or at any other gambling device whatever, such person or persons so offending, upon conviction thereof by indictment, shall be fined in any sum not less than ten nor more than fifty dollars," it has been held that the phrase "or at any other gambling device whatever" refers to the preceding section of the law enumerating certain games, and accordingly that it does not include billiard tables or tenpin alleys on which a license tax is imposed, or horse races, but does include "rondo." *Crow v. State*, 6 Tex. 334; *McElroy v. Carmichael*, 6 Tex. 454; *Randolph v. State*, 9 Tex. 521.

#### *p. Any Other Game of Hazard.*

In *Bagley v. State*, 1 Humph. (Tenn.) 486, under a statute of Tennessee (Act of 1799, ch. 8) which inflicted a penalty of five dollars on any person or persons who should encourage or promote any match or matches "at cards, dice, billiards, or any other game of hazard or address for money or other valuable thing, it was held that cockfighting was embraced by the words "any other game of hazard and address."

#### *q. Any Other House.*

Under a Kentucky statute (Act of 1801, § 12, 2 Dig. L. 989) penalizing the burning of "any tobacco house, warehouse or storehouse, or any house or place where wheat, Indian corn or other grain shall be kept, or any other house or houses whatsoever," it was held in *Wallace v. Young*, 5 T. B. Mon.

(Ky.) 155, that the words "any other house or houses whatsoever" included schoolhouses, and therefore it was actionable to charge a person with having burnt such a house. And under a later similar statute (Gen. Stat. Ky. ch. 29, art. 7, § 3) it was held in *McDonald v. Com.* 86 Ky. 10, 4 S. W. 687, 9 Ky. L. Rep. 230, that the words "or any other house whatever" were not restricted to buildings of the kind mentioned in the statute but embraced a church building.

In *Jones v. Hungerford*, 4 Gill & J. (Md.) 402, under a similar statute (Act 1809, ch. 138, § 5), it was said that there could be no doubt that a schoolhouse, not parcel of a dwelling house was embraced by the terms "any other outhouse, not parcel of any dwelling house."

#### *r. Any Other Immoral Purpose.*

On an indictment for the violation of the Act of Congress of June 25, 1910 (c. 395, § 2, Fed. St. Ann. 1912 Supp. 419), known as the White Slave Act, prohibiting the transportation, etc., of women in interstate commerce "for the purpose of prostitution or debauchery or any other immoral purpose," it was held in *U. S. v. Flaspoller*, 205 Fed. 1006, that the phrase "or any other immoral purpose" covered illicit cohabitation and concubinage as being analogous immoral acts. See to the same effect *U. S. v. Bitty*, 208 U. S. 393, 28 S. Ct. 396, 52 U. S. (L. ed.) 543.

#### *s. Any Other Inflammable Liquid.*

In *Wood v. North Western Ins. Co.* 46 N. Y. 421, the action was on a policy of insurance providing that "camphene, spirit gas or burning fluid, phosgene or any other inflammable liquid, when used in stores, warehouses, shops or manufactories as a light, subjects the goods therein to an additional charge, and permission for such use must be indorsed in writing on the policy." It was held that the phrase "other inflammable liquid" should be restricted to liquids of the same kind as those enumerated and that as so restricted it did not include kerosene at least in the absence of proof of its explosive character.

#### *t. Any Other Insurance.*

In *Mutual Reserve L. Ins. Co. v. Dobler*, 137 Fed. 550, 70 C. C. A. 134, a statement by an insured that he had not "any other assurance" was held to refer to life insurance only and not to accident insurance.

#### *u. Any Other Jurisdiction.*

In *Goldstein v. State*, (Tex.) 171 S. W. 709, in defining the phrase "or in any other jurisdiction" as used in the Texas Code of

Civil Procedure (art. 788, subd. 3) disqualifying as witnesses all persons who have been convicted of a felony "in this state, or in any other jurisdiction," the court said: "This provision of the Code, in so far as we have been able to ascertain, first came before this court for construction in the case of *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210. At that time our present senior justice, Judge Davidson, was representing the state as its Assistant Attorney General before this court, and he filed an able and exhaustive brief, contending that the words 'or in any other jurisdiction' had no reference to convictions had in other states, and that the common law rule was in force in this state in criminal as well as civil cases; he showing such rule to be: 'A judgment of criminal conviction had in one state cannot be used to show or prove a witness incompetent in another state, where the witness has been convicted of an infamous crime in the former'—[citing, among other authorities, *Com. v. Green*, 17 Mass. 515; *Campbell v. State*, 23 Ala. 44; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; 1 Greenl. Ev. (13th ed.) § 376, note 2, and section 506; 1 Bishop, *Crim. Law*, § 109; also section 976, and note; Wharton, *Crim. Ev.* § 363, note, and section 489]. The court, in overruling this contention, says: 'Leaving out of view any statutory provision upon the subject, the position of the Assistant Attorney General is sustained by very high, if not the great, weight of authority,' and 'we would incline to the view contended for by the Assistant Attorney General, were we called upon to decide the question without being controlled by statutory enactment.' They then hold that the words 'or in any other jurisdiction' in the Code, embraces within its terms judgments of convictions had in other states in the Union. However, they also discuss at some length what is necessary to be shown to render a judgment of conviction in another state sufficient to render a person incompetent as a witness in the courts of this state, and these rules have been adhered to in this court since the rendition of that opinion, and we do not deem it necessary to discuss the question at length again, but merely to restate the rule as therein announced. A judgment of conviction for a felony in a foreign state will render a person an incompetent witness in a criminal action in this state when the following facts are shown: That the person has been finally convicted of an offense in a foreign state; that the offense of which he was convicted was a felony under the laws of the state in which he was convicted, and such an offense would be a felony under the laws of this state if committed within its bounds."

#### v. Any Other Kind.

Under the Georgia general tax act of 1909 (Civ. Code, § 946) whereby a tax was imposed on "every peddler and traveling vendor of any patent or proprietary medicines, or remedies, or appliances of any kind, or of special nostrums, or jewelry, or stationery, or drugs, or soap, or of any other kind of merchandise or commodity whatsoever (whether herein enumerated or not)," etc., it was held in *Latham v. Stewart*, 140 Ga. 188, 78 S. E. 812, that chickens, eggs and butter were not comprehended by the words "or of any other kind of merchandise or commodity whatsoever."

#### w. Any Other Law.

In *Oleson v. Green Bay, etc. R. Co.* 36 Wis. 383, in construing the Wisconsin Law (Wis. 1872, § 11), providing that "if any county, town, city or village shall issue and deliver to any railroad company any bonds in pursuance of the provisions of this act, it shall not thereafter issue or deliver any bonds or incur any liability in aid of the construction of the railroad of such company, by virtue of the authority of any other law of this state," the court held that the last clause of this section related only to laws which were in existence when the Act of 1872 was passed.

#### x. Any Other Manner.

In *Peiree v. Richardson*, 9 Metc. (Mass.) 69, the court construed a Massachusetts statute (Rev. Stats. c. 90, § 83), providing that "when any person shall claim any title or interest, by force of a subsequent attachment, or purchase, or mortgage, or in any other manner, in any estate, real or personal, that is attached in a suit between other persons, such claimant may be allowed to dispute the validity and effect of the prior attachment," etc. It was held that the words "any other manner" were intended to protect a title to property acquired otherwise than by attachment, purchase, or mortgage; for instance, by pledge or other lien, or by descent.

#### y. Any Other Matter.

In *Du Pre v. Lexington County*, 90 S. C. 180, 73 S. E. 70, it was held that the South Carolina Civil Code (1902, § 806), providing for the auditing and payment by the county board of commissioners of accounts for "labor performed, fees, services, disbursements, or any other matter . . ." was broad enough to cover a claim for injury to an automobile resulting from a defect in a highway, and to confer jurisdiction on the county board to act judicially in the matter.

In *American Manganese Co. v. Virginia Manganese Co.* 91 Va. 272, 21 S. E. 466, construing the provisions of the Virginia Code (§ 3299), which allowed a defendant to plead "any other matter, as would entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract" sued on, it was held that the term "or any other matter" therein was limited to the particular defenses provided for in the preceding words of that section, viz.: failure in the consideration of the contract, fraud in its procurement, and breach of warranty of the title or the soundness of the personal property, for the price or value whereof he entered into the contract, and therefore that unliquidated damages based on the breach of a contract, other than the contract sued on by the plaintiff, could not be set up in a plea.

In *Halsey v. Fairbanks*, 4 Mason 206, 11 Fed. Cas. No. 5,964, it was claimed that a release covered not only all debts and demands for which payment and indemnity was provided, but "any other matter or thing from the beginning of the world." The court said: "The words are, indeed, as broad as the objection states them. But I have very great doubts, whether, looking at the antecedent parts of the sentence, a court of law would not restrain the meaning to those claims which are positively released and covenanted not to be sued for, and especially as the assignment, in one of its recitals, compromises the consideration to such a release. Words of this nature are often found in common releases. But they have been generally restrained to the subject-matter on which the parties acted. I have no doubt that a court of equity would so restrain them in this case. It does not appear to me, that they ought to be construed as intentionally demanding a release of any claims which were not to be compensated for. But if they do, as none other are shown to exist, it would be hard to infer a fraudulent intent from what was undoubtedly the phrase of the scrivener."

#### *z. Any Other Means.*

In *McDade v. People*, 29 Mich. 50, which was a prosecution under a Michigan statute (Comp. L. § 7557), providing that every person who shall set fire to any building or to any other material, with intent to cause any such building to be burnt, "or shall by any other means attempt to cause any building to be burnt, shall be punished," etc., it was held that the expression "or shall by any other means attempt to cause any building to be burnt" must be understood as intending some means of the same nature as those

previously stated, some physical act either personally by the party himself or through another directed to the end sought.

In *Scranton Electric Light, etc. Co.'s Appeal*, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L.R.A. 285, it was held that the legislature did not intend to embrace electric lighting in the language, "companies incorporated under the provisions of this statute, for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public by any other means," that method of lighting not being in use when the statute was enacted.

#### *aa. Any Other Moneys.*

In *Lefevre v. Freeland*, 24 Beav. 403, 53 Eng. Rep. (Reprint) 413, it appeared that a testatrix after reciting that under the will of her father she was entitled to dispose of the sum of £10,000, she, in exercise of the power, appointed "the said sum of £10,000 then secured on mortgage of Lord Methuen's estate, and any other moneys representing the same," unto her said trustees, for the use of various persons named. It was held that the phrase "any other moneys representing the same" included the fund and all additions to it.

#### *bb. Any Other Obstruction.*

In *Farquharson v. Imperial Oil Co.* 26 Ont. 206, 18 Can. L. T. 135, 19 Can. L. T. 372, construing a Canadian statute (R. S. O. 1887, c. 120, § 1), providing in part that "no person shall by felling trees or placing any other obstruction in or across any such river, creek or stream, prevent the passage thereof," it was held that the words "any other obstruction" comprehended only other obstructions of a like kind with the felling of trees, and did not include the erection of a dam by the ostensible owner of the banks.

#### *cc. Any Other Offense.*

In *Fimara v. Garner*, 86 Conn. 434, 85 Atl. 670, under a Connecticut statute (Gen. Stat. Conn. sec. 1528), providing that "in case of conviction for any high crime or misdemeanor at common law, the offender may be imprisoned in the state prison not more than five years [etc.], . . . and in case of conviction for any other offense at common law, the offender shall be imprisoned in a jail not less than thirty-one days, nor more than one year [etc.]," it was held that the phrase "any other offense at common law" comprised petty or simple misdemeanors.

#### *dd. Any Other Officer.*

In *Alexander v. Overton*, 22 Neb. 227, 34 N. W. 629, under the Nebraska Code of Civil

Procedure (§ 14), limiting the time for suing on the official bond of an "executor, administrator, guardian, sheriff, or any other officer," it was held that although county treasurers were not specifically named in the above section, they clearly fell within the general designation "any other officer."

*ee. Any Other Party.*

In *Brown v. Watkins*, 16 Q. B. D. (Eng.) 125, 55 L. J. Q. B. 126, the court construed the phrase "any other party" in rule 12 of Order XXXI, providing: "Any party may without filing any affidavit apply to a court or judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein." Mathew J. said: "I cannot think . . . that the words 'any other party,' in rule 12 were intended to mean anything but the 'opposite party' referred to in the rules relating to interrogatories. I am confirmed in that view by the forms relating to discovery in the appendices to the rules, which all seem framed to meet the case of discovery from opposite parties. Furthermore, on looking at Order XXXII. rr. 1 and 4, it will be found that precisely similar words are used to those in Order XXXI. r. 12, viz. 'any party' and 'any other party,' and yet it is obvious that in those rules only opposite parties can be meant."

The foregoing decision was followed in construing a similar rule in *Shaw v. Smith*, 18 Q. B. D. 193, 56 L. J. Q. B. 174, 56 L. T. N. S. 40, 35 W. R. 188, wherein Lord Esher said: "It appears to me that Field, J., and Grantham, J., must have considered the terms of this order wider than those of Order XXXI. r. 12, for I cannot suppose that either of those learned judges would have considered himself authorized to overrule the case of *Brown v. Watkins* [supra]. But I must say that I can see no real distinction between the language of the two orders. It must be remembered in construing these rules that they are applicable to cases in the Chancery as well as in the Queen's Bench Division. Order L. r. 3, says, that it shall be lawful for the court or a judge upon the application of 'any party' to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property, etc. There is, it may be observed, no such expression here as 'any other party,' which is found in Order XXXI. r. 12. That order provides that 'any party' may apply to the court or a judge for an order directing 'any other party' to any cause or matter to make discovery, etc. When it comes to be considered

that these rules apply to the Chancery Division, it seems to me clear that it cannot be meant that the application under them must necessarily be as between a plaintiff and a defendant. In an action in the Chancery Division there may be many parties either plaintiffs or defendants. The language does not say that the application must be by a plaintiff against a defendant, or vice versa. It says in Order XXXI. r. 12, that it may be by 'any party' against 'any other party.' With regard to Order L. r. 3, though it is true that the rule does not say, as Order XXXI. r. 12, does, that the application is to be by 'any party' against 'any other party,' yet it seems to me that it must be against some other party in the cause, and, if so, the expressions used in the two rules both come to the same thing. But in neither case does it necessarily follow that the application must be as between plaintiff and defendant. It appears to me that, with regard to the question now before us, the construction of both rules must be the same. I think that the case of *Brown v. Watkins* [supra] was rightly decided, though there is a phrase used in the judgments in that case, which, if unexplained, might possibly lead to a misapprehension. I think, however, that the meaning which I should give to that phrase is perfectly consistent with the decision. The judges there use the expression 'opposite party.' That may be construed to mean that the application must be as between plaintiff and defendant. But in the Chancery Division it may often be necessary to adjust rights in the action between two plaintiffs or two defendants, and I should construe the passages of the judgments in *Brown v. Watkins* [supra] where it is said that the application must be against an opposite party as meaning not that it must in all cases be by plaintiffs against defendants or vice versa, but that it must be by and against parties between whom there is some right to be adjusted in the action. Taking that to be the true construction of Order XXXI. r. 12, it appears to me to be just as applicable to Order L. r. 3, and I think that, under that rule also, there may be inspection, not only as between plaintiffs and defendants but as between two defendants, if there are rights which have to be adjusted between them in the action, and to which such inspection is material."

*ff. Any Other Person.*

(1) Generally.

In *Grannis v. Cummings*, 25 Conn. 165, under a statute of Connecticut (Rev. Stat. tit. 1, § 277, p. 148), providing that every person who shall set a fire "that shall run

upon the land of any other person, shall pay to the owner all the damages done by such fire," it was held that the phrase "any other person" as used therein meant a different person from the one on whose land the fire should be set.

In *Moore v. Settle*, 82 Ky. 187, 56 Am. Rep. 889, the court construed a Kentucky statute (Gen. Stat. art. 1, c. 47, § 4) providing as follows: "If such loser or his creditor do not sue for the money or thing lost within six months after its payment or delivery and prosecute the suit to recovery with due diligence, any other person may sue the winner and recover treble the amount of value of the money or thing lost if suit be so brought within five years from the delivery or payment." It was held that the section meant, by the words "any other person," any other person competent to institute the suit; that the statute created no new cause of action in favor of persons who could not sue, nor did it relieve any person of disabilities existent at the date of its passage, and therefore the words did not include the wife of the loser. And in *Spiller v. Close*, 110 Me. 302, Ann. Cas. 1914C 1079, 86 Atl. 173, it was held that a statute practically identical, did not, by the use of the term "any other person" authorize the loser's wife to prosecute a suit for treble the amount.

In *Bay State Iron Co. v. Goodall*, 39 N. H. 223, it was held that a statute authorizing a bill for discovery against a defendant in execution "and any other person" did not take away the right to bring such a bill against the defendant in execution alone.

In *Sodowsky v. Sodowsky* (Okla.) 152 Pac. 390, the court construed a statute of Oklahoma [Rev. Laws 1910, § 2991 (3358)], providing: "If a husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may in good faith, supply her with articles necessary for her support and recover the reasonable value thereof from the husband." It was held that a wife could, by virtue of the statute, charge her husband with the amount expended by her for necessities from her own means.

In *Commonwealth Title Ins. etc. Co. v. Ellis*, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. Rep. 816, it was held that a provision in a building contract that "there shall be no liens entered or filed by any subcontractors, or any other persons" prevented the filing of a lien by the principal contractor.

In *Texas Cent. R. Co. v. Waldie* (Tex.) 101 S. W. 517, the court instructed the jury as follows: "If you find from the evidence that plaintiff was injured by reason of said rail being dropped and that the same was dropped by reason of the negligence, as that term is defined in the charge of said fore-

man, either with or without the negligence, if any, of any other person, then you will find for plaintiff." It was held that the words "any other person," as used in the charge, were broad enough to include the plaintiff himself, and for that reason the charge was erroneous.

In *Hutcheson v. Priddy*, 12 Grat. (Va.) 85, under the Virginia Code (p. 542, § 10), providing that the court may revoke an order committing the estate to the sheriff, "and allow any other person to qualify as executor or administrator," it was held that the term "any other person" must necessarily have some limitation, and this was to be found only in the sound discretion of the court, to which must be referred the fitness or suitability of the party applying, and the time and circumstances of his application.

In *Irwell v. Eden*, 18 Q. B. D. (Eng.) 588, 56 L. J. Q. B. 446, 56 L. T. N. S. 620, 35 W. R. 511, the court construed Order XLII. v. 32, providing as follows: "When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the court as the court or judge shall appoint. . . . And the court or judge may make an order for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents." It was held that the expression "any other person" did not include within the rule in the case of an individual debtor any other person than himself, or, in the case of a corporation any one but officers of the corporation, and that it did not enable an order to be made except in such cases.

In *Galt v. Holder*, 32 Tex. Civ. App. 564, 75 S. W. 568, it was held that a statute making it unlawful for "any factor . . . or other person" to employ other than a public weigher of cotton included only persons engaged in a business similar to that of a factor.

A California statute (St. 1909, c. 133, p. 25, § 25) provides: "In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having the custody of such child, or any other person who shall, by an act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor." In the case of *In re Mills Sing*, 14 Cal. App. 512, 112 Pac. 582, it was held that the words "any other person" are

not limited in their application to those who stand in loco parentis, but have a broader and more comprehensive meaning and include all persons who commit the acts specified, whatever their relation to the child may be. See to the same effect *State v. Plastino*, 67 Waah. 374, 121 Pac. 851. However in *Gibson v. People*, 44 Colo. 600, 99 Pac. 333, a similar statute was restricted to persons standing in loco parentis. See also *Wilson v. People*, 44 Colo. 608, 99 Pac. 335.

In *State v. Stoller*, 38 Ia. 321, which was a criminal prosecution under a statute of Iowa (Code of 1860, § 3910, Code of 1873, § 4245), providing that "if any carrier or other person, to whom any money, goods or other property which may be the subject of larceny, has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property, etc. . . . he is guilty of larceny, . . .", the court held that the office express agents, warehousemen, and phrase "any other person" embraced local or their respective clerks, assistants and helps.

In *People v. Hennessy*, 15 Wend. (N. Y.) 147, the words "any other person" as used in a statute relating to embezzlement by a servant of the property of any other person were held to mean any person other than the servant, not any person other than his employer.

In *State v. Campbell*, 76 Ia. 1, 40 N. W. 100, the court construed a statute providing that it shall constitute a crime if "any express company, railway company, or any agent or person in the employ of any express company, or if any common carrier, or any person, in the employ of any common carrier, or if any other person, knowingly bring within this state . . . any intoxicating liquors." It was held that the words "or any other person" did not enlarge the classes which preceded, but that they meant simply other persons of like kind, or in like employment, with those specified, and were limited to other like persons; and therefore a man employed by a wholesale liquor dealer to convey liquor to the retail dealers not as a mere servant to drive a delivery team of the dealer but as the owner of two wagons was within the statute.

It has been held that the words "any revenue officer or other person hereafter becoming indebted to the United States" as used in section 5 of the Bankruptcy Act of March 3, 1797, giving the claims of the United States a preference, and the words "any revenue officer or other person accountable for public money" as used in the four preceding sections of the act, were not confined to revenue officers and persons accountable for the public money, but extended to debtors generally. *U. S. v. Fisher*, 2 Cranch 358, 2 U. S. (L. ed.) 304.

## (2) Any Other Person Entitled.

In the case of *In re Turner's Estate*, 143 Cal. 438, 77 Pac. 144, the court construed the phrase "or any other person entitled" as used in the California Code of Civil Procedure (§ 1368), which provides that if any person entitled to administration is a minor, "letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." It was held that the phrase applied to all persons who were entitled to administer as being of the same class as the minor would be, were he an adult.

## (3) Any Other Person Interested.

In *Woodley v. Harker*, 7 N. W. Ter. 333, it was held under a rule permitting "the plaintiff or any other person interested" to apply to have the liability of a garnishee determined, that the defendant was not entitled to apply. The court said: "Under these general words if any other person besides the plaintiff is intended it can only be an assignee of the plaintiff."

## gg. Any Other Place.

In *Wiggins v. State*, 172 Ind. 78, 87 N. E. 718, the court construed an Indiana statute (*Burns* 1908, § 2356, Act 1907, p. 102), providing: "That it shall be unlawful for any male person over the age of seventeen years, to cause, encourage or entice, any female person, other than his wife, under the age of eighteen years, to enter or to accompany any such person into a house of prostitution, assignation, saloon or wine-room where intoxicating liquors are sold, or any other place for vicious or immoral purposes, etc." The court held that applying the rule of "ejusdem generis" to the clause "or any other place," it must be held to mean some place, or house, of like character to "a house of prostitution, assignation, saloon or wine-room where intoxicating liquors are sold;" that is to say, to come within the statute the place described must appear to be of a nature and character which would of itself, in like manner as the specified places, naturally tend to demoralize and precipitate degeneracy in a girl of tender years.

It has been held that although the words "or in any place out of England," in the English Bankruptcy Act 1883 (§ 27, subsec. 6) providing for an order for the examination of a bankrupt, were prima facie wide enough to include a place not within the British dominions, yet they must be construed as limited to places within the jurisdiction of the British Crown, as it was impossible to suppose that the legislature intended to empower the court to order the

examination of persons in foreign countries. In *re Drucker* [1902] 2 K. B. 210, 71 L. J. K. B. 688, 86 L. T. N. S. 692, 50 W. R. 592.

*hh. Any Other Proceeding.*

In *Spencer v. Watts*, 23 Q. B. D. 350, 58 L. J. Q. B. 383, 61 L. T. N. S. 711, 37 W. R. 676, the court construed Rule 1 of Order XXVI. providing that "the plaintiff may, at any time before receipt of the defendant's defense, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants . . . and thereupon he shall pay such defendant's costs of the action. . . . Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge." It was held that the words "before taking any other proceeding in the action" meant "taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken."

*ii. Any Other Purpose.*

*State v. Dudenhefer*, 122 La. 288, 47 So. 614 was a prosecution under a Louisiana statute (Rev. St. § 903), providing that: "Any officer of this state, or any other person, who shall convert to his use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall loan with or without interest, or use in any other manner than directed by law any portion of public money, which he is authorized to collect or which may be intrusted to his safe keeping or disbursement, or for any other purpose, shall be guilty of an embezzlement." It was held that the words "or for any other purpose" were equivalent to "or otherwise."

In *Schmidt v. State*, reported in full, post, this volume at page 107, it was held that a statute forbidding the setting of a gun for the purpose of killing game "or for any other purpose," included a purpose to frighten trespassing boys.

*jj. Any Other Reason.*

In *National Surety Co. v. Morris*, 111 Ga. 307, 36 S. E. 690, the court construed the Georgia statute (Civil Code, § 2533), declaring: "The surety of any guardian on his bond, or, if dead, his representative, may at any time make complaint to the ordinary of any misconduct of his principal in the discharge of his trust, or for any other reason show his desire to be relieved as surety; thereupon the ordinary shall cite the guardian to appear at a regular term of the court and show cause why such surety shall not

be discharged." It was held that the words, "any other reason," which the surety might allege as constituting the basis of his desire to be relieved from the bond, must relate to some ground or grounds of relief not ejusdem generis with those which arose from the guardian's official misconduct, and that the want of personal integrity, lack of business capacity, extravagant or reckless living, indulgence in vicious or immoral habits, criminality, and scores of other things which might be suggested, would certainly afford good reasons for a "desire to be relieved as surety."

*kk. Any Other Relief Over.*

In *Confederation L. Assoc. v. Labatt*, 18 Ont. Pr. 266, an action for the conversion of goods, the court applied Rule 209, providing: "Where a defendant claims to be entitled to contribution, or indemnity from, or any other relief over against any person not a party to the action, he may by leave of the court or a judge issue a notice (hereinafter called the third party notice)." It was said that the words "or any other relief over" had considerably widened the scope of the rule and that its object seemed to be to avoid injustice by enabling the original defendant to bind his vendor by the result of the proceedings in the original action, and, having done so, to recover from him in the same action such relief over as he might show himself entitled to.

*ll. Any Other Respect.*

In *Lilly v. Person*, 168 Pa. St. 219, 32 Atl. 23, it appeared that a building contract provided that the builder should forfeit \$10 for each day that the building remained unfinished after the time fixed by the agreement for its completion, and also provided that any change in the plans "either in quantity or quality of the work" should be executed by the plaintiff "without holding the contract as violated or void in any other respect." It further appeared that during the progress of the work a change was made in the material for the front of the building from brick and granite to Indiana stone with carved panels and frieze. It was held that the words "in any other respect" included the implication of any change in terms except such as would result from the alteration of the plans, but not such changes as would be the necessary consequence thereof, such as a delay made necessary thereby.

*mm. Any Other Road.*

In *Reynolds v. Great Northern R. Co.* 69 Fed. 808, a statute requiring a railroad to give signals before crossing "any other road



or street" was held not to apply to a private farm crossing.

*nn. Any Other Ship.*

In *Bennett Steamship Co. v. Hull Mut. Steamship Protecting Soc.* [1914] 3 K. B. (Eng.) 57, 83 L. J. K. B. 1179, 111 L. T. N. S. 489, 19 Com. Cas. 353, 30 Times L. Rep. 515, it appeared that the collision clause attached to the usual form of Lloyd's policy was as follows: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages," etc. It was held that a steamship did not "come into collision with any other ship or vessel" where she ran into the nets of a fishing vessel when the fishing vessel to which the nets were attached was a mile or more away and the hulls of the respective vessels never at any time came into contact with each other. And in *The Mobe* [1891] A. C. (Eng.) 401, in construing the same phrase, it appearing that a tug, which was towing a sailing vessel came into collision with another vessel, it was held that the sailing vessel and the steam-tug having her in tow, constituted "one ship." Lord Selborne said: "But I cannot adopt so narrow a construction of those words, ['come into collision with any other ship']. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam launch, even if those accessories were not (as in this case) insured as being in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which case the barge owners would not be liable for a collision) if damage to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel."

*oo. Any Other Source.*

In *Hubbell v. Higgins*, 148 Ia. 36, Ann. Cas. 1912B 822, 126 N. W. 914, the court construed the provisions of an Iowa statute (Acts 33d Gen. Assem. ch. 168), relating to hotel inspection, which declares that "all hotels shall be kept and maintained in a clean and sanitary condition and free from any effluvia, gas or offensive odors arising from any sewer, drain, privy or any other

source whatever within the control of the owner, manager, agent or person in charge thereof." It was held that the odors referred to in the section were clearly such as would create a nuisance under the law quite independent of this particular act, and that the words "any other source whatever" had reference to a source of like kind with "sewer, drain, and privy," but that they did not include the odor of onions.

*pp. Any Other Species.*

In *Bagley v. State*, 1 Humph. (Tenn.) 489, under a statute of Tennessee (Act of 1799, c. 8), making void all contracts the consideration of which was money lost by playing at cards, dice, billiards, horse-racing, or any other species of gaming whatever, it was held that cockfighting was embraced by the words "any other species whatever."

*qq. Any Other Structure.*

In *Giant Powder Co. v. Oregon Pac. R. Co.* 42 Fed. 470, 8 L.R.A. 700, in construing an Oregon statute (Act of February 11, 1885, § 1, Comp. 1887, § 3669) providing that every person "furnishing material of any kind to be used in the construction . . . of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the . . . materials furnished," etc., the court said: "The language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a 'structure,' if not a 'superstructure.' A lien can as conveniently be imposed upon it as upon a 'ditch,' 'flume,' or 'tunnel.' These instances of lienable property are expressly mentioned in the statute; and the scope and operation of this general term 'structure' immediately following this specific enumeration must be ascertained by reference to the latter. The doctrine of *noscitur a sociis* applies; and the significance of the word 'structure,' in this statute, is indicated by the company it is found in,—'ditch,' 'flume,' and 'tunnel.' If the language of the act was 'building or other structure' only, then it might not be construed as including a railway. But the words, a 'ditch or any other structure,' cannot, consistently with this established rule of construction, be held to exclude a railway. A railway is literally and technically a 'structure.' It consists of the bed or foundation, which may be of earth, stone, or trestle-work, on which are laid the ties and rails. These, taken together, constitute a 'structure,' in the full sense of the word." See to the same effect, *Ban v. Columbia Southern R. Co.* 117 Fed. 21, 54 C. C. A. 407.

*rr. Any Other Water.*

The California Civil Code (§ 830) provides that "except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." In *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294, it was held that a pond which was shown to be not navigable, came within the class described as "any other water" in the last clause of the section, and that unless a different intent appeared from the patents and documents referred to therein, the patentee of the land bordering on it took to the center of the pond.

*ss. Any Other Witness.*

In *Hart v. Godkin*, 122 Wis. 646, 100 N. W. 1057, it appeared that the court charged the jury in these words: "If you are of the opinion from the evidence that any witness has wilfully sworn falsely as to any matter or thing material to the issues in this case then you are at liberty to disregard the entire testimony of such witness, except in so far as you may find it corroborated by the testimony of any other witness." It was held that the use of the term "any other witness" rendered the instructions fatally defective, the true rule being that, in the contingency mentioned, the jury may disregard the entire evidence of a witness not corroborated by some "credible" evidence.

152. ANY OWNER.

An Iowa statute (Code, § 2814, as amended by Laws 1907, chapter 153), relating to school sites, provides that "any school corporation may take and hold so much real estate as may be required for schoolhouse sites, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed one acre exclusive of public highways, except in a city, town or village it may include one block exclusive of the street or highway, as the case may be (or in certain cases may consist of not to exceed four acres unless by the owner's consent), which site must be upon some public road already established or procured by the board of directors, and shall, except in cities, towns, or villages, be at least thirty rods from the residence of any owner who objects to its being placed nearer. In *Mendenhall v. Independent School Dist.* 137 Ia. 554, 115 N. W. 11, it was said that the words "any

owner" manifestly referred to the owner of the residence and not to the owner of the site to be procured.

153. ANY PART.

*a. Generally.*

In *U. S. v. Keystone Watch Co.* 218 Fed. 502, in defining the phrase "any part" as used in the second section of the Sherman Anti-trust Act (Act of July 2, 1890, c. 647), § 2, 26 Stat. 209, 7 Fed. Stat. Ann. 340) the court said: "The second section deals with the monopolizing, or the attempt at monopolizing, 'any part' of the trade or commerce referred to; and it is clear enough, therefore, that Congress had chiefly in mind, not so much the monopoly of a whole (although the language might properly be construed to cover that also), as the much more likely case of the monopoly of a part smaller than the whole. But the question immediately arises: At what point does a business become so large that the statute condemns it? Or—to state the question in other words—is the mere size of a business enough to bring it within the disapproval of the act? Section 2 gives us no help, for 'any' part, if strictly construed, might range from a minute and inconsiderable fraction to a part just less than the whole. If, therefore, a merchant, either an individual or a corporation, by the most commendable zeal and industry should succeed in diverting to himself a very small part of a competitor's business, he would be monopolizing a 'part' of the trade, and would be condemned by the letter of the act. And in like manner, if the statute is using the strict meaning of 'restraint of trade,' no merchant could act in combination with his own partner in successful competition for part of a rival's business, even by the fairest and most honorable means, except at the risk of 'restraining' trade. Further examples are needless; many more might be given. Clearly, therefore, as it seems to us, the act could not have been intended to bear a meaning so subversive: and it seems plain that the Supreme Court was abundantly justified in turning to the rule of reason, and in holding that of necessity Congress must have been dealing with undue or unreasonable restraints of trade, whether such restraints take the form of monopolies in whole or in part, or of concerted action under any guise whatever." And in *Patterson v. U. S.* 8. 222 Fed. 599, 138 C. C. A. 123, a later case, in determining what was "any part" of interstate trade or commerce, within the meaning of the same section of the Sherman Act, the court said: "What are the possible parts of interstate trade or commerce that may be covered by

it? The interstate trade or commerce in a particular commodity of all prospective purchasers thereof in the United States is a part of interstate trade or commerce; also the interstate trade or commerce in such commodity of all prospective purchasers thereof in some particular portion thereof is a part thereof. And also the interstate trade or commerce in such commodity of any prospective purchaser thereof wherever located in the United States is a part thereof. There can be no question that the first two are parts of interstate trade or commerce within the meaning of the statute. . . . The only question is as to the third part. Is the interstate trade or commerce of a prospective purchaser a part thereof within it? . . . In dealing with this subject the Supreme Court, speaking by the Chief Justice, in the *Standard Oil Co.'s Case*, 221 U. S. 61, Ann. Cas. 1912D 734, 31 S. Ct. 516, 55 U. S. (L. ed.) 645, 34 L.R.A.(N.S.) 834, said: 'The commerce referred to by the words "any part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.' This excludes therefrom the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof. Reasoning from the analogy to a monopolizing by sovereign grant leads to the conclusion that such is a true construction of the section. In case of such monopolizing it is of a particular commodity, and in olden times in England it was limited in some instances to particular portions of the kingdom."

In *Stout v. Simpson*, 34 Okla. 129, 124 Pac. 754, under the Original Seminole Agreement of December 16, 1897 (Act July 1, 1898, c. 542, 30 St. at L. 567), providing that all contracts for sale, disposition, or incumbrance of any part of any allotment made prior to date of patent should be void, it was held that the words "any part" were intended to apply both to the homestead and the surplus allotment.

In *London & F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140, it appeared that a policy contained a clause providing that "if the building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," and that before the fire destroyed the insured building it had been visited by a cyclone, and the roof of the two front upper rooms had been blown away, the rafters, ceiling, and parts of walls remaining.

It was held that the words "any part" should not be construed as meaning any fragment or portion of a part of the building, but meant an integral part of the entire building.

In *Clark v. Lee*, 185 Mass. 223, 70 N. E. 47, wherein it appeared that a deed provided that "on the defendant's remaining land, lying southerly of the land conveyed, no dwelling or other house or building or any part thereof or projection therefrom should be built thereon within sixty-five feet of the easterly line of Walnut street, or within fifteen feet of the southerly line of the premises conveyed," etc., it was held that a wall extending from the house could not be deemed to be "any part of, or projection" from, the house, and that those words evidently referred to bay windows or porches, or things of that nature.

#### b. Any Part Thereof.

In construing the English Conveyancing Act of 1881 (§ 6, subsec. 2) providing that "a conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings; all . . . lights, . . . easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof," it has been said: "In my opinion the mortgagee has conferred upon him by the power of sale a power when the mortgage money has become due—I am using again the words of the Act in s. 19, subs. 1 (i)—'to sell or to concur with any other person in selling the mortgaged property or any part thereof.' The first question is: May a mortgagee under this power sell a part of the mortgaged property? Clearly he can. Did the mortgagee in this case in selling the garden and vinery do more than sell a part of the mortgaged property? I think he was selling a part of the mortgaged property, and a part which seemed, from physical circumstances, to be naturally divided from the other part. . . . Under these circumstances, I have come to the conclusion in this case that the sale being of a garden, with a vinery upon it, the purchaser acquired at the same time a right to the access of light to this vinery over the land retained by the mortgagee, and that she is entitled to see that that right is not interfered with by any person subsequently acquiring the adjoining land. . . . Of course, in what I have said I do not mean to suggest for one moment

that the mortgagee may so deal with a mortgaged property as to infringe the rights of his mortgagor; so long as he bona fide sells a part of the property, I think he can sell it with the legal incidents attaching to the conveyance in granting it." *Born v. Turner* [1900] 2 Ch. 211, 69 L. J. Ch. 593, 83 L. T. N. S. 148, 48 W. R. 697. But it has been held that the words "or any part thereof" did not give a mortgagee, under the power to sell a part of the mortgaged premises, the right to sell machinery affixed to a manufactory apart from the manufactory itself. *In re Yates*, 38 Ch. D. 112, 57 L. J. Ch. 697, 59 L. T. N. S. 47, 36 W. R. 563; *In re Brooke* [1894] 2 Ch. 600, 64 L. J. Ch. 21.

Under the English Dramatic Copyright Act (3 & 4 Will. § 2) making it penal to represent any protected drama, "or any part thereof," it has been held that by the words "or any part thereof" was meant some material and substantial portion of the publication of another. *Chatterton v. Cave*; *L. R. 3 App. Cas. 483*, 47 L. J. C. Pl. 545.

The English Settled Land Act (1882, § 6), provides that "a tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same," for any term not exceeding the periods respectively mentioned in the cases of a building lease, a mining lease, and any other lease. It has been held that, reading this section as a whole, it was obvious that its general language applied to building leases, as well as to mining leases and other leases, and that it enabled the tenant for life to grant a lease of "the settled land or any part thereof;" also that, looking at those words, there was no room for any doubt that the tenant for life was empowered to grant a lease for the surface of the land, reserving the mines and minerals under it, or to grant a lease of the mines and minerals without the surface. *In re Gladstone* [1900] 2 Ch. 101, 82 L. T. N. S. 515, 69 L. J. Ch. 455, 48 W. R. 531. See also *In re Rutland* [1900] 2 Ch. 206, 69 L. J. Ch. 603.

#### 154. ANY PARTNERSHIP.

*State v. Lancashire F. Ins. Co.* 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348, was an action against a foreign insurance company under an Arkansas statute (Acts 1899, p. 50, § 1), which provides that "any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual, . . . who shall create, enter into, become a member of or party to any pool, trust, agreement, combination, confederation or understanding . . . to fix or limit . . . the price or premium

to be paid for insuring property against loss or damage by fire, . . . shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act." It was held that the words "any partnership or individual" as used therein, while general words, did not apply to the citizens of other states.

#### 155. ANY PARTY.

Under a provision that "any party aggrieved by the judgment may appeal," etc., it has been held that by "any party" is to be understood any person who is a party to the action. *Senter v. De Bernal*, 38 Cal. 637; *Jones v. Quantrell*, 2 Idaho 153, 9 Pac. 418. A similar provision has been held not to require by the use of the words "any party" that all the litigants on one side should join in one appeal. *People v. Judge*, 36 Mich. 331.

*In State v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012, it was held that the phrase "any party" in the Missouri statute (R. S. Mo. 1909, § 6384), providing that "any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally," should be taken to confine the right to some one having an interest in either the estate or the personal safety of the person proceeded against. *State v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012.

Under the New Jersey Act of 1880 (Rev. Sup. p. 2878) providing "that in all civil actions in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action," it has been held that the words "any party" include, if given their usual significance, both parties. *McCartin v. McCartin*, 45 N. J. Eq. 285, 17 Atl. 809.

Under the North Carolina Code (sec. 553) authorizing "any party to appeal without giving bond," the words "any party" have been held to include administrators and executors. *Mason v. Osgood*, 71 N. C. 212; *Christian v. Atlantic*, etc. R. Co. 136 N. C. 321, 1 Ann. Cas. 803, 48 S. E. 743, 68 L.R.A. 418.

*In Pennsylvania Steel Co.'s Appeal*, 161 Pa. St. 571, 29 Atl. 294, the court construed a Pennsylvania statute (Act of May 16, 1891, § 6), providing that, upon the report of the viewers being filed, "any party may within thirty days thereafter file exceptions to the same, and the court shall have power to confirm said report, or to modify, change, or

otherwise correct the same, or change the assessments made therein, or refer the same back to the same or new viewers, with like power as to their report. Or, within thirty days from the filing of any report in court, any party whose property has been taken, injured or destroyed, may appeal and demand a trial by jury, and any party interested in any assessment of damages or benefits may, within thirty days after final decree, have an appeal to the Supreme Court." The court said: "It will be noticed that the right to file exceptions to the report is given to 'any party'—meaning, of course, any party interested in the proceeding—while the right to appeal and demand a jury trial is restricted to 'any party whose property is taken, injured or destroyed,' and the right of appeal to the Supreme Court is given to 'any party interested in any assessment of damages or benefits;' but this right of appeal to the Supreme Court must be exercised within thirty days after final decree. It cannot be rightly exercised before the entry of a final decree." But in *Re Olyphant Borough Sewer*, 198 Pa. St. 534, 48 Atl. 487, it was held that a taxpayer who "had no property taken, injured or destroyed, and can make no complaint of the assessment of damages or benefits by the viewers," had no standing to except to the action of the viewers.

In construing the California Code (§ 3214), which provides that "mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto," so as to apply to promissory notes instead of bills of exchange, it has been held that the party referred to by the words "any party thereto" must be the indorser, for the maker, the surety and the guarantors are never exonerated by mere delay until the statute of limitations has run in their favor. *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19.

In *Chandler v. Railroad Com'rs*, 141 Mass. 208, 5 N. E. 509, under the Massachusetts statute (Laws 1882, c. 135), giving to "any party aggrieved" by the decision of the county commissioners, or by their neglect or refusal to decide, an appeal to the board of railroad commissioners, it was held that the phrase did not include a taxable inhabitant of the town, who had no interest different in kind from the other taxable inhabitants of the town, and, as an owner of land abutting on the highway, had no interest different in kind from that of other abutters, or from that of the public generally, because no part of his land or property had been taken or damaged.

The South Dakota Probate Code (§ 345) provides that "an appeal may be taken to the circuit court from a judgment or order of the county court . . . (2) admitting or re-

fusing to admit a will to probate," . . . and section 346 provides that "any party aggrieved may appeal as aforesaid except where the decree or order of which he complains was made upon his default." Under that statute it has been held that a person named as the executor in a will is aggrieved by a judgment adjudging the will to be invalid, but that a divorced husband whose only possible interest in the estate of the testatrix is a contingent interest in the estate in case of the death of the child has no interest in the proceedings to probate the will that entitles him to contest the same. *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369.

## 156. ANY PERSON.

### a. Generally.

#### (1) Under Civil Statute.

In *Strachan v. Universal Stock Exchange* [1895] 2 Q. B. 697, 65 L. J. Q. B. 181, *affirmed* [1896] A. C. 166, 65 L. J. Q. B. 429, 74 L. T. N. S. 468, it was held that a statute providing that no action shall be maintained to recover money deposited "in the hands of any person," to abide the event of a wager applied to money deposited with one of the parties to a gaming contract by the other party thereto, and was not confined to a deposit with a third person.

In *Reg. v. Comptroller General* [1899] 1 Q. B. 909, 68 L. J. Q. B. 568, 80 L. T. N. S. 777, it was held that the general words of a clause giving to "any person" the right to oppose the grant of a patent, the subsequent statement of grounds of opposition confined those words to persons having an interest in the subject-matter.

Under the English Conveyancing Act, 1881 (s. 21, sub-s. 4), providing that the power of sale conferred by that act "may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money," it has been held that those words did not extend to everybody who had a power to give a receipt and discharge; that the sub-section did not include a person who had that power merely as an agent, but was intended to apply only to mortgagees or those in whom the full interest of a mortgagee has vested. In *re Dawson* [1904] 2 Ch. 219, 73 L. J. Ch. 684.

In *Metropolitan Board of Works v. London, etc. R. Co.* 14 Ch. D. 521, 49 L. J. Ch. 355, the court construed the English Metropolitan Management Amendment Act, 1862 (25 & 26 Vict. c. 102, § 6), providing that: "The 77th section of the firstly recited Act (the Act of 1855) is hereby repealed; and in lieu thereof be it enacted, that no person shall make or branch any sewer or drain, or

make any opening into any sewer vested in the Metropolitan board of works, or in any vestry or district board, without the previous consent in writing of such board or vestry: Provided that it shall be lawful for any person, with such consent, at his own expense, to make or branch any drain into any sewer vested in such board or vestry . . . such drain being of such size, materials, and other conditions, and branched into such sewer in such manner and form of communication in all respects as the board or vestry shall direct or appoint," etc. It was held that the words "any person" therein must be taken to mean any person entitled to participate in or make arrangements with the board with regard to the user of the drainage system.

Under a by-law providing that if "any person," who shall be chosen a warden, shall refuse to accept the office and take the oath, he shall forfeit it, it has been held that the word person should be considered as confined to eligible persons. *London Tobacco Pipe Maker's Co. v. Woodroffe*, 7 B. & C. 838, 14 E. C. L. 374, 108 Eng. Rep. (Reprint) 935.

In *Munro v. Waller*, 28 Ont. 29, the court construed the long form of a covenant not to sublease or assign, in the amended statute (49 Vict., c. 21 R. S. Q. Ch. 106, sec. 4 and schedule B, sec. 5), providing as follows: "And also that the lessee, his executors, administrators and assigns, shall not nor will during the said term, assign, transfer or set over . . . the said premises or any of them . . . unto any person or persons whomsoever without the consent in writing of the lessor, his heirs or assigns, first had or obtained." It was held that the lessee was embraced within the words "any person" and that a reassignment of the lease to the lessee was within the covenant and constituted a breach of it.

Under the Canadian statute (R. S. Q. ch. 123) requiring the registration of partnerships and providing for a *qui tam* action for the penalty received by the violation of the law, it has been held that as used in section 11 thereof giving the action to any person who might sue, the words "any person" are not limited to only one person, but that two or more may sue. *Chaput v. Robert*, 14 Ont. App. 354.

In the *City of Salem*, 10 Fed. 843, 7 Sawy. 477, there was involved a provision that "every boat or vessel used in navigating the waters of the state . . . shall be liable and subjected to a lien . . . for all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel. The court said: "The agent, con-

tractor, or subcontractor, or the owner of a boat, is necessarily authorized, by the nature and terms of his agreement of employment, to procure the labor and materials necessary to accomplish what he is authorized by or contracted with the owner to do thereon or thereabout. The very general phrase in the amendment—"any person having them [materialmen] employed to construct, repair," etc.—must be construed to mean any person having them so employed by the authority of the owner. For it cannot be supposed that the legislature intended that the "any person" mentioned in the section applies to any one other than a person within the category of persons just before enumerated; that is, a person sustaining some relation to the owner that authorizes him to employ the labor or purchase the material in question. A mere trespasser or intruder upon the boat of another surely cannot fasten a lien upon it for the value of labor and materials used in unauthorized repairs thereon."

In *Marvin v. Maysville St. R. etc. Co.* 49 Fed. 436, the Kentucky statute (Gen. St. ch. 57, p. 550), giving the personal representative of "any person" whose life is lost by reason of negligence, the right to institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue," was held not to confine this right to the citizens or residents of the state of Kentucky but to give the right to any person without regard to his residence or citizenship.

In *Dixon v. Western Union Tel. Co.* 68 Fed. 630, a statute making corporate employers liable for injuries to a servant caused by the negligence of "any person" was held to intend any person other than the injured employee.

In *Victor's Application*, 27 Cal. App. 73. 148 Pac. 975, it was held that as used in a statute providing that before "any person" can practice dentistry he must obtain a license, the words "any person" meant other than those whom a previous section had exempted from the operation of the act.

In *Caron v. Boston, etc. R. Co.* 164 Mass. 523, 42 N. E. 112, it was held that the words "any person who has the charge or control" of a train includes only persons having the authority to control a train and not one having momentarily the physical power to control it. See also *Denver, etc. R. Co. v. Vitello*, 34 Colo. 50, 81 Pac. 766.

Under statutes permitting the representative of "any person" who should die from any injury resulting from or occasioned by the negligence of any person or employee while running a train of cars, the words "any person" have been held not to include a servant whose death was occasioned by the negligence of a fellow-servant. *Atchison, etc.*

R. Co. v. Farrow, 6 Colo. 498; Connor v. Chicago, etc. R. Co. 59 Mo. 285; Proctor v. Hannibal, etc. R. Co. 64 Mo. 112 (*overruling* Schultz v. Pacific R. Co. 36 Mo. 13); Elliott v. St. Louis, etc. R. Co. 67 Mo. 272, *affirming* Proctor v. Hannibal, etc. R. Co. *supra*; Sullivan v. Missouri Pac. R. Co. 97 Mo. 113, 10 S. W. 852; Lutz v. Atlantic, etc. R. Co. 6 N. M. 496, 30 Pac. 912, 16 L.R.A. 819; Miller v. Coffin, 19 R. I. 164, 36 Atl. 6.

Under an Indiana statute (2 G. & H. sec. 39, p. 559, sec. 2766 Burns 1901, sec. 3154 Burns 1908, sec. 2596 R. S. 1881) providing that "any person" might contest the validity of a will, it has been held that the broad language giving the right of contest to "any person" was limited by the Code of Civil Procedure (12 R. S. 1852, p. 27, sec. 251, Burns 1908, sec. 251 R. S. 1881) providing that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided," and consequently that the phrase should be construed to mean only any person having an interest in the subject-matter of the will. *Niederhaus v. Heldt*, 27 Ind. 480; *Schmidt v. Bomersbach*, 64 Ind. 53; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Campbell v. Fichter*, 168 Ind. 645, 11 Ann. Cas. 1089, 81 N. E. 661; *Thompson v. Turner*, 173 Ind. 593, Ann. Cas. 1912A 740, 89 N. E. 314; *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177.

In the case of *In re McGhee*, 105 Ia. 9, 74 N. W. 695, a proceeding to ascertain the amount of a collateral inheritance tax under the Iowa statute (Acts of 26th Gen. Assembly, c. 28, sec. 1), providing "all property within the jurisdiction of this state . . . which shall pass . . . to any person . . . shall be subject to a tax," it was held that the statutory phrase "to any person" did not necessarily mean one person only, but would include more than one, when that was required to give the state the effect it was intended to have, and that the administrator, executor, or trustee charged with the duty of settling the estate was liable for the payment of the tax, excepting that in some cases he was required to collect the tax from the person who was to receive the property.

A statute providing that the books in county offices shall remain open for examination by "any person" has been held to give the right of examination to any person interested. *Boylan v. Warren*, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551. And under a similar statute (R. S. Wis. sec. 700), it has been held that the statute extended the right of examination, etc., to any person, applying to the custodian of public records in a proper manner, subject, however, to the payment of fees when allowed, and such reasonable supervision and control by the officer as was essential to the convenient performance of his

duties, and the current business of the public. *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30. But under the Colorado statute (Gen. Stat. § 667), it has been held that the phrase "any person" did not include abstract makers, as they do not seek information concerning a tract of land in which they themselves, or parties whom they represent have or expect to have an interest. *Bean v. People*, 7 Colo. 200, 2 Pac. 909.

Under the Louisiana Code of Practice (art. 869), providing that a mandate to prevent a usurpation of an office in a city or other corporation may be obtained by "any person applying for it," it has been held that the words "any person" meant "any person having an interest" and that the courts of the country from which the code borrowed this term of "any person" had determined and fixed by a settled jurisprudence what this interest should be, and had settled that any inhabitant of a borough or town had a sufficient interest. *State v. Kohnke*, 109 La. 838, 33 So. 793.

In *Brewer v. Crosby*, 11 Gray (Mass.) 29, under a Massachusetts statute [Rev. St. c. 58, § 13 (St. 1798, c. 54, § 3)], making liable the owner or keeper of any dog for any damage done by the dog "either to the person or the property of any person," the court held that the term "any person" was used in its broadest sense as "anybody," "any human being," and not in contrast to property.

It has been held that the words "any person" in a statute declaring that a railroad shall be liable for any damages or injury which may be sustained by any person from a locomotive or cars, did not embrace employees of the road. *Dowell v. Vicksburg, etc. R. Co.* 61 Miss. 519. And see *Carle v. Bangor, etc. R. Co.* 43 Me. 269. And likewise, under a statute providing for the ringing of a bell on the locomotive before crossing and until after it should have crossed any street and declaring that said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect, the words "any person" have been held not to include servants or employees of the railroad company. *Rohback v. Pacific R. Co.* 43 Mo. 187.

In *Spurgeon v. Hennessey*, 32 Mo. App. 83, construing a Missouri statute (R. S. § 5050) providing that if "any person shall lay off an addition to any town or city which he does not improve, and shall be the legal owner of all lots contained in such addition, such person or any other person who shall become the legal owner thereof, shall have such addition or any part thereof vacated," it was held that the words "any person" applied to any number of persons who were the owners of various lots.

In construing a statute of Missouri (R. S. 1899, § 2863) providing that "it is actionable

to publish falsely and maliciously in any manner whatsoever, that any person has been guilty of fornication or adultery," it has been held that it was the intention of the legislature to do away with all technical distinction and to make the speaking of the words "adultery" or "fornication" actionable *per se* as to any person, without reference to whether such person was or was not married. *Brown v. Wintsch*, 110 Mo. App. 264, 84 S. W. 196.

In *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779, it was held that a statute requiring "any person" entitled to a mechanic's lien to file a verified account applied to artificial persons.

In *Virginia, etc. R. Co. v. Ormsby County*, 5 Nev. 341, a statute allowing "any person" to apply for the equalization of an assessment was held to give the right to "all persons, without exception."

In *Den v. Goldtrap*, 1 N. J. L. 272, under a statute providing that an unrecorded mortgage should not avail against "any person," it was held that the phrase included only persons of the class mentioned in a preceding section, viz., bona fide purchasers.

In *Hodgkins v. Atlantic, etc. R. Co.* 3 Daly (N. Y.) 70, affirming 5 Abb. Pr. (N. S.) 73, it was held that a statute authorizing the compulsory taking of the affidavit of "any person" did not apply to the affidavit of an adverse party.

It has been held that the New York statute (11 R. S. p. 728, sec. 55) allows the application of rents and profits to the use of "any person" and that this fairly includes a contingent limitation in favor of persons who are unascertained at the creation of the trust. *Gilman v. Reddington*, 24 N. Y. 9, quoted in *Harrison v. Harrison*, 36 N. Y. 543.

In the case of *In re Beach*, 154 N. Y. 242, 48 N. E. 516, construing the New York Transfer Tax Act (Ch. 399, Laws 1892) exempting from such taxation real property, and also personal property not exceeding ten thousand dollars in value, passing by will, deed or gift to "any person to whom any such decedent, grantor, donor or vendor, for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent," it was held that the words "any person" included children born in lawful wedlock, children legally adopted, illegitimate children and children informally adopted.

In construing the New York Code of Civil Procedure (§ 72) providing that "any judge of the superior court may authorize any person to sue as a pauper" when he shall comply with the terms of the act, etc., it has been held that the expression "any person" included a resident of another state

of the Union, and therefore there was no error in the ruling of his Honor permitting the plaintiff, who resided in Tennessee, to sue in the North Carolina courts as a pauper. *Porter v. Jones*, 68 N. C. 320; *Christian v. Atlantic, etc. R. Co.* 136 N. C. 321, 1 Ann. Cas. 803, 48 S. E. 743, 68 L.R.A. 418.

In *Valley v. Grafton First Nat. Bank*, 14 N. D. 580, 106 N. W. 127, 116 Am. St. Rep. 700, 5 L.R.A. (N.S.) 387, the court held that as used in a statute in declaring that a conveyance should not be defeated or affected by an unrecorded defeasance "as against any person" other than those expressly excluded, the words "any person" must be understood as meaning any person entitled to the protection of the recording laws, namely, subsequent purchasers or incumbrancers, and did not include creditors of the grantee.

In *State v. Duniway*, 63 Ore. 555, 128 Pac. 853, construing an Oregon statute (L. O. L. § 325), providing for the recovery of real property in the nature of an action in ejectment and specifying who might bring the action, it was held that the words "any person" were broad enough to include artificial as well as natural persons, and included the state.

A provision in a poor debtor's act that "any person" may take advantage thereof has been held to include a minor. *Williams v. Ivory*, 173 Pa. St. 536, 34 Atl. 291. And in *Peterson v. Delaware River Ferry Co.* 190 Pa. St. 364, 42 Atl. 955, the court cited *Williams v. Ivory*, supra, in holding that the act of June 24, 1895 (P. L. 236), which related to actions for injuries wrongfully done, was a general act in the nature of a statute of limitations whose terms were general, and made no exceptions in favor of persons under disability.

## (2) Under Criminal Statute.

In *Reg. v. Rowlands*, 8 Q. B. D. 530, 51 L. J. M. C. 51, it was held that a statute relating to frauds by "any person," though passed in connection with a bankruptcy law and referring principally to offenses by a bankrupt, applied also to frauds by persons not bankrupt.

In *Vermont v. U. S.* 174 Fed. 792, 98 C. C. A. 500, in construing a provision of a federal act (Act Aug. 2, 1886, c. 840, § 3, 3 Fed. St. Ann. 128) referring to "any person" that sells, vends or furnishes oleomargarine, the court held that the words were not confined to dealers, and said: "If such dealers were the only persons who could sell, vend, or furnish colored oleomargarine, there would be force in his argument, but most obviously such is not the case. . . . It must be admitted that it is possible and well within the power of any and all persons to resort to the business of



coloring oleomargarine to make it look like butter; and, in view of this possibility, the words 'any person' under consideration were doubtless employed by Congress. They are broad and comprehensive and easily embrace any and all persons whether licensed wholesale or retail dealers or otherwise; and by a familiar rule of construction they should be given full force and effect, to the end that the legislative purpose may be subserved. We think there is no merit in this first objection." And to the next argument that the language employed in the amended act necessarily required, not only the adding or mixing of artificial coloration with oleomargarine, but the actual selling, vending, or furnishing of some of the colored product to constitute one "a manufacturer," and that, inasmuch as there was no proof that defendants actually sold, vended, or furnished any of the oleomargarine, which they colored, the conviction could stand on the first count, the court said: "We cannot give our assent to this proposition. The actual selling, vending, or furnishing of oleomargarine for the use and consumption of others is not one of the substantive and necessary components of a 'manufacturer' as there contemplated. The words, 'that sells, vends or furnishes oleomargarine,' etc., rather qualify or limit the subject of the sentence in which they are found. It is not 'any person' merely, but 'any person that sells, vends or furnishes,' etc., that may become a manufacturer by adding or mixing coloring matter. It is not an uncommon use of language to say that one sells or vends fruit, for instance, and to mean thereby not that he has actually made a sale, but that he is engaged in the business of selling or vending fruit. We think such is the sense in which Congress employed the words in question, and that the true meaning of the sentence is that any person engaged in the business of selling, vending, or furnishing oleomargarine for the use and consumption of others who shall add or mix with oleomargarine any artificial coloring matter shall be held to be a manufacturer and subject to the provisions of the act."

In *Wilson v. U. S.* 229 Fed. 344, 143 C. C. A. 464, the court construed the Harrison Law (Act Dec. 17, 1914, c. 1, sec. 1, 38 Stat. 785, Fed. St. Ann. 1916 Supp. p. 101), which provides that every person who produces, imports, deals in, sells, distributes or gives away opium or cocoa leaves . . . shall register with the collector of internal revenue and shall pay a special tax, but exempts certain classes of persons specified therein; and further provides that "it shall be unlawful for any person required to register under the terms of this act to produce, etc., deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having reg-

istered and paid the special tax provided for in this section." Section 8 thereof provides: "That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this act: Provided, that this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician [etc.] registered under this act; or to any United States, state, county, municipal [etc.], officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this act; or to common carriers engaged in transporting such drugs." The court said: "The contention of defendant is that he is not covered by the provisions of section 8 because the words 'any person' as used therein are to be construed as referring only to persons of the classes referred to in section 1 as being obliged to register and pay a tax. We do not find this contention persuasive; the words 'any person' are comprehensive; they are broad enough to cover not only the 'producers, dealers, distributors, givers away,' etc., who by section 1 are allowed to register, but also all other persons. That Congress used the words with this comprehensive meaning seems to us manifest from the exceptions which it includes in the proviso that immediately follows. A nurse may have some opium in her possession, and yet not be herself 'a dealer, distributor,' etc., nor entitled to take out a license. So too a person subject to sharp spasms of pain may have some in his possession, and yet not be himself 'a dealer, distributor,' etc., nor entitled to take out a license. Both these persons would be covered by the first clause of section 8 and their possession would be unlawful. Therefore Congress saved them in the proviso, by relieving from the application of the first clause—the nurse, if her possession was by virtue of her employment, and the invalid, if the drug had been prescribed for him by a physician. Grammatically there is nothing in the section which would so restrict the comprehensive meaning of the words 'any person,' as to make them include

only those who might take out license but have neglected to do so. There is nothing to indicate that Congress intended its proscription to be less comprehensive than the language it used requires. It has legislated quite drastically about opium in Act Feb. 9, 1909, c. 100, 35 Stat. at Large, 614, Fed. Stat. Ann. Supp. 1909, p. 180, prohibiting its importation for any but medicinal purposes and making any one who imports for other purposes or who uses the drug, knowing that it has been so fraudulently imported, subject to prosecution. The eighth section of the Act of 1914 is a legislation of the same sort; it prohibits any one, other than those who register and pay tax, and a few other persons, nurses, invalids, common carriers, etc., from having any opium in their possession and imposes a penalty for their doing so."

In *Ex p. Daly* (Ala.) 69 So. 598, denying writ, *Daly v. State* (Ala.) 69 So. 338, a prosecution for the violation of the Alabama Criminal Code (§ 6217) which, among other things, makes it a criminal offense for "any person" to use "abusive," "insulting," or "obscene" language "in the presence or hearing of any girl or woman," the court said: "We can see no reason why a woman or a girl cannot offend against this statute. They are, of course, included in the term 'any person,' unless the context of the statute shows that they were not, or could not be, included. We find nothing in this context to so exclude a 'woman' or a 'girl' from the phrase 'any person' as therein used. There are some offenses, common-law and statutory, which from their nature, could not be committed by one of the female sex; but the offense in question is not one of those offenses. While as to a part of the statute a female is the only person or gender that could be offended against, yet here there is nothing which prevents the female sex from being both the offender, and the offended against."

Under the Arkansas statute (Kirby's Dig. sec. 2043), which provides that "any person who shall be convicted of obtaining carnal knowledge of a female by virtue of a feigned or pretended marriage, or of any false or feigned express promise of marriage" shall be guilty of seduction, it has been held that the statute applied to "any person" who was a male and who violated its provisions, and was limited by reason of the state or condition of the man as being single or married. *Davis v. State*, 95 Ark. 555, 129 S. W. 530.

Under a Georgia statute (Penal Code, § 109) declaring that "whoever forcibly abducts or steals away 'any person,' without lawful authority, or warrant, from this state or any county thereof, and sends or conveys such person beyond the limits of the state or a county thereof against his will, is guilty

of kidnapping," it has been held that the expression "any person" meant any man, woman, or child of any age. *Sutton v. State*, 122 Ga. 158, 50 S. E. 60.

In *State v. Gardner* (Ia.) 156 N. W. 747, in holding that an Iowa statute (Code, sec. 4943) making it a crime "for any person" to resort to a house of ill fame for the purpose of prostitution, did not include men, the court said: "When section 4943 was enacted it was settled that men could not be guilty of prostitution, hence they did not become punishable for prostitution unless this was effected by enacting that statute. . . . The legislature knew 'prostitution' was generally understood to be something that men could not, and women could, be guilty of, and that this interpretation was settled in law. It used the word in the settled sense, and 'any person' to avoid repetition. The statute forbids: (1) Resort to a house of ill fame for the purpose of prostitution; (2) for the purpose of lewdness; (3) using such house for prostitution; (4) occupying such house for such purpose; (5) inhabiting such house for such purpose; (6) using such house for the purpose of lewdness; (7) occupying same for such purpose; (8) inhabiting same for such purpose. The legislature knew it was matter of common knowledge that some of these can be committed by both men and women, and some by women only. It therefore refrained from labeling four of these as applying to women only. In the light of this, it is plain that 'any person' was intended to mean 'any person who can be guilty of any of these;' that the purpose was to save words regarded as needless, rather than to enlarge a class of offenders. . . . It is its purpose to enable the state to indict in the alternative, to charge an offense that can be committed by men and women, or by men or women, or by women alone—not to permit men to be punished for what all understood they could not do. It is against reason, so long as any other explanation can be found, to suppose that a legislature which knew that all persons believed prostitution could not be practiced by a man intended to declare that it could, and omitted to put so radical an innovation into unmistakable language. No statute that imposes a five-year imprisonment in the penitentiary should be construed to work such a change unless its words compel such interpretation."

In construing a Kansas statute punishing any person who was drunk in any highway, public place, or in his own house, etc., it was held in *State v. Brown*, 38 Kan. 390, 16 Pac. 260, that the term "any person" meant only such persons as acted voluntarily in the performance of the interdicted act: that hence it did not include idiots, insane persons and children under seven years of

age, babes and persons who had been made drunk by force or fraud and carried into a public place; and that therefore one who innocently drank of liquor which intoxicated him, without an idea that it would make him drunk was not guilty of the offense prescribed by the statute though it in terms was made applicable to any person.

Statutes providing that "any person" aiding, advising or in any manner participating in an act of embezzlement of public money shall themselves be guilty of embezzlement, have been held to include all persons—officers or others—entrusted with the custody or care of public money or any other funds. *Mills v. State*, 53 Neb. 263, 73 N. W. 761; *Brown v. State*, 18 Ohio St. 496.

In *State v. Zimmerman*, 79 S. Car. 289, 60 S. E. 680, it was held that the defrauding of the state was punishable under a statute relating to the defrauding of "any person" by forgery.

In *Mills v. Missouri, etc. R. Co. (Tex.)* 57 S. W. 291, wherein it appeared that an ordinance provided that "any person or persons who shall be found jumping or swinging on or off of any moving train who is not in the employ of the railroad company within the corporate limits of the town, shall be deemed guilty of a misdemeanor," etc., it was held that the words "any person" included all persons, and being followed up with the specific exemption of a designated class of persons, they must, according to recognized canons of construction, be held to include all persons except those coming within the excepted class, and therefore that they applied to passengers, or persons intending in good faith to become passengers.

A Wisconsin statute (Laws of 1885, c. 296, sec. 4) provides, in substance, that "if any person shall vend, sell, deal, or traffic in, or, for the purpose of evading any law of this state, give away, any spirituous, malt, ardent, or intoxicating liquors or drinks in any quantity whatever, without first having obtained a license or permit therefor as required by that chapter, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished," etc. It has been held that the language of the enactment covered the case of a brewer who established an agency for the sale of beer of his own manufacture in a town away from his place of business, and sold to such persons as desired to purchase, without obtaining any license. *Peitz v. State*, 68 Wis. 538, 32 N. W. 763; *Mayer v. State*, 83 Wis. 339, 53 N. W. 444. And in a later case, the words "any person" were held to include one who sold malt liquor from his wagon direct to a customer, without a license. *Michels v. State*, 115 Wis. 43, 90 N. W. 1096.

#### b. Any Person Aggrieved.

In *Inland Revenue Com'rs v. Joicey* [1913] 1 K. B. 445, 82 L. J. K. B. 162, 108 L. T. N. S. 135, 29 Times L. Rep. 419, construing the English Finance (1909-10) Act, 1910 (§ 33, sub-s. 4), providing that "any person aggrieved" by the decision of a referee under the act might appeal against that decision to the high court, it was held that the words "any person aggrieved" included the commissioners.

#### c. Any Person Dissatisfied.

In *State v. Nygaard*, 159 Wis. 396, 150 N. W. 513, in construing a Wisconsin statute (Sec. 1087m-19), providing that "any person dissatisfied with any determination of the county board of review may appeal within twenty days," etc., it was held that taxpayers generally were entitled to appeal.

#### d. Any Person Entitled.

The Iowa Code (§ 1440) provides that "any person entitled to redeem lands sold for taxes after the delivery of the deed shall do so by an equitable action in a court of record, in which all persons claiming an interest in the land derived from the tax sale, as shown by the record, shall be made defendants, and the court shall determine the rights, claims and interest of the several parties, including liens for taxes and claims for improvements made on the land by the person claiming under the tax title," etc. In *Busch v. Hall*, 119 Ia. 279, 93 N. W. 356, it was said that manifestly, "any person entitled to redeem" was any one having such an interest in or lien on the property as that, but for the deed, he might have paid the county auditor the necessary amount, and procured a certificate of redemption.

#### e. Any Person Injured Thereby.

In *Le May v. Canadian Pac. R. Co.* 18 Ont. 314, 41 Am. & Eng. R. Cas. 331, the court construed the Canadian Railway Act (51 Vict. ch. 29 (D) § 289), providing that "every company . . . causing or permitting to be done, any matter, act, or thing contrary to the provisions of the act or the special act, . . . or omitting to do any matter, act, or thing required to be done on the part of any such company, . . . is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc. It was held that the words "any person injured thereby" applied to and comprehended an employee or servant of the railway company.

#### f. Any Person Interested.

In *Byrd v. Jones*, 84 Ala. 336, 4 So. 375, it was held that while a creditor of a solvent

estate was not a party, either necessary or proper, to a proceeding in the probate court having in view the settlement of the estate, he was "a person interested" within a statute allowing such a person to become a party.

In *Branch v. Rankin*, 108 Ill. 444, the court construed an Illinois statute (Rev. Stat. 1874, p. 112, sec. 46), providing as follows: "Whenever any person dies seized or possessed of any real estate within this state, or having any right or interest therein, has no relative or creditor within this state who will administer upon such deceased person's estate, it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county." It was held that the phrase "any person interested" was not restricted to persons who were residents of the state.

The Illinois act in regard to wills, provides that "if any person interested shall, within two years after the probate of any such will, . . . appear and by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury," etc. It has been held that the phrase "any person interested" meant any person who had a direct, existing, pecuniary interest which would be detrimentally affected by the probate of the will. Accordingly it has been held to embrace a devisee, an heir-at-law and the remote grantee of an heir-at-law by virtue of a conveyance made before the admission of the will to probate, but not a purchaser after the probate of the will, the legal and personal representatives of a deceased heir-at-law, the son of a devisee who was insane at the time of the probate of the will and who died before the statutory disability was removed, a nonresident alien who was incapable of taking or holding real estate in Illinois, or the assignee of the right or interest of a disinterested heir. *Wolf v. Bollinger*, 62 Ill. 368; *McDonald v. White*, 130 Ill. 493, 22 N. E. 599; *Jelev. Lemberger*, 163 Ill. 338, 45 N. E. 279; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; *Selden v. Illinois Trust, etc. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; *Cassem v. Prindle*, 258 Ill. 11, Ann. Cas. 1914B 385, 101 N. E. 241; *Selden v. Illinois Trust, etc. Bank*, 184 Fed. 872, 107 C. C. A. 196.

The words "any person interested" in a will have been held to include the heir of an heir of the testator (*Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743) and a lien creditor of an heir. *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615.

In *Lockard v. Stephenson*, 120 Ala. 641, 24 So. 996, 74 Am. St. Rep. 63, the court construed the phrase "any person interested therein" in the Alabama Code (Code 1896, sec. 4287) which provided as follows: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate by filing," etc. It was held that the phrase did not include the judgment creditors of the husband, as they had in no sense of the words such a tangible interest as would confer on them, as "any person interested therein," the right of a suitor. The court said: "It will be observed that it expressly names the class of persons, though not named in the will, who may contest it. These persons are those, 'who if the testator had died intestate would have been an heir or distributee of his estate;' clearly demonstrating that the legislature construed the words 'interested therein' as referring to and including only such persons as took an interest in the estate of testatrix under and by virtue of the provisions of the will."

#### g. Any Person or Persons.

In *U. S. v. Palmer*, 3 Wheat. 610, 4 U. S. (L. ed.) 471, it was said that while the words "any person or persons" as used in the federal statute against piracy, were broad enough to comprehend every human being, yet, as the crimes the legislation intended to punish were offenses against the United States and not offenses against the human race, the words were necessarily confined to any person or persons owing permanent or temporary allegiance to the United States.

In *Fowler v. Monmouthshire R. etc. Co.* 4 Q. B. D. 334, under an English Act (37 & 38 Vict. c. 68, s. 12), providing, *inter alia*, that no costs, fee, reward, or disbursement on account of any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable "by any person or persons whomsoever," it was held by Cockburn, C. J., that the effect of these words was to extend the operation of the former acts, and that they were intended to prevent, not merely the solicitor himself, but also his client, from recovering such costs.

#### h. Any Person Sustaining Damage.

As used in a statute making a railroad company liable for negligence to "any person sustaining damage" thereby, the phrase quoted has been held to include the personal representative of a person killed by negligence of a railroad company. *Larussi v. Missouri Pac. R. Co.* 155 Fed. 654, *affirmed* 161

Fed. 66, 88 C. C. A. 230; *Philo v. Illinois* Cent. R. Co. 33 Ia. 47.

i. *Any Person within Jurisdiction.*

In *Truax v. Raich*, 239 U. S. 33, 36 S. Ct. 7, *affirming* 219 Fed. 273, it was held that the words "any person within its jurisdiction" as used in the Fourteenth Amendment to designate the persons to whom equal protection of the laws may not be denied, includes aliens as well as citizens.

j. *Any Person Whomsoever.*

A New York statute provides that a proceeding to cancel the certificate was maintainable against the holder of record where any provision of the Liquor Tax Law was violated "at the place designated in said certificate as the place where such traffic is to be carried on by the holder of said certificate, or by his agent, servant, bartender, or any person whomsoever in charge of said premises." In *Matter of Cullinan*, 39 Misc. 641, 80 N. Y. S. 186, *affirmed* 84 App. Div. 642, 82 N. Y. S. 1098, it was held that the words "any person whomsoever" could not be taken as restricted to the sense of an agent or servant, for this would render them meaningless, in view of the context.

k. *Any Person Who Rents, etc.*

As used in a Colorado statute (Rev. St. 1908, § 4013) providing that the keeper of any hotel, tavern, or boarding house, "or any person who rents furnished or unfurnished rooms," shall have a lien on the baggage and furniture of his or her patrons, boarders, guests or tenants, the words "any person who rents" etc. have been held not to include a person who rented a room in an office building for office purposes (*Morse v. Morrison*, 16 Colo. App. 449, 66 Pac. 169), or one who rents rooms in an apartment house to be used for housekeeping. *Scanlan v. La Coste*, 59 Colo. 449, 149 Pac. 835, L.R.A.1915F 664. In the case last cited it was said: "The words 'any person who rents furnished and unfurnished rooms' as used in this section were not intended to include all classes of rooms, for whatever purpose they may be rented, but are limited to persons renting rooms for lodging purposes, etc., that is, for the same kind of rooms that the keeper of a hotel, tavern or boarding house are given a lien for."

157. ANY PERSONAL PROPERTY.

A New Hampshire statute [Laws 1822, c. 31, § 4 (Laws ed. 1830, p. 333)] provided "that if there be any personal estate specifically bequeathed, or undisposed of at the request of the heirs or legatees, or preserved

for their greater benefit, and not wanted for the payment of the just demands with which the estate is chargeable, the executor or administrator shall be discharged therefrom by producing the same and delivering it over to the heirs or legatees to whom it belongs." As re-enacted, it contained a proviso that "any property may be reserved at the sale, unless so needed [for the payment of debts], for the benefit or upon the request of the heirs or legatees." In *Stevens v. Meserve*, 73 N. H. 293, 61 Atl. 420, 111 Am. St. Rep. 612, it was held that the phrases "any personal estate" and "any property" were sufficiently broad to include choses in action as well as goods and chattels.

It has been held that the words "any personal, mixed or real property, franchises and rights," in an act providing for a special *feri facias* against corporate property were broad enough to cover patent rights. *Erie Wringer Mfg. Co. v. National Wringer Co.* 63 Fed. 248.

158. ANY PLACE.

In a prosecution for the crime of "bunko-steering" as defined by the Indiana statute (*Burns* 1901, § 2178, sec. 2083, *Homer* 1901), which provides that whoever "allures, entices or persuades another to any place upon any pretense," etc., it has been held that the phrase "any place" undoubtedly means some place within the state and cannot be so enlarged as to make it apply to and include some place in another state. *Cruthers v. State*, 161 Ind. 139, 67 N. E. 980.

In *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136, the words "any place" in the Massachusetts statute (St. Mass. 1891, c. 427, sec. 1), providing that whoever is found in a state of intoxication in a public place, "or is found in any place in a state of intoxication committing a breach of the peace or disturbing others by noise," may be arrested without a warrant, were held to include a dwelling house, the court saying that no expression could have been found that would have been broader in its inclusiveness.

In *Skinner v. Usher*, L. R. 7 Q. B. 423, a statute regulating carriages plying or standing for hire "in any place" was held to intend only streets and similar public places. But in *Ex p. Kippens* [1897] 1 Q. B. 1, a similar phrase in a statute penalizing a public hackney driver who shall refuse to drive "to any place" requested by a passenger was held not to be limited to public places.

In *Rogers v. Brown*, 20 N. J. L. 119, the court construed a statute declaring it to be unlawful for any person to erect, place or have "any booth, stall, tent, carriage, boat or vessel, for the purpose of selling, giving or otherwise disposing of, any kind of ar-

ticles of traffic, spirituous liquors, wine, porter, beer, cider or any other fermented, mixed or strong drink, within three miles of any place of religious worship, during the time of holding any meeting for religious worship at such place." It was held that the benefit of its provisions was not restricted to any denomination, or to any place, or mode of religious worship, but that the open fields, the woods, or a house erected for public worship, were alike within its terms; and so long as it was religious worship, it made no difference whether the worshippers were Christians, or pagan idolaters.

In *Rex v. Brennan*, 35 Nova Scotia 106, 6 Can. Crim. Cas. 29, involving a statute prohibiting the having of an unlicensed still "in any place or premises owned by him or under his control," it was held that the act was intended to cover all cases of actual or constructive possession, no matter where the still was, the words "at any place" being equivalent to "anywhere."

In *People v. Joyce*, 112 App. Div. 717, 98 N. Y. S. 863, construing a statute forbidding the desertion of a child "in any place," it was held that the words "in any place" were not mere surplusage; that they were significant and had an important bearing upon the construction to be placed on this section, and that to make out this crime it was necessary to show that such a child was deserted in a place and was so left with the intent wholly to abandon it.

In *People v. Whitman*, 157 N. Y. S. 1107, it was held that as used in a statute penalizing any person who shall by loud or profane language, annoy or interfere with any person in any place or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, the words "any place" meant any public place.

#### 159. ANY POLL-BOOK.

In *Howard v. McDiarmid*, 26 Ark. 100, the court construed a provision of the Arkansas election law that, if the clerk should reject or refuse to count the vote on any poll-book, of any election held by the people, the clerk was liable to indictment for a high misdemeanor, etc., and that it was his duty to certify, to the secretary of state, all the returns that might be returned to his office, whether legal or illegal. It was held that when the law spoke of "any poll-book," it had reference to the poll-book of a legal election, and not to the poll-book of an election that the record, in the office of the clerk of the county, advised him was *prima facie* void.

#### 160. ANY POOL.

*State v. Lancashire F. Ins. Co.* 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348, was an

action against a foreign insurance company under an Arkansas statute (Acts 1899, p. 50, sec. 1), which provides that "any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual, . . . who shall create, enter into, become a member of or party to any pool, trust, agreement, combination, confederation or understanding . . . to fix or limit . . . the price or premium to be paid for insuring property against loss or damage by fire, . . . shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this." It was held that the words "any pool, agreement, contract, combination," as used therein, while having an extra-territorial effect when construed in their general sense, should be limited in their application and did not apply to pools or combinations formed outside the state which were not intended to affect, and did not affect persons, property or prices of insurance within the state.

#### 161. ANY POOR PERSON.

It has been held that the phrase "any poor person" as used in a Delaware statute (Rev. St. c. 48, § 46) which provides that when "any poor person" shall be unable to support himself, his relatives in a stated order shall be liable for his support, was general and included all poor persons of every kind or class, the insane as well as the rational. *Sussex County v. Jacobs*, 6 Houst. (Del.) 330.

#### 162. ANY PORTION.

In *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752, it appeared that a will devised the residue of the testator's estate, real and personal, to his sisters for the term of their natural lives "hereby empowering my said sisters to dispose of any portion of my estate, either real or personal, if they should so desire." It was held that the sisters took a life estate therein, and that by the words "any portion of my estate" the power of sale was not limited to the life interest or income, but extended to the principal, so that a proper exercise of the power would convey a fee to a purchaser.

#### 163. ANY PORTS.

It has been held that a clause in a charter party giving the ship the right to call at "any ports" gave a right to call at any intermediate port in the course of the voyage. *Caffin v. Aldridge* [1895] 2 Q. B. 648, 65 L. J. Q. B. 85, 73 L. T. N. S. 426, affirming [1895] 2 Q. B. 366, 64 L. J. Q. B. 736. And see *Leathley v. Hunter*, 7 Bing.

517, 20 E. C. L. 221, 9 L. J. Exch. 118, 131 Eng. Rep. (Reprint) 200, wherein the same words were held to give a right to call at ports outside the line of the contemplated voyage.

#### 164. ANY POWER.

In *Gillette v. Chester, etc.* R. Co. 2 Pa. Dist. 450, it was held that as used in an act giving the right to construct a street railway and convey passengers "by any power other than by locomotive," the words "any power" included every known means of locomotion except steam.

In *Casgrain v. Atlantic, etc.* R. Co. [1895] A. C. (Eng.) 282, 64 L. J. P. Cl. 88, construing a statute authorizing an action against a corporation which exercises any power, privilege or franchise which does not belong to it, it was held that the expression "exercises any power, franchise or privilege" was meant to include, not every act done by the company which could be shown to be contrary to law, but such acts only as were either professedly or from their very nature manifestly done in the assertion of some special power, franchise, or privilege.

#### 165. ANY PRESIDENT, ETC.

In *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838, the court construed a Missouri statute (Rev. St. § 1350), providing that "if any president, director, manager, cashier or other officer of any banking institution doing business in this state, shall receive or assent to the reception of any deposit of money, or other valuable thing in such bank or banking institution, . . . after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny," etc. It was held that the words "president, director, manager or other officer" designated such persons as were necessarily connected with incorporated banks, and did not include a person owning and conducting a private bank.

#### 166. ANY PRISONER.

In *Ex p. Lyman*, 202 Fed. 303, it was held that the words "any prisoner" as used in a federal statute (Act Mar. 4, 1909, c. 321, § 138, Fed. St. Ann. 1909 Supp. p. 441), penalizing any person who shall voluntarily allow any prisoner to escape were broad enough to permit of the indictment of the escaping prisoner for conspiracy to violate the statute.

#### 167. ANY PRIVATE CORPORATION.

The term "any private corporation" as used in a Texas statute (Rev. Stat. art. 1198, § 21) which provides that suits against any private corporation, association or joint-stock

company may be commenced in any county in which the cause of action arose, has an agency or in which its principle office is situated, has been held to be ample to cover any private corporation created under the laws of Texas or of any other state or country. *Angerhoefer v. Bradstreet Co.* 22 Fed. 305.

#### 168. ANY PROCEEDING.

In *New York, etc. R. Co. v. Stevens*, 81 Conn. 16, 69 Atl. 1052, the court construed a Connecticut statute (Gen. Stat. § 3834), providing that "any party to any proceeding relating to street railways brought before said commissioners upon either original application or by appeal, aggrieved by the decision or order of said commissioners thereon, may appeal therefrom to the superior court, in the same manner as is provided in the case of appeals taken under the provisions of § 3747, and with like effect." It was held that there was no merit in the claim that section 3834 referred only to such proceedings as might be brought by every street railway under the general laws, and did not apply to proceedings brought in furtherance of the exercise of the power of eminent domain, which had not been granted to all of them, as the word "any" was too comprehensive to receive so narrow a construction.

#### 169. ANY PROCESS.

A Delaware statute (Rev. Code, c. 120, § 60) provides that in the event of seizure under any process of execution, attachment or sequestration the goods and chattels of a tenant shall be liable for one year's rent of the premises, in arrear, or growing due, at the time of said seizure, in preference to such process. In the case of *In re Mitchell*, 116 Fed. 87, it was held that "any process of execution, attachment or sequestration" included all the means of process aside from a distress by which a creditor could proceed against the goods and chattels of a tenant on the demised premises to enforce the payment of their demands.

In *Hodges v. Cooksey*, 33 Fla. 715, 15 So. 549, 24 L.R.A. 812, involving the homestead article of the Florida constitution of 1868 providing that certain real estate together with one thousand dollars' worth of personal property "shall be exempt from forced sale under any process of law," it was held that the statutory remedy for the enforcement of a claim for rent was embraced within the terms "any process of law."

#### 170. ANY PROFITS OR INCOME.

In construing a New York statute (1 R. S. 416, § 9) providing that "if the president or other proper officer of any incorporated

company named in the assessment roll, shall show to the satisfaction of the board of supervisors, at their annual meeting, within two days from the commencement thereof, by an affidavit of such officer to be filed with the clerk of the board that such company is not in the receipt of any profits or income, the name of such company shall be stricken out of the assessment roll, and no tax shall be imposed upon it," it was held in *People v. New York*, 18 Wend. (N. Y.) 605, that the legislature, in using the phrase "any profits, or income," did not intend to convey the same idea as that indicated by the words "net income."

#### 171. ANY PROPERTY.

In *De Witt v. San Francisco*, 2 Cal. 289, the court construed a California act of May 2, 1852, providing that "the board of supervisors shall have power, with the consent of a majority of all its members, to purchase or receive any property for the use of the county; to erect or lease a court house, jail, and such other buildings as may be necessary for the use of the county." It was held that the words "purchase or receive any property necessary for the use of the county," taken in connection with past legislation on the same subject, and the words to "erect or lease a court house, jail, and other public buildings," which immediately followed them, should be interpreted as intending to confer the power to purchase such real and personal property as was necessary for the use of the county.

In *Jersey City v. Board of Equalization*, 74 N. J. L. 753, 67 Atl. 38, the court construed a New Jersey statute (Laws of 1905, c. 67, § 6, Pamph. L. p. 126), providing: "When the said board has reason to believe, . . . that any property, including the property of railroad and canal companies, has been assessed at a rate lower than is consistent with the purpose of securing uniform and true valuation of property for the purpose of taxation, the said board shall have the power, . . . to increase the assessment made upon such property, and for this purpose, if necessary, may direct an assessor or other taxing officer to make a reassessment of such property according to the rules which the said board shall establish. . . . The board may also assess and add to the tax list and duplicate any property omitted, and may correct misnomers or other errors in assessments on notice to parties concerned." It was held that the terms "any property" and "such property," as used in the section, imported that its purpose was to secure an increase in the valuation of specific parcels of property.

In *Browne v. Fidelity, etc. Co.* 98 Tex. 55, 80 S. W. 593, under a Texas statute (Rev.

Stat. art. 2113) providing that no sale of "any property belonging to an estate" shall be made by an executor or administrator without an order of the court authorizing the same, it was held that the term "any property" embraced promissory notes as well as all other kinds of property.

In *Ayers v. Lawrence*, 59 N. Y. 192, construing a New York act of 1872 which authorized an action against any person acting for or in behalf of a municipality by whose acts the corporation or its taxpayers might be injured in its property rights or pecuniary interests "to prevent waste or injury to any property, funds or estate, of such county, town or municipal corporation," it was held that the words "to any property, funds or estate" embraced not only property and funds in possession, but the credit and the power of taxation and of borrowing money in anticipation of taxation, and every process and means by which the municipal corporation could be charged pecuniarily or the taxable property within its limits burdened.

In construing the English Larceny Act of 1861, providing that whosoever shall publicly advertise a reward for the return of "any property whatsoever" which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, shall forfeit, etc., it has been held that the words "any property whatsoever" include dogs. *Mirams v. Our Dogs Pub. Co.* [1901] 2 K. B. 564, 70 L. J. K. B. 879, 85 L. T. N. S. 6.

A Montana statute (Laws Mont. 1901, p. 166, § 2) provides that "every person . . . who runs or conducts any nickel-in-the-slot machine or other similar machine or permits the same to be run or conducted, other than the games commonly known as sure-thing games, for money, checks, credits, or any representative of value, or for any property or thing whatever . . . is punishable," etc. In *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118, it was held that the words "any property or thing whatever" were designed to include merchandise, such as cigars and similar articles, and that therefore nickel-in-the-slot machines for the distribution of cigars or other merchandise fell within the prohibition.

In an action under the Bankruptcy Act (Act of February 5, 1903, c. 487, § 4, 32 Stat. 797, 10 Fed. Stat. Ann. 38), it has been said that the words "any of the property belonging to his estate in bankruptcy" do not include a right of action given to a creditor to set aside, as fraudulent to him, a conveyance of property not made in contemplation of bankruptcy, but made without any consideration and in fraud of such creditors. In *re Dauchy*, 122 Fed. 688, affirmed 130 Fed. 532, 65 C. C. A. 78.



## 172. ANY PROPOSED ORDINANCE.

The Dallas city charter (art. 8, par. 1) prescribing the method by which an ordinance shall be submitted provides: "Any proposed ordinance may be submitted to the Board of Commissioners by a petition signed by registered electors of the city, equal in number to the percentages hereinafter required," etc. In *Southwestern Tel. etc. Co. v. Dallas*, 104 Tex. 114, 134 S. W. 321, it was held that the language, "any proposed ordinance," on any subject to which the initiatory method was applicable meant that an ordinance did not mean that all ordinances on any subject of legislation mentioned in the charter might be enacted in that manner.

## 173. ANY PROVISION BY WILL.

In *U. S. v. Duncan*, 4 McLean 99, 25 Fed. Cas. No. 15,002, it was held that the Illinois statute (Rev. St. 1833, p. 624), declaring "that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow in six months renounces the provision," should be given a reasonable construction and that when the amount of property bequeathed to a wife was small, the presumption could not arise that the bequest was given in lieu of dower.

## 174. ANY PUBLIC HIGHWAY.

It has been held that the words "any public highway" as used in the statute of Illinois (Rev. St. chap. 114, p. 1927, § 68), requiring railroad crossing signals, are not limited in the signification to public roads in the country, but include streets and roads in incorporated cities and towns; and also much-used and traveled highways, whether they have been formally and legally established or not. *Mobile, etc. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850; *Cleveland, etc. R. Co. v. Baker*, 106 Ill. App. 500.

## 175. ANY PUBLIC PURPOSE.

In *Chamberlain v. Burlington*, 19 Ia. 395, involving a provision of the Burlington city charter that "whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Burlington," etc., it was held that the term "any public purpose" must be construed to mean any public purpose within the legitimate objects of the charter, that is, any public purpose necessary for the execution of the corporate powers conferred; that the purpose must relate to, and be connected with, the objects of the incorporation, and it must be a public purpose, that is, relating to and concerning the public, as contradistinguished from one or more individuals or corporations.

Ann. Cas. 1916E.—6.

## 176. ANY PUBLIC STREET.

In *Ray v. Chesapeake, etc. R. Co.* 57 W. Va. 333, 50 S. E. 413, it was held that a statute requiring crossing signals where a railroad "crosses any public street or highway" applied to a street actually used by the public as such though there was no record of its legal establishment.

## 177. ANY PUBLISHER.

In *Ward v. Long* [1906] 2 Ch. 550, in construing the English Copyright Act 1842, making provision for a situation in which a publisher may be disposed to make a bargain with an intended author for the composition by him of a work, and to pay him for that work when composed, the court said: "It is said that this does not apply to every publisher. The section begins with 'When any publisher.' How can I test it? It is true that this 'any publisher' is spoken of as projecting, conducting, and carrying on, or being the proprietor of something. Again, he is to be the projector, conductor, and to be carrying on, or be the proprietor of 'any book whatsoever,' so that really there is very nearly an exhaustive description of a publisher. So long as he conducts any business at all in the publishing line it seems to me he is a publisher within this section."

## 178. ANY PURPOSE WHATEVER.

It has been held that by the usual clause in a marine insurance policy "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part of the cargo covered by the policy, after the policy had attached to the part taken in at the loading port. *Violett v. Allnutt*, 3 Taunt. 419, 128 Eng. Rep. (Reprint) 166; *Barelay v. Sterling*, 5 M. & S. 6, 105 Eng. Rep. (Reprint) 954; *Leathly v. Hunter*, 7 Bing. 517, 9 L. J. Exch. 118, 131 Eng. Rep. (Reprint) 200.

## 179. ANY QUANTITIES.

In *State v. Turner*, 18 S. C. 103, a prosecution under the South Carolina Act of 1880, prohibiting any sale of spirituous liquors without license, in any quantity, outside of incorporated cities, towns and villages, it was held that since this act forbade the sale of spirituous liquors in any quantities without a license, it unquestionably superseded and rendered nugatory the previous act of 1783 which made it a penal offense to sell spirituous liquors without a license, in less quantities than three gallons.

## 180. ANY QUESTION OF FACT.

In construing a rule of court providing that in civil actions not more than five wit-

nesses shall be examined "as to any question of fact or issue in the case," it has been held that the phrase "any question of fact or issue in the case" referred to any single, substantial allegation of the pleadings on which an issue was raised, and not to the ultimate fact to be determined. *Hoskins v. Northern Pac. R. Co.* 39 Mont. 394, 102 Pac. 988.

#### 181. ANY RAILROAD.

The words "any railroad" in the Arkansas Act of 1868 providing that any county may subscribe to the stock of "any railroad in this state . . . : provided that the amount of such subscription . . . shall not exceed one hundred thousand dollars," have been held to be used distributively, including all railroads taken severally, and it has also been held that the limitation had reference to the subscription to "any railroad," that was, to any one railroad taken severally. *Chicot County v. Lewis*, 103 U. S. 164, 26 U. S. (L. ed.) 495.

In *Johnson v. Louisville City R. Co.* 10 Bush (Ky.) 231 the court construed an act of Kentucky (Rev. Stat. 2 Stanton p. 510) providing "that if the life of any person not in the employment of a railroad company shall be lost by reason of the carelessness or negligence of the proprietors of any railroad, or the negligence of their servants or agents, the personal representative of the person whose life is so lost may institute an action to recover damages," etc. It was held that the language of the act applied to "any railroad" whether impelled by horse or steam power, or constructed as a narrow or broad gauge, with iron or other railing, the evident intention of the legislature being to bring within the meaning of the act all corporations known as railroad companies and engaged in the transportation of either freight or passengers.

In construing the New Jersey Railroad and Canal Act (P. L. of 1887, p. 226) the court said in *Montclair v. New York*, etc. R. Co. 45 N. J. Eq. 436, 18 Atl. 242: "Throughout the act the greatest care is taken, by express language prefacing certain of the sections, to confine the provisions of those sections to corporations formed under the act, but there are other sections, which concern proper regulations applicable to any railroad, that are not so prefaced and in terms refer to 'any railroad,' indicating that the legislative intent was to enact a general law which should regulate all railroad corporations and, at the same time, authorize formation of new ones."

A Texas statute (Rev. St. 1, art. 3017) gives a right of action "when the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage

coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents; when the death of any person is caused by the negligence or carelessness of the receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents, and the liabilities of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for the damages on account of injuries, the same as if said railroad were being operated by the railroad company." In *Bammel v. Kirby*, 19 Tex. Civ. App. 198, 47 S. W. 398, the court said: "We believe that it has not been questioned in this state that street railroads themselves, when operating their roads, are liable under this statute for damages for deaths caused by the negligence of their servants. If they are generally liable, their liability is created by the inclusion of them within the words 'any railroad' used in the first clause of subdivision 1. If that language embraces street railroads, it must necessarily follow that the same language in the second clause, with reference to the receiver of 'any railroad,' must also include receivers of such railways, because it is impossible to hold that the words are used in different senses in the two relations. It might be urged that liability would attach to such a company as the owner of 'vehicles for the conveyance of passengers,' but it is hardly to be supposed that the legislature, if intending to make them liable at all, would express its intention by referring to them as the owners of vehicles, while at the same time declaring generally the liability of railroads. The words 'other vehicles' follow naturally after 'stagecoach,' and include such instruments of conveyance as are not embraced in the preceding language. They might include street cars, but we think the more natural construction of the statute is to hold that those operating street railways are included among the owners of 'any railroad.'" In *Ott v. Johnson*, 1 S. W. 534, it was held that a statute (Rev. St. art. 3017) imposing liability on the owner, charterer, or hirer of "any railroad, steamboat, stagecoach or other vehicle for the conveyance of goods or passengers" was designed to apply to common carriers, and was not intended to apply to tram railroads owned and operated by private individuals on their own premises for private purposes, as was the fact in this case.

#### 182. ANY RAILWAY.

In *Thompson Houston Elec. Co. v. Simon*, 20 Ore. 60, 25 Pac. 147, 23 Am. St. Rep. 86,

10 L.R.A. 251, it was held that the words "any railway" as used in a statute providing that a corporation organized for the construction of any railway may appropriate land for a right of way, did not include a street railway.

In *Riley v. Galveston City R. Co.* 13 Tex. Civ. App. 247, 35 S. W. 826, the court held that the intention of the legislature in passing the fellow servants act May 4, 1893, was not to include street railways within its provisions, and that the words "any railway corporation" in the first section of the act should be restricted to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained on streets and other highways in and contiguous to cities and towns for carrying persons.

#### 183. ANY REAL ESTATE.

In *Schultz v. Schultz*, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934, it was held that under a statute allowing alimony to be made a charge on "any real estate of the party liable" a homestead was not exempt.

#### 184. ANY REAL OR PERSONAL PROPERTY.

In *Callahan v. Singer Mfg. Co.* 92 S. W. 581, the court construed a Kentucky statute (Ky. St. 1903, § 4039), providing: "It shall be the duty of all persons owning any real or personal property, mineral rights or standing (branded) trees of any kind whatever, on the lands of another, or any coal, oil or gas privileges, by lease or otherwise, or any interest therein, in this state, other than in the county in which the said owners reside, or if they should reside out of the state, to list the property for taxation, personally, or by an authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners." It was held that the words "any real or personal property" therein, referred to things of like character with those named and that notes and mortgages on property within the state, but which were kept without the state, were not taxable in the county in which the mortgaged premises lay.

#### 185. ANY REASON.

In *Hall v. Hardaker*, 61 Fla. 267, 55 So. 977, it was held that the words "any reason" in a contract fixing the rights of an employee if for any reason he was not retained in a certain position meant any reason other than his failure to render efficient service.

#### 186. ANY REASONABLY PRUDENT MAN.

In *Taylor, etc. R. Co. v. Warner* (Tex.) 60 S. W. 442, wherein it appeared that an

instruction was complained of on the ground that the use of the word "any," instead of "a," in defining negligence and care and diligence, as "any reasonably prudent man," instead of "a reasonably prudent man," imposed a higher degree of care on the defendant than the law warranted, the court held that the distinction was not well made.

#### 187. ANY RECEIPT, ETC.

In *McReynolds v. People*, 230 Ill. 623, 82 N. E. 945, under an Illinois statute (Hurd's Rev. St. 1905, c. 38, § 155), forbidding the utterance of "any receipt or other written evidence of the delivery of deposit of any grain," etc., unless the goods are "still in store and the property of the person to whom or to whose agent the receipt is issued," it was held that the words "any receipt or other written evidence," etc., when given their ordinary meaning, could be applied only to an acknowledgment by one person to another of the delivery or deposit of such property with the person giving the instrument, by the person to whom it was given, and could not be applied to an instrument by which a person acknowledged that he had his own goods or property in his own warehouse, mill, store or other building.

#### 188. ANY RECORD.

In *McInerney v. U. S.* 143 Fed. 729, 74 C. C. A. 665, a prosecution for stealing a "record of citizenship," brought under a Federal statute (R. S. U. S. § 5403, 6 Fed. St. Ann. 764), the court said: "The words 'any record,' as used in the statute, are broad enough, under reasonable construction, to include any part of a record. Two lines, or one line even, from a page of a record of a thousand pages, would be a record of the facts stated in the one or two lines, and would therefore be a record within the meaning of the statutory words 'any record.' The test of criminality cannot turn upon the question whether an offender succeeds in getting two-thirds of the record, instead of the whole, nor can immunity be made to rest upon the point that the record taken and destroyed was not technically complete, or that documents or papers filed or deposited in public offices, as a part of the government archives, were not technically complete in all respects. To illustrate the scope of the words 'any record' used in the statute with reference to the public offices, the report of a commanding general as to the operations of an army, or of a naval commander, are undoubtedly, within their meaning, records of the operations in question, though they are never spread upon record books proper, and though they are not a record in any common-law sense. An unsigned memorandum in the handwriting

of such an officer, deposited or filed in the proper office, would clearly enough in the sense of the statute be so far a record of the events to which it relates as to render a person responsible who takes it from its public place and destroys it. So it would be with respect to the reports of the commandant at West Point or Annapolis in which the doings there and the status of the various persons and things are preserved; or the report of the head of the Weather Bureau. None of these things are extended as a record proper, but they contain, none the less, a record of the events which they perpetuate, and the record resides in the original in the sense of this statute."

#### 189. ANY RELIGIOUS CORPORATION.

A New York statute (Transfer Tax Law, § 2, ch. 399, Laws 1892) exempting "any property . . . devised or bequeathed . . . to any religious corporation," has been held to apply to domestic religious corporations only. *In re Balleis*, 144 N. Y. 132, 38 N. E. 1007.

#### 190. ANY RIGHT.

In *Texas Gum Co. v. Auto Sales Gum, etc.* Co. 219 Fed. 165, 135 C. C. A. 63, the court defined the phrase "any right accruing or accrued" as section 299 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1169, Fed. St. Ann. 1912 Supp. p. 252), which provides: "The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, etc. . . . but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made." The court said: "Whatever doubts there may be as to what was intended to be embraced by the saving clause of this section, which refers to 'any right accruing or accrued,' it seems to us to be apparent that, in so far as the provisions of the section evidence a purpose to reserve the right to bring suits which, under the terms of other provisions of the act, could not be brought in a court of the United States, the only right saved is to have the previously existing law applied to 'suits and proceedings for causes arising or acts done prior to' the date of the taking effect of the act. It is such suits and proceedings which the concluding clause of the section authorizes to be 'commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made.' The extent to which the right to sue, as it existed un-

der the former law, is saved, is not left to be determined by an interpretation of the ambiguous language of the clause first above quoted from, which is qualified and explained by the succeeding clauses of the section, but is clearly defined by the explicit language of the last clause, to the effect that the former law should be applicable to 'suits and proceedings for causes arising or acts done prior to' the date of the taking effect of the act. . . . This plain description of the kind of suits, the right to bring which was intended to be saved, excludes suits on causes of action which had not arisen while the former law was in force, and forbids the conclusion that the right exists when the cause of action asserted had not accrued at the time the Judicial Code went into effect, but was only in process of accruing, something else then remaining to happen before a right to sue was perfected."

In *Partridge v. Strange*, 1 Plowd. 77, 75 Eng. Rep. (Reprint) it was said: "Whether a lease for years be within the danger of the statute all the justices agreed clearly (a) that a lease or promise for years made contrary to the form of the statute, was within the danger of the statute, as well as an estate for life, in tail, or in fee. For the scope and design of the statute was to root out maintenance, and bargains, or promises of titles. . . . And the words here are not, that none shall bargain, etc., the right or title, for then there would be more colour to say, that the word 'the' contains 'all;' but the words are, 'any right or title;' in which case, if he has a fee, and promises a lease for years, this is a right or title, which is contained in the word 'any.' And under this word 'any' the lesser estate shall be contained in the greater, as the lesser part shall be in the greater. And therefore the statute of 23 H. 6. cap. 10, ordains, that no sheriff shall let to farm in any manner his county, etc., by these words it is ordained, that he shall not let to farm any (b) part of his county, for the less is contained in the greater. And as to the case put, viz., that the Statute of Mortmain ordains, that no religious person shall buy any lands or tenements, etc., which is intended of the whole estate, viz., the fee, and a lease for years is not within the danger of the same statute; . . . and also these words (any right or title) include our case, for he that makes a lease for years, claims a right and title."

#### 191. ANY ROAD.

In *Stokes v. Scott County*, 10 Ia. 166, the court construed the following provision of the Iowa Code: "The county judge may submit to the people of his county, at any regular election, or a special one called for that purpose, the question whether money may be bor-

rowed, to aid in the erection of public buildings; whether the county will construct, or aid to construct, any road or bridge which may call for an extraordinary expenditure." It was held that the words "any road" as therein used should be interpreted by a general interpretation section of the code, providing as follows: "The words, 'highway,' and 'road,' include public bridges, and may be held equivalent to the words 'county way,' 'county road,' 'common road,' and 'State road'" (*overruling* *Dubuque County v. Dubuque, etc.* R. Co. 4 G. Greene (Ia.) 1, wherein the term "any road" was construed to include a railroad.)

## 192. ANY ROAD CROSSING.

In *Nichols v. Chicago, etc.* R. Co. 125 Ia. 236, 100 N. W. 1115, in construing a statute requiring the giving of crossing signals before "any road crossing" is reached, it was held that the words "any road crossing" should be construed by the definition section of the code, providing that "the term 'road,' as used in this code, means any public highway, unless otherwise specified," and accordingly it was held that the phrase did not include private crossings.

## 193. ANY ROTATION.

In *Glynn v. Margetson* [1893] A. C. (Eng.) 351, 62 L. J. Q. B. 466, 69 L. T. N. S. 1, it appeared that a bill of lading stated that the ship was "lying in the port of Malaga, and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or any other purpose whatsoever." It was held by Lord Hershell, that the right to touch and stay at certain ports on the way between Malaga and Liverpool was given, and that if the meaning to be given to the words "in any rotation" was that the vessel might take those ports in any order she pleased in a reasonable sense, nevertheless the ports referred to must still be ports lying between Malaga and the port of destination, Liverpool, even although there might be a justification for her not touching at any particular one of those ports, or more than one of them, in the exact order in which they would come in the voyage between those two places; that it was not necessary to decide what effect should be given to those words "in any rotation;" but even giving to them the fullest possible effect they did not enlarge the number of ports at which it would be justifiable for the vessel to touch during the course of her voyage.

## 194. ANY SALARY NOW DUE.

In *McLaughlin v. Board of Education* (Ky.) 83 S. W. 568, wherein it appeared that on a contested election for clerk of the board of education, the defendant executed a bond indemnifying the board against any loss it might sustain by reason of paying the three months' salary (\$300) then due him, it was held that the words in the bond "any salary now due him as clerk" referred to this \$300, which the board had paid.

## 195. ANY SALE OF THE PROPERTY, ETC.

In *Harnickell v. Omaha Water Co.* 146 App. Div. 693, 131 N. Y. S. 489, it appeared that the last clause of a paragraph of a mortgage on the property of a water company provided: "But upon any sale of the property and franchises covered by this mortgage, the principal of all the bonds secured hereby and then outstanding shall become due, if not already due by the terms of the bonds or by declaration as herein provided." It was held that the whole instrument contemplated but one kind of a sale, and that by the foreclosure of the mortgage; and that the phrase "any sale of the property and franchises" in the paragraph quoted referred to a sale contemplated and provided for by the terms of the mortgage itself, and not a sale by the water company of its property and franchises to the city of Omaha on an election to purchase, reserved by it in its original ordinances authorizing the construction of the water works. See also *Carlsen v. Omaha Water Co.* 146 App. Div. 702, 131 N. Y. S. 495.

## 196. ANY SCHEME TO DEFRAUD.

In *U. S. v. Beach*, 71 Fed. 160, in quashing certain indictments under the Federal statute (R. S. U. S. § 5480, 5 Fed. St. Ann. 973, as amended March 2, 1889, c. 393, § 1, 25 Stat. 873, 5 Fed. St. Ann. 973) prohibiting the use of the mails for promotion of any scheme or artifice to defraud, the court said: "The statute is not limited to the particular deceptions mentioned in it, such as the 'sawdust swindle' and the 'counterfeit money fraud,' for the first clause embraces 'any scheme or artifice to defraud;' but these words must be taken to mean any scheme or artifice of the general character of those specified in the act. The general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named."

As to what constitutes a scheme to defraud within the meaning of the foregoing statute, see the note to *Blanton v. U. S. Ann. Cas.* 1914D 1242.

## 197. ANY SCHOOL.

In *Kirk v. Roberson*, 76 S. W. 183, 25 Ky. L. Rep. 633, in holding that a Kentucky act by which the county of Mason was authorized to levy an annual tax, in aid of the common schools, was not repealed by another act regulating common schools, which provided that it should not repeal any local or special laws then in force for the benefit of any school, the court said: "The words 'any school,' therefore, in the provision referred to, might be applied to several schools, and, as the special Act of April 29, 1890, was for the benefit of the schools of Mason county, it was saved from repeal by this provision."

## 198. ANY SCHOOL DISTRICT.

In *State v. Fry*, 186 Mo. 198, 85 S. W. 328, it was held that a statute permitting "any school district" to attach itself to an adjacent district was limited to county school districts and did not embrace village districts.

## 199. ANY SEA-GOING SHIP.

In *Cope v. Doherty*, 2 De. G. & J. 614, 44 Eng. Rep. (Reprint) 1127, the court construed the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, § 514) providing: "No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity, etc." It was held that the words "any sea-going ship" must be read either "any British sea-going ship" or "any British and foreign sea-going ship," according to whether the act was limited in its operation to British ships, or extended to British and foreign ships.

## 200. ANY SEAMAN.

In *U. S. v. Palmer*, 3 Wheat. 610, 4 U. S. (L. ed.) 471, it was held that the words "any seaman" as used in an act relating to mutiny (Penal Laws § 273, Fed. St. Ann. 1909 Supp. p. 481), were limited to seamen who were citizens of the United States. But in *The Kestor*, 110 Fed. 432, the same words as used in a statute forbidding advance payment of wages (Act Dec. 21, 1898, 6 Fed. St. Ann. 871) were held to be applicable to foreign as well as American seamen.

## 201. ANY SHIP.

In *The Mecca* [1895] P. (Eng.) 95, 64 L. J. P. 40, 71 L. T. N. S. 711, 43 W. R. 209, in construing the Admiralty Court Act 1861 (§ 5), providing that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied "to any ship elsewhere than in the port to which the ship belongs," unless it is shewn to the satisfaction of the court that at the time of the

institution of the cause any owner or part-owner of the ship is domiciled in England or Wales, etc., it was held that the words "any ship" applied to any ship, British, colonial or foreign.

## 202. ANY SITUATION.

The English Public Health Acts Amendment Act 1907 (§ 30) provides: "If in any situation fronting, adjoining, or abutting on any street or public footpath, any building, wall, fence . . . or any well, excavation . . . dam or bank is, for want of sufficient repair, protection, or enclosure dangerous to the persons lawfully using the street or footpath, the local authority may, by notice in writing served upon the owner, require him, within the period specified in the notice and hereinafter in this section referred to as the 'prescribed period,' to repair, remove, protect, or enclose the same so as to prevent any danger therefrom."

In *Carshalton Urban Council v. Burrage* [1911] 2 Ch. 133, 80 L. J. Ch. 500, 104 L. T. N. S. 306, 75 J. P. 250, 9 Local Gov. Rep. 1037, 27 Times L. Rep. 280, it was held that the words "in any situation" fronting, adjoining or abutting on any street or public footpath," covered the case of an ancient excavation or chalk pit of considerable size and depth, the edge or bank of which extended along the whole length of the defendant's strip of land and some feet beyond.

## 203. ANY SOLICITOR.

In the case of *In re Norris* [1902] 1 Ch. 741, W. N. 83, 35, 65, the court construed a statute providing as follows: "Any solicitor to whom, either alone or jointly with any other person a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan" and doing certain other things "all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business, and do such acts." It was held that a solicitor who had himself advanced the money was entitled to charge the negotiation fee, as, under the act, a solicitor-mortgagee was entitled to such remuneration as he would have been entitled to if the mortgage had been made to some one else who had employed him as his solicitor to transact the business.

## 204. ANY SPECIAL ORDER.

In construing an Idaho statute (Rev. Codes, subd. 3, § 4807) providing that an appeal may be taken from "any special order

made after final judgment," it has been held that the statute is broad enough to authorize an appeal from an order made by the court vacating or setting aside a judgment. *Shumake v. Shumake*, 17 Idaho 649, 107 Pac. 42.

(*overruling* in part *Opsahl v. Northern Pac. R. Co.* 78 Wash. 197, 138 Pac. 681); *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B-475, 34 S. Ct. 635, L.R.A. 1915C 1.

#### 205. ANY SPECIES OF SEINES.

Under the provisions of a Michigan statute (2 Comp. Laws § 10, § 5857), that it shall be unlawful to put into certain waters "any species of seines or continuous trap nets," it has been held that a gill net is covered by the description "any species of seines or continuous trap nets." *Hilborn v. Smith*, 148 Mich. 474, 111 N. W. 1082, 14 Detroit Leg. N. 234.

#### 206. ANY STAGE.

In *Hunter v. Boyd*, 24 Can. L. T. 61, 6 Ont. L. Rep. 639, 2 Ont. W. Rep. 1055, it was said: "It was expressly decided in *The Duke of Buccleugh* (1892) P. D. 201, that even after a case had been to the House of Lords a new plaintiff might be substituted for one wrongly so made. Their decision was based on this, that the words "at any stage" meant "as long as anything remained to be done." Now in the present case the action is just as if it was at issue and had not yet been tried. Then if the plaintiff can maintain his action against the present defendant, he is entitled to an opportunity of shewing any special damage he may have suffered and claiming compensation for same. This would be calculated to secure the giving of judgment according to the very right and justice of the case.

#### 207. ANY STAGE OF UTERO-GESTATION.

In *Edwards v. State*, 79 Neb. 251, 112 N. W. 611, a prosecution under the Nebraska Criminal Code, providing that any physician or other person who shall administer, or advise to be administered to any pregnant woman "with a vitalized embryo, or foetus, at any state of utero-gestation," any medicine, etc., it was held that the words "at any stage of utero-gestation," in the statute, meant at any stage of pregnancy.

#### 208. ANY STATUTE ENACTED.

The federal employers' liability act (Act April 22, 1908, Fed. St. Ann. 1909 Supp. p. 584) provides that an employee shall not be held to have been guilty of contributory negligence or to have assumed the risk if a violation by the employer of "any statute enacted for the safety of employees" contributed to the injury. It has been held that the phrase "any statute enacted," etc., includes federal statutes only. *Lauer v. Northern Pac. R. Co.* 83 Wash. 465, 145 Pac. 606

#### 209. ANY STOCK OF GOODS, ETC.

In *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784, the court construed a Washington statute (*Pierce's Code*, § 5346) providing: "It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, . . . a written statement, etc." It was held that the word "any" was comprehensive and so was the word "stock," and that accordingly the phrase "any stock of goods" did not relate to business of merchandising alone, but included the goods, wares and merchandise of a boarding house and restaurant proprietor.

#### 210. ANY STREET.

In *J. Burton Co.* 236 Ill. 383, 15 Ann. Cas. 965, 86 N. E. 93, the words "any street" in an ordinance forbidding the use of any space underneath the surface of any street were held to include an alley.

In *Fleetwood Streets*, 8 Pa. Co. Ct. 210, it was held that a statute relating to the opening of "any streets or alleys" authorized the opening of a single street.

#### 211. ANY SUBSEQUENT MEETING.

In *Redondo Beach v. Barkley*, 151 Cal. 176, 90 Pac. 452, the court construed a California statute (St. 1901, p. 27, c. 32, § 1), providing as follows: "Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two thirds of all its members, and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement . . . the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting of such board, by the vote of two thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters . . . the question of incurring a debt for the purpose set forth in said resolution." It was held that the phrase "any subsequent meeting of the board" meant any subsequent meeting whether it was a stated, a special or an ad-

joined meeting, and that no particular time was required to intervene.

#### 212. ANY SUBSTANCE OR SUBSTANCES.

In *Com. v. Darlington*, 9 Pa. Dist. 700, there was involved a statute (P. L. 317) defining adulteration as follows: "If any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its quality, strength or purity." It was held that the statute included the mixture of substances originally contained in the article, and that "any substance or substances" meant as well a substance which was a necessary ingredient of the article as a foreign substance. It was accordingly held that the addition of water to milk was a mixture of a substance which lowered, depreciated or injuriously affected the quality, strength and purity of the milk.

#### 213. ANY SUCH ARREARS.

In *Berlin v. Grange*, 1 U. C. Err. & App. 279, the court construed an English statute (16 Vict. c. 182, § 50) providing: "That from the time that the collector's roll had been returned to the treasurer of his (the collector's) municipality, no more money should be received on account of the arrears than due by any officer of such municipality; but the collection of such arrears should belong to the county treasurer alone, and he should receive payment of any such arrears, and of all the taxes on lands of nonresidents, an account of which was to be transmitted to him." It was held that the terms "such arrears" and "any such arrears" were large enough to include rates on personal, as well as on real property.

#### 214. ANY SUCH CASE.

The Pennsylvania Act of 1836, involved in *Com. v. Burrell*, 7 Pa. St. 34, provided as follows: "Writs of quo warranto in the manner and form hereinafter provided, may also be issued by the several courts of common pleas concurrently with the Supreme Court, in the following cases, to wit: 1. In case any person shall usurp, intrude into, or unlawfully hold or exercise, any county or township office within the respective county. 2. In case any person duly elected or appointed to any such office, shall have done, suffered, or omitted to do, any act, matter, or thing, whereby a forfeiture of his office shall by law be created. 3. In case any question shall arise concerning the exercise of any office in any corporation created by authority of law, and having the chief place of business within the respective county. And in any such case, the writ aforesaid may be issued upon the suggestion of the at-

torney-general, or his deputy, in the respective county (or of any person or persons desiring to prosecute the same)." It was held that on every principle of grammatical relation and obvious meaning, by the words "any such case," the legislature had in view the cases specified in the same section immediately preceding the final clause.

#### 215. ANY SUCH CLAIMANT.

In the case of *In re Willow Creek*, 74 Ore. 592, 144 Pac. 505, in construing a statute (Laws 1909, p. 328) regulating the adjudication of claims to water rights and providing that "any such claimant" who does not file proof of his claim is barred, it was held that the words "any such claimant" was impliedly limited by a previous provision requiring notice of the proceeding and included only claimants having notice.

#### 216. ANY SUCH CORPORATION.

In the case of *In re Prime*, 136 N. Y. 347, 32 N. E. 1091, 1 L.R.A. 713, under a New York statute (Chap. 553 of Sess. Laws 1890), declaring an exemption from taxation on personality in favor of religious corporations and providing that the succession tax law "shall not apply thereto, nor to any gifts to any such corporation by grant, bequest or otherwise," it was held that the act applied only to religious corporations created by the laws of this state, and that the words "any such corporation" therein referred to such a corporation and not to a religious corporation created by the laws of other states.

#### 217. ANY SUCH PERSON.

The metropolitan elections district law of New York (Laws of 1899, ch. 499, § 7) provides that the state superintendent, or any deputy, may call on any person to assist him in the performance of his duty, and then continues as follows: "Any such person . . . who shall fail on demand by the state superintendent or any deputy to render such aid and assistance in the performance of his duty as he shall demand, or who shall wilfully hinder or delay, or attempt to hinder or delay such superintendent or deputy in the performance of his duty, shall be guilty of a felony." In *People v. Hochstim*, 36 Misc. 562, 73 N. Y. S. 626, it was held that the phrase "any such person" plainly referred to the persons referred to in the preceding sentence, namely, any persons called on by the officer to aid him, and that the meaning of the statute therefore was that any person who had been so called on, who should refuse his assistance to, or hinder or delay, the officer, should be guilty of a felony.



## 218. ANY SUCH PETITION.

In *Valin v. Langlois*, 3 Can. Sup. Ct. 90, the court construed clause 8 of the Controverted Election Act of 1874, in reference to the filing of a counter petition, which provides as follows: "And in case any such petition (meaning the petition against the return of the sitting member) is presented, the sitting member, whose election and return is petitioned against, may, not later than fifteen days after the service of such petition against his election and return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election who was not returned, and who is not a petitioner, and on whose behalf the seat is not claimed." Henry, J., said: "What do, then, the words 'any such petition against a sitting member' mean? Clearly, to my mind, any petition against the election and return of a sitting member."

## 219. ANY SUCH PLACE.

Under an Idaho statute (the Rev. Codes, § 6825) which provides that it shall be unlawful to keep open on Sunday . . . "any theater, playhouse, dance house, racetrack, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling-alley, variety hall, or any such place of public amusement, . . ." it has been held that a "scenic railway" is not prohibited by the phrase "or any such place of public amusement," as used therein. In *re Hull*, 18 Idaho 475, 110 Pac. 256, 30 L.R.A. (N.S.) 465.

## 220. ANY SUIT.

In *Shute v. Boston*, 99 Mass. 236, in construing a Massachusetts statute (Gen. Sts. c. 43, § 79) providing that a party aggrieved by the doings of the mayor and the board of aldermen in laying out a street might apply for a jury to the superior court, . . . "within one year after the final determination of any suit wherein the legal effect of the proceedings of the board of aldermen is drawn in question," it was held that the words "any suit" therein must be held to embrace only suits wherein the party making application for a jury was a party and bound by the judgment, or proceedings like the writ of certiorari, where a judgment establishing or avoiding the act of the city in taking the land for the way was, like a judgment in rem, binding on all persons.

Under the Mississippi statute (Hutch. Code p. 641, § 1 & 2) declaring that usury may be shown on the plea of the defendant, in any suit founded on a bond or specialty, it has been held that the term "any suit" means all suits which may be prosecuted on the

contracts, bonds, and notes named in the statute. *McLaurin v. Parker*, 24 Miss. 509.

Under the provisions of the Federal statute (Act of July 20, 1892, c. 209, § 1, 27 Stat. 252, 2 Fed. St. Ann. 294) permitting any citizen of the United States to prosecute any suit or action in any court of the United States without being required to prepay fees or costs or give security therefor before or after bringing suit or action, on filing in said court a statement under oath, in writing, that, because of his poverty, he was unable to pay the costs of said suit or action which he was about to commence, etc., it has been held that, in view of the remedial character of the statute, writs of error and appeals were within the construction to be given the words "any suit or action" contained therein. *Columb v. Webster Mfg. Co.* 76 Fed. 198.

In the case of *In re Guilbert*, 16 Pa. Dist. 689, the court construed section 1 of the Bankruptcy Act (Act of July 20, 1892, 2 Supp. R. S. 41) providing: "That any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in such court a statement, under oath, in writing, that because of his poverty he is unable to pay the costs of such suit or action which he is about to commence, etc." It was held that the phrase "any such suit or action in any court of the United States" embraced objections to the discharge of a bankrupt prosecuted by the creditor in forma pauperis by virtue of the act.

In *U. S. v. New Departure Mfg. Co.* 195 Fed. 778, the court construed the phrase "any suit or proceeding" as used in the repealing section of the Federal Judicial Code (Act March 3, 1911, c. 231, § 299, Fed. St. Ann. 1912 Supp. p. 252) which provides in part as follows: "The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ or certiorari, etc." The court said: "The phrase, 'or any suit or proceeding,' contained in section 299, broadly includes an inquiry pending before a grand jury, or, indeed, any act that might be done to affect a legal right in a particular case. The word 'proceeding,' though frequently used in a restrictive sense, is, nevertheless, to be understood in its ordinary signification, unless it is qualified, as, for instance, proceedings in rem, criminal proceedings, proceedings on executions, entire proceedings, special proceedings, etc., or unless the text which contains the word denotes a different intention."

## 221. ANY SUM OF MONEY PAID.

It has been held that the words "any sum of money paid" in section 1 of the English Gaming Act of 1892, applies to money to be paid, as well as to money which had actually been paid, and therefore that there can be no recovery by a betting agent from his principal for bets on behalf of the principal, lost and not paid. *Levy v. Warburton*, 70 L. J. K. B. (Eng.) 708.

## 222. ANY SYSTEM OR CODE OF LAWS.

In *State v. De Hart*, 109 La. 570, 33 So. 605, the court construed article 31 of the Louisiana constitution of 1879, and article 33 of the constitution of 1898 prohibiting the General Assembly from adopting any system or code of laws by general reference to such system or code, and providing that in all cases there shall be recited at length the several provisions of the laws it may enact. It was held that the words "any system or code of laws," as used in the article, meant systems or codes of laws other than those of Louisiana—systems of law, codes of law in vogue in other countries and jurisdictions.

## 223. ANY TAX.

Under the Federal statute (R. S. § 3224, 3 Fed. St. Ann. 600) providing that no suit for the purpose of restraining the assessment or collection of "any tax" shall be maintained "in any court," it has been held that the word "any" as inserted in the revision made the section more comprehensive than it was originally and therefore the words "any tax" included the income tax. *Moore v. Miller*, 5 App. Cas. (D. C.) 413.

## 224. ANY TELEGRAPH COMPANY.

It has been held that the words "any telegraph company organized under the laws of any state" as used in the Act of July 24, 1866 (§ 1; 14 Stat. 221, see R. S. U. S. §§ 5263, 5264; 7 Fed. St. Ann. 205, 212), which granted certain privileges and benefits to "any telegraph company now organized or which may hereafter be organized under the laws of any state," and provided that the rights and privileges "shall not be transferred by any company acting thereunder to any other corporation, association, or person," were advisedly used, and used with a recognition that they did not include a "person" or an individual. 24 Op. Atty.-Gen. 603.

## 225. ANY TERM EXCEEDING TWO YEARS.

In *Kauffman v. Kauffman*, 28 Pa. Co. Ct. 142, affirmed 24 Pa. Super. Ct. 437, it was held that a statute making it a ground for divorce that a spouse has been convicted of an infamous crime and sentenced to imprisonment "for any term exceeding two years," it was held that the statute contemplated a

sentence on a single charge, and therefore that it was not a ground for a divorce that two sentences of eighteen months each, the second to begin on the expiration of the first, had been imposed.

## 226. ANY TERM OF YEARS.

Under a Massachusetts statute (St. 1817, c. 176, § 5, 6 and St. 1827, c. 118, § 19, 20) providing that whenever any person who shall be convicted of any crime, the punishment whereof is confinement to hard labor for "any term of years," shall have been before sentenced to a like punishment, by any court, of this or any other of the United States, he should be sentenced to solitary imprisonment not exceeding thirty days, and confinement to hard labor not exceeding seven years, in addition, etc., it has been held that the natural and legal, as well as the literal and grammatical construction of the words, "any term of years," must be a period of time not less than two years. Ex p. *Seymour*, 14 Pick. 40; Ex p. *Dick*, 14 Pick. 89. And see Ex p. *White*, 14 Pick. 90; Ex p. *Stevens*, 14 Pick. 94. And the same construction was applied to a similar statute in *People v. Burrighe*, 90 Mich. 343, 58 N. W. 319.

## 226a. ANYTHING.

A discussion of the meaning of the word "anything" will be found in the note to the case of *In re Arnold*, Ann. Cas. 1915A 23.

## 227. ANY THIRD PERSON.

In *Monmouth Second Nat. Bank v. Thuet*, 124 Ill. App. 501, the court construed the phrase "any third person" in the Illinois statute concerning chattel mortgages, which provides: "That no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property shall be valid as against the rights and interest of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor and the instrument is acknowledged and recorded as hereinafter directed, etc." It was held that such a defectively acknowledged or recorded chattel mortgage was void, as against all persons claiming in good faith the right of possession except the mortgagor and those representatives who stood in his shoes, and therefore covered a person having an interest in the property as a lienor or purchaser from the mortgagor.

## 228. ANY TIME.

## a. Generally.

In *Digges's Case*, 1 Coke Rep. 173a, 7; Eng. Rep. (Reprint) 373, wherein it appeared

that a covenant in a deed provided that it "should be lawful for the said Christopher, at any time during his life, with the consent of certain persons, by deed indented, to be enrolled in any of the Queen's courts, to revoke any of the uses or estates, and to limit new uses," it was held that the words "at any time" amounted to as much and were as equivalent, as if he had said, from time to time, as often as he should think good.

Under the English Lunatic Act (8 & 9 Vict. c. 126, s. 58) authorizing the justices to inquire into and adjudicate on the settlement of a lunatic pauper "at any time," it has been held that by the words "at any time" the legislature contemplated that no evidence might be attainable at first, and therefore gave an indefinite time for inquiry, during which the truth might be discovered. *Heston v. St. Bride*, 1 El. & Bl. 583, 72 E. C. L. 583, 118 Eng. Rep. (Reprint) 556.

In the case of *In re Newton* [1896] 2 Q. B. (Eng.) 403, 65 L. J. Q. B. 686, Vaughan Williams, J., said: "The question has to be decided entirely on the construction of rule 13, which provides that a creditor who has valued his security may 'at any time' amend his valuation and proof. Now, Lord Esher, M. R., in *Ex p. Norris*, 17 Q. B. D. (Eng.) 728, 56 L. J. Q. B. 93, 35 W. R. 19, pointed out that the words 'at any time' must be subject to some limitation, because, he says, 'it is impossible to suppose that after the trustee has paid the amount of the valuation, and has thus on behalf of the general body of the creditors become the purchaser of the security, the creditor can undo all that.' He goes on: 'Is there any other implied limitation? I think there may be another with reference to the right which by clause (c) of rule 12 is given to the creditor to require the trustee to elect whether he will redeem the security. But no such limitation applies to the present case, for the conditions which give rise to that right of election do not exist. Therefore, the only limitation which could apply is this, that after a trustee has paid the amount at which the security has been valued by the creditor, the creditor cannot reopen the transaction.' In the case before us we have to say whether such time has elapsed, or such events have happened, as to deprive the creditor of his right of amendment having regard to the limitation laid down by the court of appeal. In my judgment nothing of the sort has happened. . . . I may point out, however, that the distinction between this case and *Ex parte Norris*, *In re Sadler* (1), is a very fine one, because there the trustee wrote to the creditor's solicitors giving notice that it was his intention to redeem the policy valued in the creditor's proof, and unless the addi-

tional fact relied on here as taking away the creditor's right to amend—namely, that the notice to redeem was coupled with a tender of the amount at which the policy was valued—makes a difference, there is none. . . . I think the court of appeal meant to say, as matter of principle, that the rule ought so to be construed as to give the creditor the right to amend, unless by something which has happened the position of the trustee and the creditor has become so altered that the rights of the parties concerned may be considered to be fixed on the basis of the alteration. That would be so where the trustee had paid the creditor the amount at which his security had been valued, but it is not so here. It is perfectly clear that the legislature did not mean that the mere fact that the creditor's security had increased in value since his valuation of it should take away his right to amend, because by the very terms of rule 13 he may amend on shewing to the satisfaction of the trustee or the court that his security has increased in value since its previous valuation. . . . The creditor has a right to amend until the amount at which he has valued his security has not only been tendered to him, but accepted by him. I may add that I am very much inclined to doubt whether tender and acceptance together would be sufficient to take away the creditor's right to amend if he did not know the true facts at the time he accepted the amount tendered."

Under rule 73 of the Bankruptcy Act 1869, providing that the trustee might "at any time" apply to the court to expunge a proof after its admission, it has been held that there was no limit to the time within which a proof might be expunged. *Ex p. Harper*, 21 Ch. D. (Eng.) 537, 52 L. J. Ch. 117.

In the case of *In re Lewis F. Perry*, etc. Co. 172 Fed. 744, it was said that the words "at any time" as contained in the provision of the bankruptcy act (Act July 1, 1898, c. 541, § 59f; 1 Fed. St. Ann. 671), that creditors other than the original petitioners may "at any time" join in the petition, should not be construed in an absolutely unlimited sense but permitted a joinder in the petition at any time before its dismissal.

In *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801, in construing a timber deed, it was held that the words "at any time" as used in a clause conveying all timber, standing or fallen, "with the right to cut and remove same at any time," should not be given their literal meaning, as that would allow the defendant to await for all time to remove the timber, but they should be held to mean a reasonable time, without unnecessary delay, the same as if no time at all were specified, and that what was a reasonable time was to be determined from the facts and circumstances of each case.

Under a Delaware statute which provides that the court of chancery may appoint a receiver "at any time," that phrase has been held to be unlimited, and not to mean any time within three years, which by another section of the same act is the time the corporate existence is extended from the time of its voluntary dissolution for the purpose of winding up the corporate affairs. *Harned v. Beacon Hill Real Estate Co.* 9 Del. Ch. 232, 80 Atl. 805; *Slaughter v. Moore*, 9 Del. Ch. 350, 82 Atl. 963.

In *Raymond v. Nathan*, 142 Ind. 367, 41 N. E. 815, a statute permitting pleadings to be amended "at any time" was held to permit an amendment after verdict.

In *State v. Lewis*, 72 Kan. 234, 83 Pac. 619, a motion for a new trial was denied and at the same time the following order was made: "At which time plaintiffs were given thirty days to make and serve a case made for the supreme court of the state of Kansas, and the defendant given five days after service to suggest amendments, the case to be signed and settled on two days' notice of either party at any time thereafter." The court said: "It is impossible to say that the wholly undefined and indeterminate period of 'any time' means a fixed and ascertained time within which counsel might, by giving notice, end the uncertainty as to when the case would be settled."

In *State v. Newark*, 40 N. J. L. 92, there was involved a New Jersey statute (Rev. p. 1045, § 15) providing as follows: "The proceedings upon which such deeds, declarations of sales and conveyance are founded shall not be subject to be questioned collaterally, but may be at any time reviewed by certiorari, or other proceeding in the Supreme or circuit courts." It was held that under the liberal statutory allowance, "at any time," the time should be extended in cases to at least the period limited for an action of ejectment, otherwise the statute might, in effect, shorten the limitation of time for the recovery of possession of lands within the statutory period of twenty years.

Under a New Jersey statute (Pamph. L. p. 540) and a supplement thereto (Pamph. L. 1896 p. 132) providing that the township committee "may at any time set off and divide the said townships into districts," it has been held that the phrase "at any time" did not express a legislative purpose that the said division shall affect every portion of the township at one and the same time, but meant "from time to time." *Smith v. Howell*, 60 N. J. L. 384, 38 Atl. 180.

In *U. S. v. Sena*, 15 N. M. 187, 106 Pac. 383, under a New Mexico statute (Comp. Laws N. Mex. 1897, § 896) providing that the party appealing shall prepare and present the intended bill of exceptions to the trial

judge "at any time within twenty days before the first day of the term of the Supreme Court in which the said cause shall be docketed," it was held that the words "at any time within twenty days" were to be construed as meaning at any time in not less than twenty days, and that the statute thus required the preparation and presentation of the bill of exceptions to the trial judge at least twenty days before the first day of the term of the court to which the case was returnable.

In *Garcia v. Callender*, 53 Hun 12, 5 N. Y. S. 934, affirmed 125 N. Y. 307, 26 N. E. 283, it appeared that a covenant in a deed provided that the party of the first part shall, "at any time, have the right of pre-emption of the premises above described and conveyed to the party of the second part by the party of the first part, at and after the same price as the above mentioned consideration for this conveyance." It was held that full effect might be given to the words "at any time" by holding that at any time that the grantee desired to sell the grantor should have the pre-emptive right to purchase.

In *Raynor v. Syracuse University*, 35 Misc. 81, 71 N. Y. S. 293, it was held that a consent that a municipality might at "any time" continue a street through certain premises, contemplated a reasonable time only. See also *Erie v. Pennsylvania R. Co.* 246 Pa. St. 238, 92 Atl. 192, wherein a similar construction was given to an instrument giving a railroad company the right to appropriate "at any time" land needed for corporate purposes. So in *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161, a contract to buy food "at any time" was held to intend a reasonable time. Likewise in *Perry v. Acme Oil Co.* 44 Ind. App. 207, 88 N. E. 859, the right of an oil lessee to remove his property "at any time" was held to be limited to a reasonable time. See also *Shellais v. Shivers*, 171 Pa. St. 569, 33 Atl. 95. And in *Ellis v. Durkee*, 79 Vt. 341, 65 Atl. 94, wherein it appeared that the defendant wrote, on December 15, 1901, offering to buy stock of the intestate, saying: "Now at any time after six months, if you still think you want to quit, I will cash you up myself, and pay you six per cent, if you can't do better," and on the 23d of August 1901, the intestate wrote the defendant that he would accept his offer and turn over his stock to him at six per cent, it was held that the character of this proposition was such that it was a continuing offer,—good, if not withdrawn, for six months and for a reasonable time thereafter.

Where an express covenant in a lease provides for the purchase of the property by the lessees "at any time," it has been held that time is not of the essence of the contract unless it appears that the parties themselves

in making the contract have clearly considered time an important part thereof, or unless it necessarily follows from the nature and circumstances of the contract. *Pruot v. Roby*, 15 Wall. 471, 21 U. S. (L. ed.) 58; *Maughlin v. Perry*, 35 Md. 352; *Schroeder v. Gemeindner*, 10 Nev. 355; *D'Arras v. Keyser*, 26 Pa. St. 249.

The phrases "at any time" and "at any time hereafter" as used in covenants of attorney authorizing the entering of judgment by confession, given as security for promissory notes, have been held to authorize the entering of judgment at any time after the delivery of the note and execution of the covenant, and before the note is due. *Thomas v. Mueller*, 106 Ill. 36; *Cohen v. Burgess*, 44 Ill. App. 206; *Elkins v. Wolfe*, 44 Ill. App. 376.

#### *b. Any Time before the Trial.*

In *Fisk v. Henane*, 142 U. S. 459, 12 S. Ct. 207, 35 U. S. (L. ed.) 1080, the court discussed the meaning of the phrase "at any time before the trial thereof" in the statute (Judicial Code § 28; Fed. St. Ann. 1912 Supp. p. 144) providing that "any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The court said: "This has been construed to mean the first term at which the cause is in law triable—the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after the hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. In view of the repeated decisions of this court in exposition of the acts of 1866, 1867, and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word 'final,' in the connection in which it was used in the prior acts, and the settled construction of the act of 1875, deliberately changed the language, 'at any time before the final hearing or trial of the suit,' or 'at any time before the trial or final hearing of the cause,' to read: 'at any time before the trial thereof,' as in the act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof." In *Detroit v. Detroit City R. Co.* 54 Fed. 1, it was held that the words

"at any time before the trial" should be given their ordinary meaning, i. e. at any time before the first trial thereof; and up to the time of that first trial, whether that occur at one term or another, the right of removal under the local prejudice clause remained. And in *Parker v. Vanderbilt*, 136 Fed. 246, in construing the same phrase, the court said: "It was manifestly the intention of Congress to extend to a defendant who was a nonresident the right to have his case removed to the federal court at any time before the trial thereof, provided that it should be made to appear that he could not obtain justice in the state court on account of prejudice or local influence. To say that this clause of the act means that he should only have the right to file his petition at the term at which the case first stood for trial would defeat the very purpose for which the act in question was passed."

#### *c. Any Time Called For.*

It has been held that there is no distinction between an obligation payable "on demand" or "when demanded," and one payable "on call" or "at any time called for," and that in each case the debt is payable immediately. *Bowman v. McChesney*, 22 Grat. (Va.) 609.

#### *d. Any Time During the Life, etc.*

In *Charbonier v. Arbona*, 68 Fla. 194, 67 So. 41, it appeared that by an option a vendor agreed to convey the property by warranty deed "at any time during the life of this said option." It was held that the words "at any time," etc., fixed the date as of which the title should be warranted as at the time when the contract was to be consummated by a conveyance at a stated price.

#### *e. Any Time Hereafter.*

In *Bridges v. Potts*, 17 C. B. N. S. 314, 33 L. J. C. Pl. 338, 144 Eng. Rep. (Reprint) 127, it appeared that an article of a lease provided that the lessees were to be at liberty "at any time hereafter" to determine the agreement, or the lease hereby agreed to be granted, and to abandon the works, on giving to the lessor six months' notice in writing of their intention so to do. *Erle, C. J.*, said: "Now, had the lessees a right under that article, according to the ordinary meaning of the words, to abandon the premises and so to put an end to their liability under the agreement by a six months' notice to expire at any period, or to expire only at the end of a current year of the tenancy? I am of opinion that the true construction is, that the six months' notice may expire at any time. . . . Premises

are let for one year and so on for any number of years the parties may mutually agree: either party is at liberty to give the other a six months' notice that he will not let or take the land for the ensuing year. That is the meaning of the ordinary six months' notice to quit. Now, here, the parties never contemplated the creation of a tenancy from year to year, but a term of twenty-one years under a lease which was to contain, in addition to anything specially provided for therein, proper covenants for the effectual working of the said minerals, for the preservation, protection, and keeping in repair the said works, etc., and all other usual and customary clauses. No formal lease was ever executed, but the proposed lessees entered, and paid rent; and, under these circumstances, if this had been the case of a lease of ordinary premises, they must be supposed to have agreed to hold as tenants from year to year subject to all the terms of the agreement so far as they might be applicable to a tenancy from year to year: and such an agreement would be a perfectly legal one if it contained a stipulation for the determination of the term by a notice expiring at any time, instead of in the usual manner, at the end of a current year of the tenancy. I think such an agreement may fairly be implied from the words of the instrument here: and, this being, as I before observed, an agreement for a lease of mining property, I see nothing unreasonable in such a stipulation."

*f. Any Time or Sitting.*

In *Trumbo v. Finley*, 18 S. C. 305, the court construed a South Carolina statute (Rev. St. c. 79, § 6), providing: "Any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice-table, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum or value of fifty dollars, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof." It was held that the object of the statute was manifestly to punish excessive gaming and that the words "at any time or sitting" should be regarded as only another way of saying "at any one time or sitting."

*g. Any Time within Thirty Days.*

In *Ferris v. Chambers*, 51 Colo. 368, 117 Pac. 994, the court construed a Colorado

statute (Rev. St. 1908, § 520), providing as follows: "The lien of any chattel mortgage given to secure the payment of any indebtedness, which has been duly admitted to record as provided by law, may, at any time within thirty days after the maturity of the last installment of the indebtedness secured thereby, be extended for the unpaid portion of such indebtedness, by the mortgagee or his assignee filing with the county clerk of the county wherein the mortgage is recorded or filed, a sworn statement showing: First—The total payments that have been made on the debt, and the amount of the debt which remains unpaid. Second—That it is still due the mortgagee or his assignee, and that the said mortgagee or his assignee consents to extend the said mortgage for some period not exceeding two years. And, thereupon, the lien of the mortgage shall be extended for such designated period." It was held that the phrase "at any time within thirty days after the maturity," etc., required that the sworn statement should be filed within the thirty days next after the maturity of the indebtedness, and therefore a statement filed on the day of maturity was prematurely filed.

229. ANY TOBACCO.

In *Hale v. Morris* (1914) 1 K. B. (Eng.) 313, 83 L. J. K. B. 162, 109 L. T. N. S. 875, 78 J. P. 17, 23 Cox C. C. 666, 30 Times L. Rep. 9, the court construed the following provision of English Customs and Inland Revenue Act (50 & 51 Vict. c. 15, s. 4): "If any manufacturer of tobacco shall have in his custody or possession any tobacco . . . and such tobacco shall in either case on being tried at a temperature of two hundred and twelve degrees as denoted by Fahrenheit's thermometer be decreased in weight by more than thirty-five per centum he shall incur an excise penalty of fifty pounds and the tobacco shall be forfeited." It was held that the words "any tobacco" meant any portion of tobacco which was not so small as not to be recognized, any portion with which the public may deal, and that if it was merely one or two ounces which the manufacturer so had in his possession, it was a trivial offense and it ought to be so treated; yet it was an offense against the statute, because he had had in his custody a portion of tobacco not so small as not to be recognized, large enough to be dealt in by the public.

230. ANY TOWN.

In a prosecution under a Massachusetts statute (Stat. 1814, c. 175) forbidding any person to dig up a human body "not being authorized by the board of health, or the selectmen of any town in this Common-

wealth," it has been held that the words of the statute in regard to a license from the selectmen of any town had reference to the town within which the offense was committed. *Com. v. Loring*, 8 Pick. (Mass.) 370.

In *Reg. v. Young*, 13 Ont. 198, the court construed the Canada Temperance Act (§ 103), providing in part as follows: "If the offense was committed in any county, city, or town having a police magistrate, then," (the prosecution may be brought) "before such police magistrate, or in his absence, then before the mayor or any two justices of the peace; or, if the offense was committed in any city or town not having a police magistrate, then before the mayor thereof, or before any two justices of the peace." It was held by O'Connor, J., that the term or expression in the section, "any town having a police magistrate," meant a police magistrate for the town specifically, not a police magistrate appointed for a district, being part of a county, which district comprehended the town within its limit.

#### 231. ANY TRADE OR CALLING.

In *Raines v. Watson*, 2 W. Va. 371, it was held that a person working on Sunday labors at "any trade or calling" within the meaning of a Sunday law though the trade or calling is not that habitually followed by him.

#### 232. ANY TRUST.

In *London, etc. Banking Co. v. Goddard* [1897] 1 Ch. (Eng.) 642, 66 L. J. Ch. 261, 76 L. T. N. S. 277, 45 W. R. 310, the court construed the following provision: "Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, . . . shall vest in the persons who by virtue of the deed become and are trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right." In that case it was said: "It is said that the trustee contemplated by s. 12 is a trustee as contradistinguished from a bare trustee, and is a trustee who must have some substantial duty to perform. I do not follow that criticism on the act. The words are: 'Where a new trustee is appointed to perform any trust,' and I do not see what ground there is for introducing the words 'any substantial trust,' or to say that any trust is to be excluded from these words—words which are large enough to apply to any case. In this case it seems to me that a trustee is appointed to perform a trust; and then in the next place it seems to me reason-

able that the section should apply to a case where the mortgagor retains the legal estate and declares himself a trustee; for suppose the mortgagor had disappeared altogether, it would be essential that in some way the legal estate should be taken out of him and vested in some one on behalf of the mortgagee; and this section enables that to be done without an application to the court being necessary."

#### 233. ANY TRUSTEE OR FACTOR.

Under the Mississippi statute (Code Miss. of 1906, § 1136) providing that "if any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private person shall embezzle . . . property which shall have come or been intrusted to his care or possession by virtue of his office, place or employment, he shall be guilty of embezzlement and shall be punished," etc., it has been held that the words "any trustee or factor, carrier or bailee" do not refer to trustees, factors, carriers, and bailees of private persons alone, but that the language employed by the legislature refers to trustees, factors, carriers, or bailees of both artificial and natural persons. *State v. Journey*, 105 Miss. 516, 62 So. 354.

#### 234. ANY TWO OR MORE PERSONS.

Under Sir Samuel Romilly's act (52 Geo. 3, c. 101) providing that "any two or more persons" may present a petition for charitable relief, it was held in *Matter of Bedford Charity*, 2 Swanst. 470, 36 Eng. Rep. (Reprint) 696, that those words must be understood to mean persons having an interest, and therefore the petition of the minister of the parish was received, because the poor might be burdensome to him; but that as Jews were not entitled to the Bedford charity, the words did not include persons of the Jewish persuasion.

#### 235. ANY UNMARRIED WOMAN.

In *State v. Jehlik*, 66 Kan. 301, 71 Pac. 572, 61 L.R.A. 265, under the Kansas statute providing that "any unmarried woman," etc., might institute a bastardy proceeding, the phrase "any unmarried woman" was broad enough to include without qualification idiots and lunatics, the court nevertheless held that such an action could not be instituted by an unmarried woman who was an imbecile, as only those who understood the binding force of an oath and were capable of giving testimony were within the spirit and intent of the act.

#### 236. ANY UNPAID STOCK.

A Tennessee statute (Acts 1875, p. 237, ch. 142, sec. 5; M. & V. Code, § 1708) provides as follows: "The amount of any unpaid

stock due from a subscriber to the corporation shall be a fund for the payment of any debts due from the corporation; the transfer of stock by any subscriber does not relieve him from payment, unless his transferee has paid up all or any of the balance due on said original subscription." It has been held that "any unpaid stock" means all unpaid stock, the purpose of the statute being that all unpaid stock should be a fund for the payment of all debts of the corporation. *Shields v. Clifton Hill Land Co.* 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L.R.A. 509; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

#### 237. ANY UNSETTLED PERSON.

A statute of Massachusetts (St. Mass. 1874) provides as follows: "'Any person of the age of twenty-one years who resides in any place within this state for five years together and pays all state, county, city or town taxes duly assessed on his poll or estate for any three years within that time shall thereby gain a settlement in such place;' section 3 providing that 'no existing settlement shall be changed by any provision of this act unless the entire residence and taxation herein required accrues after its passage; but any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though the whole or a part of the same accrues before the passage of this act.'" It has been held that the words "any unsettled person" in the last clause means any person having no settlement at the time when the statute took effect. *Fitchburg v. Ashby*, 132 Mass. 495. And in a later Massachusetts case, it was held that the words "any unsettled woman" in a subsequent statute (St. 1879, c. 242, § 2) had the same meaning as was given to the words any unsettled person in *Fitchburg v. Ashby*, supra. *Worcester v. Great Barrington*, 140 Mass. 243, 5 N. E. 491.

#### 238. ANY USEFUL BEAST, FOWL OR ANIMAL.

Under a North Carolina statute (Revisal, N. C. § 3299) which enumerates as subjects protected from cruelty "any useful beast, fowl or animal," it has been held that the killing or poisoning of chickens comes within the purview of the statute. *State v. Neal*, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810; *State v. Bossee*, 145 N. C. 579, 59 S. E. 879.

#### 239. ANY VIADUCT OR VIADUCTS.

In *Chicago, etc. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L.R.A. 481, the court construed a Nebraska

statute (Sess. Laws 1887, p. 105, ch. 10, § 48), providing as follows: "The mayor and council shall have power to require any railway company or companies owning or operating any railway tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public, etc." It was held that the phrase "any viaduct or viaducts" must be held to include those then in existence as well as those to be subsequently constructed.

#### 240. ANY WAREHOUSE.

In *Liverpool v. Tomlinson*, 7 Dowl. & R. 556, 16 E. C. L. 295, wherein it appeared that the defendant covenanted in a deed "not to permit or suffer any warehouse door to be opened or put out to the front of Juggler street" it was held that the covenant applied to buildings to be erected on the land conveyed and other buildings abutting on that land, in other words to every warehouse he might have, whether before or after the conveyance, and whether in his own occupation, or in the occupation of another.

An Illinois statute (Hurd's Rev. St. 1915, c. 238, § 124) provides as follows: "Whoever fraudulently makes or utters any receipt, or other written evidence of the delivery or deposit of any grain, flour, pork, wool, salt, or other goods, wares or merchandise, upon any wharf or place of storage, or in any warehouse, mill, store or other building, etc." In *McReynolds v. People*, 230 Ill. 623, 82 N. E. 945, it was held that the words "upon any wharf or place of storage or in any warehouse, mill, store or other building" included all buildings, of every kind and character, in which goods, wares and merchandise are or may be stored, whether for hire or otherwise.

#### 241. ANY WATERS OF THE STATE.

In *State v. Hang*, 95 Ia. 413, 64 N. W. 398, 29 L.R.A. 390, it was held that a statute forbidding seining in "any of the waters of the state," but excepting the Mississippi river, included a lake which, though connected with the main body of the Mississippi river, yet formed no part of the river proper so far as navigation was concerned, or for boundary purposes.

#### 242. ANY WAY.

In *Metropolitan Acc. Assoc. v. Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359, it appeared that a provision of an appli-



cation for insurance was: "I agree that this insurance shall not be held to extend . . . to poison in any way taken, administered, absorbed or inhaled." It was not disputed that the death of the member was caused by poison accidentally taken. It was held that the words "in any way" related to the mode or manner in which the poison was taken, and not to the motive of the insured in taking it.

In *Mills v. Dunham* (1891) 1 Ch. (Eng.) 576, 60 L. J. Ch. 362, 64 L. T. N. S. 712, 39 W. R. 289, it appeared that an agreement provided that on the termination of the employment of a salesman he was "not in any way," to deal or transact business with any old customers. It was argued that this prohibited him from buying any of the necessities of life from the old customers of the plaintiffs' firm. It was held that the words meant dealing or transacting business of the same or a similar kind to that which had been carried on by the plaintiffs.

In an action for the violation of a section of an ordinance providing that "no person or persons licensed as aforesaid, shall keep open his or their saloon or place of business, nor in any way dispose of any of the liquors aforesaid upon Sunday," it has been held that the words "in any way dispose of" should not be restricted to the sale of liquor only, as selling was but one mode of disposing of property. *Jerseyville v. Becker*, 117 Ill. App. 86.

In *Hall v. Hall*, 2 McCord Eq. (S. C.) 269, wherein it appeared that a testator declared that the sum of \$3,000 should be paid his wife "annually, or in any way she may wish," for her support, it was held that she could not claim the payment of the whole annuity in advance, but that she could call for the payment of the annuity at short periods.

#### 243. ANY WILL.

The Illinois statute (Laws of 1821, p. 119, § 5) providing for the contest of "any will," has been held to include not only domestic wills probated in the state but foreign wills filed in the state for record under the provisions of section 23 of the same act. *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145.

In *Brett v. Brett*, 3 Add. Ecc. 210, the court construed an English act (25th Geo. II.), providing that "if any person shall attest the execution of any will or codicil, made after June 24, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of, or affecting, any real or personal estate, shall be thereby given, or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far as affects such person attesting the execution, be utterly void." In that case it was said: "The particular  
Ann. Cas. 1916E.—7.

phrase 'any will or codicil,' occurring in the statute, upon which the present question depends, viewed thus in connection with its whole context in the statute, is not even difficult of interpretation, in my view of it. It is not, I think, to be taken in the general sense, which the phrase of itself, 'any will or codicil,' imports—on the contrary, it is to be taken in that limited sense of 'any will or codicil of real estate,' which the context satisfies me is the true interpretation or construction of the phrase." And in *Emanuel v. Constable*, 3 Russ. 436, 38 Eng. Rep. (Reprint) 639, under a similar statute, the Master of the Rolls said: "When this statute, therefore, proceeds to enact, 'that, if any person shall attest the execution of any will or codicil, who shall have a gift by the will or codicil, such gift shall be void,' it is a reasonable construction to say, that the legislature must be understood here to be speaking of such wills or codicils as by the statute of frauds require to be attested by witnesses; and the indefinite words 'any will or codicil' may reasonably be read 'any such will or codicil,' unless it should appear from other parts of the statute, that the legislature intended to give the words 'any will or codicil' their most extended and indefinite meaning. It seems to me, upon a careful perusal of the whole statute, that, except these words, 'any will or codicil,' which are necessarily often repeated in the course of the enactments, there is not a single word in the statute, which supports the notion, that these words were meant to be used in their indefinite sense: and, on the contrary, that most clauses in the statute, and especially the second, third, eighth, ninth, and tenth sections, strongly confirm the inference, that the words 'any will or codicil,' throughout the statute, are to be read 'any such will or codicil.'"

#### 244. ANY WITNESS.

In *Hodgkin v. Atlantic*, etc. R. Co. 5 Abb. Pr. (N. S.) 73, *affirmed* 3 Daly (N. Y.) 70, it was held that a statute authorizing the examination of "any witness" who shall have refused voluntarily to make his deposition did not warrant the examination of a party.

#### 245. ANY WOMAN.

In *Tigert v. Wells*, 134 Tenn. 144, 183 S. W. 737, it was held that a statute regulating inheritance from "any woman" who should die leaving an illegitimate child applied to negro women who became mothers while they were slaves.

In *Woodbury v. Freeland*, 16 Gray (Mass.) 105, a statute giving separate property rights to "any woman who may hereafter be married in this commonwealth," was held to ex-

tend to a woman resident in the commonwealth but married during a temporary absence therefrom.

In *Allen v. Allen*, 43 Conn. 419, there was involved the Connecticut statute with respect to divorce (Gen. Stat. tit. 14, ch. 3), providing as follows: "The Superior Court . . . may grant divorces to any man or woman for the following offenses committed by the other party. . . . The Superior Court may assign to any woman so divorced, part of the estate of her late husband, not exceeding one-third." The court said: "Although the expression 'any woman so divorced,' taken by itself, seems to be broad and all-inclusive, yet the act read as a whole furnishes good foundation for the belief that only those husbands who are divorced for their own violations of the marriage contract are to be punished by such diminution of their estates. . . . We therefore advise the Superior Court that it has not the power to assign to a woman divorced for her own fault or guilt any part of the estate of her late husband."

In *Marlborough v. Marlborough* (1901) 1 Ch. (Eng.) 165, 70 L. J. Ch. 244, 83 L. T. N. S. 578, 49 W. R. 275, 17 Times L. Rep. 137, it appeared that by a deed or resettlement of freehold estates, the "Marquis was thereby empowered, either before or after his marriage with any woman, by deed or will 'to appoint to any woman whom he may so marry for her life or for any less period' any yearly rent-charge or rent-charges by way of jointure not exceeding in the whole, etc." It was held that the power included a second wife, though the first wife, having obtained a divorce, was living at the date of the second marriage.

#### 246. ANY WORK OR ACT.

In *Edmundson v. Render* [1905] 2 Ch. (Eng.) 320, it appeared that the defendant had covenanted that he would not "at any time hereafter, either on his own behalf or as a clerk or partner or otherwise on behalf of any person or persons who practise or who may practise or carry on the business or profession of a solicitor, do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross without the written permission" of the plaintiff. It was held that the words "any work or act" covered the writing and posting to persons at addresses within the prohibited district, of letters demanding an apology for an alleged slander with cost and expenses, or demanding payment of a debt.

#### 247. ANY WORKS OF INTERNAL IMPROVEMENT.

In *State v. Kelly*, 71 Kan. 811, 6 Ann. Cas. 298, 81 Pac. 450, 70 L.R.A. 450, wherein it

appeared that a bill provided for an appropriation for the construction, operation and maintenance of an oil-refinery, it was held that as an oil-refinery was a "work of internal improvement," within the provisions of section 8, article 11 of the Kansas constitution providing that "the state shall never be a party in carrying on any works of internal improvements," the bill was void.

#### 248. ANY WRAPPER.

In *Williams v. Baker* [1911] 1 K. B. (Eng.) 566, 80 L. J. K. B. 545, 104 L. T. N. S. 178, 75 J. P. 89, 9 Local Gov. Rep. 178, the court discussed the English Butter and Margarine Act, 1907 (§ 8) limiting the printed matter which may appear "in any wrapper." The court said: "In my opinion the words 'in any wrapper' were advisedly used and were intended to be construed with the words 'on any package;' for, as appears from the two cases decided in 1906 which have been cited to us, a practice had grown up of delivering margarine to a purchaser enclosed in a paper wrapper on the outside of which was printed the word 'margarine' only, so as to comply with s. 6 of the Act of 1899, and then inside the wrapper was inserted a slip or label on which other matter was printed. It was this practice which the legislature intended to deal with when it used the words 'in any wrapper' in s. 8 of the Act of 1907. The Acts of 1907 and 1899 are to be read together, Section 6 of the Act of 1899, which is not repealed, deals with that which may be printed on the wrapper, and s. 8 of the Act of 1907 provides that it shall be an offense if 'in any wrapper' the margarine is described by any name other than 'margarine' or a name combining 'margarine' with a fancy or other descriptive name approved by the Board of Agriculture."

#### 249. ANY WRIT.

In *Kennedy v. Agricultural Ins. Co.* 165 Pa. St. 179, 30 Atl. 724, the court construed a Pennsylvania statute (Act of April 4, 1873, as amended by the Act of June 20, 1883), providing as follows: "No insurance company, not of this state, nor its agents, shall do business in this state, until it has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on . . . the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within the state. . . . The term process shall be construed to mean and include any and every writ, rule, order, notice or decree, including any process of execution that may issue in or upon any action, suit

or legal proceeding to which said company may be a party, etc." It was held that "any and every writ" clearly comprehended an attachment execution.

COLE

v.

SLOSS-SHEFFIELD STEEL AND IRON COMPANY.

Alabama Supreme Court—February 12, 1914.

186 Ala. 192; 65 So. 177.

Master and Servant — Injury to Minor Illegally Employed — Complaint Sufficient.

A complaint for damages for the death of a boy which alleged that deceased was under 14 years of age, that he was struck by one of defendant's tram cars while he was in the discharge of his duties, and that his death was proximately caused by reason of defendant's employing him in violation of Code 1907, § 1035, which prohibits the employment of boys under 14 years of age in mines, states a cause of action under that section of the Code.

[See Ann. Cas. 1912B 803.]

Legal Meaning of "Any."

Acts 1896-97, p. 1099, was entitled "An act to regulate the mining of coal in Alabama," and section 27 of that act provided that no boy under the age of 12 years should be employed to work or labor in or about the mines in the state. Code 1907, § 1035, which revised that act, provided that no boy under 14 should be employed in *any* mine in the state. Held, that the substitution in the Code section of the word "any," which in its ordinary significance means "all," "every," for the word "the" in the statute of 1897 indicated a legislative intent that the Code section should not be limited to coal mines as was the original statute by reason of its title.

[See note at end of this case.]

Statutes — Revision — Effect of Verbal Changes.

In the revisions of the statutes, the alteration of phraseology, or the omission or addition of words, will not necessarily change the operation or construction of the former statutes, unless the legislative intent to make such change is clear.

Construction of Statute — Effect of Unrelated Statutes.

The construction of Code 1907, § 1035, prohibiting the employment of women and children in mines, as applicable to all mines, and not limited to coal mines, does not govern, and is not governed by, the construction of the other sections of the same chapter of

the Code, since those sections are not dependent upon each other, or so closely related that each must be given the same construction.

Master and Servant — Contributory Negligence of Infant — Plea Insufficient.

In an action for damages for the death of a boy under the age of 14 years, a plea which relies upon the boy's contributory negligence in riding upon a tram car in violation of his employer's rules, but which does not aver that he had sufficient capacity to appreciate the danger or risk, is defective.

Violation of Rule — Manner of Pleading.

A plea of contributory negligence which alleged that there was a rule of the company which prohibited employees performing the duties plaintiff's intestate was employed to perform, from riding on its tram cars, is not objectionable as failing to allege that plaintiff's intestate was required to conform to such rule.

[See generally Ann. Cas. 1912A 84.]

Appeal from Bessemer City Court: GWIN, Judge.

Action for damages. Joe Cole administrator, plaintiff, and Sloss-Sheffield Steel and Iron Company, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[193] Count 5 is as follows: "Plaintiff, suing as the administrator of Willie Cole, deceased, who was a minor under the age of 14 years, claims of defendant the sum of \$1,999 as damages for that, heretofore on, to wit, the 17th day of June, 1911, while plaintiff's intestate was in the service or employment of defendant at its ore mines near Bessemer, Jefferson county, Ala., and while in the discharge of his duties, in the course and line of his employment as such, and after he had been employed to work in said mine by defendant, he was struck by one of defendant's tram cars, and thereby so injured that he died from the effect thereof, and plaintiff avers that said injuries and death of intestate were proximately caused by reason of defendant employing the said intestate to work in said mine in violation of the laws of the state of Alabama as embodied in section 1035, Code 1907 of the state, which prohibits the employment of boys under 14 years of age to work in or about mines in this state."

The following is plea 2: "(2) Defendant says that plaintiff's intestate himself was guilty of negligence which proximately contributed to his alleged injuries and death, which negligence consisted in this: At the time said intestate suffered said injuries, there was in force and effect a rule of defendant prohibiting employees performing the

duties that said intestate was employed to perform from riding on cars operated on the track on which the said car or tram that struck said intestate was being run when it struck him, and of which rule the said intestate well knew, and, immediately before said intestate received said injury, he was riding on one of the cars being operated on said track, in violation of said rule."

Demurrer B to the second plea is as follows: "Said plea fails to aver or show that plaintiff's intestate was [194] a boy of mature judgment and discretion, and therefore appreciated the risk or danger of riding on one of defendant's tram cars."

C: "It fails to aver that plaintiff's intestate or other employee in his position were required to conform to the rule prohibiting employees from riding on the cars as operated in said mine."

*Estes, Jones & Welch* for appellant.

*Tilman, Bradley & Morrow* for appellee.

MCCLELLAN, J.—Count 5 of the amended complaint was, under the authority of *De Soto Coal Mining, etc. Co. v. Hill*, 179 Ala. 186, 60 So. 583, not subject to demurrer, [195] provided the provisions of Code 1907, § 1035, apply to *ore* mines—to mines other than *coal* mines. The report of the appeal will contain the count.

Code 1907, § 1035, is as follows: "1035 (2933). Women and boys under fourteen not to work in mines.—No woman, or boy under the age of fourteen years, shall be employed to work or labor in or about any mine in this state."

With the exceptions that *or*, before *boy*, was substituted for *nor* and *fourteen* was substituted for *twelve*, Code 1907, § 1035, is identical with section 2933 of the Code of 1896.

On February 16, 1897 (*Acts 1896-97*, pp. 1099-1112), an act entitled "An act to regulate the mining of *coal* in Alabama" was approved and became a law. [Italics supplied.] Section 27 of that act provided "that no woman shall be employed to work or labor in or about *the mines* in this state, or any boy under the age of twelve years be so employed." In consequence of the title of the act wherein the subject of the act was restricted to *coal* mines, it is manifest that the provisions of (its) section 27 were only applicable to *coal* mines in this state. From this established premise, it is insisted that the codifications of 1896 (section 2933) and 1907 (section 1035) did not intend and did not effect such change in the legislative purpose as to extend the prohibitive provisions of the law to *mines* other than *coal* mines in this state. The question, therefore, is: Did the codifications mentioned expand the effect of the inhibition under consideration to com-

prehend *all, every* mine, whether coal, ore, or other kind of mine?

As appears, the inquiry presented requires that due account should be taken, as is done, of the rule of statutory construction thus set down in *Landford v. Dunklin*, 71 Ala. 609, and reiterated in *Lindsay v. United States Savings*, [196] etc. Co. 127 Ala. 366, 371, 28 So. 717, 718, 51 L.R.A. 393, 394, among other of our cases: "No rule of statutory construction rests upon better reasoning than that in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes. The language of the statute as revised or the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation."

In our recent case of *De Soto Coal Mining, etc. Co. v. Hill*, supra, Justice, now Chief Justice, Anderson writing for the majority, forming the court's pronouncement, it was said of section 1035: "This statute was intended to protect women and children of a tender age from incurring the hazard and danger incident to the operation of mines by imperatively preventing the employment of same, . . . and it should be liberally construed so as to effectuate the humane intent of the Legislature." And this from a New York case is there approvingly quoted: "This is a statute which makes an epoch in the progress of humanity, and the courts should not get in its way or whittle it down, as courts have done in the past."

Aside from the general recasting, in the Code of 1896, of the features of the section (27) whereby the *objects* of its solicitude were described, the chief changes in phraseology, from the act to that employed in the codifications, was the substitution of the word *any* for the word *the* just preceding the word *mines* and the substitution of *mine* for *mines* as that noun was used in the act. In order to be justified in the affirmation that such changes manifested a legislative intent to bring under these provisions *all* mines, it must appear that such purpose was clear and evident.

[197] In the brief for appellee it is pertinently said: "It is immaterial, of course, that the mischief to be remedied is the same in ore mines as in coal mines, since the expressed intention of the Legislature is the criterion in determining the purview of the acts." In the brief for the appellant this is asserted: "The necessity for such a law with reference to ore mines exists just the same as with reference to coal mines. . . . These deliberate observations of counsel evince the conclusion that there was or is no particular reason based on differences in the

nature of coal and ore mining—operations that might qualify the natural inducement to apply the humane legislative purpose to the protection of women and children (within the age limit stipulated) in mines other than *coal mines*.

As employed in sections 2933 and 1035, *any* must be given its usual, ordinary signification in such circumstances. It means *all, every*, as there used. The very fact that the expression *any mine* was substituted by the codifications for the expression *the mines*, when the latter expression in the act could only refer to *coal mines*, manifests, without any fair basis for doubt, a legislative intent to subject to the inhibition of the statute *every* mine in Alabama. It is not conceivable that the change of phraseology thus made could have been adopted without that purpose in view.

*Any* has been the object of much judicial consideration. In 3 Cyc. L. P. p. 1463 et seq., exhaustive treatment has been accorded the word. Upon occasions it has been accorded a narrower meaning and effect than that we have stated it must here receive. Our own court has several times interpreted it as importing, in the concrete cases under view, that wide signification—that it meant *all, every*, in the relation found. These are our cases referred to: Taylor v. Hutchinson, 145 Ala. 202, [198] 205, 40 So. 108; Dallas County v. Timberlake, 54 Ala. 403, 412; Gandy v. State, 82 Ala. 62, 2 So. 465; Wilson v. Taylor, 89 Ala. 368, 370, 8 So. 149; Millard v. Hall, 24 Ala. 209, 229, 232. In Gandy's Case, *supra*, it was affirmed that the expression *any election* comprehended in *ipsis verbis* *all* elections, special or general, of the character defined in the statute there considered. To the like direct and comprehensive effect was the statement of the court in interpreting the words *any contract* in question in Wilson v. Taylor, *supra*.

It is urged in brief that, because the codifications were of the act of 1897, which by its title and context was confined to *coal mines*, the irrefragable implication is that *coal mines* only were intended to be subjected to the inhibition of Code 1896, § 2933, and code 1907, § 1035.

This contention is, of course, worthy of presentation—an argument that should be and has been considered and carefully weighed—but our conclusion is that, though according a fair influence thereto, it is not sufficient to overcome the clear effect of the very comprehensive and unequivocal term *any mine* as employed in the codifications. To conclude to the contrary would require the court to ascribe to the word *any* no more comprehensive significance than to the word *the*—an interpretation that cannot be justified or approved.

It is insisted that the construction of section 1025 we have adopted should logically lead to the application to *all* mines in Alabama of numerous other provisions of the many sections embraced in the Code chapter on Mines and Mining. Our conclusion is to the contrary. Each section of the chapter will be construed and applied as concrete cases are presented to invoke this court's pronouncement. The prohibition of section 1035, as is manifest, is not so related to any other provision [199] or provisions of our mining statutes as to justify the premise of the insistence last stated. If there are provisions in the chapter mentioned that are restricted to *coal mines* for their operation, as doubtless there are, they neither depend upon section 1035 nor reflect upon the stated application of section 1035. That section (1035) is independent of any other in our positive law on the subject. This court, therefore, erred in sustaining the demurrer to count 5 of the amended complaint.

Plea 2 was faulty, as pointed out in ground B of the demurrer thereto, in the omission to aver that plaintiff's intestate, who was alleged in the complaint to be under 14 years of age, was a boy of sufficient *capacity* to appreciate the danger or risk to be incurred in not observing the rule averred in the plea to be known to him.—Pratt Coal, etc. Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751. The plea does aver that the rule described was in force and effect at the time of the injury, thus taking the point out of grounds C and D of the demurrer.

Pleas 3, 4, 5, 6, and 7 were affected with the same infirmity pointed out as affecting plea 2.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

Anderson, C. J., and DeGraffenried and Gardner, JJ., concur. Mayfield, Sayre, and Somerville, JJ., concur in the ruling on the pleas, but dissent from the ruling construing Code, § 1035.

Rehearing denied May 14, 1914.

# NOTE.

It is held in the reported case, that the word "*any*" is to be given its usual, ordinary signification, and so, in an action under a statute forbidding women and boys under fourteen to work "in or about any mine in this state," the court holds that "*any*" as used therein means *all* or *every*, and manifests a legislative intent to subject to the inhibition of the statute *every* mine in Alabama. For a general discussion of the legal meaning of "*any*," see the note to State v. Kansas City, reported *ante*, this volume, at page 1.

**BARBER**

v.

**MORGAN ET AL.**

Connecticut Supreme Court of Errors—July  
16, 1915.

89 Conn. 583; 94 Atl. 984.

**Joint Stock Companies — Definition —  
Distinguished from Corporation.**

A joint-stock corporation is one organized under a general statute authorizing the creation of such corporations and providing the procedure for creating it, and is distinguished from a corporation created by special resolution or act of the legislature, which resolution or act is the charter of the corporation, when accepted, and the corporation organized thereunder, and the corporation is a chartered corporation, as distinguished from a joint-stock corporation.

[See 7 R. C. L. tit. *Corporations*, p. 28.]

**Legal Meaning of "Any."**

Gen. St. 1887, § 1954, providing that "every such corporation" may increase or redeem its capital and the number and par value of its shares, provided that within thirty days after reduction a certificate signed by a majority of the directors shall be published, and provided that, in case of the reduction of the capital stock of "any corporation" by any mode which shall render it insolvent, the stockholders, assenting thereto, shall be liable for the debts of the corporation, included in chapter 120, entitled "Joint-Stock Corporations," and originally passed by Pub. Acts 1880, c. 97, dealing with joint-stock corporations, section 11 of which is the same as section 1954, applies only to joint-stock corporations, and the quoted words "any corporation" must be limited to joint-stock corporations.

[See note at end of this case.]

**Statutes — Construction — Restriction  
of General Words.**

General words and phrases in a statute may be restricted in meaning to adapt their meaning to the subject-matter in reference to which they are used.

**Corporations — Transfer of Assets —  
Rights of Creditors.**

Where all the assets of a corporation are turned over to another corporation without provision for payment of the debts of the former corporation, the creditors thereof may follow the assets into the hands of the latter corporation and charge its stockholders, who have received the stock in consideration of the transfer of their stock in the former corporation, as trustees for the creditors of the former corporation, because its assets are in equity a fund for the payment of debts.

[See generally Ann. Cas. 1913E 1044.]

**Appeal — Issue as to Occurrence at  
Trial — Procedure.**

Where an issue of fact is raised as to what occurred on the trial, the proper procedure

is to ask for a correction of the appeal in the Supreme Court of Errors, under Gen. St. 1902, § 801, and what the facts were must be proved on an issue of fact raised, as provided in the statute.

**Theory of Case on Trial — Review.**

Where an action by a creditor of a corporation against a stockholder was founded originally on the liability imposed by Gen. St. 1887, § 1954, and the court tried the case on that theory, but during the trial plaintiff asked for an amendment seeking a recovery on the theory that the property which the stockholder received might be charged with an equitable lien for the payment of plaintiff's debt, but the amendment was withdrawn on it appearing that a postponement of the case would result by reason of its allowance, and plaintiff's counsel remarked that the trial could proceed to determine statutory liability, the court can not correct the findings of the superior court that the case was tried on the theory of statutory liability.

Appeal from Superior Court, New Haven county: WILLIAMS, Judge.

Action to enforce stockholder's liability. Clarence L. Barber, plaintiff, and John P. Morgan et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Walter J. Walsh* and *Clarence L. Barber* for appellant.

*Henry Stoddard* and *Arthur M. Marsh* for appellees.

[584] THAYER, J.—The International Company of Mexico, a corporation incorporated by Special Act of the legislature of this State and located in Hartford, but carrying on its business and having large and varied interests in the Republic of Mexico, became financially embarrassed and unable to continue its operations there, whereupon an English company, under the name of the Mexican Land and Colonization Company, was organized under the laws of Great Britain, and all the property, assets and good will of the first-named company, which we will call the American Company, were conveyed and turned over to the last-named company, hereafter called the English Company. The capital stock of the American Company was \$20,000,000 [585] fully paid up, divided into two hundred thousand shares of \$100 each. The capital stock of the English Company was £2,000,000 (\$10,000,000), divided into two hundred thousand shares of £10 (\$50) each. The consideration of the sale and transfer from the former to the latter company was the undertaking by the English Company to pay all moneys due and to become due in respect of certain debentures of the American Company, amounting to \$5,000,000.

000, and to pay, fulfil and satisfy all the obligations, debts, engagements and liabilities properly incurred by or existing against the American Company, and the allotment by it to the several persons who, at the date of the agreement between the companies, were stockholders in the American Company of shares in the English Company at the rate of one share of that company of the nominal value of £10 for each share of the nominal value of \$100 held by such persons, respectively, in the American Company, which last-named shares were transferred to the English Company.

At the date of this transfer and conveyance, May, 1889, J. Pierpont Morgan, the original defendant in this action, owned a large number of shares in the American Company, and assented to, and by proxy voted in favor of, such transfer. From 1880 until 1901 there was in this State a statute reading as follows: "Every such corporation may increase or reduce its capital and the number and par value of the shares therein, at any meeting of the stockholders specially warned for that purpose, by a vote of stockholders holding at least two-thirds of the whole stock; and certificates of the increase or reduction of said capital or the number or value of said shares shall be made, filed, and recorded as provided in this chapter for original stock, provided, that within thirty days after such reduction a certificate thereof, signed by a majority [586] of the directors, shall be published two weeks successively in a newspaper published in the county where such corporation is located; and provided further, that in case of the reduction of the capital stock of any corporation by any mode which shall render such corporation insolvent, the stockholders assenting thereto shall be jointly and severally liable for all debts of the corporation existing at the time of such reduction, after judgment obtained against the latter and a return of execution unsatisfied." General Statutes (Rev. 1888) § 1954.

In June, 1889, one Bates brought suit in the State of California against the American Company, claiming damages for the breach of a contract made with him in 1887, and for bad faith on the part of the company in failing and refusing to carry out the contract, and in November, 1892, recovered judgment in that action for the sum of \$120,600 and costs. Of this judgment, \$26,350, with \$9,673.37 interest to the date of judgment, was for breach of contract, and \$84,576.63 was for bad faith of the company. The plaintiff, to whom Bates assigned this judgment and the causes of action upon which it is founded, brought suit upon that judgment in 1900 in this State against the American Company, and on May 13th 1910, obtained a judgment

against it for \$243,762 and costs, upon which execution issued and was returned wholly unsatisfied.

It is claimed by the plaintiff that the transfer and conveyance of all its assets by the American Company, as above recited, was a reduction of its capital and rendered it insolvent, and that the stockholder Morgan, having assented to and voted for that transfer and conveyance, became individually liable under the statute above mentioned for the debts of the corporation existing at the time of the transfer which are embodied in the plaintiff's judgment; execution thereon [587] having been returned wholly unsatisfied. The Superior Court held that the American Company was not a joint-stock corporation, that the statute referred to did not apply to it or to the alleged acts of it and its stockholders, and that the plaintiff could not recover under the provisions of the statute. The correctness of these rulings is questioned by the appeal.

The complaint alleges that the American Company was incorporated as a joint-stock company under the laws of this State by a resolution approved March 9th, 1885, and amended by another resolution approved March 4th, 1887. This allegation itself shows that the corporation is not what is known in this State and is spoken of in our statutes as a joint-stock corporation, if it be true, as alleged, that it was incorporated by a legislative resolution, and this is found to be true by the court. As is well understood, a joint-stock corporation is one organized by any three persons, who may choose to form a corporation, under a general statute of this State authorizing the creation of such corporations and providing the procedure for creating them. Such corporations are distinguished from corporations created by special Resolutions or Acts of the General Assembly. Such Acts or Resolutions creating certain persons a corporation are spoken of as charters of the corporation, when accepted and the corporation is organized thereunder, and the corporation is called a chartered corporation, as distinguished from the joint-stock corporation, which is organized under the general law. If, therefore, the statute upon which the plaintiff relies relates only to joint-stock corporations, there can be no recovery upon that statute in this action.

That statute, already quoted (§ 1954 of the Revised Statutes of 1888), is a part of chapter 120 of that Revision, which is entitled "Joint Stock Corporations." Only joint-stock corporations are referred to in that [588] chapter in the ten sections which precede § 1954, and the words "every such corporation," with which that section begins, unquestionably refer to joint-stock corporations and to none other. But the second *pro-*

viso in that section, in providing for the liability of the stockholder who assents to a reduction of the capital stock producing insolvency of the corporation, reads: "that in case of the reduction of the capital stock of any corporation," etc.; and the plaintiff says that language is broad enough to include specially chartered as well as joint-stock corporations. This would be true if the quoted words stood alone. But we think it is a case for the application of the rule that general words and phrases may be restricted in meaning to adapt their meaning to the subject-matter in reference to which they are used. Chapter 120 of the Revised Statutes of 1888 was originally passed as chapter 97 of the Public Acts of 1880, and § 11 of that Act is the same as § 1954 of the Revision. The legislature, in that Act, were dealing with the subject of joint-stock corporations, and in § 11 of that Act, and § 1954 of the Revision, they were dealing with the subject of the increase and reduction of the capital of such corporations. Having provided that every such corporation might increase or reduce its capital stock, and the manner in which it might be done, but without limiting the extent to which the capital might be reduced, it provided, in the same sentence, that if the stock of any corporation was so reduced as to render it insolvent, the stockholders who assented to such reduction should be jointly and severally liable for all debts of the corporation existing at the time of the reduction. What corporations did the legislature have in mind when they used the words "any corporation?" Naturally joint-stock corporations with which they were dealing, and for the reduction of whose stock [589] provision was made in the same section and sentence in which these words are found. Clearly by "any corporation" was intended any such corporation, and the general words must be limited to that meaning. It cannot be presumed that they intended to make a provision applying to chartered corporations (many of whose charters make provision for the reduction of their stock and provide for the liability of officers or stockholders, if reductions prejudicial to creditors are made) in a section and sentence of a joint-stock corporation Act which provides for the reduction of capital in such corporations only. The Superior Court was right, therefore, in its conclusion that the plaintiff was not entitled to recover under the provisions of this statute.

If the assets of the American Company were withdrawn and turned over to the English Company without proper provision being made for payment of the debts due creditors, the creditors, by a proper proceeding, might follow the corporate property into the hands of the English Company, and also charge

the stockholders of the latter company (they having received its stock in consideration of the transfer of their stock in the American Company) as trustees for the creditors of the latter company, its assets being in equity a fund for the payment of its debts.

The plaintiff claims that his complaint contains allegations sufficient to charge the defendant, as trustee for the plaintiff, with the assets of the American Company, and that the evidence which was introduced upon the trial was sufficient to warrant a judgment in his favor upon this theory, and that he made those claims in the court below. It is apparent from the record that the theory upon which both the original and amended complaint were drawn was that the defendant was liable for the debts of the company under the statute which has been referred to, and [590] this is frankly admitted. The Superior Court has found that the case was tried upon this theory, and that the plaintiff claimed only a personal general judgment for the amount of his claimed debt under the statute, and made no claim for judgment upon the ground that the shares of the English Company received by Morgan could be charged as an asset of the American Company with the payment of his debt. The plaintiff is thus at variance with the trial judge as to what occurred upon the trial. He asked to have the finding corrected to accord with his present claim as to what there occurred, upon the ground that the finding in this respect is not supported by the evidence, and has embodied, in his motion to correct, a portion of his argument upon that trial, and also certain remarks of his counsel when moving an amendment to the complaint. When, as here, an issue of fact is raised as to what occurred upon the trial, the proper procedure is to ask for a correction of the appeal in this court under § 801 of the General Statutes. *State v. Hunter*, 73 Conn. 435, 445, 47 Atl. 665; *Bernier v. Woodstock Agricultural Soc.* 88 Conn. 558, 561, 92 Atl. 160. If the portion of the finding here complained of is wrong, the plaintiff is harmed, not because it is found against the evidence, but because it misstates the facts as to what occurred upon the trial. What the facts were in this respect must be proved upon an issue of fact raised as provided in General Statutes, § 801.

If we might, upon this appeal as it now stands, correct the finding, we should not, from the remarks of counsel upon which the plaintiff relies in his motion and exceptions, find that the court was wrong in the statement of fact which is complained of. It appears that the plaintiff and his counsel during the trial, after the defendants had introduced a large part of their evidence, conceived that they might, upon the [591] defendants'



evidence, claim that the stock of the English Company which Morgan received at the time of the transfer was valuable, and that it might be charged with an equitable lien in his hands as the property of the American Company for the payment of the plaintiff's debt. The confessed purpose in asking for the amendment referred to was to adapt the complaint to this evidence for the purpose of asking a judgment upon this theory. The amendment was allowed, but when it appeared that a postponement of the case would result, the amendment was withdrawn by the plaintiff's counsel, with the remark that, rather than have a postponement, they preferred to have the trial proceed and to try out at least the question of the defendants' statutory liability. In the portion of the plaintiff's argument which is made a part of the motion to correct the finding, he states his opinion as to the different theories of the case to which the complaint is applicable, but concludes by saying that the real question before the court was whether the defendants were liable under the statute, and that he would confine his argument to that. We find nothing in these remarks which would warrant us in ordering a correction of that portion of the finding which states that the question of the defendants' statutory liability was the only one which was tried. The other requests for changes it is unnecessary to consider, as, if made, they would not affect the question of the defendants' liability under the statute.

As the decision thus reached is decisive of the case, we do not decide the question whether the plaintiff's action is barred by the statute of limitations of the State of New York.

There is no error.

In this opinion the other judges concurred.

#### NOTE.

The reported case construes a statute which provides that "every such [joint-stock] corporation may increase or reduce its capital and the number and par value of the shares therein, at any meeting of the stockholders specially warned for that purpose, etc. . . . and provided further, that in case of the reduction of the capital stock of any corporation by any mode which shall render such corporation insolvent, the stockholders assenting thereto shall be jointly and severally liable for all debts of the corporation existing at the time of such reduction, etc." It is held that the words "any corporation" therein do not extend the statute beyond the joint-stock corporations dealt with in the earlier provisions thereof. An

exhaustive discussion of the cases construing the word "any" as used in various phrases, will be found in the note to *State v. Kansas City*, reported ante, this volume, at page 1.

#### STATE

v.

#### SANDERS.

Louisiana Supreme Court—March 22, 1915.

136 La. 1059; 63 So. 125.

#### Abduction — Indictment Sufficient.

An indictment, drawn under section 1 of Act No. 134 of 1890, p. 175, which statute provides for the punishment of any person who entices, abducts, induces, decoys, hires, engages, employs, or takes any woman of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution, or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere, and which charges a person with having taken such woman from her father's house "unto the public highway for the purpose of having unlawful sexual intercourse with her, and did unlawfully have sexual intercourse with her," is sufficient.

#### Words and Phrases — "Or Elsewhere" Defined.

It is clearly manifest that the general words "or elsewhere," contained in the statute, were used for the purpose of including other places than are suggested by the specific words "at a house of ill fame or at any other place of like character."

#### Legal Meaning of "Any."

The words "any unlawful sexual intercourse" means unlawful sexual intercourse "to any extent; in any degree; at all;" and they cover a single act of sexual intercourse.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia: SIMON, Judge.

Criminal action. Henry Sanders indicted for abduction. Indictment quashed. State appeals. The facts are stated in the opinion. REVERSED.

R. G. Pleasant, Anthony N. Muller and G. A. Gondran for appellant.

Burke & Smith for appellee.

[1060] SOMMERVILLE, J.—The state appeals from a judgment sustaining a motion to quash

an indictment charging defendant with having feloniously abducted a woman of previous chaste character from her father's house, for the purpose of having unlawful sexual intercourse with her on the public highway, in Iberia parish, and within the jurisdiction of the Nineteenth judicial district court of this state. The motion to quash was based on the allegation that the indictment returned against the defendant sets forth no offense for which he may be held.

The trial court was of the opinion that the words "or elsewhere," found in the statute under which the indictment was brought, were confined in their scope and intention to the words of particular description which immediately preceded them, "a house of ill fame or in any other place of like character," and that they did not include the public highway, [1061] and that the offense charged was not covered by the statute.

The act under consideration, No. 134, 1890, p. 175, is entitled "An act making the abduction of women a crime." Section 1 of the act is that under which the indictment was found, and it is as follows:

"That any person who shall fraudulently, deceitfully or by any false representation, entice, abduct, induce, decoy, hire, engage, employ or take any woman of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution or for any unlawful sexual intercourse, at a house of ill fame or at any other place of like character, or elsewhere, and any person who shall knowingly or intentionally aid, abet, assist, advise or encourage any such enticing, abduction, inducing, decoying, hiring, engaging, employing or taking, shall on conviction be punished by imprisonment at hard labor in the penitentiary for not more than five years."

The remaining sections in the act provide for crimes of the same nature as that embraced in section 1.

When the statute was before the court for consideration in the case of *State v. Savant*, 115 La. 226, 38 So. 974, we said:

"Thus the crime lies in the abduction. The words 'for the purpose of prostitution,' etc., are merely descriptive of the intent of the abduction. . . . 'Unlawful' does not necessarily mean contrary to law. 'Un' is a preposition used indiscriminately, and may mean simply 'not,' and 'unlawful' means 'not authorized by law.' *MacDaniel v. U. S.* 87 Fed. 324 [58 U. S. App. 729] 30 C. C. A. 670. Again, in the phrase descriptive of the purpose of the abduction, the words 'unlawful sexual intercourse' are closely associated with the words 'prostitution' and 'house of ill fame,' clearly indicating, under the rule of *noscitur a sociis*, what character of unlawful sexual intercourse is meant; that is to say,

such as is associated with prostitution and houses of ill fame—in other words, the infringement of the moral law, and not necessarily of the civil law; the popular, not the technical, meaning. Under the rule of *noscitur a sociis* a single act of cohabitation with a female was held to constitute concubinage within the meaning of a statute inhibiting the abduction of a female under 18 years of age for the purpose of prostitution or concubinage. *State v. Gibson*, 111 Mo. 92, 19 S. W. 980."

And now there is presented for consideration the words "or elsewhere" used in the statute. Defendant is charged with having [1062] feloniously, etc., abducted a young woman named in the indictment, of previous chaste character, from her father's home, and with having taken her upon the public highway for the purpose of having unlawful sexual intercourse with her, and that he did have such unlawful sexual intercourse with her there, contrary to the statute above quoted from.

To construe the words "or elsewhere," as used in the statute, in the manner and with the restriction claimed by defendant, would be to misconstrue plain and unequivocal language. The words have an exact and clear meaning, and cannot be construed so as to limit them to houses of ill fame or assignation, as appears to have been done with the same words in construing certain criminal statutes in other jurisdictions, as cited by defendant.

"Elsewhere" means "any other place; in some other place; in other places, indefinitely." If the word "elsewhere" was construed to mean a place like or similar to a house of prostitution or assignation, the word would be tautological and entirely meaningless in the statute. For the law would then read that any person who shall feloniously, etc., take any woman of previous chaste character from her father's house for the purpose of prostitution or for unlawful sexual intercourse "at a house of ill fame or at any other place of like character, or at a house or place of like kind," will be punished, etc.

The words "or elsewhere," found in the statute, were put there by the Legislature for a definite purpose, and the language of the statute must be interpreted according to the ordinary meaning of the words used therein, and effect must be given to them. The taking of a woman of chaste character from her father's house for the purpose of prostitution or for unlawful sexual intercourse "at a house of ill fame or at any other place of like character, or elsewhere," is a crime, as defined by the statute, if the person took such [1063] woman "unto the public highway for the purpose of having sexual intercourse with her." The public

highway is "elsewhere" from a house of ill fame, or other place of like character. The motion to quash should have been overruled.

Defendant has cited the case of *People v. Warden*, 137 N. Y. S. 268, where the restricted and limited meaning of the words "or elsewhere" contended for by him was adopted by the court of that state. But the law of New York refers to "a house of ill fame or of assignation, or elsewhere." And the court held that the word "elsewhere" referred to a place which had been used to some extent for the purposes of prostitution or of assignation. The court applied the rule:

"That where words of a particular description in the statute are followed by general words, less specific and limited, the general words are to be construed as applicable to words, things, or cases of like kind to those designated by the words, unless there be a clear manifestation of a contrary purpose." 1 Cyc. 147.

The Louisiana General Assembly has, in the statute under consideration, clearly manifested the purpose to make it a crime to abduct a female of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution or for any unlawful sexual intercourse, at any house of ill fame, or at any other place of like character, or at any other place.

The object of the Legislature was to avoid the interpretation of the New York court of the statute of that state with reference to the same offense, by changing the language in the statute of this state. In the state of New York, as reported in *Carpenter v. People*, 8 Barb. (N. Y.) 603, the statute is quoted as reading, at the time of that decision:

"Any person who shall inveigle, entice or take away any unmarried female of previous chaste character, under the age of twenty-five years, [1064] from her father's house or wherever else she may be, for the purpose of prostitution at a house of ill fame, assignation or elsewhere," etc.

Whereas, the Louisiana statute, as has been seen, refers to a house of "ill fame or at any other place of like character, or elsewhere." So that there is no room, after the words "at any other place of like character" in the Louisiana statute, for the words "or of like character," as has been held by the New York courts in construing the statutes of that state, wherein different language was used. The word "elsewhere" means "in other places, indifferently," than houses of ill fame and places of like character.

The statute under consideration appears, also, to make the abduction of a woman "for any unlawful sexual intercourse," under the conditions therein stated, a crime, by the use of the word "any." Had the statute followed the language of the statute of Pennsylvania,

it might have been interpreted to mean that the unlawful sexual intercourse there referred to did not cover a single act of sexual intercourse. The statute of Pennsylvania reads that one is guilty of abduction who "entices an unmarried female . . . into a house of ill fame or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse." The Pennsylvania court differed from the courts of New York, and held that the character of the place to which the woman is taken is immaterial, but that she must be enticed into some place for the purposes of prostitution, as generally understood, and not for a single act of intercourse. The word "any" is not in the Pennsylvania statute before the words sexual intercourse. 1 C. J. 287.

"Any" means "to any extent; in any degree; at all." So that unlawful sexual intercourse "to any extent," even if it be a single act, is covered by the statute of Louisiana.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, [1065] that the motion to quash be set aside and denied, and that the case be remanded to the district court, to be proceeded with in accordance with law.

#### NOTE.

The reported case in construing a statute providing that any person who shall . . . abduct, . . . any woman of previous chaste character "for the purpose of prostitution or for any unlawful sexual intercourse" . . . shall on conviction be punished, etc., holds that as used therein, "any" means "to any extent; in any degree; at all," so that unlawful sexual intercourse "to any extent," even if it is a single act, is covered by the statute. For an extensive discussion of the legal meaning of the word "any," see the note to *State v. Kansas City*, reported ante, this volume, at page 1.

#### SCHMIDT

v.

#### STATE.

Wisconsin Supreme Court—November 17, 1914.

159 Wis. 15; 149 N. W. 353.

#### Words and Phrases — "Any Other Purpose" Defined.

St. 1913, § 4394, provides that any person who shall set or fix in any manner any gun

or other firearm to kill game of any kind by coming in contact therewith, or with any string, wire, or other contrivance attached thereto, by which the same may be discharged, "or for any other purpose," shall be punished, etc., and if the death of any person is caused thereby, he is deemed guilty of "manslaughter in the second degree." Held, that the phrase or for "any other purpose" was not to be construed, under the rule ejusdem generis, as limited to the setting of guns to kill game, etc., but prohibited the setting of a gun for any purpose whatever other than with intent to effect the death of or physical injury to a human being or the wrongful destruction of property, or for a purpose evincing a depraved mind, regardless of danger to human life, so that where defendant set a gun in his orchard to prevent persons from stealing his apples and decedent was shot and killed thereby, the court properly limited the jury to a conviction of murder in the first or second degree and manslaughter in the second degree, and refused to submit manslaughter in the fourth degree or excusable homicide.

[See note at end of this case.]

**Weapons — Set-gun — Conviction Sustained.**

In a prosecution for homicide resulting from a gun set by defendant in his orchard to protect it against apple thieves, evidence held to sustain a conviction for manslaughter in the second degree.

[See 15 Ann. Cas. 587; 19 Ann. Cas. 939.]

Error to Circuit Court, Marathon county: REID, Judge.

Criminal action. William Schmidt, convicted of murder in second degree, and brings error. The facts are stated in the opinion. **AFFIRMED.**

*Brown, Pradt & Genrich* for plaintiff in error.

The Attorney General, *Edvard P. Gorman* and *M. B. Rosenberry* for defendant in error.

[16] KERWIN, J.—The information in this case charged the plaintiff in error, hereinafter called defendant, with murder in the first degree of one George Kramer. The jury found the defendant guilty of murder in the second degree and judgment was entered accordingly. The case is here on writ of error.

The evidence shows that the defendant set a gun in his orchard loaded with powder and No. 3 shot, cocked, with a wire attached to the trigger of the gun, running back over a spool and then extending along in range with the barrel of the gun and for some distance in front of the muzzle and about eight inches from the ground, so that contact with the wire would be likely to discharge the contents of the gun against any person coming in contact with the wire. The deceased seeing

the wire took hold of and pulled it and received the charge of shot in his left hip and left arm at the elbow, from the effects of which he died some time thereafter.

The case was submitted to the jury upon the following grounds: (1) Whether defendant was guilty of murder in the first degree; (2) whether defendant was guilty of murder in the second degree; and (3) whether the defendant was guilty of manslaughter in the second degree.

The following errors are assigned:

"1. The court erred in refusing to give the instructions to the jury upon manslaughter in the fourth degree requested by the defendant.

"2. The court erred in refusing to give the instructions to the jury upon excusable homicide requested by the defendant.

[17] "3. The court erred in charging the jury that the defendant was guilty of some crime; that it was unlawful for the defendant to set the gun as he did, and that if such setting of the gun caused the death of George Kramer, then the defendant was guilty of some degree of murder or manslaughter. And in charging the jury that the facts in the case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable. And in charging the jury that they had the power, if they saw fit, to acquit the defendant of all crime, but in case they should do so they would disregard the undisputed facts and the law applicable to this case. And in submitting, by the charge, to the jury the consideration only of the question whether the defendant was guilty of murder in the first degree or in the second degree, or manslaughter in the second degree. And in charging the jury at all upon the subject of murder in either the first or second degree, or manslaughter in the second degree. And in charging the jury that they should find the defendant guilty of manslaughter in the second degree if they did not find him guilty of murder in either the first degree or in the second degree.

"4. The court erred in denying the motion of the defendant to set aside the verdict and for a new trial."

The first three assignments of error may be treated together. There was no error in refusing to give the instructions to the jury on manslaughter in the fourth degree or upon excusable homicide. The court instructed the jury that they might consider only the question of murder in the first degree, murder in the second degree, and manslaughter in the second degree.

The argument of counsel for defendant is that the court erred in refusing to instruct on manslaughter in the fourth degree and excusable homicide. It is insisted that because

one might set a gun for the purpose of committing murder and hence be convicted of murder upon a proper showing though committed by a set-gun, by parity of reasoning it follows that where death results from the discharge of a set-gun it would be proper to show, for the consideration of the jury, facts relating to its setting that might lead them to the conclusion that [18] the defendant was guilty of some degree of manslaughter or homicide less than manslaughter in the second degree fixed by the set-gun statute.

It is quite true that a gun might be set for the purpose and with the intent to commit murder, and upon conviction of murder punishment should not be confined to manslaughter in the second degree, but for the degree of murder found, and therefore it was proper upon the evidence in the present case to submit to the jury upon sufficient evidence the two degrees of murder. But it does not follow that because murder may be committed by means of a set-gun the defendant may escape with a lighter punishment than for manslaughter in the second degree where all the elements necessary to constitute the offense of setting a gun under sec. 4394, Stats., are proved, and death is caused by the discharge of such gun.

Whether punishment in case of death by a set-gun could in any case be reduced below manslaughter in the second degree we need not here determine, for we are convinced that upon the undisputed facts in the instant case the court below was clearly right in refusing to submit a lower degree of manslaughter or homicide. The statute provides:

"Section 4394. Any person who shall set or fix in any manner whatever any gun, pistol or other firearm, or any spring gun for the purpose of killing game of any kind by coming in contact therewith or with any string, wire or other contrivance attached thereto, by which the same may be discharged, or for any other purpose, shall be punished by imprisonment in the state prison not less than six months nor more than three years; and if the death of any person is caused thereby he shall be deemed guilty of manslaughter in the second degree."

It is argued that the evidence shows that the gun was set to protect property and frighten boys who were likely to enter the premises for the purpose of stealing apples, and that such purpose does not fall within the provisions of the above section. The statute applies to setting a gun for the purpose of [19] killing game, "or for any purpose." Setting a gun to frighten boys is within the terms of the statute.

It is plain that the object of the legislature in passing this statute was to prevent the setting of guns which might inflict injuries

and be dangerous to life or limb, and in case persons violating the statute thereby caused the death of a human being they should be held guilty of manslaughter in the second degree, though the gun was set for an innocent purpose. The statute forbids the setting of a gun for the purpose of killing game, "or for any other purpose." The intent of the legislature was to prevent the setting of guns generally. The words "or for any other purpose" were evidently not intended to have their general meaning disassociated from the context of the statute, because such a meaning would include intentional and all other felonies killing of a human being, which the legislature manifestly did not contemplate. Reading the words "or for any other purpose" in their connection with the other parts of the statute, their meaning naturally is to be construed as if it read "for any other similar purpose," that is, a purpose other than where there was a design to effect the death of or physical injury to another, or the wrongful destruction of property, as well as where a gun was set with a purpose evincing a depraved mind regardless of danger to human life. In these latter cases, if death results from the setting of the gun the killing would come within the law regulating homicides, but where such death is not one of these, then the statute makes it manslaughter in the second degree and it cannot be less. So if the defendant merely purposed to frighten boys, and that was an innocent purpose, then he was guilty of manslaughter in the second degree and could not be convicted of a lesser offense.

The court below proceeded upon the theory that if the jury failed to find the defendant guilty of a higher degree of offense than that prescribed by sec. 4394, Stats., he should be convicted [20] of manslaughter in the second degree as prescribed by the statute. In this view we think the court was correct. The evidence is undisputed that the defendant was at least guilty of manslaughter in the second degree as prescribed by sec. 4394, and therefore it was not error to refuse to submit to the jury a lower degree of manslaughter or homicide.

The evidence shows that the defendant deliberately set the gun, he says, to frighten boys coming into the orchard to steal apples. But it was to set as to discharge its contents into any person going to the apple tree and coming in contact with the wire attached to the trigger of the gun.

Counsel for defendant content that the defendant had a right to set the gun for the purpose of protecting his property, if there was no intent to commit any offense. But the statute makes the setting of the gun an offense regardless of whether it was set with intent to do injury to another or not.

Counsel complain of the following parts of the charge:

"If you should have a reasonable doubt from the evidence in this case that the defendant did not intend to kill any human being by means of the gun and apparatus which he set in his orchard, and if you should also have a reasonable doubt that the act of setting the gun and adjusting the apparatus did, under all the circumstances in which the defendant acted, constitute an act imminently dangerous to others and evincing a depraved mind regardless of human life, and should believe from the evidence that the defendant intended only to frighten persons who might come into his orchard, yet that he nevertheless produced the death of George Kramer, then you should find the defendant guilty of manslaughter in the second degree."

"Upon the undisputed facts in this case it is clear that the defendant is guilty of some crime, and it is for the jury to determine of which crime he is guilty."

"It was unlawful for the defendant to set and fix the gun in question loaded, cocked, and adjusted with the apparatus for firing the same in the manner and place in which he admits he did set and fix it, and if by so setting and fixing the gun in question he produced the death of George Kramer in [21] the manner in which has been testified to on this trial, then the defendant is guilty of some degree of murder or manslaughter."

"If the defendant set and fixed and adjusted the gun in question solely for the purpose of scaring away trespassers and without intent to physically injure them, he thereby committed a crime under this statute, and if he thereby produced the death of a human being the crime was so much more serious. If in setting, fixing, and adjusting said gun and apparatus he intended to kill any human being or to seriously injure any human being, that is, do him great bodily harm, then the defendant, in causing the death of George Kramer by means of said gun and apparatus, became guilty of some degree of murder or manslaughter."

"But the facts in this case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable."

"The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case."

There was no prejudicial error in the parts of the charge complained of. The undisputed evidence shows that the defendant violated the statute in setting the gun. The learned trial judge below in charging the jury said:

"A large share of the facts involved in this case are not in dispute. It has been proved without dispute that on August 24, 1913, about noon, George Kramer, a young man in the eighteenth year of his age, while on the premises of the defendant, William Schmidt, in this county, and in an orchard on said premises, came in contact with a wire stretched horizontally a little above the ground and thereby discharged a loaded shot gun which had been set and affixed to stakes in the orchard and received a large share of the contents of said loaded gun in his left thigh between the knee and the hip and in his left arm, above and below the elbow, and thereby he was seriously wounded; that without ever recovering therefrom the said George Kramer died on or about November 4, 1913, and that the primary cause of his death were the gunshot wounds in question; that the defendant Schmidt had two [22] days before the shooting loaded said gun, taken it to said orchard, and set and fixed the same in place in the orchard where it was at the time when it was discharged and fixed and adjusted a wire or wires extending from the trigger of the gun for a considerable distance so adjusted that contact with the wire would pull the trigger and cause the discharge of the gun; and that said gun was partly concealed where it was set by means of three old wash boilers set up at the sides and above as described in the evidence."

This is a fair statement of the evidence upon the points covered. In addition to this there was evidence of malice, deliberation, depravity of mind evincing disregard for human life, and intent to injure whoever might enter the orchard for the purpose of stealing apples. Under these circumstances there was ample evidence to support the verdict of the jury under sec. 4339, Stats., which provides:

"Such killing, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being, shall be murder in the second degree."

And the evidence being undisputed that defendant was guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in the charge in that regard. *Cupps v. State*, 120 Wis. 504, 522, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

Error is assigned because the court below denied a new trial. It is argued that the evidence was not sufficient to support the verdict. We have heretofore referred to the evidence and a recital of it at length would serve no useful purpose. Under this head counsel for defendant discuss the alleged error in the charge relating to manslaughter in the second degree and insist that the jury

must have been prejudiced thereby. As before observed, the charge in this respect was correct, and how it could have prejudiced the jury are unable to see.

Error is also assigned because the court refused to charge [23] on excusable homicide and manslaughter in the fourth degree. Sufficient has already been said to show that there was no error in this regard.

The undisputed evidence showing that the defendant was at least guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in refusal to charge on a lower degree of offense. We are unable to see that there was any error in the charge or refusal to charge.

We have carefully examined the record and find no grounds for a new trial. The record shows that the case was carefully tried by the learned judge below and fairly submitted to the jury, and we discover no prejudicial error in the record.

By the Court.—The judgment is affirmed.

**TIMLIN, J. (dissenting).**—I think that under the maxim "*eiusdem generis*" the words "or for any other purpose" found in the set-gun statute (sec. 4394) must be limited to purposes similar to "the purposes of killing game." The purpose of killing game in the proper season is not an unlawful or criminal purpose. Out of season it is unlawful and at no time is it a felonious purpose. But the "other purpose" mentioned in the statute is not by this maxim of construction required to be exactly like the purpose of killing game, but only a purpose of the same class, genus, or family of purposes. The dominant purpose of killing game with a set-gun is either to gain ownership of the hide and carcass or to protect crops or domestic animals against the depredations of game animals. Both of these purposes may concur. The one is to acquire property, the other to protect property already acquired. To protect the cabbage patch against deer, the corn field against raccoons, the wheat field against domestic animals, or the chickens and ducks against foxes, mink, and otters, or the apple crop against boys, are purposes of a similar kind, if there is no intention to do bodily injury to the boys. The law relating to set-guns is well collected in the notes to *State v. Barr*, [24] 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L.R.A. 154. Under our statute, if the accused set the gun for any of the purposes above mentioned and if the death in question, although not intended, was caused by his act in so doing, he would be guilty of manslaughter in the second degree. But here there are two questions of fact involved: (1) With what intent was the gun set? (2) Was the death of the boy caused by setting the gun or did

it result from some intervening cause? (He was injured August 24, 1913, and died of a hemorrhage from the wound November 4, 1913.) The proper construction of this statute is that it elevates all homicides resulting from a set-gun, where no homicide is intended, to manslaughter in the second degree. But where a gun is set for a felonious purpose and homicide results, the graver crime is not by this statute reduced to manslaughter in the second degree.

The accused was charged with murder in the first degree and convicted of murder in the second degree. Here questions of fact were also involved. Among other instructions the court gave the following to the jury:

"Upon the undisputed facts in this case it is clear that the defendant is guilty of some crime and it is for you to determine of which crime he is guilty. . . . But the facts in this case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable. . . . The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case."

This jury had been sworn according to sec. 4692, Stats., to "well and truly try the issue between the state of Wisconsin and the defendant, . . . according to evidence." To me the above instructions are equivalent to directing a verdict of guilty. True, the court gives the jury the alternative of committing perjury, that is, disregarding the undisputed facts and the law applicable to the case, if they choose. If it is to be the law of this state that a trial judge may direct a jury to [25] bring in a verdict of guilty in a criminal case, so be it. But until it is authoritatively decided that a judge may do so I cannot bring myself to approve the foregoing instructions upon any pretense that they are not the equivalent of directing a verdict of guilty. I think the judgment should be reversed and a new trial awarded.

#### NOTE.

In construing a statute providing that "any person who shall set or fix in any manner whatever any gun, pistol or other firearm, or any spring gun for the purpose of killing game of any kind by coming in contact therewith or with any string, wire or other contrivance attached thereto, by which the same may be discharged, or for any other purpose, shall be punished," the reported case holds that the setting of a gun to frighten boys is clearly embraced by the words "or for any other purpose," and that, when read in con-

nection with the other parts of the statute, their meaning is to be construed as if it read "for any other similar purpose." An exhaustive discussion of the cases construing the word "any" as used in various phrases, will be found in the note to *State v. Kansas City*, reported ante, this volume, at page 1.

**AUSTIN**  
v.  
**CALLOWAY.**

West Virginia Supreme Court of Appeals—  
November 25, 1913.

73 W. Va. 231; 80 S. E. 361.

**Executors and Administrators — Actions — Allegation of Representative Capacity.**

A declaration by an administrator, suing as such, upon a cause of action accruing to his intestate in his lifetime, which fails to aver that plaintiff was appointed and qualified as such administrator, is bad on demurrer.

[See note at end of this case.]

**Action on Contract of Deceased — Pending.**

Such a declaration in assumpsit upon a note payable to his intestate, and past due at his death, need not aver a promise to the administrator. It is sufficient to aver a promise to his intestate and a breach, by nonpayment to either his intestate or himself.

**Appraisement — Assets Not within Requirement.**

Section 12, c. 56, Acts 1907, respecting the appraisement of notes, bonds, and evidences of debt, owned by a decedent at the time of his death, does not apply to evidences of debt not taxable in this state, owned by a nonresident at the time of his death, and sent to an attorney in this state, by his personal representative, for suit thereon against the debtor who resides here.

**Bills and Notes — Actions — Loss of Note.**

When it is proven that a note declared on has subsequently been lost, secondary evidence of its contents is admissible.

**Same.**

Loss of a note, occurring after it has been declared on, does not abate the suit or require amendment of pleadings.

**Same.**

A court of law has jurisdiction of an action to recover upon a lost note, when it is clearly established that plaintiff had title to such note and that its loss occurred after it became payable.

(Syllabus by court.)

Error to Circuit Court, Mason county.

Action on promissory note. John P. Austin, plaintiff, and John Calloway, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

*Somerville & Somerville* for plaintiff in error.

*J. E. Beller and S. P. Bell* for defendant in error.

[232] WILLIAMS, J.—John P. Austin, sheriff of Mason county and as such administrator of Lucy Stallard, deceased, recovered a judgment against John Calloway for \$173.46, and he was awarded this writ of error thereto. The action was upon a note dated 16th October, 1907, and payable to plaintiff's intestate one day after date, signed John Calloway. Defendant demurred and pleaded *non est factum* and non assumpsit. The demurrer was overruled and on the issues of fact the jury found for plaintiff. A number of errors are assigned. First, that it was error to overrule the demurrer to the original declaration. The grounds of demurrer are (1) that the declaration does not aver that plaintiff was appointed administrator, and (2) that it does not aver a promise made to plaintiff. While it appears from the form of the declaration that plaintiff sues in a representative capacity, the declaration does not aver the fact of plaintiff's appointment and qualification as administrator. Such an averment was necessary in order to show his authority to bring the action. The rule is laid down in 8 Enc. Pl. & Pr. 665, as follows:

"In a suit by an executor or administrator in his representative capacity, the plaintiff should allege in a direct or issuable form that he is executor or administrator and that he brings the suit in his representative capacity." The action is upon a note which became due in the lifetime of plaintiff's intestate, and therefore, the personal representative only can bring an action on it. The declaration in such case should aver the fact of plaintiff's appointment and qualification, else it will be held bad on demurrer. "A declaration by an executor or administrator upon a cause which can be maintained only in a representative capacity, and which does not contain a sufficient averment of that capacity, is bad on demurrer." *Foster v. Adler*, 84 Ill. App. 654; *Collins v. Ayers*, 13 Ill. 358.

In discussing the sufficiency of the complaint by an administrator, which was objected to on the ground that it did not sufficiently allege plaintiff's appointment as administrator, the supreme court of Minnesota, in the case of *Chamberlain v. Tiner*, 31 Minn. 372, 18 N. W. 97, says: "It is not now necessary, as formerly, to make profert of letters testamentary [233] or of adminis-



tration. But it is necessary for a plaintiff who sues as executor or administrator to allege in a direct and issuable form that he is such. This properly should be done by alleging that he is executor or administrator by virtue of letters issued by a probate court of some county, giving the name of the court and the term at which the letters were granted."

"When a party sues, as executor, etc., there must be a substantial averment in the pleadings, showing that he sues in his representative capacity, and nothing by intendment can be taken to supply the want of such an allegation." *Sabin v. Hamilton*, 2 Ark. 485.

In *Judah v. Fredericks*, 57 Cal. 389, the complaint was held bad on demurrer for failure to properly aver plaintiff's official character. The following cases are also directly in point. *Pelletreau v. Rathbone*, 1 N. J. Eq. 331; *State v. Matson*, 38 Mo. 489; *Sheldon v. Hoy*, 11 How. Pr. (N. Y.) 11; *Rowan v. Lee*, 3 J. J. Marsh. (Ky.) 97; *Smith v. Zimmerman*, 29 Mo. App. 249; *Otto v. Regina Music-Box Co.* 87 Fed. 510 (Circuit Court for District of New Jersey); *Wilson v. Hall*, 13 Tex. Civ. App. 489, 36 S. W. 327.

At the common law it was not only necessary for a plaintiff, suing in a representative capacity, to aver his appointment and qualification as such personal representative, but also to make profert of letters testamentary, or of letters of administration. This latter requirement, however, has been abolished both in England and in the two Virginias. 3 Rob. Prac. 256; 5 Rob. Prac. 35; Sec. 33, Ch. 125, Code 1906. But this statute dispensing with the necessity of making profert of commission of administration or letters testamentary does not avoid the necessity of plaintiff's averring his appointment and qualification as such personal representative. If the defendant in this case had not demurred, his pleas to the general issue might have operated as an admission of plaintiff's capacity to sue, under authority of the case of *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033, and the authorities cited in the opinion at page 187, to which we add 8 Enc. Pl. & Pr. 673. *McDonald v. Cole*, supra, holds that the capacity of plaintiff who sues as administrator or executor can be put in issue only by the plea, *ne unques administrator*, [234] or *executor*. But the rule there discussed we understand to apply even when capacity, which is an issuable matter, has been properly averred. That case does not decide that such an averment is not necessary; it only decides that a plea of *ne unques* alone can raise an issue as to the averment when made, and that a general plea admits plaintiff's authority to sue. But in the present case the sufficiency of the declaration is challenged by demurrer, and we see that

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a material averment is omitted from it. Capacity had not been averred and therefore a plea *ne unques* was unnecessary; the omission was properly taken advantage of by demurrer. We find also in the form books that the form of a declaration by a personal representative, for a cause of action arising during intestate's lifetime, contain an averment as to his appointment and qualification as such personal representative. *Gregory's Forms*, Nos. 21 and 136, pages 22 and 272; 4 Min. Inst. 1697; *Rob. Forms*, 415.

The cause of action arose in the lifetime of plaintiff's intestate, and therefore it was not necessary for plaintiff to allege a promise made to himself. He does allege a promise made to his intestate and a breach of that promise in her lifetime, and he also alleges a continuation of that breach by failure to make payment to him as her administrator. In this respect the declaration is good.

It is urged that judgment should not have been rendered on the note because it was not appraised. Section 12 of Chapter 56, Acts 1907, provides for the appraisal of notes, bonds and evidences of debt owned by a decedent at the time of his death, and further provides that no judgment shall be rendered upon such note, bond or evidence of debt unless and until the same shall be first shown to have been listed by the appraisers. The note in question not having been appraised, it is contended that the statute forbids the rendition of judgment on it. But we do not think the note in this case falls within the purview of the statute; which was passed in aid of the taxing power of this state, and for the purpose of compelling persons to list their intangible property, such as notes, bonds, etc., for taxation. The statute was clearly not intended to forbid the rendering of judgments upon notes held by nonresidents and not taxable in the [235] state of West Virginia. Plaintiff's intestate was, at the time of her death and had been for years prior thereto, a resident of the state of Kentucky. The note was not then taxable in this state. Its situs was the payee's domicile at the time of her death, and it was only sent to this state for the purpose of collection because the obligor lived here. In such case there could be no reason for requiring the note to be appraised in this state, and the statute was not intended to apply in such case. Other parts of the statute clearly indicate that it relates to property that is subject to a tax as provided by chapter 33, Code of West Virginia.

After suit was brought plaintiff's attorney sent the note to the attorney in Kentucky representing the administrator of Lucy Stallard in that state for the purpose of proving its due execution by defendant, by witnesses in Kentucky whose depositions

were to be taken, and which were thereafter taken and used as evidence in the trial of the case. The note appearing to have been lost, the court permitted a copy of it to be used as evidence over the objection of defendant, and this is assigned as error. Its loss is accounted for by proof of the following facts. After the depositions were taken they were sealed and addressed to the clerk of the circuit court of Mason county as registered mail; but, at the request of the West Virginia attorney, the note was not filed as an exhibit with the depositions, and was mailed to him in a separate envelope, not as registered matter. That night the post office burned, and all the letters were destroyed, except registered matter which the postmaster had placed in an iron safe. This is sufficient accounting for the loss of the note to make secondary proof admissible. Before sending the note to Kentucky, plaintiff's attorney had made a copy of it. His testimony shows that the copy is an exact copy of the original. In view of these facts it was not error to admit the copy of the note as evidence. Secondary evidence is admissible when primary evidence is not to be had. *Snyder v. Charleston, etc. Bridge Co.* 65 W. Va. 1, 63 S. E. 616, 131 Am. St. Rep. 947.

It was not error to admit the depositions of witnesses taken to prove defendant's handwriting. Some of them had received letters from defendant, had seen him write and were well acquainted with his handwriting. One or two others, however, [236] based their opinions upon a comparison of the handwriting in the body of the note and the signature thereto, with the handwriting of other papers exhibited to them at the time their depositions were taken. Defendant admitted that the papers with which they compared the note were actually written by him. One of those papers purported to be a will made by defendant in favor of plaintiff's intestate, who was his aunt; and the other is a letter written by him to J. T. Smith, her Kentucky administrator. One of such witnesses was the attorney who represented the Kentucky administrator and the other was the notary public before whom the depositions were taken, who had also served a term of office as clerk of the circuit court of Letcher county, Kentucky. They were competent witnesses, and the jury had to judge of the value of their testimony.

It is urged that no issues were joined on the pleas to the supplemental declaration, filed by permission of the court, setting up the subsequent loss of the note. This point is not material. The loss of the note, occurring after the declaration had been filed and depositions of witnesses taken to prove its due execution, did not call for the filing of a supplemental declaration. Proof of the loss,

justified the admission of secondary evidence to prove the averments of the declaration, and no additional averment was needed. There was no occasion to change the character of the action from one upon an existing note to one upon a lost note. The loss of the note did not abate the suit. It was overdue when it was lost and no indemnity was necessary. Defendant cannot be prejudiced by the failure to produce it. A judgment against him in this action would be a bar to any future action on the note, by any person whomsoever. But if it had not been clearly proven that it was overdue when lost, then, it being negotiable under the new negotiable instruments act, defendant might have had good reason to complain of its non-production. But in view of the facts proven, it is clear that a judgment against defendant could be pleaded in bar of any future action on said note. As apropos to this question, see also *Campbell v. Myers*, 72 W. Va. 428, 78 S. E. 671, 48 L.R.A.(N.S.) 648. If the note had been lost at the time of suit, plaintiff could nevertheless have brought an action at law for the money due on it, because it is proven [237] to have been past due at the time of suit, and was lost after it came into the hands of the payee's administrator. 19 Am. & Eng. Enc. of Law (2d ed.) 566. In such case a court of law has jurisdiction, no indemnity to defendant being necessary.

For reasons herein given we reverse the judgment, set aside the verdict and remand the case for a new trial, with leave to plaintiff to amend his declaration.

Reversed and remanded

#### . NOTE.

**Necessity that Executor or Administrator in Action Brought by Him Allege that Suit Is Brought in Representative Capacity.**

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#### *Introductory.*

It is the purpose of the present note to discuss the question whether, in an action brought by an executor or administrator as such, it is necessary for him to allege that he sues in his representative capacity. Cases wherein the sufficiency of such an allegation has been determined have been included, as indirectly involving the necessity of the allegation.

The right of a plaintiff to amend his pleading so as to change the capacity in which he sues from representative to individual, or vice versa, is discussed in the note to *Hardy v. Woods*, Ann. Cas. 1916C 398.

#### *England.*

In England, where a cause of action accrues to a person in his lifetime and he thereafter dies testate, his executor must sue thereon as such; but where it accrues after the testator's death, the executor may sue as such or not. *Gallant v. Bouteflower*, 3 Dougl. 34, 99 Eng. Rep. (Reprint) 525; *Bac. Abr. Executors & Administrators*, O. Williams on Executors & Administrators, Pt. V. Bk. I, p. 1770; 1 Chit. Plead. 23.

If an executor or administrator may sue in his individual capacity the words "executor" or "administrator," as used in his pleading to denote his representative character, without any other sufficient averment of his right to sue in that character, may be regarded as a description of the person and rejected as surplusage. *Betts v. Mitchell*, 10 Mod. 315, 88 Eng. Rep. (Reprint) 744; *Henshall v. Roberts*, 5 East 154, 102 Eng. Rep. (Reprint) 1026; *Hornsey v. Dimocke*, 1 Vent.

119, 86 Eng. Rep. (Reprint) 82. And see *Hollis v. Smith*, 10 East 293, 103 Eng. Rep. (Reprint) 786.

In *King v. Thom*, 1 T. R. 487, 99 Eng. Rep. (Reprint) 1212, in an action on a bill of exchange indorsed to the plaintiffs as executors, Ashhurst, J., said: "There is no doubt but that this action may be supported. It must be taken for granted that the indorser was indebted to the testator, and to the plaintiffs, as executors, and so he might indorse to the plaintiffs, as such executors. Then they held the bill, as executors, and, upon the acceptor's refusing to pay it, they may declare upon the right in which they hold it. No case has been cited to show that this cannot be supported: and the acceptor is not in a worse condition than he would have been, if the plaintiffs had declared against him in their own right. They have only declared according to the truth of the case."

In an action by a special administrator, he must aver the continued existence of the fact on which his status depends. Thus an administrator cum testamento annexo, durante absentia of an executor, must aver that the executor is still absent. *Hodge v. Clare*, 4 Mod. 14, 87 Eng. Rep. (Reprint) 235; *Slater v. May*, 6 Mod. 304, 87 Eng. Rep. (Reprint) 1043; 3 Salk 23, 91 Eng. Rep. (Reprint) 668; 2 Ld. Raym. 1071, 92 Eng. Rep. (Reprint) 210; *Slaughter v. May*, 1 Salk 42, 91 Eng. Rep. (Reprint) 42. So, an administrator durante minori aetate, must aver that the person during whose minority he is administrator, is still under age at the time the suit is brought. *Slater v. May*, 6 Mod. 304, 87 Eng. Rep. (Reprint) 1043; 3 Salk 23, 91 Eng. Rep. (Reprint) 668; 2 Ld. Raym. 1071, 92 Eng. Rep. (Reprint) 210. And an administrator pendente lite, who brings suit, must aver that the contest continues. *Slater v. May*, 6 Mod. 304, 87 Eng. Rep. (Reprint) 1043; 3 Salk 23, 91 Eng. Rep. (Reprint) 668; 2 Ld. Raym. 1071, 92 Eng. Rep. (Reprint) 210; *Buckly v. Welsh*, 3 Keb. 212, 84 Eng. Rep. (Reprint) 682.

#### *United States.*

In the federal courts it is held that in a suit on a cause of action accruing during the lifetime of the deceased, an executor or administrator must aver in his declaration that he is such, in order to maintain the action. *Kane v. Paul*, 14 Pet. 33, 10 U. S. (L. ed.) 341; *Fugate v. Bronaugh*, 3 Cranch C. C. 65, 9 Fed. Cas. No. 5,146; *Campbell v. U. S.* 13 Ct. Cl. 108.

So, a declaration in an action by an administrator on a bond to his intestate, must contain an averment that the plaintiff was administrator. *Fugate v. Bronaugh*, 3 Cranch C. C. 65, 9 Fed. Cas. No. 5,146.

And in *Campbell v. U. S.* 13 Ct. Cl. 108, it was held that where a claimant sued, as executrix, on a cause of action which apparently accrued in the lifetime of her testator, her appointment as executrix and her right to maintain the action must be shown.

#### *Alabama.*

In Alabama, the rule as to the necessity that an executor or administrator should sue as such was laid down in *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603, wherein the court said: "There seems to be uncertainty and confusion in the authorities, as to what is necessary to distinguish when an action is brought in the name of the individual, and when in his representative character. We hold the proper rule to be, that when the plaintiff's name appears in the caption, followed by the words 'administrator,' 'guardian,' etc., and there is no statement or averment in the body of the complaint to indicate differently, the words 'administrator,' 'guardian,' etc. are mere words of descriptio personae, that if the name of the plaintiff in the caption to the complaint is followed by the use of such words 'as administrator,' or 'as guardian,' or 'who sues as,' or words of equivalent import, these words are sufficient to show that the plaintiff sues in a representative capacity when the complaint proceeds in the usual form, such as, 'the plaintiff claims of the defendant,' etc. In the latter case, the words in the complaint, 'the plaintiff,' will be referred to the character of the plaintiff as expressed in the caption. We further hold that where the words in the caption are mere words of description, yet if in the body of the complaint there is a sufficient statement or averment to show that the suit by plaintiff is in his representative character, the body of the complaint must govern the caption."

Thus, although the plaintiff may describe himself as "executor," "administrator," yet if he avers a right of action as an individual, which he does not sufficiently aver to have accrued to him in a fiduciary character, he is to be regarded as suing in his individual capacity, and the superadded words, "executor," "administrator," etc., are to be regarded as descriptive of the person. *Arrington v. Hair*, 19 Ala. 243; *Tate v. Shackelford*, 24 Ala. 510, 60 Am. Dec. 488; *Agee v. Williams*, 27 Ala. 644; *George v. English*, 30 Ala. 582; *Williams v. Moore*, 32 Ala. 506; *Ikelheimer v. Chapman*, 32 Ala. 676; *Freeman v. McCann*, 37 Ala. 714; *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603. And see *Warren v. Rist*, 16 Ala. 686; *Crimm v. Crawford*, 29 Ala. 623; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Bryant v. Southern R. Co.* 137 Ala. 488,

34 So. 562. Thus in *Ikelheimer v. Chapman*, 32 Ala. 676, in the summons the plaintiffs were described as "administrators de bonis non of Ellen Chapman, deceased." In the marginal statement of the names of the parties in the complaint, they were described as "Evans & Portis, as administrators, plaintiffs." In commencement of the complaint it was averred that "the plaintiffs, as administrators de bonis non, claim of the defendant," etc.; but the complaint did not otherwise show that they sued in their representative character. The court said: "The judgment in this case must be reversed, because the words 'administrator,' in the marginal description of the case accompanying the complaint, and the words 'as the administrators de bonis non' in the complaint, are unmeaning and useless, without a statement showing of what estate the plaintiffs are administrators. The complaint cannot be aided by reference to the summons, especially as there is no word of reference in the complaint to the summons. The court should have regarded the complaint as by the plaintiffs in their individual capacity, and charged the jury, if they believed the evidence, to find for the defendant." But in *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89, the court said: "The declaration avers, that the plaintiff was possessed of the slaves, 'as of his own property as such administrator as aforesaid, and being so possessed thereof,' casually lost them; that they came to the possession of the defendant, by finding; and that the defendant, knowing them to be the property of the plaintiff 'as administrator as aforesaid,' did not deliver them to him; and it makes profert of the letters of administration. This case is distinguishable from those in which mere words of description, such as administrator, governor, etc., succeed the name of the plaintiff in the declaration. Here, in those averments which constitute the gist of the action, the words 'as administrator' are used, clearly indicating a cause of action in the plaintiff in his representative capacity. The declaration, in this particular, corresponds with the precedents in actions by administrators." And in *Watson v. Collins*, 37 Ala. 587, wherein, in the margin of the complaint, the plaintiff was styled "administrator of the estate of William Collins, deceased," but the complaint further alleged that the sum sued for would, when collected, be assets of the aforesaid estate, the allegation was held sufficient to show that the suit was brought by the plaintiff in his representative character. In *Curry v. Paine*, 8 Ala. 154, wherein it appeared that the writ was at the suit of Magee, administrator of Goodwin, and against James Curry and Charles W. Gazam; and the declaration was at the suit of Magee, in his own right, and against Curry

and Audley H. Gazzam, it was held that the word "administrator," which followed the name Magee in the commencement of the declaration, was a word to which no definite meaning could be attached, in the connection in which it was found, that it did not show of what, or of whose estate he was administrator, and could not even be regarded as *descriptio personae*, and that therefore the declaration was at the suit of Magee, individually. See also *King v. Griffin*, 6 Ala. 387.

However, it has been held that the character in which a party sues must be determined, not from the description of himself which he gives in the caption of the declaration, but from the body of the pleading. *Tate v. Shackelford*, 24 Ala. 510, 60 Am. Dec. 488; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Farrow v. Bragg*, 30 Ala. 261; *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603; *Englehart v. Richter*, 136 Ala. 562, 33 So. 939; *Bryant v. Southern R. Co.* 137 Ala. 488, 34 So. 562. In *Bryant v. Southern R. Co.* 137 Ala. 488, 34 So. 562, the court said: "The caption in the first count in the complaint in this case, is 'Alva F. Bryant, administrator, etc. v. Southern Railway Company.' In the body of the complaint is the averment, 'the plaintiff, Alva F. Bryant, suing as the administrator of the estate of William F. Dorrough, deceased, claims,' etc. This averment aids the caption, to the extent of showing in what capacity the plaintiff sues. . . . If this had not been done, and we were left to the caption alone, to determine in what capacity the plaintiff was suing, it would be held to be his individual suit, and not one in his representative capacity. . . . The words, 'administrator, etc.' following the name of Alva F. Bryant, in the caption of the complaint, are mere words of description, and, alone, as stated, import a suit by said Bryant in his individual and not in his representative capacity. A. F. Bryant and A. F. Bryant, administrator, are one and the same name."

It has also been held that, following the form prescribed in the Alabama Code, the appropriate mode of distinguishing a suit as being brought on the title of a decedent, is for the executor or administrator to state distinctly that he claims in his representative capacity; and this is done by stating that the "plaintiff, as administrator," etc. *Crimm v. Crawford*, 29 Ala. 623.

In *Cummings v. Edmunson*, 5 Port. (Ala.) 145, it was held that an administrator *de bonis non* must show the death or removal of the administrator in chief. The court said: "The plaintiff in the cause below, can only be entitled to sue on the claim which is the foundation of this suit, by virtue of his representative character, and we are unable to perceive any distinction so far as the

necessity of allegation exists, between his and any other case of a derivative title. An executor or administrator, must show in pleading the death of the testator or intestate, although it may not be necessary to prove it on the general issue; a surviving copartner must set out the death of his partner; a joint obligor, who sues alone, must set out the death of his co-obligors—and in the case we are now considering, we cannot perceive why the same reason does not prevail, when the suit is by an administrator *de bonis non*. He claims title under the administration, and if the administrator in chief be not dead, he can have no title, whatever. He may be termed an assignee by operation of law, and there can be no good reason urged, why he should not be obliged to state the sole fact from which his authority as administrator *de bonis non*, is to be derived."

Where a contract is made with an administrator in his representative character, he is not compelled to sue as administrator for its breach, and there is no reason why he should so allege in the pleadings; an allegation to that effect being regarded as mere *descriptio personae*. *Harbin v. Levi*, 6 Ala. 399; *James v. Johnson*, 44 Ala. 629.

In *Moseley v. Mastin*, 37 Ala. 216, wherein in the summons, the plaintiff was described as the administrator of Elisha Moseley, jr., deceased, in the marginal statement of the parties' names in the complaint, "as adm'r of Elisha Moseley, jr., deceased," and in the body of the complaint, "as adm'r of all goods and chattels, rights and credits of Elisha Moseley, jr., deceased, which were left unadministered by the administrator in chief," it was held that the court must judicially take notice of such abbreviations as "adm'r."

A complaint which describes the plaintiff as "administrator" and claims the amount due on the note sued on as assets of the plaintiff's intestate is sufficient to show the representative character of the plaintiff. *Rhodes v. Walker*, 44 Ala. 213; *Graham v. Gunn*, 45 Ala. 577.

In an action on a promissory note payable to the administrator of an estate by an administrator *de bonis non*, the declaration should state who were, at the time of the execution of the note, the administrators of the estate, and that the note was made payable to them by that name and description. *Cummings v. Edmunson*, 5 Port. (Ala.) 145.

In *White v. Pulley*, 27 Fed. 436 (applying the Alabama rule), it was held that where the declaration stated that the plaintiff, as administratrix of the estate of the deceased, had filed her final account of administration, and that she was the sole distributee of the estate, the plaintiff was suing in her own right, and neither as administratrix, assignee, nor distributee.

In *Wagner v. Chenault*, 7 Ala. 677, the declaration described the plaintiff as sheriff of St. Clair county, in this state, ex officio administrator of the estate of Peter Wagner, deceased, successor to Elbert L. Gibson, late ex officio administrator of said estate. It was further alleged that "the term of office of said Gibson having expired according to law, the said plaintiff, sheriff of said county of St. Clair, was, on the 2d day of October, 1843, by the judge of the county court of that county, duly appointed ex officio administrator de bonis non of the said estate of the said Peter Wagner, deceased. Whereby," etc., it was held that the allegation that the official term of Gibson had expired according to law, and that the plaintiff was duly appointed administrator ex officio de bonis non of the same estate, in connection with the description at the commencement of the declaration, that he was sheriff of St. Clair county, was sufficient to show that he was administrator by virtue of his office as sheriff, and that he had lawfully succeeded Gibson in that function.

#### Arkansas.

In Arkansas, the court has declared the rule as to the necessity of a personal representative suing as such to be as follows: "If a party sues an executor, there must be a substantive averment in the pleadings showing that he sued in his representative capacity, and nothing by intendment shall be taken to supply the want of such an allegation. But it is immaterial in what part of the declaration or of the pleadings that averment occurs. The declaration now under consideration expressly contains such an averment, and unquestionably shows that the plaintiff sued in his representative, and not in his individual capacity, for it alleges that Byrd, Belding and Shelton failed to pay the intestate in his lifetime for the rations delivered by him, nor have they, as yet, paid the same or any part thereof to the said plaintiff as administrator as aforesaid." *Sabin v. Hamilton*, 2 Ark. 485; *Mohr v. Sherman*, 25 Ark. 7.

Where the suit is brought on a bond or note payable to A. B. administrator, etc., he may elect to treat it as a debt due in his fiduciary capacity. *Hemphill v. Hamilton*, 11 Ark. 425 (*limiting Brown v. Hicks*, 1 Ark. 232 and *overruling Watkins v. McDonald*, 3 Ark. 266), wherein the court said: "This court, in the case of *Brown v. Hicks* decided that the terms 'A. B. administrator,' in the absence of the word 'as' immediately preceding the word 'administrator' did not indicate the right in which the plaintiff sued, but that the terms 'administrator, etc.' were

merely words of personal description and the reference to them in after parts of the declaration, 'A. B. administrator, etc., as aforesaid' was not sufficient to entitle the plaintiff to recover in his representative character, and that the words 'as administrator, etc.,' must somewhere appear in the averments or breach in order to enable the plaintiff to recover in the representative right. The fact that the court attaches no particular importance to the position or connection in which these terms are used, shows clearly that it did not intend to decide that the word 'as' was essentially necessary to assert a right of action or a breach of it; for if such had been the case then the word 'as' should be used in averring an indebtedness to the plaintiff as well as in the breach; for an allegation of indebtedness to 'A. B. administrator' and a breach that the money had not been paid to A. B. as administrator would not be commensurate with and responsive to such allegation, and for that reason in violation of a familiar and well-recognized rule of pleading.

But when the cause of action is averred to have accrued to the plaintiff since the death of the testator or intestate, the terms 'A. B. administrator, etc.,' are not sufficient without the aid of some more significant terms to indicate the right in which the plaintiff intends to sue. And these other and more significant terms will suffice if found in any of the allegations or breaches in the declaration and are used as aids to determine whether the plaintiff intended by the terms 'A. B. administrator, etc., plaintiff,' merely to identify and fix for himself a personal description, or that he intended to assert a right of action in a particular character. And this is the extent to which these decisions go in view of the cases decided and the authorities upon which they were made. The distinction between cases where the plaintiff counts on a cause of action, which could only accrue to him in his representative character, and such as he avers to have accrued to him since the death of the testator or intestate, seems to be this, that in the first class of cases the terms 'A. B. administrator, etc., plaintiff,' are explained and their meaning fixed by the plaintiffs averring a cause of action which could alone be maintained by the plaintiff in his representative right: whereas, in the second class of cases, the reverse is true, because the plaintiff by averring a cause of action which accrued to him since the death of the testator repels the presumption that the terms 'administrator, etc.,' were intended to indicate or declare the right in which he sued, unless other and more definite terms are brought to their aid. Much importance has been attached by the court to the use of the word 'as' in determining the right in which the plaintiff in-

tended to sue. We readily admit that this word in connection immediately preceding the word 'administrator' does more certainly indicate the character or right in which the plaintiff intends to declare, yet it by no means follows that no other word or connection of words will express with sufficient certainty the right in which the suit is brought, or that the words 'administrator, etc.' disconnected with the word 'as' should in view of the whole pleadings be limited in meaning to a mere personal description of the plaintiff. So far from this, every word used must be understood in its ordinary sense; and where from its position or otherwise, it is susceptible of two meanings, that should be given to it which will best accord with the obvious intention of the instrument, such as will promote, not defeat that intent." And see *Bailey v. Gatton*, 14 Ark. 180.

But a personal representative may sue individually on an obligation payable to "A. B. administrator" etc. in which case the words "administrator," etc., will be regarded as a personal description only. *Brown v. Hicks*, 1 Ark. 240; *Anderson v. Wilson*, 13 Ark. 409; *Mohr v. Sherman*, 25 Ark. 7; *Bailey v. Gatton*, 14 Ark. 180.

Where a declaration contains nothing whatever to show that the cause of action accrued to the plaintiffs in their representative capacity, the suit must be considered as brought in the individual right of the plaintiffs. *Fesmire v. Brock*, 25 Ark. 20.

Where an obligation is made payable to a designated person, his personal representative must in an action thereon aver his representative capacity. In *Hynds v. Imboden*, 5 Ark. 385, the court said: "The plaintiffs, to show in themselves the legal title in and right of action on the writings obligatory, set forth in the declaration, without showing any assignment thereof from the payee, were bound to show such facts as would by law vest in them such title. This they could not do without showing the death of the payee, and the subsequent commission to them, by competent authority, of the execution of his last will and testament, or the administration of his estate if he died intestate. Consequently, in such cases, the law requires of the party suing to make profert of the letters testamentary or letters of administration granted to him, to execute the will or administer the estate of the person deceased, to whose rights, in respect to the things demanded, he claims to have succeeded, and whose legal representative he claims to be. And if this be omitted, or the facts as stated, admitting them all to be true, fail to show in the plaintiffs such legal title to the thing demanded, the law, in either event, determines the pleading insufficient, and denies to him the assertion of any legal right thereto until such title be so shown."

In *Barkman v. Duncan*, 10 Ark. 465, the action was brought by "Benjamin Duncan, as administrator of all and singular the goods and chattels, rights and credits unadministered, which were of Benjamin Dickinson, deceased, at the time of his death, plaintiff," etc. The declaration alleged a promise "to pay the plaintiff as administrator as aforesaid." It was held that when the plaintiff described himself as administrator of the unadministered estate, he sufficiently described himself as administrator *de bonis non*.

### California.

In California, it has been said that to entitle a personal representative to recover in an action brought on a right accruing to the decedent he is required to allege in his complaint that he was the personal representative of the estate of the deceased. *Judah v. Fredericks*, 57 Cal. 389, wherein the court in passing on the sufficiency of an averment in a complaint that the plaintiff was "the duly appointed, qualified, and acting executrix of the last will and testament of John Ferguson, deceased," said: "We have already shown that the plaintiff was obliged to sue in her representative capacity; and to make out her right to bring the action, or to entitle her to recover in the action, she was required to allege in her complaint that she was the personal representative of the estate of John Ferguson, deceased. There was no sufficient averment of that fact in the complaint, and no right of action was shown in the plaintiff." In *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327, in holding that an allegation "that the plaintiff is the duly appointed, qualified and acting administrator of the estate of Julia Collins, deceased," was sufficient, the court said: "This, it is claimed, on the authority of *Judah v. Fredericks*, 57 Cal. 391, is insufficient. A similar allegation was indeed held to be insufficient in that case, but the case was that of an administrator appointed by the old probate court, which, though a court of record, was a court of limited and special jurisdiction. Our attention has not been called to any decision applying the rule to administrators appointed by the superior court; nor are we prepared to hold that, in the absence of special demurrer, the allegation is insufficient. But the allegation is expressly admitted in the answer, which is in effect a stipulation of the fact; and this rendered the allegation of more specific facts unnecessary." And see *San Francisco, etc. Land Co. v. Hartung*, 138 Cal. 223, 71 Pac. 337.

In *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261, the court said, in holding that the omission of the word "as" in the title was corrected by the averments of the complaint: "It is first contended that the omission to

insert the word 'as' after the name of plaintiff, in the title of the action, necessarily makes the action one prosecuted by plaintiff in his individual right and not in his representative capacity. There is no merit in this claim, since the averments of the complaint themselves clearly and distinctly disclose that plaintiff brought the action as the administrator of the estate of Michael Carr, deceased, and not in his own right. The complaint sets out the death of deceased and that he died intestate; that plaintiff was duly appointed administrator of the estate of said deceased, and that he duly qualified and is acting as such; that the money referred to in said complaint is the property of said estate; that 'plaintiff, as such administrator of the estate of Michael Carr, deceased, demanded of said defendants, and each of them, . . . that they and each of them deliver to him, as such administrator, said money so on deposit; that said defendants have, and each of them has, refused, and still refuse, to deliver said money, or any part thereof, to plaintiff, as such administrator.' These allegations are sufficient to show and, as stated, do clearly show, that the action is prosecuted by plaintiff solely in his character as administrator of the estate of the deceased, and nothing more is or ought to be required to make the pleading perfectly safe as against an assault on the ground thus urged against it." In *Burling v. Thompkins*, 77 Cal. 257, 19 Pac. 429, in the title of a complaint in ejectment, the plaintiff was styled "Benjamin Burling, administrator of the estate of William Burling, deceased." The complaint contained no allegations respecting his representative character, being in the ordinary form, alleging ownership and right of possession in the plaintiff. It was held that the complaint showed that the plaintiff was suing in his individual capacity. The court said: "The words quoted created no uncertainty or ambiguity. If words showing simply the official capacity of the party are added directly to his name in the title of the cause, as in the case at bar, without the word 'as,' they will be regarded as a mere descriptive personae. The allegations of the complaint show whether the action is brought by or against a person *en autre droit*." And see *Barfield v. Price*, 40 Cal. 535.

When it is not necessary for a plaintiff to sue as executor or administrator, his description of himself as such may be rejected as surplusage. *Munch v. Williamson*, 24 Cal. 167; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; *Burling v. Thompkins*, 77 Cal. 257, 19 Pac. 429. In *Munch v. Williamson*, supra, the court said: "The plaintiff seems to have sued as administrator of two, as it is claimed, distinct estates, to each of which a portion of the property al-

leged to have been taken from the possession of the plaintiff by the defendants and converted by them, belonged. It is contended that the plaintiff, regarded in his official capacity, is, in contemplation of law, two persons, and has been improperly joined as plaintiff, and that inasmuch as the property belongs to two separate and distinct estates, the anomaly is presented of two persons who have no joint interest, or other connecting link, litigating each his separate and independent cause of action in the same suit. This apparently anomalous condition of the case arises from the notion that the plaintiff was obliged to sue in his official and representative capacity. All the difficulties in the case find a ready solution in the fact that no such necessity existed. It was not necessary for him to sue as administrator, and all the matter contained in the complaint in relation to the capacity in which he held possession of the property in question was mere surplusage; and, inasmuch as surplusage never vitiates, might have been, and doubtless was, disregarded by the court below."

Complaints have been held sufficient to show the representative capacity of the plaintiff where they contained averments of the facts showing his appointment under a petition for letters in the proper court by an order of the court duly made and given, and his qualification and the issuance of letters thereunder. *Halleck v. Mixer*, 16 Cal. 576; *McCutcheon v. Weston*, 65 Cal. 37, 2 Pac. 727; *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Munro v. Pacific Coast Dredging, etc. Co.* 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

In *Lucas v. Todd*, 28 Cal. 182, the court held to be sufficient a complaint which averred that the testator died in 1853, leaving a will, by which he appointed James Black and James Miller his executors, and that the will was probated; that in 1854 they qualified; that letters were issued to them, and they entered on the discharge of the duties of the trust, and continued to act until 1856, when they resigned, and their resignation was accepted by the probate court; that the plaintiff was a nephew of the deceased, and in 1858 was appointed by the probate court of Marin county administrator of the estate, and qualified, and letters were issued to him, and that he was still administrator.

In *Salmon v. Wilson*, 41 Cal. 595, the complaint, after giving the title of the court and names of parties, commenced with the following declaration: "The said plaintiff in this action as well on her own account as on the account of the other heirs and devisees of Francis Salmon, deceased, complains of the above named defendants." It then alleged in the usual form the death of the testator,



the leaving of a will, which was set forth in full, its proper probate and issuance of letters testamentary to the plaintiff, and her qualification. Then followed the allegation that she, "by virtue thereof, possessed herself of the real estate of said testator," hereinafter described, and ever since then has been, and now is, the owner seized in fee simple of an estate of inheritance of, in, and to all of said land, both as such executrix and as heir at law of said testator, and is now entitled to the possession thereof," and also alleged ouster by the defendants, described the land, and prayed judgment of restitution, etc. The complaint was held to contain a sufficient averment of seizin and a right of possession in the plaintiff in her capacity of executrix.

In *Liening v. Gould*, 13 Cal. 598, wherein the plaintiff, in an action in a justice's court, alleged that he was the administrator in fact of the intestate, and this was not denied by the answer, it was held that the failure to make proof of the plaintiff's right to sue was no ground for a nonsuit.

#### Colorado.

In *Colorado*, in *Buck v. Fischer*, 2 Colo. 182, it was held that it is not necessary that a personal representative shall in terms claim as such if facts showing his representative capacity are alleged. In that case by a bill to foreclose a mortgage as originally framed, the complainants claimed in their own right. The bill was subsequently amended so as to show the death of the mortgagee, leaving one of the plaintiffs his sole legatee and devisee. There was filed with the bill, as an exhibit, the last will and testament of the mortgagee, from which it appeared that one of the plaintiffs was appointed sole executrix of his estate, and also that he had bequeathed all his property to her. There was not in the bill any allegation or statement that she was executrix, or that she sued as such. The court said: "The failure of appellees to describe themselves as executrix and executor of the estate, the facts being alleged from which that conclusion may be drawn, cannot be fatal to the suit. That the suit could only be maintained by appellees as personal representatives of the estate, may be conceded (1 Story's Eq. Pl. sec. 200), but the character in which they sue sufficiently appears from the facts alleged in the bill."

In *Duncan v. Wheedbee*, 4 Colo. 143, a declaration was held defective in that the plaintiff therein sued in his representative capacity, but concluded the *ad damnum* averment to himself personally, and not in his representative capacity, thereby rendering it impossible to determine whether the recovery was sought by him as administrator, or in his own right.

#### Connecticut.

In Connecticut, it has been held that, where a plaintiff describes himself as executor in the first count of his declaration, there is no necessity that he shall repeat the words "as executor" in each count thereafter. *Bulkley v. Andrews*, 39 Conn. 523, wherein the court said: "The first count in the declaration is a count in general *indebitatus assumpsit* for money lent, money paid, money had and received, goods sold, etc., etc. The first error assigned in the motion in error is, that the first three causes of action in this count are in favor of the plaintiff in his capacity and right as executor, and the last two causes of action in his own right. This, no doubt, would be a bad count if the fact were so, but it is not. The plaintiff describes himself in the outset as executor, and adds the words 'as executor' to every repetition of the term 'plaintiff,' as often as it occurs throughout the count, including the *ad damnum* clause. We are at a loss to imagine how he could have made his claims as executor more explicitly or more exclusively. . . . The second, third, and fourth causes of error may be considered together. The second, third and fourth counts of the declaration are said to be for causes of action accruing to the plaintiff in his own right, and so cannot be joined with the first count. No authority need be quoted to show that claims in one's own right cannot be joined with claims as executor. Such misjoinder is bad on demurrer, on motion in arrest of judgment, or on error. In this declaration, however, we discover no such misjoinder. The special counts, it is true, do not add the word 'as executor' after the word 'plaintiff,' but two at least of those counts allude to the property sued for as belonging to the plaintiff as executor, or as needed by him in the settlement of the estate of which he was executor. Then, as we have already stated, the plaintiff describes himself in the commencement of the declaration as executor. There can be no more necessity for repeating the words 'as executor,' in each count, in order to identify the character in which the plaintiff sues, than there is for repeating the name of the plaintiff in order to identify his person."

#### District of Columbia.

In the District of Columbia, it was held in *Jordan v. Hamlink*, 21 D. C. 189, that a declaration stating that "the plaintiff, . . . administrator of . . . deceased, sues the defendant," etc., sufficiently stated the character in which the plaintiff sued, and that it was not necessary that he should state by what court he was appointed administrator.

In *Yeaton v. Lynn*, 5 Pet. 224, 8 U. S. (L. ed.) 105, it was held that, where an administrator brought suit during the minority

of the executor, he must aver the fact that the executor had not attained his full age in the declaration, since his power as administrator was determined when the executor attained his full age.

In *Campbell v. Wilson*, 2 Mackey 497, an action brought by a person describing himself as administrator on a contract made with him was held to be brought in his individual capacity, and to be therefore barred by limitations.

#### *Florida.*

It has been held in Florida that in an action of replevin, an executor or administrator has an option either to sue in his representative capacity and declare as executor or administrator, or to bring the action in his own name, and in his individual character; but if he chooses the former, it must be averred that it accrued to him "as" executor, as it is not enough to say that it accrued to him "executor" or being "executor." *Branch v. Branch*, 6 Fla. 314.

#### *Georgia.*

In Georgia it has been said that, if an executor or administrator desires to have the debt treated as one due him, strictly in his representative right, he must describe it as such, by annexing the words "as executor" or "as administrator" to his name. *Daniel v. Hollingshead*, 16 Ga. 190.

Where suit is brought by an executor or administrator on a cause of action which he is entitled to maintain in his own name, it has been held that his description of himself as "executor" or "administrator" will be regarded as designatio personae and therefore as surplusage. *Daniel v. Hollingshead*, 16 Ga. 190; *Macon, etc. R. Co. v. Davis*, 18 Ga. 679; *Kenan v. DuBignon*, 46 Ga. 258; *Wheeler v. Long*, 73 Ga. 110. "When an executor or administrator finds it necessary to bring suit upon a debt, which, in the management of his testator's or intestate's estate he has suffered to be contracted with him, for and on account of said estate, he may, at his option, declare upon that debt, as one due to him in his representative character, or as due to him personally. If he mean to bring the suit in his representative character, apt and fit words should be used, for the purpose of manifesting such intention. When, in such case, he declares on such a contract, it seems, by the rules of pleading, not enough that he should simply style himself executor or administrator—that he should describe himself in his petition, for example, as 'A B executor of C D;' for this, it is held, only shows that the debt was contracted with him in that character, but does not show that he has elected, in his suit, to treat it as the

debt of the estate. It is said, that subjoining to his name, in such a suit, the word 'executor' or 'administrator' is simply a designatio personae; and that if he means to have the debt treated as one due to him, strictly in his representative right, he must describe it as such, by annexing the words 'as executor' or 'as administrator' to his name." *Daniel v. Hollingshead*, supra. Likewise, where the executor or administrator has been in the actual possession of the property which is the subject of the suit, it will not be necessary for him to give evidence of his title, as executor or administrator, in an action against a wrongdoer. And in such a case, the naming himself "executor" or "administrator" in the declaration, may be regarded as mere surplusage. *Macon, etc. R. Co. v. Davis*, 18 Ga. 679. But in *Gilbert v. Hardwick*, 11 Ga. 599, the action was brought by the plaintiff in his representative character; he described himself as executor, made proffer of his letters testamentary, and prayed that the defendant appear and answer to his plaint as executor. The court said: "It could not proceed as an action in his representative character, because he had been removed upon his own showing, from the executorship. . . . Nor could the cause be retained as a suit in his personal character, being made such by striking out or disregarding so much of the declaration, as exhibits him in a representative character, as merely descriptio personae. The rule as to descriptio personae, in these cases, is this: if the plaintiff describes himself executor, etc., etc., it is an action in his personal character—the descriptive part being regarded as immaterial. But if the plaintiff describes himself, as he has done in this case, as executor, etc., then it is an action in his representative character, and the descriptive part is of substance, and cannot be regarded as immaterial. Whether this distinction be with or without reason, it is the rule of the common law, and was the rule of the common law when we adopted it, and it is therefore, obligatory upon this court. The order of the inferior court, dismissing the suit, was right; the little word as, is in such cases, quite potent."

Where a petition states that the suit was brought by certain individuals, who described in the first paragraph thereof, themselves as administrators of the estate of a deceased, and sets forth as a cause of action that the defendant was indebted to the estate in a certain amount, it is sufficient in the absence of a special demurrer to show that the plaintiffs are suing in their representative capacity. *Peavy v. Sangster*, 13 Ga. App. 418, 79 S. E. 215.

In *Leathers v. Raburn*, 13 Ga. App. 744, 79 S. E. 946, it was held that, in a suit brought by the plaintiff in his individual

character for the recovery of damages for injury to property, an amendment adding the words "as administrator" of a certain person, was insufficient, in the absence of averments in the petition and amendment as to the death of the decedent, the fact that the title to the property was in such decedent, and the appointment and qualification of the plaintiff as administrator.

#### *Illinois.*

In Illinois, it has been held that, where a declaration by an executor or administrator based on a cause of action which can be enforced by him only in his representative capacity, does not contain a sufficient averment of that capacity, it is bad on demurrer. *Foster v. Adler*, 84 Ill. App. 654.

In *Iowa State Traveling Men's Assoc. v. Moore*, 73 Fed. 750, 34 U. S. App. 670, 19 C. C. A. 662 (applying rule in Illinois), it appeared that in a special count, the plaintiff was called "Maggie M. Moore, administratrix of the estate of John H. Moore, deceased," instead of "as administratrix." But the common counts were added, and in each of them the cause of action was alleged to be an indebtedness "to said plaintiff's intestate." In the special count profert was made of the letters of administration, and the promise alleged was "to pay to the personal representative of said John H. Moore." The court said: "If we could say that the words in the special count, 'administratrix of the estate of John H. Moore, deceased,' and the words, 'the personal representative of said John H. Moore,' are descriptio personae, and that said court shows a cause of action in Maggie M. Moore, the record would fail to support the judgment. . . . To say that the declaration here can be construed as showing the cause of action to be in Maggie M. Moore, otherwise than as administratrix of the estate of John H. Moore, deceased, is out of the question."

In an action on a contract made with an executor or administrator in his own right and not in a fiduciary or representative character, or for an indebtedness growing out of such a contract, it has been held that he may sue in his own name, and that if the word "executor" or "administrator" is used after his name, it will be regarded as merely descriptive of the person. *Newhall v. Turney*, 14 Ill. 338; *Brent v. Shook*, 36 Ill. 125; *Higgins v. Halligan*, 46 Ill. 173; *Laycock v. Oleason*, 60 Ill. 30; *Wolf v. Beaird*, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565; *Miller v. Kingsbury*, 128 Ill. 45, 21 N. E. 209. And see *McKinley v. Braden*, 1 Scam. (Ill.) 64.

#### *Indiana.*

In Indiana it has been held that it is sufficient if the body of the pleading shows that

the plaintiff is suing in his representative character, without setting out his appointment and qualification. *Durham v. Hudson*, 4 Ind. 501; *English v. Roche*, 6 Ind. 62; *Kelley v. Love*, 35 Ind. 106; *Bennett v. Gaddis*, 79 Ind. 347; *Chicago, etc. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026; *McDowell v. North*, 24 Ind. App. 435, 53 N. E. 789. And see *Hansford v. Van Auker*, 79 Ind. 157, 302.

So, in *Durham v. Hudson*, 4 Ind. 501, wherein some of the counts of a declaration did not conclude to the damage of the plaintiff "as" administrator, but concluded "to the damage of the plaintiff administrator as aforesaid," it was held that the declaration was good as the counts all showed plainly that the plaintiff was suing as administrator.

In *English v. Roche*, 6 Ind. 62, in a bill to foreclose a mortgage, the complainants described themselves as "administrators of the goods and chattels, rights, credits, moneys and effects which were of Henry Ossum, late of Huntington county, deceased, who died intestate." The bill further stated that "on or about the 1st day of October, 1848, said Henry Ossum died intestate, and that your orators were duly appointed," etc. It was held that the bill sufficiently showed that the complainants were the administrators of Henry Ossum, deceased.

In *Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859, the title of the cause and the commencement of the complaint were as follows: "Frank L. Wagner, Administrator of the Estate of Jane Brunk, deceased, v. Edward Toner and Albert D. Toner, Sr. The plaintiff in the above entitled cause, as administrator of the estate of Jane Brunk, deceased, complains," etc. The court said: "We are asked by counsel for appellants to disregard the words 'as administrator of the estate of Jane Brunk, deceased,' in the body of the complaint, and to construe that pleading as if the action were brought in the name of Frank L. Wagner alone, with no designation of the character in which he sues, and with no indication of his connection with the note sued upon. This we do not feel authorized to do. The statutory rule requires that a liberal construction shall be given to the pleadings in civil causes, with a view to substantial justice between the parties. . . . A formal allegation of the death of Mrs. Brunk, and of the issuing of letters of administration upon her estate to the person named as administrator, would have been more in accordance with the rules of good pleading and with approved precedents than the form of averment adopted; but, under the liberal provisions of the civil code, as interpreted and applied by this court, the complaint must be held sufficient. While there is some diversity of opinion as to the necessity of such allegations of the death of the intestate and

the appointment of the administrator or executor, the tendency of the courts is toward a relaxation of the strictness of the common law rules of pleading, and it is now generally held that no formal words are essential to show the representative character in which the plaintiff sues. . . . In the present case no one could be misled by the title of the cause, or by the averments in the body of the complaint as to the character in which the plaintiff sued, his title to the note, or that the payee of the note was dead. But, even if there had been any merit in these objections to the form of the complaint, the defects complained of were effectually cured by the admission of record by the appellants that Jane Brunk had died intestate, and that the plaintiff, Frank L. Wagner, was the duly appointed and acting administrator of her estate."

In *Hamilton v. Ewing*, 6 Blackf. 88, wherein the plaintiff sued on a promissory note payable to the deceased, describing himself as "executor" of the deceased, it was held that there was nothing to show the connection of the plaintiff with the cause of action, as the mere description of his person as the executor of the deceased was not enough for that purpose, and that there should have been an averment to show his interest in the note.

In *Campbell v. Baldwin*, 6 Blackf. 364, it was held that, when it is necessary for a plaintiff to sue as executor or administrator, an omission to show his authority is fatal on demurrer; but that when he can maintain the action in his own right, as where he has obtained a judgment for a debt due to his testator, the omission is immaterial, though he describes himself as executor or administrator.

Where the debt sued for is due to, or the judgment sought to be enforced was recovered by, an administrator or executor in his personal capacity, and not in *autre droit*, a designation of himself as administrator, etc., is surplusage, and should be rejected as such. *Helm v. Van Vleet*, 1 Blackf. 343, 12 Am. Dec. 248; *Capp v. Gilman*, 2 Blackf. 45; *Barnes v. Modisett*, 3 Blackf. 253; *Hamilton v. Ewing*, 6 Blackf. 88; *Campbell v. Baldwin*, 6 Blackf. 364. And see *Daniels v. Richie*, 7 Blackf. 391.

In *Daniels v. Richie*, 7 Blackf. 391, the plaintiffs were described in the declaration as executors, but it did not appear that the cause of action accrued to them in that capacity; they were not alleged to have demised the premises as executor, nor were the premises averred to have belonged to the testator; but the covenants were laid to have been made to the plaintiffs individually. It was held that, viewing the declaration as setting forth a lease made by the plaintiffs personally, and containing covenants by the

defendants to them personally, which were alleged to have been broken, it was to be considered good on demurrer.

In *Vanblaricum v. Yeo*, 2 Blackf. 322, it was held that the declaration in an action of debt by an administrator *de bonis non* should contain the name of the original administrator and a statement that the money had not been paid to him. And in *Griffith v. Fischli*, 4 Blackf. 427, it was held that in addition to the requirements set forth in *Vanblaricum v. Yeo*, *supra*, the declaration should contain an averment that the money had not been paid to the previous administrator or to the present administrator, who was the plaintiff, or the deceased.

#### Kansas.

In *Central Branch Union Pac. R. Co. v. Andrews*, 37 Kan. 162, 14 Pac. 509, it was held that the allegation in a complaint was held to be sufficient: "That the said R. S. Andrews died, in Atchison county, Kansas, on March 9, 1883; and thereafter, and on March 13, 1883, said L. A. Andrews and B. F. Hudson were, by the probate court of Atchison county, Kansas, being duly and legally authorized thereto, duly and legally appointed administrators of the estate of said R. S. Andrews, deceased, and letters of administration duly and legally issued to them as such out of and by said court, and that they thereupon duly and legally qualified as such administrators, and have ever since been and now are the duly and legally authorized, appointed, qualified, and acting administrators of the estate of R. S. Andrews, deceased."

#### Kentucky.

It is not required, in Kentucky, that the plaintiff in the caption of the pleading should style himself in his official capacity, but the fiduciary character in which a party sues must be stated in the body of the petition. Thus, in *Quinn v. Newport News, etc. Valley Co.* 22 S. W. 223, 15 Ky. L. Rep. 74, wherein the plaintiff, after reciting the facts constituting the cause of action, alleged that "Quinn died intestate, a resident of Jefferson county, and the plaintiff was appointed by the county court to be, that it accepted and qualified as, and became and now is, the administrator of the estate of Joseph Quinn, deceased," it was held that this was a sufficient statement of facts to show that the recovery was sought by the plaintiff in its representative, and not in its individual, capacity.

In *Louisville, etc. R. Co. v. Herndon*, 126 Ky. 589, 104 S. W. 732, 31 Ky. L. Rep. 1059, it was held that an allegation in a petition by a corporation that "on February 9, 1906, Wm. H. Herndon died intestate, a resident

of Hopkins county, Ky., and on August 30, 1905, it was appointed by said Hopkins county court administrator of his estate, and thereupon qualified as such administrator as required by law, and has acted as such ever since," was sufficient to show a special appointment as administrator of the estate.

In *Bowler v. Lane*, 3 Metc. 311, it was held that the fact that in the style of the action, the name of the plaintiff was inserted as "Ellen Lane, plaintiff, administratrix of Maurice Lane, deceased, against R. B. Bowler, defendant," showed conclusively the character in which the plaintiff sued; so that an amended petition wherein it was averred that the action was brought by her, as the administratrix of Maurice Lane, deceased, did not change the character of the action.

Where it does not appear by any statement in the writ or declaration that the plaintiff sued in his representative capacity, and the cause of action is laid in his personal right, the fact that he is named administrator, etc., should be taken as a description of the person suing, rather than of the character in which he sues. *Spurgen v. Robinet*, 4 Bibb 75; *Baker v. Baker*, 4 Bibb 346; *Reid v. Watts*, 4 J. J. Marsh. 440. Thus in *Baker v. Baker*, supra, the court said: "Though the plaintiffs are styled executors in the note upon which the action is founded, yet it is plain that can only operate as a *descriptio personarum*; for as the note was given to them, and not to their testator, they could only maintain the action in their right, and not in that of their testator, and consequently a plea that there was another executor, not joined with them in the action, could not abate the suit."

In *Rowan v. Lee*, 3 J. J. Marsh. 97, wherein in the first part of his declaration the plaintiff stated that he was the executor of the deceased's estate, but in a subsequent part he averred that he had taken out letters of administration, the court said: "The distinction between an executor and administrator is perfectly defined by law, and when a plaintiff demands a debt, in right of another, whose representative he assumes to be, he ought to set out with precision his true character."

It has been held that the declaration need not state where or by what authority the letters of administration were granted. *Walton v. Kindred*, 5 B. T. Mon. 388. But in *Acton v. Walker*, 74 S. W. 231, 24 Ky. L. Rep. 2377, it was held that a petition was defective where the plaintiff failed to aver where the testator died, and in what court she qualified as executrix, and in what court the will was probated, the terms of the will, and that under the will she was vested with the title to the land which had been sold appellants, or state the facts which would

show that she had the right to make and tender them a deed, which they were bound to accept under the terms of the title bond.

In *Warfield v. Brand*, 13 Bush 77, no objection on the ground of insufficiency was made to a petition which contained distinct allegations that Burr, Scott, and the appellee were each, in succession, appointed administrator, with the will annexed, of William M. Brand, but there were no allegations of the death, resignation, or removal of the original executors, or of Burr or Scott. The only allegation as to the executors was that they all qualified except Mrs. Brand; that W. H. Brand was the active executor; that the executors named having died or declined to act, Burr was appointed administrator; that he afterwards ceased to act, when Scott was appointed by the Fayette county court.

#### Louisiana.

In Louisiana it has been held that the capacity of a party, appearing as a fiduciary, should be averred, but it need not be proved unless specially denied. *Hatcher's Succession*, 23 La. Ann. 136.

In *McNeil's Succession*, 9 La. Ann. 113, wherein the plaintiff styled himself in his rule, not only administrator, but attorney in fact of the heirs, and his quality of administrator was undisputed, it was held that his allegation of another quality in himself than that of administrator of the estate might therefore be treated as surplusage.

#### Maine.

The rule obtaining in Maine is that in order that a suit may be deemed one brought in a representative capacity, the plaintiff must not only describe himself as an executor, but he must aver that the promise was made to the testator, in his lifetime, or that it was made to the plaintiff, as executor. And so, where the plaintiff describes himself in his writ as an executor, but the cause of action is described as one accruing to him in his own right, and he does not aver that the promise on which the action was brought was made to the testator, nor that it was made to him, as executor, but it is described as one made to the plaintiff himself and on a consideration moving from him, the suit is one brought in the private and individual capacity of the plaintiff. *Bragdon v. Harmon*, 69 Me. 29; *Hayes v. Rich*, 101 Me. 314, 64 Atl. 659, 115 A. S. R. 314; *Buswell v. Eaton*, 76 Me. 392; *Fleming v. Courtenay*, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414.

In *Brown v. Nourse*, 55 Me. 230, 92 Am. Dec. 583, in answer to an objection that the writ did not state that the plaintiff was administratrix of her intestate within this state, the court said: "If the objection is,

at this stage of the case, open to the defendant, the reply is that she does allege that she is 'administratrix of the estate of J. W. L. Brown, late of,' etc. The promises set forth are all to the intestate. This is the usual mode of declaring in this state. It has never been required that the writ should set out where, or by what authority, the administration was granted. The administrator never makes profert of his letters of administration. The legal inference is, when a suit is brought in the name of an administrator, and he declares that he is administrator of a certain deceased person, that the declaration is that it was granted in this state. For he cannot be an administrator, with a right to sue in our courts, unless he has been here appointed."

#### *Maryland.*

In Maryland, if the action is one which the plaintiff can maintain only in an individual capacity, the addition of the word executor or administrator may be treated as a superfluous description. *Sasser v. Walker*, 5 Gill & J. 102, 25 Am. Dec. 272; *Chapman v. Davis*, 4 Gill 166. In the case first cited, the court said: "The appellees being styled in the writ 'executors of William Walker,' and merely called in the declaration (after reciting the writ), 'the said plaintiffs,' the words 'the said plaintiffs,' in the declaration, must be understood as having reference to the plaintiffs as described in the writ, and to mean the plaintiffs, executors of William Walker; and being called in the replication throughout 'executors of William Walker,' and in the demurrer 'the said plaintiffs,' as in the declaration, which must be understood in the same manner as the declaration, there is perfect correspondence between the writ, declaration, replication, and demurrer; and if the appeal bond on which the suit was brought, and which was given to them as executors, on the appeal from the judgment obtained by them in that character against Kemp was a contract on which they could sustain an action only in their individual, and not in their representative capacity, then the addition of the word 'executors,' in the writ, etc., might be construed and treated as a superfluous description, and not irregular, the demand being the same."

In *Banton v. Higgins*, 41 Md. 539, it was held that, in an action by a foreign executor to enforce the payment of a judgment already recovered by him in the state where his letters testamentary were granted, the judgment became a new debt due to him as administrator, and his right to sue for the same did not depend on his letters of administration; that while strictly speaking, the suit should be brought in his own name, a de-

scription of himself as administrator would be rejected as mere surplusage. But in *Chapman v. Davis*, 4 Gill 166, it was held that where the plaintiff could have maintained an action, either in his personal or representative capacity, and sues in the latter capacity, he is bound to sustain it as an action in that capacity.

#### *Massachusetts.*

In Massachusetts it has been held that a declaration by an administrator need not set forth where, or by what authority, the administration was granted. *Langdon v. Potter*, 11 Mass. 313.

And where the action might have been brought by the representative in his own name, it has been held that his styling himself executor or administrator is merely descriptive and not essential to his right to recover. *Talmage v. Chapel*, 16 Mass. 71; *Baker v. Hathaway*, 5 Allen 103.

Thus in the case last cited the plaintiff annexed to his name the title of administrator, etc., but in the stating part of his bill he set forth an agreement as actually made with himself, and asked specific performance in the manner stated in the contract. The court held that it was competent for him to require the stipulated conveyance to be made either to himself or such other persons as he might designate, and that the bill might well be considered as brought by him personally, if necessary to sustain the same, and the addition of administrator might be treated as merely descriptive.

In *Arnold v. Sabin*, 4 Cush. 46, wherein the petitioner described himself as administrator and creditor, but it appeared that he was not entitled to act as administrator, the court said: "The respondent alleges, in his petition, that he is 'administrator and' creditor; but the words 'administrator and' are material, and cannot be treated as surplusage. It may have been upon this ground alone that the judge took jurisdiction."

#### *Michigan.*

In Michigan, it has been held that the character in which the plaintiff sues, i. e., in a representative or an individual capacity, is to be determined from the allegations of the body of the pleading. *Middlesworth v. Nixon*, 2 Mich. 425, 57 Am. Dec. 136. So, in *Walker v. Cady*, 106 Mich. 21, 63 N. W. 1005, wherein the bill of complaint set forth very fully all the proceedings in the probate court, the appointment of complainant as administrator, the allowance of a claim, an appeal to the circuit court, the recovery of verdict and judgment there, and the deficiency of assets, the court said: "While there is no specific allegation that the bill is filed in his

capacity of administrator, there exists no room for doubt that it is so filed, and that the defendants so understood. The point is too technical to require further comment."

#### Minnesota.

In Minnesota, the rule is that it is necessary for a plaintiff who sues as executor or administrator to allege in a direct and issuable form that he is such, though it is the better practice so to do by alleging that the plaintiff is executor or administrator by virtue of letters issued by a probate court of some county, giving the name of the court and the term at which the letters were granted. *Chamberlain v. Tiner*, 31 Minn. 371, 18 N. W. 97; *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118.

It has been held that in an action by an administrator *de bonis non* the complaint should state the name of the original representative, and that he is dead, or has resigned, or has been discharged, or that his letters have been revoked, as the case may be. *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118.

#### Mississippi.

In Mississippi, it has been held that the declaration should state with clearness and precision the character in which the plaintiff sues. *Cushing v. Gibson*, Walk. 87. In that case, wherein the plaintiffs described themselves as the "legal representatives" of the deceased, the court said: "The words 'legal representative' may be considered a generic description, out of which we may have many species, such as heirs, aliens, executors and administrators, administrators *de bonis non*, and administrators with the will annexed. If this be a fact, and the declaration be held sufficient, it is manifest that the defendant will be deprived of the privilege of controverting their existence under either head of the species, for they do not describe themselves as being one or the other. If the plaintiffs were suffered to recover under the present state of the pleadings, could such a recovery be pleaded in bar by the defendant, in the subsequent suit for the same cause of action by an executor or administrator? I think not."

Where a note is made payable to a party as administrator, the words "as administrator" are merely descriptive of the person and do not change the nature of the action, which may be maintained in the party's own name and in his own right. *Carter v. Saunders*, 2 How. 851; *Trotter v. White*, 10 Smedes & M. 607; *Falls v. Wilson*, 24 Miss. 168; *Rucks v. Taylor*, 49 Miss. 552.

In *Boswell v. Thigpen*, 75 Miss. 308, 22 So. 823, it was held that it was not usual or

necessary, in suits by administrators, to state when the intestate died.

#### Missouri.

In Missouri it is held that the caption of a pleading by an executor or administrator is simply descriptive personae, and not a substantive allegation; and therefore that, to be sufficient, a petition ought to show, by proper averments and statements of fact, the authority of the plaintiff to bring such a suit. *Higgins v. Hannibal*, etc. R. Co. 36 Mo. 418; *State v. Matson*, 38 Mo. 489; *Fuggie v. Hobbs*, 42 Mo. 537; *Headlee v. Cloud*, 51 Mo. 301; *Bird v. Cotton*, 57 Mo. 568; *State v. Bartlett*, 68 Mo. 581; *Smith v. Zimmerman*, 29 Mo. App. 249. Thus, where the chief ground of objection to a petition was that the plaintiff was not styled in the caption thereof as the administrator of the estate of the deceased, the court said: "These words are mere *descriptio personae*, and had they been added to the name of Edwards, would have given him no standing in court, unless the fact of his appointment and qualification as administrator had been averred in the petition. In such case the averments in the petition would determine the right of the party to prosecute the suit; and as it is expressly averred that plaintiff was duly appointed administrator, and thereafter did qualify, and as such administrator prosecutes the suit, the omission of the words as administrator of the estate of ShROUT is not fatal on demurrer, as the omission is fully supplied and cured by the allegations of the petition." *State v. Bartlett*, 68 Mo. 581.

In *Dodson v. Scroggs*, 47 Mo. 285, an action on the bond of an administrator who had defaulted, by an administrator *de bonis non*, it was held that the plaintiff should be required to aver the fact of his appointment affirmatively, and that it was usual and proper to give the date of his letters and the court from which they were issued, that the defendant might be advised in regard to his authority, and be able intelligently to put it in issue. In *State v. Green*, 65 Mo. 523, it was held that a petition which by an administrator *de bonis non* which failed to show the termination of the authority of one of two original administrators was insufficient.

In *Duncan v. Duncan*, 19 Mo. 368, the plaintiff, styling herself in the petition, administratrix of all and singular the goods, chattels and effects of a named decedent, commenced a civil action against the defendant, on a note alleged to have been made by the defendant to the intestate, and on an account due from the defendant to the intestate, praying judgment as administratrix. It was held that the petition stating the character

in which the plaintiff sued (as administratrix) and the indebtedness to her intestate, and praying judgment as administratrix for the debt, was a sufficient statement of the cause of action, and of her right to sue, "in such manner as to enable a person of common understanding to know what is intended." (Code, art. 6, sec. 1.)

In *Fuggle v. Hobbs*, 42 Mo. 537, it was held that where, in the title to the petition, the plaintiff was described as "administrator" but in the body of the petition it was averred that he was the acting and lawful executor of the last will and testament of the deceased, and there was no other allegation of his appointment, qualification, or representative capacity, the averment contained in the petition was good.

In *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955, it was held that, under the Missouri statute (Rev. Stat. 1889, § 299) making it the duty of the public administrator to take charge of the estate of deceased persons in the cases specified in the first seven subdivisions thereof, the public administrator, in taking charge of estates, acts independently of any order of the probate court, and in suits brought by him he is not required to show the facts which authorized him to take on himself the burden of administration.

It has been held that an administrator can maintain an action in his individual name on a judgment obtained by him, or on a note made payable to him "as administrator, etc.," or "as executor, etc.," the words "administrator, etc." being mere words descriptive of his office or title to be rejected as surplusage or *descriptio personae*. *Lacompte v. Seargent*, 7 Mo. 351; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979, 16 L.R.A. 410; *State v. Kaime*, 4 Mo. App. 479; *Knoche v. Perry*, 90 Mo. App. 483.

#### Montana.

In *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063, it was held that where an administratrix was made a party plaintiff, not by the action of the parties, but by an order of the court, no allegation of her official capacity was required.

In *Knight v. LeBeau*, 19 Mont. 223, 47 Pac. 952, the complaint alleged that on a stated day the plaintiffs were duly and legally appointed administrators with the will annexed of the estate of a certain decedent and duly qualified as such administrators; and letters of administration with the will annexed of said estate, were duly and legally issued to them and each of them; and that they and each of them have ever since been, and now are, the duly and legally appointed, qualified, and acting administrators with

the will annexed of the estate. Holding the complaint to be sufficient, the court said: "It is true that the averments as to the legal capacity of plaintiffs to sue are very defective. Properly the pleading should have shown by direct averment that Godwin died leaving a will; that a court of this state (naming it) duly made orders admitting said will to probate, and issuing letters of administration with the will annexed to plaintiffs. . . . The actual cause of action in the complaint under review is the unpaid promissory note executed by defendant to the decedent, Godwin. The capacity in which a plaintiff sues is not necessarily an essential element of the cause of action stated in his complaint. . . . In *State v. Matson*, 38 Mo. 489, and *Judah v. Fredericks*, 57 Cal. 389, which are the main precedents relied upon by appellant, the courts evidently proceeded upon the theory that the right of the party to recover is an essential element of the cause of action he states. We can readily understand that the right to recover may be regarded as an element of the cause of action, under certain circumstances. . . . But there is a manifest distinction between a complaint which fails to show any capacity to sue, or any right to recover, and one which only defectively sets forth the capacity or right. In the two cases relied upon by appellant, cited *supra*, we think the courts overlooked this distinction. For in both of these cases there were allegations showing that the plaintiffs sued as executors of decedents, however defective they may have been. Between a right to recover and the want of legal capacity designated as a ground for demurrer in section 680, Code of Civil Procedure 1895, the difference may not, at times, seem very clear. But if a right to recover is to be regarded as an essential element of the cause of action stated, to such an extent as to include the capacity to sue; then such a doctrine, carried out logically, would completely nullify the specific statutory ground of demurrer for want of legal capacity to sue. We cannot follow any such doctrine even if the cases *State v. Matson* and *Judah v. Fredericks*, *supra*, and others cited by appellant, do follow and teach it. For the purposes of the general demurrer to the complaint because it fails to state a cause of action, we must accept as conceded that the plaintiffs were the administrators of Godwin, that Godwin was dead, and that the note sued upon is in their hands as administrators of his estate. However defective the allegations, these facts are clearly inferable. Under the general rule that there is no presumption against the pleader, we cannot infer from these averments that Godwin is alive, that he left no will, and that a court qualified to do so did not duly issue



letters of administration with his will annexed to plaintiffs. . . . Again, appellant urges that the complaint is unintelligible and uncertain, inasmuch as it cannot be ascertained when or where said Godwin died. But appellant is not injured by such omissions in the complaint. The demurrer was properly overruled in this respect."

*Nebraska.*

In *Williams v. Eikenbary*, 36 Neb. 478, 54 N. W. 852, it was held that a petition sufficiently showed that the plaintiff sued in her representative capacity, though the caption gave her individual name only where the body of the petition showed her appointment as administratrix and stated the cause of action as one accruing to her intestate.

*Nevada.*

In *Stanley v. Sierra Nevada Silver Min. Co.* 118 Fed. 931 (applying the Nevada rule), the complaint alleged that before the commencement of this action W. H. Stanley died intestate, and that on or about the 8th day of August, 1902, on proper proceedings had therefor in the first judicial district court of the state of Nevada, in and for the county of Storey, an order was duly made by said court appointing plaintiff administratrix of the estate of said W. H. Stanley, deceased, and that thereupon plaintiff duly qualified as such administratrix, and letters of administration upon the estate of said W. H. Stanley, deceased, were duly issued to plaintiff, and that thereupon plaintiff entered upon the discharge of the duties of said office, and ever since has been, and now is, such administratrix. The court said: "The averment as to the death of W. H. Stanley, and of the appointment of I. M. Stanley as administratrix of the estate, might, perhaps, have been stated in clearer terms; but the court, from the averments, is not authorized to assume that 'said W. H. Stanley did not die until after plaintiff was appointed administratrix of the said estate.'"

*New Jersey.*

In New Jersey, it has been held that in an action by an executor his authority to sue as such must be alleged. *Pelletreau v. Rathbone*, 1 N. J. Eq. 331. (Must allege probate of will).

And it has also been held that a declaration by a limited or special administrator should contain an averment of the continued existence of the facts pending which special letters were granted. *Cole v. Wooden*, 18 N. J. L. 15, wherein Dayton, J., said: "That the settlement of the suit, at once terminated the powers and authority of these special ad-

ministrators, is clear. The very title, 'administrators pendente lite,' carries with it its own explanation. It continues, pending the suit, only. The same rule applies to all special and limited administrations. They are 'granted durante minore aetate,' 'durante absentia,' or 'pendente lite,' and in all cases fall to the ground, when the especial circumstances under which they are granted, have terminated. . . . But further, a declaration by such limited administrator, should always aver the existence of a continuation of that fact, pending which only, it was granted; and if it do not, is demurrable; but in the present case, the declaration not only fails to aver the fact, that the suit (pending which, administration was granted) was still in existence, but it avers the contrary; it alleges that it was finally settled in open court by the parties interested."

But it has been held that it is not necessary, in a suit brought by an executor, that he should be styled such, either in the process, or in the commencement of the bill, or in the prayer for process, if the allegations in the bill are sufficient to bring him before the court in that character. *Evans v. Evans*, 23 N. J. Eq. 74; *Ransom v. Geer*, 30 N. J. Eq. 249; *Plaut v. Plaut*, 44 N. J. Eq. 18, 13 Atl. 849; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054. And where the plaintiff is styled executor in the process or in the commencement of the declaration, the designation may be rejected as surplusage, and the suit proceed as one by him individually, though it is otherwise when the suit is brought by him "as executor." *Evans v. Evans*, 23 N. J. Eq. 74.

In *Slover v. Reading*, 29 N. J. Eq. 152, which was a bill by certain complaints as administrators to foreclose a mortgage, it was held that the bill must state that the complainants' alleged intestate was dead, and that letters of administration of his estate had been issued to them. *Stover v. Reading*, 29 N. J. Eq. 152.

In *Lake v. Weaver*, 80 N. J. Eq. 395, 86 Atl. 817 (*affirmed* 80 N. J. Eq. 554, 86 Atl. 821), it was held that where the plaintiff recited in the bill that she was the administratrix of her father's estate, but she nowhere indicated that the bill was filed by her solely as administratrix, the bill was to be considered as one brought by her individually and also as an administratrix of her father's estate.

In *Sautter v. Metropolitan L. Ins. Co.* 73 N. J. L. 455, 63 Atl. 994, it was held that where a declaration set forth the death of a certain person, and averred that the plaintiff was thereafter appointed administrator of his goods, chattels and credits in a designated court, the absence of a profert of the letters was not a defect of sufficient

importance to move the court to strike out the declaration.

#### *New York.*

The rule obtaining in New York is that where a personal representative brings an action which he can maintain only in his representative capacity, an allegation is necessary showing the appointment of the executor or administrator as such, with all the necessary details to make that fact apparent. *Kingsland v. Stokes*, 25 Hun 107, *affirming* 58 How. Pr. 1; *Wheeler v. Dakin*, 12 How. Pr. 537. In *Sheldon v. Hoy*, 11 How. Pr. 11, the court held in an action of trover by a representative, that the fact that the plaintiff was an administrator, and had been regularly appointed by the surrogate of some county in the state, was a material and traversable fact, and must be stated in such form as to tender an issue to the other party. And to the same effect see *Cordier v. Thompson*, 8 Daly 172.

In the case of *In the Matter of the Superior Court*, 1 How. Prac. 200, it was held that executors must sue in their representative capacity in order to exonerate themselves from the payment of a judgment for costs secured by the defendant; and that where their declaration showed that the cause of action accrued to themselves and not to the testator, their stating themselves to be executors was not sufficient to exonerate them.

On the other hand if the cause of action is plainly alleged to have accrued to the plaintiff "as executor" it is sufficient. *Scrantom v. Farmers' etc. Bank*, 33 Barb. 527, *affirmed* 24 N. Y. 424. And see *Spencer v. Strait*, 40 Hun 463.

In general, an averment of due appointment as executor or administrator by a designated court is sufficient. *Marshall v. Bresler*, 1 How. Pr. (N. S.) 217; *Cohu v. Husson*, 113 N. Y. 662, 21 N. E. 703, *affirming* 14 Daly 200, 6 N. Y. St. Rep. 292; *Brenner v. McMahon*, 20 App. Div. 3, 46 N. Y. S. 643. But it has been said that the jurisdiction of the appointing court must appear. *Secor v. Pendleton*, 47 Hun 281. And see *Otto v. Regina Music Box Co.* 87 Fed. 510 (applying New York rule).

It has been held that where an executor or administrator may sue in his representative or individual capacity and the summons or caption of the complaint designates him "executor" or "administrator," omitting the word "as" between the plaintiff's name and description, and there is no sufficient averment of his representative character in the body of the pleading, the suit is to be considered as one brought by him in his individual capacity. *Christopher v. Stockholm*,

5 Wend. 36; *Bright v. Currie*, 5 Sandf. 433; *Sheldon v. Hoy*, 11 How. Pr. 11; *Forrest v. New York*, 13 Abb. Pr. 350; *Merritt v. Seaman*, 6 N. Y. 168, *reversing* 6 Barb. 330; *Beers v. Shannon*, 73 N. Y. 297, *affirming* 12 Hun 161; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Scott v. Parker*, 5 N. Y. S. 753. See also *Smiley v. Finucane*, 134 N. Y. S. 59; *Blanchard v. Strait*, 8 How. Pr. 83; *Worden v. Worthington*, 2 Barb. 368. Therefore, the descriptive words "executor" or "administrator," following the plaintiff's name in the summons or title of a complaint, the averments of which show a cause of action in his individual capacity, may be rejected as surplusage, such a statement being *descriptio personae* merely. *Newberry v. Robinson*, 36 Fed. 841 (applying New York rule); *Bright v. Currie*, 5 Sandf. 433; *Sheldon v. Hoy*, 11 How. Pr. 11; *Murray v. Church*, 1 Hun 49; *Bingham v. Marine Nat. Bank*, 41 Hun 377, 17 Abb. N. Cas. 431, 2 N. Y. St. Rep. 638, *rehearing* 18 Abb. N. Cas. 135, N. Y. St. Rep. 528, *affirmed* 112 N. Y. 661, 19 N. E. 416; *Wick v. Jewett*, 45 Hun 589 mem. 9 N. Y. St. Rep. 477; *Merritt v. Seaman*, 6 N. Y. 168, *reversing* 6 Barb. 330; *Peck v. Mallams*, 10 N. Y. 509; *Stillwell v. Carpenter*, 62 N. Y. 639 (reported more fully in 2 Abb. N. Cas. 238) *modifying* 59 N. Y. 414; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Scott v. Parker*, 5 N. Y. S. 753. And see, *Gross v. Gross*, 26 Misc. 385, 56 N. Y. S. 219, *affirming* 25 Misc. 297, 54 N. Y. S. 572. Compare *Farrington v. American Loan, etc. Co.* 18 Civ. Pro. 135, 9 N. Y. S. 433. In *Murray v. Church*, 1 Hun 49, the court said: "A good cause of action is completely alleged and set forth in the complaint, but it appears to be in the plaintiffs' own right, and not in their representative capacity. If they had not described themselves as executrix and executor, no possible objection could be made to the cause of action alleged. It would then be as complete and perfect as any rules of pleading could require it to be. The circumstances that they did so describe themselves, does not, in any manner, change the effect of the facts alleged. That is merely a description of their persons; and, in view of the facts stated, it does not warrant the conclusion that the suit must be maintained by them in that capacity. They were at liberty, notwithstanding that description, to rely upon a cause of action existing in their favor, in their own right; and, in doing so, their complaint, being sufficient in all other respects, was not demurrable on account of the fact that, in the title of the action, they describe themselves as having a representative character." In *Merritt v. Seaman*, 6 N. Y. 168, *reversing* 6 Barb. 330, the court said: "The declaration commences in the following form: 'Charles H. Merritt,

executor of the last will and testament of John Sampson, deceased, plaintiff in this suit, by A. K. Hadley, his attorney, complains of John F. Seaman," etc. This is the only part of the declaration that contains any indication that the suit is brought by the plaintiff in any other than his individual character. The promises are all laid to the plaintiff individually; and no mention is made of letters testamentary, either in the declaration, or in the testimony. This mode of describing the plaintiff as executor, is, upon all the authorities, to be regarded as merely a *descriptio personae*, in no respect changing the character of the pleadings, or the rights of the parties under them. But in *Smiley v. Finucane*, 134 N. Y. S. 50, the court said: "In this case, however, although plaintiff is named in the summons and complaint as administrator, the cause of action stated is not one that is alleged to have existed in favor of his intestate, but one which accrued to him individually. Taking the complaint to contain a correct statement of facts, plaintiff is not suing in a representative capacity as administrator. Hence the words 'as administrator' must be treated as surplusage." In *Wick v. Jewett*, 45 Hun 589 mem. 9 N. Y. St. Rep. 477, the court said: "If the mere title of executors, etc., had been added to the names of the plaintiffs it would necessarily be treated as descriptive merely of the persons, but it is urged that such effect cannot be given to those words in this case, because the use of the word 'as' distinctly qualifies and fixes their relation to the action as that of representatives, and as such only they must be treated for the purposes of this action. We think they are not concluded by the form given to the title of the action, but their rights may rest upon the cause of action as alleged in the complaint, which as there presented and as proved is none other than in behalf of the plaintiffs as individuals. And the words used expressing their situation as executors, in view of the allegations of the complaint, may be treated as descriptive of the persons rather than restrictive in their effect upon the relation of those plaintiffs to the action and their right of recovery. And this has the support of authority. . . . By the title of the action, the two plaintiffs appear to have come into court as the personal representatives of a deceased person, and by the allegations of the complaint they clearly appear not to be prosecuting the action in such representative capacity, but in their individual right only. They allege a cause that accrued to the plaintiffs as the firm of Wicks Brothers & Co." In *Cordier v. Thompson*, 8 Daly 172, it was said: "There is no doubt that a good pleader will never omit to place the word 'as' between the surname of

his client and the word administrator whenever he brings suit for the legal representative of an intestate."

However, it has been held that the character in which the plaintiff sues, is to be determined, not from the description of himself which he gives in the summons or in the title of the complaint, but from the averments in the body of the pleading; and that the pleading is sufficient if the allegations therein show that the plaintiff has brought the suit in his official capacity. *Marshall v. Bresler*, 1 How. Pr. (N. S.) 217; *Scrantom v. Farmer's etc. Bank*, 33 Barb. 527, *affirmed* 24 N. Y. 424; *Bingham v. Marine Nat. Bank*, 41 Hun 377, 17 Abb. N. Cas. 431, 2 N. Y. St. Rep. 638, *rehearing* 18 Abb. N. Cas. 135, 4 N. Y. St. 529 *affirmed* 112 N. Y. 661. 19 N. E. 416; *Wick v. Jewett*, 45 Hun 589, 9 N. Y. St. Rep. 477; *Collins v. Steuart*, 2 App. Div. 271, 37 N. Y. S. 891; *Van Buren v. Coopers-town First National Bank*, 53 App. Div. 80, 65 N. Y. S. 703, *affirmed* 169 N. Y. 610, 62 N. E. 1101; *Willets v. Haines*, 96 App. Div. 5, 88 N. Y. S. 1018, *affirmed* 182 N. Y. 543, 75 N. E. 1135; *Cordier v. Thompson*, 8 Daly 172; *Stilwell v. Carpenter*, 62 N. Y. 639 (reported more fully in 2 Abb. N. Cas. 238) *modifying* 59 N. Y. 414; *Beers v. Shannon*, 73 N. Y. 297, *affirming* 12 Hun 161; *Farrington v. American Loan, etc. Co.* 18 Civ. Pro. 135, 9 N. Y. S. 433. And see *Gross v. Gross*, 26 Misc. 385, 56 N. Y. S. 219, *affirming* 25 Misc. 297, 54 N. Y. S. 572. In *Cordier v. Thompson*, 8 Daly 172, the court said: "Although the plaintiff does not expressly aver that she brings the action in her capacity as administratrix, and although the addition of the words 'administratrix of the goods and chattels of Rosine Cordier' in the title of the complaint is a mere *descriptio personae*, I think a fair construction of the pleading shows that the plaintiff sued in her representative character." In *Willets v. Haines*, 96 App. Div. 5, 88 N. Y. S. 1018, *affirmed* 182 N. Y. 543, 75 N. E. 1135, the court said: "What is claimed . . . is that the judgment recovered belonged to the plaintiffs as executors or trustees under the will of Samuel Willets, deceased, and that this action is brought by them, not as executors or trustees, but personally. It is true that in the title of the action in the summons and complaint the word 'as' between the names of the plaintiffs and the words descriptive of their representative capacity is omitted, but it does not necessarily follow because of such omission that the action is brought in a personal and not a representative capacity. On the contrary, it clearly appears from the allegations of the complaint that the action is brought by them as executors, and not otherwise. They described themselves as such, and allege that they are the 'surviving

executors under said will and the owners and holders of said judgment.' This is sufficient to bring the case under the general rule, that where the averments in a complaint are such as to affix to the plaintiff a representative character and standing in the litigation, and to show that the cause of action, if any, devolved upon him solely in that character, the omission in the title to the action of the word 'as' between the name of the plaintiff and the words descriptive of his representative capacity does not prevent him from claiming that the action is brought and recovery is to be had by him in the latter capacity."

In *Steele v. R. M. Gilmour Mfg. Co.* 77 App. Div. 199, 78 N. Y. S. 1078, wherein the plaintiff sued personally and as executrix, it was held that she could maintain the action though she failed to establish the latter fact, since she and her coplaintiffs also sued in their individual capacity.

Where a person deals with an executor or administrator in his official capacity, and is later sued by the representative on a cause of action arising out of those dealings, there is no necessity that the plaintiff should make formal allegations respecting his official character in the pleading. *Skelton v. Scott*, 18 Hun, 375; *Kingsland v. Stokes*, 25 Hun 107, affirming 58 How. Pr. 1; *Steele v. R. M. Gilmour Mfg. Co.* 77 App. Div. 199, 78 N. Y. S. 1078.

#### North Carolina.

In *Belloat v. Morse*, 3 N. C. 157, it was held that where the plaintiff suing as executor did not aver that the will had been proved and that he had qualified as executor thereunder, the complaint was demurrable. But in *Hurst v. Addington*, 84 N. C. 145, it was held that where the complaint sufficiently showed that the will had been proved and that the executor had qualified before the filing of the complaint, an objection that it did not state that the will was admitted to probate and the plaintiff qualified as executor of said will prior to the issuing of the summons was frivolous.

Where an executor sues "as executor," when in fact the action is brought in his individual character, the words "as executor" are considered as mere surplusage. *Cotten v. Davis*, 48 N. C. 355; *Beaty v. Gingles*, 53 N. C. 302.

#### Ohio.

In Ohio, it has been held that the plaintiff, suing in a representative capacity as executor or administrator, must state every material fact issuably. *Neil v. Cherry*, 2 Ohio Dec. (Reprint) 28, 1 West L. Month. 155. In that case it was held that a petition

commencing "Ann Neil, Administratrix of Solomon Neil, deceased, plaintiff," and containing no other averment that the plaintiff was administratrix, or was so appointed, did not allege that the action was prosecuted by her in her official character, as such a statement is mere *descriptio personae*. It was said that the better form of pleading is, in the title of a cause, and throughout the petition, to employ the expression "as administratrix," etc.; but that this is not necessary, and that a petition stating that "the plaintiff is administratrix" or "was duly appointed administratrix is not liable to a demurrer for any defect in the form of stating the plaintiff's representative capacity. It was further said that it is better pleading for the petition to show the date, place and power of appointment of the administratrix.

#### Oregon.

The prevailing rule in Oregon is that when a cause of suit or action, whether in contract or in tort, accrues after the death of a testator or an intestate, the money, if recovered, will be assets of the estate, and the executor or administrator may sue, at his option, in either his representative or individual capacity. So where the complaint shows, when the documents on which it is based, the averments touching them, and its whole scope, are considered, that plaintiffs have sued in their individual, and not their representative capacity the use of the word "executors," in the title of the case, is a mere *descriptio personae*, and does not of itself operate to attach to plaintiffs a representative character, and may be regarded as surplusage. *Burrell v. Kern*, 34 Ore. 501, 56 Pac. 809; *Sears v. Daly*, 43 Ore. 346, 73 Pac. 5.

#### Pennsylvania.

In Pennsylvania in *Martin v. Smith*, 5 Bin. 16, 6 Am. Dec. 395, it was held that an objection to the conclusion of a declaration to the damage of the said plaintiff without adding "as executor," etc., had no weight as in actions brought by executors or administrators, the usual conclusion was to the damage of the plaintiff, without saying more.

In *Lewis v. Ewing*, 3 Serg. & R. 44, it was held that it was a fatal omission by a plaintiff who sued as an administrator cum testamento annexo not to have averred that the executor, during whose absence the administration was granted, continued to be absent at the time of the bringing of the action.

Where the action appears to have been brought by the plaintiff in his individual character, his naming himself as executor or administrator, is surplusage. *Kline v. Gutherford*, 2 Pen. & W. 490; *Wolfsberger v.*

Bucher, 10 Serg. & R. 10; Stephens v. Cotterell, 99 Pa. St. 188; Biddle v. Wilkins, 1 Pet. 686, 7 U. S. (L. ed.) 315 (applying Pa. rule).

#### *Rhode Island.*

In a Rhode Island case, it has been said that it is not the practice in that state, for the plaintiff to set forth in his declaration the title by which he claims to sue as executor or administrator, or to make profert of his letters. *Ellis v. Appleby*, 4 R. I. 462.

#### *South Carolina.*

The rule in South Carolina is that, while it is necessary that the character in which the plaintiff sues should appear in the complaint, it is sufficient if this appears substantially in the body of the complaint, or in the complaint taken as a whole. *Dial v. Tappan*, 20 S. C. 167; *Mickle v. Congaree Constr. Co.* 41 S. C. 394, 19 S. E. 725. And see *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386. Thus, in *Dial v. Tappan*, *supra*, the court said: "It is next objected that plaintiff did not sue as, or in the capacity of administrator. In the case of *Bird v. Cotton*, 57 Mo. 568, the learned judge who delivered the opinion said: 'The capacity in which the plaintiff sued was not as clearly stated as should have been. But the petition styled the plaintiff as executor, stated that the note was made payable to their testator, averred his death, and then brought their letters into court and made profert of them. All these facts taken together showed unmistakably the capacity in which the plaintiff sued, and their right to sue, and enables any person to know what was intended.' So we say here. 'No form of words is absolutely essential to show the plaintiff's authority. The pleading is not demurrable if the facts appear substantially, or even obscurely, provided it appear. But the true way is to allege directly the death of the decedent, that letters of administration upon the estate, or testamentary, as the case may be, were issued to the plaintiff upon a day named and by a court named, and that he is still acting as such administrator or executor.' Bliss, § 265. No doubt it is necessary that the character in which the plaintiff sues should appear in the complaint, but it seems that so this appears substantially in the body of the complaint, or in the complaint taken as a whole, this will be sufficient." In *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503, the court said: "As said by this court in the very recent case of *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386, when in that case the court was discussing some of the same kind of objections to the phraseology of the complaint, a quotation

was made from the case of *Dial v. Tappan*, 20 S. C. 167, as follows: 'In delivering the opinion of this court, the late Chief Justice Simpson used this language, which it seems to us is quite pertinent to the present case: "Taking up the alleged defects to the complaint in the inverse order in which they are presented, the first to be considered is the objection that there was no averment that the will of the testator had been admitted to probate. The averment on this subject was that the plaintiff had been appointed administrator with the will annexed by the probate court of Richland county. This, we think, includes the averment of all that was necessary to warrant the probate judge to make this appointment; and no authority need be cited to the point that the probate judge could not have granted the letters prior to the probate of the will before him. All that was necessary, to entitle the plaintiff to exercise and be clothed with the rights and powers of administrator, was a legal appointment as such by the probate judge. . . . But as is well said by Judge Cochran, the court of probate is a constitutional court of record, having jurisdiction especially as to the appointment of administrators; and when an appointment is alleged in the complaint and admitted in the demurrer, the maxim, 'omnia praesumuntis rite,' applies." Continuing, Chief Justice McIver remarks: "This applies equally as well to the grant of letters testamentary, which furnish the evidence of the right of a person to act as executor of a will; and when it is alleged, as in this case, that the plaintiffs have duly qualified as executors in the probate court, this includes an averment that all that was necessary to invest them with the rights and powers of executors had been done. This view may be supported, also, by an analogy drawn from a complaint in an action to recover possession of real estate, when the plaintiff simply alleges that he has title to the premises in dispute, it never was supposed to be necessary that the plaintiff should set out in his complaint how or where he derived his title. Of course, if his allegation of title is denied in the answer, then it would become necessary for him to show how and when he derived title. So here, where the plaintiffs have alleged in their complaint that they are the duly qualified executors of the will of the testator, as we think they have done substantially, no further allegations as to the manner in which they acquired their right to act as such executors are necessary. But if the defendants, by their answer, had denied that the plaintiffs are the duly qualified executors of the testator, then it would be necessary for the plaintiffs to prove how and when they had acquired the right to act as such executors.'" "

In *Lanier v. Brunson*, 21 S. C. 41, it was held that a counterclaim was demurrable which failed to sufficiently allege that the defendant was the duly qualified executor of the deceased.

In *Mickle v. Congaree Constr. Co.* 41 S. C. 394, 19 S. E. 725, the following complaint was held to allege sufficiently the plaintiff's appointment as administrator: "The plaintiff above named, as administrator of the estate of John Mickle, deceased, suing for the benefit of the parents of the said John Mickle, complaining, alleges," etc. "That the said John Mickle died intestate, and left as his heirs at law, his father, the plaintiff herein, and his mother, Ardella Mickle, who were dependent upon the said John Mickle for a greater part of their comfort, subsistence, and maintenance in life, and who, by reason of his death as aforesaid, are injured as set out in paragraph five of this complaint. That the plaintiff is the duly appointed and qualified administrator of the goods, chattels, and effects of the said John Mickle," etc.

Where it appears in the caption of the complaint that the plaintiff is suing in his representative capacity as executor or administrator, but there are no allegations of fact in the body of the complaint to show his right to sue, the complaint is not therefore, demurrable, as the words "as executor" etc., in the caption of the complaint are merely surplusage, immaterial and may be stricken out at any time by amendment. *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617. And see *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386.

It has been held that an executor of an executor may declare as the representative of the testator without naming or noticing the first executor; though the more usual and correct mode of proceeding is to notice the prior executorship. *O'Driscoll v. Fishburn*, 1 Mott. & McC. 77.

#### *Tennessee.*

In Tennessee, the rule is well-settled that an executor or administrator may sue in his individual capacity, his naming himself "executor" or "administrator" is but descriptio personae and does not alter the character in which he sues. *Page v. Cravens*, 3 Head. 383; *Walt v. Walsh*, 10 Heisk. 314; *McCallum v. Woolsey*, 6 Baxt. 308. And see *Winningham v. Crouch*, 2 Swan. 170.

In *McCallum v. Woolsey*, 6 Baxt. 308, the court said: "His Honor gave judgment for the defendant on the ground that the suit was in the name of plaintiff as executor, and that the contract was with him personally. In this he erred. If necessary the words executor, etc., might well be treated as merely descriptive, or disregarded as surplusage, as

it is clear the party suing is entitled to recover, and the object was purely technical and formal. It is not clear, however, that it was not a debt due to him as executor, and certainly was assets of the estate, and as such might well have been sued for in official capacity."

#### *Texas.*

The rule in Texas as to the necessity of an averment by the plaintiff as to his right to sue in a representative capacity was stated in *Guest v. Phillips*, 34 Tex. 176, wherein the court said: "A party suing for the benefit of an estate he represents, must show that fact by direct and positive allegations in his petition." And to the same effect was *Beal v. Batte*, 31 Tex. 371, wherein the court said: "Has the plaintiff made such allegations as are necessary to show that he is authorized to bring suit in this cause of action? There are three, and perhaps more, ways by which plaintiff could bring suit on this note: First, by being the indorsee of the note; second, the assignee in bankruptcy; third, executor or administrator of the payee. And if he should bring suit in either of these capacities he should make such allegations as would authorize the court to make the inference therefrom that the party was authorized to appear in such capacity. If, for instance, the plaintiff sue as the assignee of a note, he must state that the payee did indorse the note, or such other allegations as would enable the court to decide that he was the assignee. He must not state inference, and cause the court to make, either mentally or otherwise, the allegation. In the case before the court there is no allegation that the payee is dead, or that the plaintiff is the legal representative. The petition begins with, 'John G. Batte, executor of the last will and testament of John F. Edwards.' Had the petition anywhere stated that Edwards had died, that he made his will in his lifetime, and that the plaintiff had been appointed in the will the executor, that the will had been admitted to probate and that plaintiff had accepted and had been qualified as executor, and had he further stated that he was recognized as such executor by a county court of a county in this state, then would the court have been authorized to infer, as a conclusion of law, that the plaintiff was executor of the last will and testament of John F. Edwards, deceased. As the court did not judicially know that the plaintiff was executor of the will of the payee, and as there is no allegation to that effect, the exception should have been sustained."

Where an executor or administrator may sue in his own name or as administrator, at his election, the words "as administrator"

etc., may be treated as mere descriptio personae, and the action maintained by the plaintiff in his own name. *Gayle v. Ennis*, 1 Tex. 184; *Groce v. Herndon*, 2 Tex. 412; *Butler v. Robertson*, 11 Tex. 142; *Claiborne v. Yoeman*, 15 Tex. 44; *Hall v. Pearman*, 20 Tex. 168; *Rider v. Duval*, 28 Tex. 622; *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035; *Nelson v. Bagby*, 25 Tex. Supp. 305; *Wilson v. Hall*, 13 Tex. Civ. App. 489, 36 S. W. 327; *Hayden v. Kirby*, 31 Tex. Civ. App. 441, 72 S. W. 198. In *Hall v. Pearman*, supra, the court said: "The presumption is, that suit is brought in the individual right of the plaintiff, when he appends to his name the terms merely 'administrator of,' etc., and not in his right as administrator of the deceased. This, from the looseness of pleading, may frequently not accord with the facts. It may be that the suit could be maintained only in his capacity as administrator, and yet the averment be in his own name, appending merely 'administrator of the deceased,' and not laying his complaint 'as administrator of the deceased.' There is nothing in this case to show that the suit could not have been maintained in his individual right, and the ordinary and legal presumption must be allowed its full force."

In *Taylor v. Williams*, 105 S. W. 837, the petition alleged that "the plaintiff W. T. Williams is the duly qualified and acting statutory independent executor of the last will and testament of the said W. J. Williams, deceased, which said will has been duly probated in the probate court of Marion county and said statutory independent administration by said executor has been continuously, and is still open and pending, and has never been closed, and there has been no distribution of the property of said estate." It was held that the allegations sufficiently showed Williams' authority to administer the estate and to prosecute this suit; and that it was not necessary to good pleading that he should make further allegations showing the condition of the estate, when he qualified, the terms of the will, what act he was performing, etc., nor why the heirs did not prosecute.

In *Boyle v. Forbes*, 9 Tex. 35, it was held that inasmuch as under a law of Louisiana then in force in Texas an administrator held his appointment for one year only, unless it was extended for sufficient cause shown from year to year, an administrator suing after the lapse of a year must show the extension of his authority.

In *McKeen v. Ellis*, 83 S. W. 880, the petition commenced as follows: "Come now Amanda Mitchell Ellis, independent executrix of the will of L. A. Ellis, and Amanda Mitchell Ellis for herself," etc., "complain of W. R. McKee," etc. It was held that while ordinarily the words "independent executrix" are regarded as descriptio

personae, they could not be so taken when the pleading mentioned her again as a distinct party suing in her own right, as the intention was thereby made clear that she was proceeding in both capacities.

In *Thomas v. Jones*, 10 Tex. 52, a petition by an administrator for a writ of error was held to be insufficient. The court said: "There is no averment in the petition for a writ of error that Mims is administrator. And it is only by the tacit admission in the affidavit in support of the motion to dismiss that we are distinctly apprised of that fact, and of his purpose in prosecuting a writ of error. But if it sufficiently appears that he is administrator of the estate of Williams, he was not a party to the suit, and it does not appear that, as administrator, he is interested in the judgment. If the defendants had recovered in the action, it does not follow as of course that the land must have been subjected to administration. That would depend on facts which do not appear. We do not think any stranger to the subject-matter of the litigation, by simply naming himself administrator, etc., can prosecute a writ of error in a case like the present without averring that he is administrator, and that as such he is interested in the subject-matter of the judgment which he seeks to reverse."

#### Vermont.

The Vermont rule is laid down in *Trask v. Karrick*, 87 Vt. 451, 89 Atl. 472, wherein the court said: "The character in which a party sues, whether in his own right or in a representative capacity, it is admitted, should appear. It is also admitted that it is not enough to add to the plaintiff's name the word 'executor,' 'administrator,' or 'trustee,' as these words are usually descriptive, merely, and leave the suit an individual undertaking. But pleadings are to be given a reasonable construction, and all that is required is that it shall fairly appear, from the writ and declaration, taken as a whole, in what capacity the plaintiff brings suit. In such cases, it is not necessary to allege that the plaintiff sues as executor, if that fact fairly appears." And to the same effect see *Pope v. Stacy*, 28 Vt. 96.

Though a declaration by an executor or administrator concludes to the damage of the plaintiff individually, it will not be held faulty where it and the writ, taken as a whole, show that the plaintiff sues in his representative character. *Pope v. Stacy*, 28 Vt. 96; *Trask v. Karrick*, 87 Vt. 451, 89 Atl. 472.

#### Virginia.

In Virginia a declaration in a representative capacity is sufficient if taken as a whole

it shows that capacity. *Lawson v. Lawson*, 16 Grat. (Va.) 230, 81 Am. Dec. 702, wherein the court said: "It is said however that the plaintiff can only recover in his character of executor, and that here he has not declared as executor but in his individual character. The cause of action here accrued after the death of the testator. . . . Now where an executor sues in respect of a cause of action which accrued in the lifetime of the deceased, he must declare in his representative character. But where the cause of action accrued after the death of the testator, if the money recovered will be assets, the executor may declare in his representative character or in his own name. . . . But if necessary, the declaration may, I think, in support of the justice of the case, be considered as a declaration in the plaintiff's character as executor. The circuit court so thought, for the judgment for costs against the plaintiff directed them to be levied of the assets of his testator. The plaintiff declared as executor of John Lawson, and the other allegations referring to him may reasonably be considered as referring to him in his character of executor; and upon the demurrer to evidence, I think, they should be so considered."

And in *Giddings v. Green*, 48 Fed. 489 (applying the Virginia rule), it was held that where an executor appointed in Ohio, sued in Virginia on a judgment obtained in the former state, describing himself as executor, these words would be treated as *descriptio personae*.

#### *Washington.*

In Washington a general averment by the plaintiff of his appointment as executor is sufficient. *Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119. In that case, after setting forth the will, the plaintiffs alleged only that they "duly qualified and accepted the trust thereby created and ever since have been and now are the duly qualified and acting executors." The court said: "Certainly the facts stated show they are trustees, with authority to sue, and are duly appointed executors. The objection that there is no allegation that letters testamentary have been granted is immaterial, for this is a non-intervention will."

#### *West Virginia.*

The West Virginia rule is well settled, that, where it appears from the form of the declaration that the plaintiff sues in a representative character, and the cause of action is one which arose during the life-time of the plaintiff's intestate, or one which the administrator can maintain only in his official character, the declaration must contain an averment, in an issuable form, of the fact of the plaintiff's appointment and qualifica-

tion as administrator. *Perry v. New River, etc. Consol. Coal Co.* 74 W. Va. 122, 81 S. E. 844; *Moss v. Campbell's Creek R. Co.* 75 W. Va. 62, 83 S. E. 721, L.R.A.1916C 1183; *Crockett v. Black Wolf Coal, etc. Co.* 75 W. Va. 325, 83 S. E. 987; *Byer v. Paint Creek Collieries Co.* 86 S. E. 476; *Brogan v. Union Traction Co.* 86 S. E. 753. And see the reported case.

In *Capehart v. Hale*, 6 W. Va. 547, the court said: "In a bill in equity preferred by an executor, as such, he ought to describe himself as the executor of his testator. He should do this, in order that the defendant may be informed as to the particular character in which he professes to act, and may conveniently ascertain and approve or controvert the reality of the character, and the consequences resulting from it; and that the court and clerk may conveniently shape and enter the decree on conformity to the statement. . . . If in the introduction of a bill, one who is actually an executor, mention himself simply in his own character—not as executor—and so make his complaint, though afterwards, in the statement of facts to maintain the complaint, he shows that he happens to be the executor of a person who made his will and died, and as such has a cause of suit against the defendant, this does not change the character of the plaintiff and transform the bill into one preferred and prosecuted by the executor of that testator, in his executorial capacity."

It is improper for an executor to describe himself merely as "personal representative" of a person deceased. *Capehart v. Hale*, 6 W. Va. 547.

#### *Wisconsin.*

In *Moir v. Dodson*, 14 Wis. 279, the death of the testator, the execution and probate of the will, the appointment of the plaintiffs as executors, the issuing of letters testamentary to them, and their qualification and acceptance of the trust, were all distinctly alleged in the body of the complaint. It was held that there could be no pretense that the action was brought by them in their individual character, and that the complaint stated no cause of action in their favor.

In *Hyde v. Kenosha County*, 43 Wis. 129, a complaint alleging that a certain tax certificate was "now lawfully possessed and owned by said administrator and plaintiff," was held to contain a sufficient allegation that the certificate belonged to the plaintiff in his representative capacity.

But in *Robbins v. Gillett*, 2 Pin. 439, 2 Chand. 96, a complaint in an action of trespass *quare clausum freget* was held to be in the plaintiff's individual character, where it charged that the defendants broke and entered



the close of the plaintiff, "administrator as aforesaid," and throughout, alleged the injury to have been done to the plaintiff's close, since the addition of the words "administrator as aforesaid" did not alter the nature of the allegation, these words being a mere *descriptio personae*.

ARMSTRONG

v.

WALTON ET AL.

Mississippi Supreme Court—June 2, 1913.

105 Miss. 337; 62 So. 173.

**Beneficial Societies — Designation of Beneficiary by Will.**

Designation of the beneficiary of the amount agreed by a benefit society to be paid on death of a member may be made by will, this appearing to be the plan of the society.

[See Ann. Cas. 1913B 1286.]

**Wills — Necessity of Signature at End.**

Under Code 1906, § 5078, providing a will must be signed, without stating where, it is unnecessary that the signing be at the end.

[See note at end of this case.]

**Same.**

Under Code 1906, § 5078, permitting signing of a will for testator by another in testator's presence and by his express direction, J. A., unable to read or write, to the knowledge of W., having requested W. to fill out his will, the writing by W. of the name of J. A. at the beginning of it, "I, J. A., . . . give and bequeath," it then being properly attested, and handed back to J. A., all parties understanding it to be a completed instrument, will be considered a sufficient signing.

[See note at end of this case.]

Appeal from Chancery Court, Monroe county: ROBINS, Chancellor.

Action by Harriett Armstrong Walton et al., plaintiffs, against Mary Lou Armstrong, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

Paine & Paine for appellant.

D. W. Houston, Sr. and Jr., for appellees.

[350] REED, J.—This appeal was a controversy between the widow of a deceased member of the Masonic Benefit Association, claiming to be his designated beneficiary, and his children by a former marriage, over the proceeds of an insurance certificate, John Arm-

strong, at the date of his death, May 3, 1911, was a member in good standing of the Masonic Benefit Association. The certificate of insurance, dated May 27, 1905, was made payable to him upon his death, and was for five hundred dollars. The amount of this insurance was afterwards, by properly adopted order of the association, increased to seven hundred dollars. On December 3, 1906, John Armstrong designated his wife, Mary L. Armstrong, appellant herein, as his beneficiary in the insurance certificate. The instrument [351] by which this designation is made is called a will. It is claimed that it was not sufficiently executed by John Armstrong, by reason of his signature not being placed on the line at the end thereof. The following is the benefit certificate and the so-called will:

"No. 4522.

"MASONIC BENEFIT ASSOCIATION.

(Organized 1880)

Of the M. W. Stringer Grand Lodge

*Deum servamus, nostras viduas et orphanos sustinebimus.*

Office of the Treasurer.

"Will pay to Bro. John Armstrong, of Sesostria Lodge No. 14, at Aberdeen, Mississippi, who is a member of the

MASONIC BENEFIT ASSOCIATION.

"This certificate witnesseth: That the Masonic Benefit Association of the M. W. Stringer Grand Lodge of F. & A. M., of Mississippi, will pay to John Armstrong, upon his death, five hundred dollars (\$500), provided he is in good financial standing with the Masonic Benefit Association and in good standing with his local lodge at the time of his death.

"Any failure to comply strictly with the laws and regulations of the Masonic Benefit Association, as prescribed by the aforesaid Grand Lodge, causes forfeiture in the membership represented by this certificate.

"No suit shall be maintained on this claim unless instituted within one year after the member's death.

"Proof of death must be filed in the M. B. A. within thirty days after the death of member.

"Given under my hand and official seal at Edwards, Mississippi, this 27th day of May, 1905.

"[Signed]

E. E. PERKINS,

"[Seal.]

Sec'y & Treas.

"I, John Armstrong, of Aberdeen, Miss., age 49 years, being of sound and disposing mind, give and bequeath [352] the money due to me by virtue of the certificate upon which.

this, my last will, is indorsed unto my wife, Mary L. Armstrong.

"In witness whereof, I this the 3rd day of Dec., 1906, sign, publish and declare this instrument as my will, so far as the money is concerned, which is due me after my death from the Masonic Benefit Association. I appoint Mary L. Armstrong as my executor.

"State of Mississippi, Monroe County.

"The said John Armstrong, on the 3rd day of December, 1906, signed the foregoing instrument and published and declared the same in our presence and in the presence of each other, as his last will, and we, at his request, and in his presence, and in the presence of each other, on said date, have hereunto written our names as subscribing witnesses thereof.

"[Signed] F. N. B. WARD, W. M.  
"R. E. WARD, S. D."

The form of the certificate and the will is on one page. There is only a line dividing the instruments. From the appearance of the form, it seems that the certificate and the will, when executed, was intended to be considered and read together and as one.

The will contains the statement that it is indorsed upon the certificate. It is shown therein that its only purpose is to dispose of the money to be due to the member on the certificate, from the association, at the time of his death. The form of the certificate indicates that it should be made payable to the member "upon his death . . . provided, he is in good financial standing." The form excludes the idea that it was meant to have the certificate made payable, upon its original issuance, to some other person than the member. It appears to be the plan of the association that the certificate should be made payable to the member to whom it is issued, and that the member should afterwards designate his beneficiary in [353] the instrument called a will, which follows immediately the certificate and together occupies the face of the sheet which is known as the benefit certificate.

We have carefully examined the rules and regulations of the Masonic Benefit Association. These are called the constitution and by-laws. The only provision we find relative to the issuance of the benefit certificate and the designation of the beneficiary is the form of the policy, and thereunder the form of the instrument, which is stated to be a will. Therefore, with the exception of prescribing a form for the certificate and for the designation of the beneficiary, there is nothing in the rules and regulations of the association to control the manner in which the beneficiary shall be named.

It will be noted that John Armstrong's name is not written on the line at the end of the instrument which he denominates his will, and in which he gives the proceeds of the benefit certificate to his wife. It is shown by the testimony that he was a colored man, unable to read or write; that he went to F. N. B. Ward, one of the attesting witnesses to the will, and who was the Worshipful Master of the local lodge of the association, and requested him to make out his will and make it payable to his wife, Mary Lou Armstrong. Thereupon Ward filled out all the blanks in the instrument in the presence of John Armstrong and his son, R. E. Ward, who was Senior Deacon. The two Wards then signed the attestation to the will. F. N. B. Ward wrote down the name of Armstrong in two places, at the beginning of the will, and in the certificate of attestation. This was done because he was requested by Armstrong to fill out his will, and that meant the writing of all necessary words to make out and complete the execution of the will. The paper was then handed to Armstrong, who delivered it to his wife; and upon his death it was found in her bedroom, framed and hanging on the wall. F. N. B. Ward testified that he signed John Armstrong's name to the will.

[354] It appears to be settled that the right of a member of a benefit society in the amount agreed to be paid in the certificate, at his death, is simply the power to appoint a beneficiary, and that the rules and regulations of such society, such as may be contained in the constitution or charter and by-laws, are the foundation and source of such power. Bacon's Benefit Societies, vol. 1, sec. 237. But we find no requirement in the rules and regulations of the Masonic Benefit Association, relative to the execution of the power to name the beneficiary, except the form of the will set out in the constitution and used in this case. This formality was intended to be complied with by the member, John Armstrong. We understand that the designation of a beneficiary may be made by will. This seems to be the plan of this association.

Has the instrument purporting to be a will been sufficiently executed? It is contended by appellee that it was necessary for the paper to have been signed at the end thereof. The statute of this state (section 5078 of the Code of 1906) provides that a will must be signed by the testator, or some other person in his presence and by his express direction, and if the will is not wholly written and subscribed by the testator, then it shall be attested by two or more credible witnesses in the presence of the testator or the testatrix.

Now, as to the place of signature: We find in 30 Am. & Eng. Ency. of Law (2 ed.)

582, the following: "Under the English statute of frauds, a will was held to be sufficiently 'signed' if the testator wrote his name at the beginning or in the body of the will with intent thus to sign the instrument; and this rule has been followed in those jurisdictions wherein the statute is silent as to the place of signature, with the modification, in some instances, that the intent to sign must appear upon the face of the will." In 40 Cyc. 1104, is the following: "Where the statute relating to signing requires no more than the statute of frauds—merely that the will shall be [355] in writing, and be signed—it is immaterial where the testator's signature was placed, if it was placed there with the intention of authenticating the instrument." It is stated to be the general rule, applicable to the signature to writings of various kinds, that "it is now almost universally held that, if the name of the party to be charged is written by himself or his representative anywhere in the body of the instrument, with intent thereby to authenticate it and render himself bound, it is a good signature." *Lampkin v. State*, 105 Ala. 1, 16 So. 575; *In re Camp*, 134 Cal. 233, 66 Pac. 227; *Cunningham v. Hawkins*, 163 Mich. 317, 128 N. W. 223.

In the case of *Armstrong v. Armstrong*, 29 Ala. 538, wherein it was held that the writing of the name of the testator at the beginning of the will was sufficient, *Rice, C. J.*, said in delivering the opinion of the court: "It is not essential that the testator should write his own name. The British statute, as well as our own, allows a will to be signed for him by another; and his name, when written by another, for him, in his presence, and by his direction, will have the same effect as if it had been written by himself. Although his name is not written by himself, nor subscribed to the will, yet, if it be written in the beginning of the will, by another, in his presence, and under his direction, and if it be acknowledged by him to the attesting witnesses, at the time he calls on them to attest and subscribe it, it will be as effectual as if with his own pen he had written it."

It seems that a distinction has been made between the meaning of the words "sign" and "subscribe." In the case of *Missouri, etc. R. Co. v. Denton*, 29 Tex. Civ. App. 284, 68 S. W. 336, the court, in holding a signature in the body of an instrument, called attention to the fact that the statute requiring such signature provided that such instrument should be "signed," and not that it be "subscribed." It will be noticed that the statute in Mississippi prescribes that the will shall be signed [356] by the testator, or some other person, at his direction, where it is not wholly written by him, and that, when

it is wholly written by him, it shall also be subscribed by him.

We do not find any decision of this court wherein the question of the location of a signature to a will has been passed on. In reference to the location of the signature of the witnesses attesting the will, it has been decided in the case of *Fatheree v. Lawrence*, 33 Miss. 585, that the purpose of attestation is to identify the instrument signed and published by the testator, and that no particular form of words is necessary to constitute an attestation. In the case of *Murray v. Murphy*, 39 Miss. 214, it is decided that it is immaterial as to what particular part of a will is located the name of the attesting witness. It is settled under the laws of this state that a signature to a will may be made for a testator by another party writing his name (*Watson v. Pipes*, 32 Miss. 451); and a testator may be assisted in signing his will by having his hand steadied by another party, and can also sign by his mark (*Sheehan v. Kearney*, 82 Miss. 688, 21 So. 41, 35 L.R.A. 102).

We find from the testimony in this case that John Armstrong had the purpose definitely in mind to make his will, so that his wife could be designated as the beneficiary in his insurance certificate. He went to an officer of the local lodge, the person who had full information on the subject, and knew how to write the paper in the proper manner and in conformity with the prescribed form of the association; and he directed that his will be made out, and that the insurance should be given to his wife. The officer wrote out the instrument as directed. In compliance with our statute, it was written in the presence of the testator, and at his express direction. Such express direction followed and was obedient to the request by Armstrong contained in the words, "Fill out my will to my wife."

[357] Armstrong could neither read nor write. This was known to Ward, and Ward intended to write every word necessary in the blank form in the will, including the signature of Armstrong. He knew that this was contained in the request made of him to fill out the will. Armstrong gave him all necessary information to enable him to prepare the paper. It is hardly possible that Armstrong knew the meaning of all the formal words used in making the bequest. It was sufficient for him to know that he was designating his wife as beneficiary in the will. He depended upon the man, the officer of the association, who had superior knowledge and who had special capacity to do what he desired. The will was properly attested by the witnesses when it was then handed back to Armstrong. All the parties, the testator and

the witnesses, understood that it was a completed and executed instrument, and it was so afterwards dealt with. Armstrong delivered it to his wife, the beneficiary. She had it in her possession and before her in her room, so that it could be easily seen by all. No one afterwards questioned the sufficiency of the execution of the paper. In fact, the record discloses that it was duly proved by the testimony of the subscribing witnesses and admitted to probate in accordance with the provisions of the statute. The execution further complied with the provisions of the statute by the attestation by two witnesses in the presence of the testator.

The Mississippi statute does not state where the signature of a testator to a will shall be located. It does not say that the will shall be signed or subscribed at the end thereof. As the statute is silent as to the place of signature, and merely provides that the will shall be in writing and signed, we believe the rule that it is immaterial where the signature of the testator should be placed on the instrument should be followed in this state. It seems clear that it was the intent of the testator to make and execute this instrument as his will, for the purpose [358] of designating his wife as the beneficiary in his insurance certificate. We therefore decide that the instrument is sufficiently executed and is a valid will under the law.

We have not entered into any statement or discussion of the pleadings in this case, as we have not deemed it necessary to do so. The Masonic Benefit Association, by an interpleader, admitted its indebtedness under said insurance certificate, in the sum of \$700. It is contended by the appellees that the will was not sufficiently executed, and therefore invalid, and that the amount due under the benefit certificate descended to the heirs at law of John Armstrong, who are the appellant, his widow, and the appellees, his children by former marriage. The chancellor decided this issue in favor of the appellees, holding that the will was not the true and last will of John Armstrong. We conclude that the court erred in doing this.

The case is therefore reversed, and judgment entered here in favor of the appellant, and dismissing the original bill of the appellees.

Reversed.

#### NOTE.

**Necessity that Will Be Signed by Testator at End thereof in Absence of Statute So Requiring.**

#### *In General.*

The rule laid down in the reported case that in the absence of any statutory designa-

tion as to the place of the testator's signature to a will it is immaterial where the signature is written provided it is attached with the intention of authenticating the instrument, finds support in a number of decisions. *Armstrong v. Armstrong*, 29 Ala. 538; *Kolowski v. Fausz*, 103 Ill. App. 528; *Meads v. Earle*, 205 Mass. 553, 91 N. E. 916; *In re Phelan*, 82 N. J. Eq. 316, 87 Atl. 625; *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807; *Alexander v. Johnston* (N. C.) 88 S. E. 735; *Lawson v. Dauson*, 21 Tex. Civ. App. 361, 53 S. W. 64; *Adams v. Field*, 21 Vt. 256; *Re Walsh* [1884-1896] 5 Newfoundland L. Rep. 738. See also *Thomson v. Carruth*, 218 Mass. 524, 106 N. E. 159; *Richards v. W. M. Lumber Co.* 158 N. C. 56, Ann. Cas. 1913D 313, 73 S. E. 485.

Thus it has been held that a will is properly signed where the name of the testator is written by him in the opening clause of the instrument. *Meads v. Earle*, 205 Mass. 553, 91 N. E. 916; *Lawson v. Dauson*, 21 Tex. Civ. App. 361, 53 S. W. 64; *Adams v. Field*, 21 Vt. 256; *Re Walsh* [1884-1896] 5 Newfoundland L. Rep. 738. In *Meads v. Earle*, supra, the court said: "There can be no doubt that she intended to make and supposed she had made a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place shows that. She does not appear to have been advised or assisted by any one. She personally superintended the whole work. There was however no signature at the end; and it is contended by the contestants that the single justice was not warranted in finding that she wrote her name at the beginning *animo signandi*. The finding must be interpreted to mean not simply that after writing her whole will she adopted as her signature her name as written previously in the *exordium*, but that at the time she wrote her name there she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all the circumstances into one harmonious whole and is supported by the evidence. The will was therefore properly signed." So in the case of *In re Phelan*, 82 N. J. Eq. 316, 87 Atl. 625, a will was held to be valid which was in the handwriting of the testator and which contained his signature at the beginning, and also in the attestation clause of the instrument. It appeared that the second signature was in a clause written by the testator which read "Signed, sealed, published and declared by the said Cornelius or Corniel F. Phelan to be his last will and testament in

the presence of as witnesses," and was written by him in the presence of the witnesses to the will. In *Alexander v. Johnston* (N. C.) 88 S. E. 785, two papers in the handwriting of a testatrix, one an envelope on which was written the words "Julia W. Johnston Will," and the other a paper without a signature which was found in the envelope and directed a certain disposal of the testatrix's estate, were admitted to probate as a good holographic will.

Likewise where a statute provides that a will must be signed by the testator or by some person in his presence, and by his direction, it has been held that a will is effectually signed if the testator's signature is written at the beginning of the document by another, in the presence and under the direction of the testator, and acknowledged by him to the attesting witnesses at the time he calls on them to attest and subscribe the will. *Armstrong v. Armstrong*, 29 Ala. 538. And see the reported case.

It was held in *Brown v. Tilden*, 5 Harr. & J. (Md.) 371, that a codicil in the handwriting of the testator which was found enclosed with a will under the same cover, and which recited changes that the testator intended to make in his will as to his personal estate, was a good and valid testamentary disposition of personal estate without the signature of the testator or the attestation of witnesses.

It was said in *Catlett v. Catlett*, 55 Mo. 330, under a statute silent as to the place where a testator should sign his will, that a signature by a testator to a will in any other place than at the foot of the instrument was good only if the will was in the handwriting of the testator and the signature was intended as a final signing and as an authentication of the instrument. It was held in the same case that under this view of the law a will could not be upheld which was not in the handwriting of the testator and which showed by the words "in witness whereof I have hereunto set my hand this 24th day of October, A. D. 1872," at the conclusion of the instrument that a different signing was intended beside the formal recital of the testator's name, written by another person, at the beginning of the will.

#### *Rule in Virginia.*

In Virginia in 1849 an amendment was added to the statute of wills which provided that a will should be signed "in such manner as to make it manifest that the name is intended as a signature." Under that act it has been held that a will is properly signed where the testator's signature is placed in the margin of the fifth page of the instrument near the end thereof,

the signature having been affixed by the testator in the presence of the witnesses. *Murgeriondo v. Nowland*, 115 Va. 160, 78 S. E. 600. A similar view was taken in the case of *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473, wherein it was held that a holographic will should be admitted to probate which contained the signature of the testator only in a phrase at the end of the instrument which read, "I, William Dinning, say this is my last will and testament." The court said: "The signature is at the end of an apparently completed instrument, and followed by only eight words, which do not indicate a purpose to add anything more, or to take anything from what had been written, but, understood according to their usual acceptation, constitute an emphatic declaration that the signature was intended to authenticate all that had preceded it, as the final consummation of the testator's purpose. If the testator had said, 'I say this is my last will and testament—William Dinning,' no question could have been raised. The sense is exactly the same when he says, 'I, William Dinning, say this is my last will and testament.' Neither form was essential. The will would have been complete without these words, either following or preceding the signature. The testator evidently used them as adding force to his signature, and it would be trifling with the right of a man to dispose of his property by will to hold that the addition of the words mentioned after the signature to an otherwise completed will had resulted in rendering invalid the entire instrument."

But in *Ramsey v. Ramsey*, 13 Grat. (Va.) 664, 79 Am. Dec. 438, involving a holographic will wherein the testator's signature appeared only in the opening clause, it was held that as the signing at the top of the instrument was from its nature an equivocal act and was aided by no other evidence or explanation on the face of the instrument which showed that such a signing was for the purpose of ratifying or authenticating the contents of the will, the requirements of the statute in regard to the signing of testamentary instruments had not been complied with. To the same effect see *Warwich v. Warwich*, 86 Va. 596, 10 S. E. 843, 6 L.R.A. 775 (holographic will with testator's name at beginning and enclosed in envelope bearing the testator's name); *Roy v. Roy*, 16 Grat. (Va.) 418, 84 Am. Dec. 696 (holographic will with testator's name at beginning and also endorsed on third page, the will itself ending on the second page). In *Warwich v. Warwich*, supra, the court said: "The signing of a will, to be a sufficient signing under the statute, must be such as, upon the face of the instrument, appears to have been intended to give it authenticity. It must appear that the name was regarded as a signature, and that the

instrument was complete without further signature; and the paper itself must show this, for the statute requires that the will shall be so signed—that is, signed in a manner to make it manifest that the name was intended as a signature. It is an equivocal act, as is well settled, to insert the name at the top or beginning, and extrinsic evidence is not employed to affect either *pro* or *con* the question of finality of intention, when this internal evidence, to be afforded by the face of the paper, is wanting.”

In *Selden v. Coalter*, 2 Va. Cas. 553, and *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564, decided before the amendment of 1849, it was held that a holographic will was not properly signed which contained the signature of the testator only in the opening clause of the instrument, where it appeared from the paper itself that the signature was not intended to be final.

## KAPIOLANI ESTATE, LIMITED

v.

## ATCHERLEY.

United States Supreme Court—June 14, 1915.

238 U. S. 119; 35 S. Ct. 832.

### Guardian and Ward — Liability of Guardian for False Claim — Effect of Allowance of Claim.

The right of a minor ward upon coming of age to obtain relief in equity under the Hawaiian laws, against his guardian, who had, in fraud of the ward, presented a claim and obtained in his own name an award by the Hawaiian board of land commissioners of a title in fee simple to the ward's land, was not foreclosed by an affirmance in the Federal Supreme Court of a decree of the Hawaiian Supreme Court adjudging that the award in question could only be attacked by a direct appeal by a party who had presented his claims to the board, where the vitally important fact of guardianship was not included in the findings of fact certified to the Federal Supreme Court.

### Courts — Effect of Decision — State and Federal Courts.

The Federal Supreme Court will ordinarily defer to the rulings of the local courts with respect to the validity under the Hawaiian laws of a judgment of the Hawaiian courts.

[See 7 R. C. L. tit. *Courts*, p. 1012.]

### Covenants — Conclusiveness against Covenantor of Judgment against Covenantant — Necessity of Notice to Defend.

Notice of the suit and opportunity to defend it must be given to the warrantor of a

title, or a judgment against the title in a suit against his grantee will not be available against him, if available at all, in favor of the successful assailant of the title.

[See note at end of this case.]

Appeal from Supreme Court of Territory of Hawaii.

Action for injunction. Kapiolani Estate, Limited, plaintiff, and Mary H. Atcherley et al., defendants. Judgment for plaintiff in Circuit Court. Judgment reversed by Supreme Court of Hawaii. Plaintiff appeals.

The facts are stated in the opinion. REVERSED.

David L. Withington, W. A. Greenwell, William R. Castle and Alfred L. Castle for appellant.

Lyle A. Dickey, E. M. Watson, and Mary H. Atcherley, in propria persona, for appellees.

[124] McKENNA, J.—Appeal to review a decree of the Supreme Court of Hawaii which reversed a decree of the circuit judge of the first judicial circuit enjoining the prosecution of an action of ejectment brought by Mary H. Atcherley, one of the appellees, against appellant for the recovery of certain described lands, decreeing that appellant had the equitable title to the lands and that appellees, including Dickey and Watson, who were made parties pending the suit, held the naked legal title thereto as tenants in common, one-half thereof by Mary H. Atcherley and one-quarter thereof by each of the other appellees, as trustees of appellant. The decree required that the appellees execute a conveyance of such title to appellant.

The bill alleges that one David Kalakaua, under and through whom the appellant company (designated hereinafter as complainant) claims, on or about December 29, 1856, litigated his title with the following parties, under whom defendant Atcherley claims title, to wit: Kinimaka, Pai, his wife, and their children, in the Supreme Court of the Hawaiian Islands, in equity, alleging that Kinimaka held title to the lands in trust and as guardian [125] of Kalakaua and not otherwise, and praying that he, Kinimaka, be declared trustee of the lands for Kalakaua and be decreed to convey the same in fee to Kalakaua; that summons was duly issued and served on Kinimaka, who, before filing answer died, leaving a will devising the lands to his children, whom he left surviving him, and his widow, Pai; that these facts were suggested to the court and it was prayed that the widow and children be made parties to the suit, and a guardian *ad litem* be appointed for the children, it being alleged that they became trustees of the property in the same

manner and under the same trust as Kinimaka.

That subsequently (March 8, 1858) Kalakaua filed a petition for administration upon the estate of one Kaniu, deceased, under whom he claimed title to the lands, and for the appointment of a guardian *ad litem* for the minor children of Kinimaka. That upon the filing of such petition George E. Beckwith, administrator of the estate of Kinimaka, was appointed guardian *ad litem* of the minor children of Kinimaka, and notice was served on him as such administrator and guardian and upon Pai to show cause why letters of administration might not issue to Kalakaua upon the estate of Kaniu, deceased.

That upon proceedings being had a decree was rendered adjudging Kalakaua to be the devisee of Kaniu and directing letters to be issued to him.

That on June 19, 1858, Kalakaua filed a further petition alleging the same facts substantially which he had alleged in the petitions of December 29, 1856, and March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children of Kinimaka, and prayed that he might be ordered to convey the lands to Kalakaua; and that a summons was duly served upon Armstrong as guardian of the children and upon Pai; that Armstrong and Pai subsequently answered; that evidence was taken, the case heard upon [126] the merits, and on November 2, 1858, the court duly entered the following decree:

"David Kalakaua against Richard Armstrong, guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, as guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo, on the island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause."

That it did not appear either from the records of the court or from the registry of deeds in Honolulu that the decree of the court was in fact obeyed but, it is alleged, that after the decree Kalakaua "ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious and undisputed possession and dealt with the said land in all ways as his own, and continued to do so until he disposed of said property."

The bill here made "all papers, pleadings and exhibits of whatsoever kind in said equity proceedings" a part of it and asked leave to refer to them as if actually incorporated therein. Then came the following: "And,

in this connection, the complainant attaches hereto a copy of the original Land Commission award and royal patent [they were not previously referred to in the bill], and copies of the original record of evidence given before the Land Commission in support of said Land Commission award and royal patent, the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill."

That the successors in title of Kalakaua (the conveyances being set out) had retained and had been in the same kind of possession and exercised the same disposition [127] as he. That such possession in Kalakaua and his successors was known to the children of Kinimaka; that they attained their majority respectively in 1867, 1871 and 1877 and at no time did they or any of them assert any claim to the land or deny the rights of Kalakaua or his successors but acquiesced in his and their possession.

The manner by which defendants obtained the title they assert was set out and it was alleged that owing to the failure of Armstrong to obey the decree of the court and convey the interest of the children of Kinimaka as ordered by the court, complainant's required chain of title was incomplete and that the action in ejectment of Mary H. Atcherley, one of the defendants, sought "to take unconscionable advantage of the above-mentioned technical error in the chain of title." A cloud upon the title of complainant was asserted hence to follow and that it would be inequitable to permit her to prosecute her action of ejectment and that as naked trustee of the title she should be required to convey it to appellant.

An injunction, temporary and permanent, was prayed and that Mary H. Atcherley, the defendant, be declared trustee and be required to convey the property to complainant.

Copies of the proceedings referred to in the bill were annexed to it as exhibits. Among these, we have seen, were the award of the Land Commission and the royal title. The latter recites that—

"Whereas the Board of Commissioners to Quiet Land Titles has awarded to Kinimaka by award No. 129 a freehold estate less than allodial in the premises mentioned below, and,

"Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

"Therefore, by this Royal Patent Kamehameha III . . . shows . . . that he has conveyed and [128] granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries. . . . It is

granted in fee simple to him, his heirs and devisees. . . ."

The lands in suit were part of the lands conveyed.

Mary H. Atcherley, then being sole defendant, demurred to the bill on the ground that it did not set out a cause of action.

By stipulation of the parties, in order to determine the question whether the decree of 1858 was *res adjudicata*, the circuit judge made a *pro forma* ruling sustaining the demurrer to the bill and dismissing it.

The complainant appealed to the Supreme Court of the Territory, it being stipulated that complainant should do so.

The Supreme Court reversed the decree. 14 Hawaii 651. In its opinion it recited the facts with great fullness, completed the allegations of the bill by the exhibits attached, and then disposed of the contentions as follows:

1. The decree adjudging Kalakaua to be the owner of the land and requiring conveyance of it to be made to him by Armstrong as guardian of the children of Kinimaka was not ambiguous, but it took certainty from the averments of the bill and the record and there could "be no doubt that it was the intention of the court to order the conveyance of the interests of the minors."

2. The minors were bound by the decree notwithstanding "they were not named as parties defendant in the suit." This was decided on the authority of Hawaiian cases and the power of guardians over the estates of their wards established by them and upon the general principle of collateral attacks upon judgments. And specifically replying to the contention that the decree was not binding because of "the lack of service and upon the merits" and that the court should refuse to enforce the decree, it was said:

[129] "It is not contended that the court must in all such cases reexamine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to retry the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interest were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested."

Upon the filing of the mandate of the Supreme Court in the court below Mary H. Atcherley filed an answer in which she admitted many of the allegations of the bill, denied some—among others, the undisturbed possession of the land in Kalakaua and his successors, as alleged, and the inferences from it—asserted the validity of her title, and the staleness of complainant's demand, it having been "brought forty-three years or more than four times the term of the statute of limitations since the alleged date of the alleged decree ordering Richard Armstrong to give a conveyance." That to enforce a conveyance from her without giving her an opportunity to be heard upon the matters set forth in the bill would deprive her of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

By a supplemental answer she alleged the following, which we state narratively:

Since the filing of the answer the complainant Kapiolani [130] Estate, Limited, has parted with all of its estate in the land by a deed of a small portion to certain named parties and the balance, with covenants of warranty, to Lewers and Cooke, Limited, a Hawaiian corporation.

June 29, 1906, that corporation brought suit in the Court of Land Registration to register its title to the land conveyed. September 16, 1907, it was decreed that the corporation had a good title which was entitled to registration. The decree was reversed by the Supreme Court of the Territory March 5, 1908, that court holding that the corporation had no title, legal or equitable, to the land. 18 Hawaii 625. The case was remitted to the Court of Land Registration for further proceedings and that court dismissed the petition of the corporation. The latter appealed from the decision to the Supreme Court of the Territory, which court modified the decree and on March 24, 1909, entered a final decree that the corporation had no title, legal or equitable, to the land. 19 Hawaii 334. Upon appeal to this court the decision was affirmed. [Lewers v. Atcherley, 222 U. S. 285, 32 S. Ct. 94, 56 U. S. (L. ed.) 202.]

The decree of the Supreme Court of Hawaii is in full force and effect and it is alleged that the "proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States were upon the merits of the case and the cause of action so finally adjudicated was the same right and cause of action as that on which complainant in this case has founded its bill."

There was a replication to the answer and an amendment to the amended bill, and it appears that Mary H. Atcherley conveyed an undivided half of the property to Lyle A.



Dickey and Edward M. Watson, two of the defendants. They were made parties by consent and answered in the case, in effect repeating the answers of their grantor.

It was decreed that (1) the allegations of the bill and replication of complainant were true. (2) The defendants [131] and each of them were estopped from litigating against or in opposition to the claim of complainant. (3) The defendants held the legal title to the land as tenants in common, one-half by Mary Atcherley and one-fourth by each of the other defendants. (4) Such title and titles were held by the defendants respectively as trustees for complainant and that each of them should be decreed to execute conveyance thereof to complainant, all and singular, the matters appertaining to the title having theretofore been litigated between the predecessors in title of the complainant and defendants respectively, and that the same were *res judicata*. (5) Defendants should be permanently enjoined from further prosecuting that certain action in ejectment then pending on the law side of the court, wherein Mary H. Atcherley was plaintiff and complainant was defendant.

A conveyance was decreed to be made accordingly and in case of default after thirty days the clerk of the court as its commissioner should make such deed. Further prosecution of the action in ejectment was enjoined.

The decree was reversed by the Supreme Court of the Territory.

The opinion is somewhat difficult of condensation. It rapidly reviews the steps in the litigation exhibited in 14 Hawaii 651; 18 Hawaii 625; 19 Hawaii 47 and 334; and 222 U. S. 285, 32 S. Ct. 94, 56 U. S. (L. ed.) 202. Then this comment was made:

"Notwithstanding the statement made in the Matter of Lewers, 19 Hawaii 48, that there had been no reversal of the facts found by the court of land registration, the fact found by that court that Kinimaka 'was the natural guardian of the minor' was not included in the findings of fact certified up by this court on the appeal to the United States Supreme Court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of [132] Kalakaua's property seems to be beyond the range of dispute at this time. If the relation existed in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. 'It is not essential that a legal guardianship should exist; the doctrine, (constructive fraud) applies wherever the relation subsists in fact.' 2 Pom. Eq. Jur. Sec. 961.

Ann. Cas. 1916E.—10.

"We are satisfied that this court fell into error in the Lewers & Cooke case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show."

Hawaiian cases were reviewed and the court said:

"The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

"The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur. Secs. 1052, 1058."

After further review of the case and consideration of the rights of Kalakaua, the action and duty of Kinimaka, the character and effect of the proceedings which he had instituted [133] and which were instituted against him by Kalakaua and, after his death, against his devisees, the court declared that certain principles resulted therefrom and that "within these principles, then, the decree of 1858 was not erroneous but right."

The character of the awards of the Land Commission was considered and described and their proper relation to the questions and rights of the parties in the case; and this was said: "If the decree in Kalakaua v. Pai and Armstrong was right it ought to be enforced. If the decision in the Lewers & Cooke Case was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

"Being of the opinion that this court was wrong in the conclusion reached in the Lewers & Cooke Case, and that the decree of 1858 was not 'erroneous in a fundamental principle,' and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the Lewers & Cooke Case were we not bound by it because of its

And we may say it is disputable besides if they constituted an appearance of the complainant. *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801.

The principle invoked by defendants is that one who warrants a title is concluded by a judgment against the title in a suit brought against his grantee, even when the title is aggressively used. *Andrews v. Denison*, 16 N. H. 469, 43 Am. Dec. 565. But in favor of whom and under what conditions? In favor of the grantee undoubtedly when he brings suit on his covenant against his vendor. But will it be available in favor of the successful assailant of the title? *Wood v. Davis* and *Cadawallader v. Harris*, *supra*, are authority against the proposition.

But, granting this is disputable, and cases may be cited the other way, it is well established that in order to make the judgment available even to the grantee of the title his covenantor must receive notice of the suit and an opportunity to defend it. Such notice was not given in this case. We certainly cannot assume that notice was given against the decision of the Supreme Court virtually to the contrary, accepting, indeed, the finding of the trial court. The trial court, as we have seen, found that the allegations of fact contained in complainant's bill of complaint, as finally amended herein, and in its said replication, were true. The replication contained a denial of the averment of the supplemental answer that complainant had notice of the proceedings in the Court of Land Registration, the Supreme Court of Hawaii or the Supreme Court of the United States, though it admitted "that certain of its officers and directors in their capacity as individuals (but not in their capacity as such officers or directors of said complainant corporation) were aware of the pendency of said proceedings."

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

#### NOTE.

#### **Necessity of Notice to Covenantor of Good Title to Defend Eviction Proceeding in Order to Conclude Him in Action on Covenant.**

General Rule, 148.

Sufficiency of Notice, 149.

Effect of Judgment Where Covenantor Is Not Notified, 149.

#### *General Rule.*

In *Morgan v. Haley*, 107 Va. 331, 13 Ann. Cas. 204, the rule was applied that in an

action on a covenant, the covenantee, in order to conclude the covenantor by a judgment rendered in eviction proceedings against the covenantee, must show that he notified his covenantor to come in and defend the eviction proceedings. The recent cases support this rule. *Cox v. Bradford*, 101 Ark. 302, 142 S. W. 170; *Brooks v. Winkles*, 139 Ga. 732, 78 S. E. 129; *Council Imp. Co. v. Pacific, etc. Northern Land, etc. Co. (Idaho)* 157 Pac. 258; *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129; *Fernbach v. Stein*, 146 N. Y. S. 1078. See also *Leet v. Gratz*, 137 Mo. App. 208, 117 S. W. 642; *Shalet v. Stolloff*, 135 App. Div. 376, 120 N. Y. S. 345; *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827. And see the reported case.

In *Louisiana*, it has been held in a recent case, wherein the defendant covenantor pleaded failure of notice of ejectment proceedings conducted in another state, that: "Under C. C. art. 2518, such a judgment concludes the vendor, unless he can show that, had he received notice, he could have proven new facts, or filed some peremptory exception, which if presented to the court would have produced a different result." *Klumpp v. Howcott (La.)* 71 So. 353.

Whether the covenantor was notified by the covenantee to appear and defend is a question for the jury. *Cox v. Bradford*, 101 Ark. 302, 142 S. W. 170; *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129.

But the covenantee is not required to show that he notified the covenantor of the action which established the paramount title where it appears that both the covenantor and the covenantee were made parties to that action. *Rice v. Cook*, 141 Mo. App. 1, 120 S. W. 1191. See also *Norfolk, etc. R. Co. v. Mundy*, 110 Va. 422, 66 S. E. 61. "In those cases where the paramount title is established in a suit against both the covenantor and covenantee, and it appears the covenantor who was a party thereto as well as the covenantee appeared and defended the action, the judgment establishing the paramount title is conclusive against him in an action on the covenant by the covenantee. This is the settled law. Indeed in such cases notice from the covenantee to the covenantor to appear and defend the action is entirely superfluous, for it, at most, could require no more than the covenantor has actually performed. Nor could such notice confer any rights upon the covenantor looking to the protection of his own interests which are not conferred by having been made defendant in the original action." *Rice v. Cook, supra*.

Nor is proof of notice to the covenantor required where it appears that the suit which resulted in eviction was brought by the covenantee at the instigation of the covenantor, the latter being the real party to the proceed-

*ings. Landes v. Matthews*, 136 Mo. App. 637, 116 S. W. 1185.

#### *Sufficiency of Notice.*

The authorities divide on the question whether a notification which does not include a request to defend is sufficient to bind the warrantor. It has recently been held that such a notice is not sufficient. *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129. The contrary rule was adopted in *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827, wherein the court said: "The notice given by the plaintiffs to the defendants of their other suit, while there was no express 'tender of the defense,' as it is called, was quite sufficient to warn the defendant that he was expected to assist in the defense of the suit, nor does it show that the plaintiff intended to exclude the defendants from participation therein. Why notify the defendants at all, if they did not expect them to comply with their covenant and defend the title, which they had expressly promised to do? The notice clearly implied that the plaintiffs in this suit looked to the defendants to protect them in the other suit by defending the same and making good their assertion of title to the land. It is not required that the notice shall be in any particular form or in writing, if it sufficiently, though only substantially, informs the warrantor that his covenantee has been sued and his title has been assailed, and the former has the opportunity to defend his title against attack and to save himself from liability upon his warranty."

The notice need not be in writing. *Sarrls v. Beckman*, 55 Ind. App. 638, 104 N. E. 598. In that case, the court said: "It is very urgently insisted on behalf of appellant that the notice required to be given him should have been in writing. It is not urged that appellant did not have actual notice of the defect in the title which he attempted to convey to appellee. He was in attendance at the trial as a witness at the time judgment was rendered against appellee in favor of the Whitworth heirs. He had talked repeatedly with appellee and his agent with respect to the condition of the title, and had refused to have anything to do with the defense of the case, insisting that he had no interest in the matter. However desirable it may be that written notice should be given in such cases, and the court has so intimated in the case of *Beasley v. Phillips* (1898) 20 Ind. App. 182, 50 N. E. 488, we see no necessity for it in the practice, as the essential thing is that the grantor of a defective title should have knowledge that the title is being assailed. Then, when demand is made upon him to defend, it becomes his duty, under the law, to see that the rights of his grantee, as well as

his own rights are protected, so that the failure to give written notice cannot be held to be a defense to this action. This is very aptly stated in appellee's brief as follows: 'When a party has full notice of an action pending which will affect his rights, he cannot be supinely neglectful and afterwards set up a tenuous technicality in claiming that he was not notified.'

In *Fernbach v. Stein*, 146 N. Y. S. 1078, the court said: "While it has been frequently held that where a person ultimately has notice of the commencement of an action, and an opportunity to defend the same, this is sufficient so far as notice is concerned, without any express notice to defend, to make the judgment binding upon him (*Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. S. 411, and cases there cited, *affirmed* 178 N. Y. 585, 70 N. E. 1108), it has never been held that a judgment is binding upon the parties unless reasonable notice and reasonable opportunity to defend has been given (see *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360). For this purpose proof merely that a brother of defendant was taken to court as a witness seems to me palpably insufficient."

#### *Effect of Judgment Where Covenantor Is Not Notified.*

In a recent case it was held that where the covenantor was not notified, a judgment against the covenantee was not even prima facie evidence, in an action for breach of warranty, of the invalidity of the title warranted. *Council Imp. Co. v. Pacific, etc. Northern Land, etc. Co.* (Idaho) 157 Pac. 258. The court in that case discussed the effect of such a judgment as follows: "The principal question here presented, and one which seems to us to be decisive of this appeal, is: Does the judgment in the case of *Council Improvement Company v. Draper*, in view of the fact that appellant was neither called upon to defend the title nor notified of the pendency of the action, constitute prima facie evidence in this case of the invalidity of the title warranted? While considerable diversity of opinion may be found in the adjudicated cases upon this question, the weight of authority supports the rule stated in *Devlin on Deeds*, vol. 2, § 937, as follows: 'Of course, such a judgment cannot bind the covenantor. The only question that can arise is one of evidence. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was prima facie evidence of the existence of a paramount title. But the most reasonable rule, and the one sustained by authorities, is that the judgment, where no notice has been given, and the covenantor is not a party to the suit,

is not even *prima facie* evidence that the eviction was founded upon an adverse and paramount title.' Quoting from *Sisk v. Woodruff*, 15 Ill. 15, the author further says: 'It is a familiar principle of law that a man shall not be bound by a judgment pronounced in a proceeding to which he is not a party, actually or constructively. He should be allowed to appear in the case and adduce evidence in support of his rights before he is concluded by the judgment. If a warrantor has no notice of the action against his grantee, and no opportunity of showing therein that he transferred a good title, he cannot in any sense be considered a party to the action, and therefore ought not to be bound by an adjudication of the question of title. But, if he has notice, he may become a party to the suit, and it is his own fault if his title is not fully presented and investigated. He then has an opportunity of sustaining the title he has warranted and defeating a recovery by the plaintiff in ejectment. If he fails to do this successfully, he is concluded from afterward asserting the superiority of that title, and compelled to refund the purchase money, with interest. By giving the warrantor notice, the defendant in ejectment may relieve himself from the burden of afterwards proving the validity of the title under which he is evicted. But, if he neglects to give the notice, he must come prepared to prove, on the trial of the action of covenant, that he was evicted by force of an adverse and superior title; in other words, he must show that the warrantor, by appearing and defending the action of ejectment, could not have prevented a recovery.'"

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**FISH**

v.

**VANDERLIP.**

New York Court of Appeals—April 18, 1916.

218 N. Y. 29; 112 N. E. 425.

**Marine Insurance — Action — Joinder of Underwriters.**

Where a number of underwriters insure a vessel by a contract expressly declaring that they bound themselves severally, and not jointly, for its performance, the insured cannot maintain a single action against all the insurers to recover an aggregate amount of the policy.

**Judgments — Persons Concluded — Third Person Assisting Defense.**

Where a party of underwriters insured a vessel by a contract making the liability of

each party several, and not joint, a judgment against the insured in his action against one of the insurers, in which the defendant and other insurers openly participated in the defense and contributed to the expense thereof, is not a bar to a subsequent action against the defendant, as he was not a party to, and could not properly have been made a party in, the former action.

[See note at end of this case.]

**Conclusiveness as to Persons Not Parties.**

A former adjudication, to be available as a plea in bar, must have been a determination of the same issue between the same parties or their privies, though it is not always necessary, for the person sought to be bound should have been a party to the record in the former suit, but it is enough if he had a right to control the litigation and appeal from the judgment.

*Fish v. Vanderlip*, 170 N. Y. App. Div. 780, affirmed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action on insurance policy. J. Albert Fish, plaintiff, and Frank A. Vanderlip, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[30] The action is brought to recover \$150 upon a "United States Lloyds" policy of insurance covering the yacht *Senta*, which is alleged to have been destroyed by fire on October 25th, 1910, while lying in the harbor of Edgartown, Massachusetts. The defendant, together with ninety-nine other individual subscribers, signed the insurance contract, each obligating himself to the payment of \$150. The aggregate amount of the insurance was \$15,000, and was effected through the subscriber's attorneys in fact, Higgins & Cox, "By the undersigned firms and individuals, as separate Underwriters, each represented by the above attorneys." By the terms of the policy the subscribers bound "themselves severally and [31] not jointly, nor one for the other . . . for the true performance of the premises, each one for his own part of the whole amount herein insured only."

The plaintiff seeks to recover against the defendant the amount of his individual subscription. In the separate defense demurred to it is alleged that in a previous action brought in the Municipal Court of the City of New York by this plaintiff against one Douglass F. Cox, one of the subscribers to the policy, upon the same policy for his proportionate part of the same loss, the same issues as are presented by the answer herein were tried and decided and a judgment on the merits was rendered against this plaintiff; that the said Cox is a member of the attorneys in fact who represented all the

subscribers in the issuance of the policy and was authorized "to act for and on behalf of each and all of the said subscribers . . . ; that the interest of this defendant in the said action against the said Cox was identical with that of the said Cox and that the said Cox defended the said suit in which he was defendant as aforesaid under and by direction of and at the expense and the interest of each and all of said subscribers including this defendant, and had the plaintiff recovered judgment in said action against Cox this defendant would have been obliged to pay his proportionate share thereof, which facts were known to the plaintiff at the time of the trial of said action, and that the said judgment is a bar and estoppel in this action because it is an adjudication against the plaintiff's right to recover for said alleged loss under said policy and because it deprives this defendant of his right to contribution against the said Cox, and because it is an adjudication that the plaintiff was the culpable cause of the loss sued for."

The court at Special Term held that the judgment in the former suit set up in this separate defense was not *res adjudicata* and sustained the plaintiff's demurrer. The order entered upon this decision was affirmed at the [32] Appellate Division. That court has allowed an appeal and certified the question whether the defense above set forth is sufficient in law upon the face thereof to constitute a defense to the plaintiff's cause of action.

*Irving G. Vann and Harry W. Hayward* for appellant.

*Jesse W. Tobey* for respondent.

[33] WILLARD BARTLETT, Ch. J.—The obligation assumed by the underwriters toward the assured was a several liability. Not only was this expressly declared in the contract of insurance, but the assumption of any joint liability was distinctly negated therein. It has been held that the insured under such a contract cannot maintain a single action against all the insurers to recover the aggregate amount of the policy. (*Straus v. Hoadley*, 23 App. Div. 360, 48 N. Y. S. 239.) Reference is made in the brief of the learned counsel for the appellant to the contents of the agreement between the underwriters themselves which provides that the losses are to be paid out of the premiums and in case the cash assets are insufficient to meet the obligations an advisory committee has power to levy an assessment; but we cannot take cognizance of this agreement in passing upon the defense attacked by the demurrer, as it forms no part of the record. According to that defense the plaintiff has been defeated in an-

other action which he brought against another one of the underwriters to enforce his individual liability, and a judgment upon the merits was rendered against him after a trial of the same issues as are involved in the present suit. He is now met with the defense of *res adjudicata* based upon such former judgment. This defense is predicated solely upon the ground that the defendant here, together with his co-subscribers, had, with the knowledge of the plaintiff, joined in defending the former suit and contributed to the expense thereof, and that he will lose the proportionate part of such expenses contributed by him unless the former judgment is held to be an estoppel. The appellant contends that the rule of [34] estoppel by former judgment extends not only to the parties to the former suit and their privies, but also to persons not parties of record, who to the knowledge of the opposite party participated in the defense for the protection of some interest of their own. It is conceded that no case in the New York state courts has gone as far as we are asked to go in this case, but it is insisted that there is no decision to the contrary by the New York courts and that there is ample authority to be found in Federal cases for taking this desirable step in advance.

The Federal decision which gives most support to the position of the appellant is *Greenwich Ins. Co. v. N. & M. Friedman Co.* 142 Fed. 944, 74 C. C. A. 114, decided by the Circuit Court of Appeals for the Sixth Circuit. In that case a store belonging to the insured parties at Grand Rapids, Michigan, had been destroyed by fire and a large loss was sustained. Some thirty insurance companies had issued policies covering the property destroyed. Payment was refused by the companies upon the ground that a substantial part of the loss was occasioned by the fall of the building prior to the fire. The assured recovered judgment against two of the companies in actions where the issue thus raised was decided against the companies. These former judgments were set up by the assured as conclusive upon the liability of the *Greenwich Insurance Company*, and the claim thus set up was sustained. The court's decision was based upon the finding of fact that the *Greenwich Insurance Company* had for the protection of its own interests joined with the defendants in the other suits, and that the said joinder was open and avowed and was well known to the assured. The Circuit Court of Appeals in sustaining the decision of the lower court rested its decision upon the rule announced in previous cases to the following effect: "The doctrine is well settled that one who, for his own interest, joins in the defense of a suit to which he is not a party of record, is as much concluded by the judg-

ment as if he [35] had been a party thereto, provided his conduct in that respect was open and avowed or otherwise well known to the opposite party." The rule thus stated was quoted from *Penfield v. Potts*, 126 Fed. 475, 480, 61 C. C. A. 371, which was one of several patent infringement suits in which several parties who were charged as infringers of the same patent had joined together in making defense. In one of such suits the complainant was defeated and the judgment therein was held to be conclusive upon him in another suit against another alleged infringer. The court there, before stating the rule as above quoted, said (p. 479): "Thus the question in respect of the infringement of the third claim was in each of these two cases identical, and, if the appellants were privies with the Anderson Machine Company in such sense that they would have been concluded by a decree determining a question litigated upon the same evidence in each case, it must follow, from the mutuality of an estoppel, that the patentees who were plaintiffs in both cases would be also concluded, for an estoppel by judgment or decree must be mutual." The court there in effect held that the defendant there had become privy to the defendant in the former action by its conduct in joining in the defense of the former suit with the knowledge of the plaintiff. Similar decisions have been rendered in other cases in the Federal courts of which the following are examples: *Theller v. Hershey*, 89 Fed. 576; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528. There are other cases, however, decided by the Federal courts where a contrary doctrine seems to have been laid down and in which it was held that where a party to protect some interest of his own, aids and contributes to the expense of a suit, he does not thereby become bound by the judgment in a subsequent litigation where he is a party and the same issues are involved. (*Helm v. Zarecor*, 213 Fed. 648, 654; *Merchants' Coal Co. v. Fairmont Coal Co.* 160 Fed. 769, 777, 88 C. C. A. 23.) The cases holding otherwise are all patent infringement [36] cases, except the *Greenwich Ins. Co. Case* (*supra*), which does not appear to have been since cited or followed. It is true that an application for a writ of certiorari to review the decision in that case was denied by the United States Supreme Court (200 U. S. 621) 26 S. Ct. 758, 50 U. S. (L. ed.) 624, but we may not assume from this action of that court that it approved of the decision sought to be reviewed. The Federal Supreme Court exercises its power of granting the writ of certiorari very sparingly, and only where the case is one of gravity or general importance. (*In re Woods*, 143 U. S. 202, 12 S. Ct. 417, 36 U. S. (L. ed.) 125; *Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 U. S. (L. ed.) 1095.)

The general rule is that a former adjudication to be available as a plea must have been a previous determination of the same issues between the same parties or their privies. It is not always necessary, however, that the person sought to be bound should have been a party to the record in the previous suit. It is enough if he had the right to control the conduct of the litigation and appeal from the judgment. Such was the case of *Castle v. Noyes*, 14 N. Y. 329, 335. There it appeared that in a former action the defendant had sued the servant of the plaintiff's testator for the recovery of property belonging to the testator. The defendant was defeated in the former action and the judgment therein was held conclusive. In that case Judge Comstock said: "Upon these facts the parties are to be regarded as the same. It is by no means true that, in order to constitute an estoppel by judgment, the parties on the record must be the same. The term has a broader meaning. It includes the real and substantial parties who, although not upon the record, had a right to control the proceedings and appeal from the judgment."

Professor Greenleaf thus states the true principles upon which estoppels by judgment proceed: "The rules of law upon this subject are founded upon these evident principles or axioms that it is for the interest of the community [37] that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried: but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be held bound. Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side." (*Greenleaf's Evidence*, §§ 522, 523. See also § 535.) The defendant here had no right to control the former suit, or to appeal from the judgment.

In *Bigelow v. Old Dominion Copper Min. etc. Co.* 225 U. S. 111, 126, Ann. Cas. 1913F. 875, 32 S. Ct. 641, 56 U. S. (L. ed.) 1009, separate suits against joint promoters of a corporation to recover secret profits were instituted by the corporation. One of the defendants, Lewisohn, lived in New York, and a separate suit was instituted against him

there. The New York suit was dismissed. In another suit in Massachusetts where the defendant Bigelow lived the New York judgment was pleaded by Bigelow as a bar. The Supreme Court of the United States in holding that the New York judgment was not a bar, said: "To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not, a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was, therefore, a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in [38] the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against Lewisohn as a precedent is not that of *res judicata*, and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent. Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own case, create an estoppel as to Bigelow." The court then declares again the rule that estoppels must be mutual, and in discussing this phase of the question, said: "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. (See *Portland Gold Min. Co. v. Stratton's Independence*, 158 Fed. 63, 85 C. C. A. 393, 16 L.R.A.(N.S.) 677, where the cases are collected.) The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee." (p. 127.) The defendant here comes neither within these classes nor within the principle upon which such parties are held bound. There are other adjudicated cases not strictly within the classes mentioned where the same principle applies.

In *Old Dominion Copper Min. etc. Co. v. Bigelow*, 203 Mass. 159, 216, 89 N. E. 193, 40 L.R.A.(N.S.) 314, being the same case that was before the United States Supreme Court (*supra*), in discussing the question whether the defendant Bigelow could avail himself of the judgment in favor of Lewisohn who had a common [39] interest with him, it is said:

"The evidence shows that he (Bigelow) knew of the suit, and through his counsel gave such assistance in the preparation of the briefs for the arguments of that suit as might have been expected. But, as he was not a party, this fact is not of much importance. It is treated by most of the expert witnesses called by the defendant as to the New York law as of no consequence. Privy depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. . . . Bigelow could not have appeared as of right and made a defense in that suit. No judgment can be regarded as *res judicata*, as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice." (pp. 216, 217.) It will be seen that when this case reached the United States Supreme Court, that court took the same view in regard to the effect of the action of a defendant in aiding in the defense of another suit to which he was not a party, but in which he was simply interested.

In the case at bar, notwithstanding all the matters set up in the fifth separate defense showing a unity of interest between the underwriters as among themselves, one fact stands out with marked prominence and emphasis. The contract of insurance is so drawn as wholly to separate the rights and obligations of each insurer from the rights and obligations of every one of his associates. This must have been done with a purpose. In determining the status of the plaintiff and defendant, the policy is to be construed as if they alone were parties thereto. [40] Otherwise no effect would be given to the declaration therein contained that the assurers bind themselves "severally and not jointly, nor any one for the other . . . each one for his own part of the whole amount herein insured only." The several character of the contract being so explicit, we cannot change it into a joint undertaking on the part of the insurers; and we would virtually do this if we held that the judgment in the Municipal Court suit constituted an estoppel. In the brief for the appellant we are told in italics: "It would be abhorrent and a reproach to the law that upon the same written instrument and under the same state of facts one of the parties to a contract should be held liable and another, in the same right,

held not liable." This possibility, however, if it exists, would seem to be entirely due to the appellant and his associates who drew their policy in such a form as to compel the assured to bring a hundred different suits to recover the insurance upon his yacht, if they saw fit for any reason to refuse payment.

We conclude that the matters pleaded in the fifth separate defense in the amended answer do not suffice to make the judgment in the Municipal Court suit available to the appellant by way of estoppel. It is easy to conceive of a case where it would operate most harshly to hold a person bound by a former judgment adverse to his interest, merely because he had aided in combatting it but without any legal right to control the course of the litigation, or to appeal from the adverse judgment although it was palpably erroneous.

The order appealed from should be affirmed, with costs, and the question certified answered in the negative.

Cuddeback, Cardozo and Seabury, JJ., concur; Chase, Collin and Pound, JJ., dissent on dissenting opinion of Laughlin, J., below.

Order affirmed.

#### NOTE.

#### **Estoppel by Judgment as Applicable to Person Assisting Prosecution or Defense of Action.**

Scope of Note, 154.

Generally, 154.

Particular Kinds of Assistance:

Contributing Money, 156.

Employing Attorney, 156.

#### *Scope of Note.*

This note is concerned with the question whether a person who is not a party and is not bound by his relation to a party or to the subject of the litigation, but who gives assistance to a party prosecuting or defending an action, comes within the estoppel of the judgment rendered in that action. The present inquiry does not extend to a consideration of the questions that arise where a person litigates an interest in the name of another, or takes a share in the control of the case, or has a right to take part and, on notice is bound to assert that right.

#### *Generally.*

By the great weight of authority the rule is established that a person, not a party and not bound by reason of his relation to a party or to the subject of an action, does not by assisting the prosecution or defense of the action without a right to control the same

come within the estoppel of the judgment therein rendered. *Carr v. U. S.* 98 U. S. 433, 25 U. S. (L. ed.) 209 (U. S. government not estopped); *Bigelow v. Old Dominion Copper Min. etc. Co.* 225 U. S. 111, Ann. Cas. 1913E 875, 32 S. Ct. 641, 56 U. S. (L. ed.) 1009, affirming 203 Mass. 159, 89 N. E. 193, 40 L.R.A. (N.S.) 314; *Northern Bank v. Stone*, 88 Fed. 413 (State government not estopped); *Australian Knitting Co. v. Gormly*, 138 Fed. 92; *Merchants' Coal Co. v. Fairmont Coal Co.* 160 Fed. 769, 88 C. C. A. 23; *Helm v. Zarecor*, 213 Fed. 648; *Loftis v. Marshall*, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286; *Samuel v. Dinkins*, 12 Rich. L. (S. C.) 172, 75 Am. Dec. 729; *Boles v. Smith*, 5 Sneed (Tenn.) 105; *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615. See also *Rumford Chemical Works v. Hygienic Chemical Co.* 215 U. S. 156, 30 S. Ct. 45, 54 U. S. (L. ed.) 137; *Falla v. Gamble*, 66 N. C. 455. And see the reported case, and the cases cited throughout this note. "Although a person individually interested in the result of a suit against another assists in its defense, because of interest in the decision as a judicial precedent, the result as to him is merely that of precedent, and not of res adjudicata, and no estoppel is created against him by assisting in such defense." *Helm v. Zarecor*, 213 Fed. 648. In *Loftis v. Marshall*, 134 Cal. 394, 60 Pac. 571, 86 Am. St. Rep. 286, the court, after adverting to its earlier decisions holding a landlord bound by a judgment against his tenant, defined the rule as follows: "The decision is to be understood as applying only to cases where the landlord has appeared openly in the case, and been permitted by the court to undertake the defense; for in no other way could he obtain control of the case and become party thereto. For though 'the landlord may appear and defend in his [the tenant's] name, or be substituted in his place,' it is said 'such appearance or substitution should be entered of record, and only allowed upon notice to the parties;' and 'after it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of his landlord.'" (*Dutton v. Warschauer*, 21 Cal. 619.) Accordingly, in the concurring opinion in *Valentine v. Mahoney*, 37 Cal. 393, the decision is limited to such cases, and it is said: "It would be dangerous to extend the rule to cases where there is nothing in the record of the action tending to show that the landlord took the defense of the action upon himself. The parties to be estopped," it is added, "ought to be indicated by the record itself" (p. 399). In such cases, the landlord becomes in fact a party to the action." And in *Boles v. Smith*, 5 Sneed (Tenn.) 105, the court, referring to a statute limiting the conclusive effect of a judgment to the "party against whom it is



recovered," said: "By the term party, in general, is meant one having a right to control the proceedings, to make a defense, to adduce, and cross-examine witnesses, and to appeal from the judgment. It is clear that Boles was no party to the former action, in the legal sense of the term, and the fact that he officiously, or by the favor of the court, was permitted to interfere in conducting the defense, does not affect the question; he had no legal right to do so."

Especially does the rule apply where the person rendering assistance does not make known to the opposite party his part in the trial. *Andrews v. National Foundry, etc. Works*, 76 Fed. 166, 46 U. S. App. 281, 22 C. C. A. 110, 36 L.R.A. 139; *Cramer v. Singer Mfg. Co.* 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Singer Mfg. Co. v. Cramer*, 109 Fed. 652, 48 C. C. A. 588, reversed on other grounds, 192 U. S. 265, 24 S. Ct. 291, 48 U. S. (L. ed.) 437; *Hanks Dental Ass'n v. International Tooth Crown Co.* 122 Fed. 74, 58 C. C. A. 180; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801; *Cannon River Mf'rs Ass'n v. Rogers*, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; *Central Baptist Church v. Manchester*, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893. "The proofs as a whole satisfy us that the purpose of the Diamond Meter Company was to maintain such an attitude with reference to the Catskill suit that it might have the indirect benefit of the decree if favorable to the defendant therein, and yet not be concluded should the decree be adverse to the defendant. But if the Diamond Meter Company desired that the decree in the Catskill suit should operate as an estoppel in its favor, it was bound by avowal or open action to place itself in such an unequivocal position that the decree would be mutually binding as res adjudicata upon itself and upon the complainant." *Jefferson Electric Light, etc. Co. v. Westinghouse Electric, etc. Co.* 139 Fed. 385, 71 C. C. A. 481, affirming 135 Fed. 365.

The division of authority referred to in the reported case seems not to affect the rule that a person assisting, but not having a controlling part in the prosecution or defense of an action, is not estopped by the judgment. Thus in *Greenwich Ins. Co. v. N. & M. Friedman Co.* 142 Fed. 944, 74 C. C. A. 114, the court in holding the defendant to be estopped explained the part taken by that defendant in the former trial as follows: "It appears there were some 30 cases growing out of the destruction of the Luce Block and its contents. The policies were identical in form. The cases all turned upon the same question of fact: Did the building fall as a result of the fire, or fall before the fire occurred? It was to the interest of both the insurers and the insured that this question be determined

without unnecessary delay. . . . Accordingly the insurance companies entered into the agreement described in the stipulation. The defendant was a party to it. By this agreement the defense of all the cases was entrusted to a committee chosen by all the companies. This committee was to select lawyers, supervise the litigation, and apportion the costs and expenses. The joinder of the companies was open and avowed, and the plaintiff knew of it before the *Liverpool & London & Globe* case was tried. In that case both the committee and the counsel employed acted as the agents of the defendant as well as of the company sued. . . . It seems to us that, if the companies directly affected, the *Atlas* and the *Liverpool & London & Globe*, had not seen fit to take the cases up for review as they did, this defendant might have done so." And the following rule was laid down in *Theller v. Hershey*, 89 Fed. 575: "Parties include, not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of proceedings therein." In *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528, the question was whether or not the defendants did openly and avowedly undertake the defense of the former case. And it seems plain that the "joining in the defense" which, in *Penfield v. Potts*, 126 Fed. 475, 61 C. C. A. 371, was regarded as conclusive, means taking a controlling part, for in that case the court said: "The appellants, not having been parties of record to the *Indiana* case, can only rely upon the decree in that case by showing that they in fact defended that suit. . . ." In clear distinction from the foregoing cases appears the position of the defendant in the reported case who "had no right to control the former suit, or to appeal from the judgment."

It is a question of fact as to what part in the action was taken by the person assisting. *Hauke v. Cooper*, 108 Fed. 922, 48 C. C. A. 144; *Pence v. Rhonemus*, 58 Ind. App. 268, 108 N. E. 129. But the existence of the estoppel is a question of law for the court. *McNamee v. Moreland*, 26 Ia. 96.

It is well settled that the rule of estoppel is reciprocal; the binding scope of a judgment is identical with its protecting scope. *Litchfield v. Goodnow*, 123 U. S. 549, 8 S. Ct. 210, 31 U. S. (L. ed.) 199; *Bigelow v. Old Dominion Copper Min. etc. Co.* 225 U. S. 111, Ann. Cas. 1913E 875, 56 U. S. (L. ed.) 1009, affirming 203 Mass. 159, 89 N. E. 193, 40 L.R.A.(N.S.) 314; *Lownsdale v. Portland*, 1 Ore. 381, Deady 1, 15 Fed. Cas. No. 8,578; *Andrews v. National Foundry, etc. Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L.R.A. 139; *Valentine v. Mahoney*, 37 Cal. 389; *Goodrow*

v. Litchfield, 63 Ia. 275, 19 N. W. 226, *affirmed* 123 U. S. 549, 8 S. Ct. 210, 31 U. S. (L. ed.) 199. And see the reported case.

### *Particular Kinds of Assistance.*

#### CONTRIBUTING MONEY.

A person is not brought within the estoppel of a judgment by contributing money to aid one side of the litigation. *Mercantile Invest. etc. Trust Co. v. River Plate Trust, etc. Co.* [1894] 1 Ch. (Eng.) 578, 63 L. J. Ch. 366, 70 L. T. N. S. 131, 42 W. R. 365; *General Electric Co. v. Morgan-Gardner Electric Co.* 168 Fed. 52, 93 C. C. A. 474, *reversing* 159 Fed. 951; *Litchfield v. Goodnow*, 123 U. S. 549, 8 S. Ct. 210, 31 U. S. (L. ed.) 199; *Gross v. Whitley County*, 158 Ind. 531, 64 N. E. 25, 58 L.R.A. 394; *Goodnow v. Litchfield*, 63 Ia. 275, 19 N. W. 226, *affirmed* 123 U. S. 549, 8 S. Ct. 210, 31 U. S. (L. ed.) 199; *Allin v. Hall*, 1 A. K. Marsh. (Ky.) 525; *Feldkamp v. Ernst*, 177 Mich. 550, 143 N. W. 887; *State v. King*, 64 W. Va. 546, 63 S. E. 468. Compare *Miller v. Liggett, etc. Tobacco Co.* 7 Fed. 91; *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177 (person assisting in test case is bound thereby). Thus, in *Mercantile Invest. etc. Trust Co. v. River Plate Trust, etc. Co.* supra, it was said: "Now, the English Company were not parties to that action, and, *prima facie*, are not bound by the judgment. The American Company defended that action. The English Company, by reason of the covenant of indemnity given by them, were interested in assisting the American Company, and accordingly they did assist the American Company in their defense and counter-claim, and, when the American Company failed, paid their costs. But this in itself did not put the English Company in the position of defendants to that action, or estop them in the present action." And, in *Litchfield v. Goodnow*, 123 U. S. 549, 8 S. Ct. 210, 31 U. S. (L. ed.) 199, wherein a prior adjudication was pleaded as a defense to the recovery of certain taxes, the court said: "The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill, but neither she nor any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct

from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation." In *Gross v. Whitley County*, 158 Ind. 531, 64 N. E. 25, 58 L.R.A. 394, it was held that a county officer, who contributed to the expenses of litigation involving the validity of a statute affecting his salary was not estopped by the judgment rendered as the result of such litigation.

In *State v. King*, 64 W. Va. 546, 63 S. E. 468, 495, the court said: "We do not think the authorities sustain the position that participation in appeal by strangers to the cause in the court below, or advancing money for the prosecution of the appeal, would make the decree appealed from, after affirmation, binding upon such persons. They had no opportunity to plead in the court below and set up their claims. In the appellate court the record is taken as made in the court below. It cannot be altered. This court decided the case upon that record. These new parties were not called upon before the decree was entered to come in and make their defense and possibly had no opportunity to do so, because of lack of notice. As we read the decisions, they do not hold persons bound as parties who, because of their interest in the legal questions involved, advance money to pay counsel fees or otherwise aid in the prosecution of an appeal, or even in an action, when they bear no relation to the party aided, such an indemnitor or warrantor, and cannot be affected by the decision otherwise than as a precedent."

#### EMPLOYING ATTORNEY.

A person employing an attorney for a party to an action does not thereby come within the estoppel of the judgment rendered. *Lownsdale v. Portland*, 1 Ore. 381, *Deady* 1, 15 Fed. Cas. No. 8,578; *Andrews v. National Foundry, etc. Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L.R.A. 139, *rehearing denied* 77 Fed. 774, 23 C. C. A. 454, 36 L.R.A. 153; *Mankato v. Barber Asphalt Paving Co.* 142 Fed. 329, 73 C. C. A. 439; *Loftis v. Marshall*, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286; *Brady v. Brady*, 71 Ga. 71; *Elliott v. Hayden*, 104 Mass. 180; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801; *McPike v. Wells*, 54 Miss. 136; *State v. Johnson*, 123 Mo. 43, 27 S. W.

399; *Magwire v. Labeaume*, 7 Mo. App. 179; *Cockins v. Alma Bank*, 84 Neb. 624, 122 N. W. 16, 133 Am. St. Rep. 642; *Hunt v. Haven*, 52 N. H. 162; *Ryerss v. Rippey*, 25 Wend. (N. Y.) 432; *Board of Education*, 35 Okla. 733, 130 Pac. 951; *Central Baptist Church v. Manchester*, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893. Accordingly, in *State v. Johnson*, 123 Mo. 43, 27 S. W. 399, it was held that a city officer, who employed counsel to defend the auditor in an injunction suit for restraining payment of the officer's salary, was not concluded by the judgment. And in *Lownsdale v. Portland*, 1 Ore. 381, Deady 1, 15 Fed. Cas. No. 8,578, the court said: "If, in a suit between A and B, the question is, whether a conveyance of black acre by a deed not duly acknowledged passed the estate to the vendor, and there should be a hundred other persons having conveyances to land in the same estate, similarly executed, they would all have an interest in the question involved in the suit between A and B, because the law as determined in that case would be the rule for like cases, but still they are not parties to the suit, or in any way estopped by the determination of it. As to the employment of counsel by the town, the record, as set up in the answer, shows that the counsel spoken of appeared for Parrish, and not for the town. I suppose the fact is that the town, after its incorporation, thinking, so to speak, that it had an interest in the question, or being so advised by counsel, contributed something to stimulate his efforts as the solicitor of Parrish. The case is the same as if the hundred persons in the instance supposed had contributed money to employ counsel to argue B's side of the controversy between him and A, for the purpose of procuring a determination thereof, which, as a precedent, would be favorable to themselves. This would not make them parties to the suit."

It should be remembered, however, that where the attorney employed to represent the party of record does in fact represent also his employer and controls the litigation for his employer, the latter may be bound by the judgment. This question is not properly within the scope of this note: but for illustrative cases reference is made to the following: *U. S. etc. Salamander Felting Co. v. Asbestos Felting Co.* 4 Fed. 816, 18 Blatchf. 310, 5 B. & A. Pat. Cas. 622, 28 Fed. Cas. No. 16,787a; *Ward v. Clendenning*, 245 Ill. 206, 91 N. E. 1028; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260; *McNamee v. Moreland*, 26 Ia. 96; *Stoddard v. Thompson*, 31 Ia. 80; *Parr v. State*, 71 Md. 220, 17 Atl. 1020; *Nash v. D'Arcy*, 183 Mass. 30, 66 N. E. 606; *Bomar v. Ft. Worth Bldg. Ass'n*, 20 Tex. Civ. 603, 49 S. W. 914; *McMillan v. Barber Asphalt Paving Co.* 151 Wis. 48, 138 N. W. 94.

TELFORD

v.

MCGILLIS ET AL.

Minnesota Supreme Court—July 16, 1915.

130 Minn. 397; 153 N. W. 758.

**Taxation—Redemption from Sale—  
Notice of Expiration Insufficient.**

A notice of expiration of redemption from a tax sale which imposes upon the redemptioner the burden of determining which of two amounts stated therein as necessary to redeem is correct does not comply with the statutes upon the subject and is insufficient.

**Same.**

The notice in this respect must be definite and specific and free from doubt and uncertainty.

**Judgments—Conclusiveness of Judgment Settling Title—Persons Concluded.**

A judgment in an action to determine the title to real property is conclusive of the rights of all parties to the action and those in privity with them, and includes all rights or interests in the property which were or could have been litigated therein.

**Effect of Judgment on Grantor of Party.**

Intervener in this action, claiming certain rights and interests in the land in controversy, conveyed the same to a third person to enable such third person to perfect the title: such third person thereupon brought an action to quiet title to the land, making defendants Stubler, under whom intervener now claims, parties defendant; judgment was rendered to the effect that defendants were the owners of the land free and clear of all claims on the part of plaintiff in the action, who was prosecuting the same in the interests of intervener. It is held that the judgment forever barred and extinguished all rights intervener may have had in or to the land, including the right to terminate the Stubler title by redemption as their mortgage.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, St. Louis county: FESLER, Judge.

Action to determine adverse claims to real property. W. S. Telford, plaintiff, Amelia Stubler, et al., defendants, and Charles McGillis, intervener. From judgment rendered, plaintiff and intervener separately appeal. The facts are stated in the opinion. **AFFIRMED.**

*T. J. Davis* and *E. L. Kimball* for plaintiff.  
*William P. Harrison* for defendants Stubler.

*John Heitmann*, *F. E. McGray* and *W. B. Douglas* for intervener.

[398] BROWN, C. J.—Action to determine adverse claims to certain real property situated in St. Louis county. The land is owned by several persons in undivided interests, and the case in this court resolves itself into two separate controversies, namely, (1) between plaintiff, and the defendants Stubler and the intervener, who join in contesting the validity of plaintiff's title to a part of the land; and (2) between defendants Stubler and intervener, as to a part of the land not owned by plaintiff. Plaintiff claimed to own an undivided nine-twelfths of the land, but the court awarded to him title to eight-twelfths only, the remaining [399] one-twelfth claimed by him being awarded to one of the Stublers. As against the Stublers the intervener claims the right to extinguish their title by redemption as mortgagor. The trial court held that the intervener had no claim to this property, or right to redeem for the Stublers, and he appealed from an order denying his alternative motion for judgment or for a new trial. Plaintiff also appealed from an order denying a new trial of the issue involving the one-twelfth interest awarded to the Stublers.

1. Plaintiff's claim of ownership of the particular one-twelfth interest was founded upon a tax title, the validity of which was challenged by defendants Stubler and the intervener. The question whether it is valid depends wholly upon the sufficiency or insufficiency of the notice of expiration of redemption. If the notice is sufficient under the statutes the title is valid; if insufficient, and not in compliance with the statutes, the title is invalid and the trial court properly adjudged title in the Stublers.

The tax sale under which plaintiff claims took place on May 14, 1906, and the interest in question was duly struck off to the state, and in July, 1907, assigned to one Davis, who subsequently conveyed to plaintiff. Before so conveying to plaintiff Davis caused a notice of expiration of redemption to be given, the sufficiency of which is here in question.

The contention was made on the argument, as well as in the briefs, that section 47, chapter 2, p. 26, Laws 1902, applied to the case, and that the notice of redemption should have been in compliance with the form therein prescribed. This claim is founded upon the theory that section 956, R. I. 1905, never became operative because superseded by chapter 270, p. 406, Laws 1905, the effect of which, it is claimed, was to revive chapter 2, p. 26, Laws 1902, and, under section 5504, R. L. 1905, must be construed as amendatory of section 956. We refer to the question, but do not stop to consider it, for we find, and so hold, that the notice of redemption here in question does not comply with either statute.

This notice, so far as material, is as follows:

"That the amount required to redeem said parcel, exclusive of the costs to accrue upon this notice, is the sum of fifty-nine cents and [400] interest as provided by law to the day such redemption is made, and all delinquent taxes, penalties, costs and interest accruing subsequently to said assignment. That said delinquent taxes, penalties and costs for the year 1907 accruing subsequent to said assignment, amounted to the sum of \$297.26 on May 10th, 1909, and bears interest at the rate of twelve per cent per annum from said May 10th, 1909, to the day such redemption is made. That said amount required to redeem calculated to the date of this notice is the sum of \$319.22 . . . and the time for redemption of said parcel will expire sixty days after the service of this notice. . . ."

The statutes, both the act of 1902, and section 956, R. L. 1905, require the notice of expiration to state the amount required to redeem, and the notice in this, as well as all other respects, must conform strictly to the form and contents as there prescribed. Such notices have uniformly been construed with exactness, and errors therein held fatal, which in any other proceeding would be regarded as of no importance. *Kipp v. Robinson*, 75 Minn. 1, 77 N. W. 414; *Merrill v. Dearing*, 32 Minn. 479, 21 N. W. 721; *Lawton v. Parker*, 105 Minn. 102, 117 N. W. 249; *Johnson v. Fraser*, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676; *Shine v. Olson*, 110 Minn. 44, 124 N. W. 452, 19 Ann. Cas. 962; *DeLaurier v. Stilson*, 121 Minn. 339, 141 N. W. 293. It is unnecessary to state in the notice the amount required to redeem at the date thereof, though under *Midland Co. v. Eby*, 89 Minn. 27, 93 N. W. 707, it is proper to do so, provided there be no uncertainty, and the amount stated is left free from doubt. The statute does not require such statement, all that it requires is that the amount necessary to redeem be stated therein. This is found in the amount of the sale, together with subsequent taxes, penalties and costs, with interest. When these two amounts are stated, with the date from which to compute the interest, there is a full compliance with the statute. But when such amounts are properly stated and are followed, as in the notice here before us, with the statement "that the amount required to redeem calculated to the date of this notice" is a certain sum of money, which does not correspond with the specific items given, doubt appears affirmatively as to such amount, and the notice does not serve [401] the purpose intended by the law, and is not a compliance therewith. The notice in this respect must be definite and specific, and a notice which imposes upon the redemptioner the burden of solving a doubt

created by a statement of different amounts as necessary to redeem does not answer the requirements of the statute, and is insufficient. The notice here before us is wholly unlike that held sufficient in *Fortier v. Parry*, 128 Minn. 235, 150 N. W. 803. The notice involved in that case left no doubt or uncertainty as to the amount necessary to redeem. We therefore hold that the notice in this case was, for the reasons stated, insufficient.

This disposes of the case as between plaintiff and defendants Stubler and the intervenor, who joined in contesting the validity of plaintiff's tax title, and brings us to the issues between the Stublers and the intervenor.

2. The facts, upon this branch of the case, as found by the trial court, are substantially as follows:

Intervenor was the patentee of this land, having acquired his patent many years ago. In March, 1892, he conveyed the same and the whole thereof to the Pennsylvania Iron & Steel Co., a Minnesota corporation, and received therefor the entire consideration agreed to be paid except certain stock in the corporation and the sum of \$500. The taxes against the land remained unpaid for several years, and at a forfeited tax sale held in June, 1899, the land was exposed for sale for the delinquent taxes for the years 1892 to 1895, inclusive, and the same was sold to intervenor, as the highest bidder, for the sum of \$7.25. Intervenor was without funds and was unable to pay the amount of his bid, and to enable him to do so he borrowed of defendant Jacob Stubler the sum of \$8.25. In making this loan Stubler was acting as the agent of his wife, defendant Amelia Stubler. To secure the repayment of this loan, intervenor caused the tax sale certificate to be issued in the name of Mrs. Stubler, and it was so issued and subsequently recorded in the office of the register of deeds. A like certificate of sale was also issued to intervenor and he caused this also to be recorded in the office of the register of deeds. The issuance of two certificates of the same sale was probably an error on the part of the county auditor, but the fact remains that [402] they were issued and both recorded as evidence of the title and rights of the respective holders thereof. At this point the trial court expressly found that, for a long time prior to said tax sale, intervenor had no interest, legal or equitable, in or to the land. Intervenor insists that this finding was error for the reason that, since intervenor had not been paid the full purchase price of the land by the Pennsylvania Co., he retained a vendor's lien which he had the right to protect either by the payment of the taxes, or to mortgage to the Stublers to obtain money

for that purpose. But, as we view the pivotal question in the case, this particular controversy is not important, and we proceed with the facts.

Long after intervenor had procured the issuance and record of the tax sale certificates on November 17, 1899, he conveyed the land by warranty deed to one Macdonnell, and the deed was duly recorded on November 27, 1899. Intervenor never acquired any interest in the land subsequent to this conveyance, which, as found by the trial court, was made by him as a means of giving to Macdonnell authority to perfect title to the land. Thereafter, in December, 1899, Macdonnell commenced an action in the district court of St. Louis county against defendant Amelia Stubler, holder of the tax certificate issued to her as heretofore stated, to determine the title to the land. Mrs. Stubler had no claim or interest in or to the land except under this tax certificate, which covered the entire tract, and the sole purpose of the action was to secure an adjudication of its invalidity; the complaint in the action prayed that such certificate be cancelled and set aside. Such proceedings were thereafter had in the action that judgment was rendered therein that plaintiff, Macdonnell, had no right or title to the land, and Mrs. Stubler was the owner thereof free and clear of all claims of said Macdonnell; the basis of the decision being, as we understand the record, that the tax certificate was valid and vested in Mrs. Stubler title to the land in fee simple. Intervenor was present at the trial of that action and testified therein as a witness. Macdonnell had no knowledge of the transaction by which the land was so conveyed to him, or the purpose or effect of the action to determine title to the same, did not participate therein except by permitting the use of his name, all of [403] which, the conveyance of the land and the action to quiet title thereto, was procured and conducted, as found by the trial court, by and in the interests and for the benefit of parties unknown to the court; and of which latter fact no explanation appears to have been made on the trial below. The judgment has at all times since remained in full force and effect. The trial of the action seems to have been concluded by a stipulation and agreement that judgment be entered in favor of Mrs. Stubler, and upon the agreement that the land should subsequently be conveyed to a third person. Pursuant to this agreement the Stublers, the Pennsylvania Co. and Macdonnell conveyed the land, and all their interests therein to one Hicks, and on April 9, 1900, Hicks, in further compliance with the agreement, conveyed to the Pennsylvania Co. an undivided one-third of the land and to Mrs. Stubler an undivided one-third. By subsequent conveyances de-

defendant Jacob Stubler and Mrs. Stubler each became vested with an undivided one-twelfth, which represents the interests now in controversy between the Stublers and intervener. The only title the Stublers have to the land is that acquired in this manner.

At this point in the history of the title, matters seem to have rested for about 10 years, when in December, 1910, intervener tendered to the Stublers the sum of \$8.25, with interest, the amount he claims to have borrowed from them for the purpose of acquiring the tax certificate in June, 1899, and demanded a conveyance of the two-twelfths interest in the land then held by them. This they refused. Intervener is uneducated and unaccustomed to business methods, for many years of limited means, and for a time subsequent to the events related incapacitated, to what extent or what length of time does not appear. After making the tender referred to, intervener consulted several lawyers in reference to his claim of interest in the land, all of whom declined to handle the matter for him, but for what reason does not appear. So far as the record discloses intervener made no claim to an interest in the land subsequent to the Macdonnell action, as a mortgagor of the Stublers or otherwise, until 10 years later, when he made the tender just referred to, and the trial court found that he had no interest in the land in fact.

The evidence is not returned, and the only question presented by [404] the assignments of error is whether the conclusions of law are supported by the findings of fact. In our opinion the question must be answered in the affirmative.

It may be conceded for present purposes that, under the facts found, intervener at the time he borrowed the money from the Stublers to make payment for the tax certificate had a vendor's lien upon the land, as against his grantee, the Pennsylvania Co. and that it was such an interest as was capable of being mortgaged to the Stublers to secure the repayment of such loan. We do not consider the question, for we deem it unnecessary. That fact in no way relieves or helps intervener. By his conveyance to Macdonnell he parted with that interest, and it has never been reconveyed to him. It is not important that intervener did not understand the purport or effect of the warranty deed, for he did understand that he was thereby vesting Macdonnell with authority to perfect title to the land and to sell the same. In view of this situation it is clear that intervener is forever estopped and barred from repudiating the force and effect of that judgment. It was procured in an action authorized by him, for he concedes that the conveyance was made to

enable Macdonnell to perfect title to the land, and he not only knew that an action for that purpose had been brought, but participated therein in an effort to procure an adjudication that the Stubler title under which he now claims as mortgagor was invalid. It does not matter that intervener was not a formal party to the action. It was brought in the name of his representative, and this concludes him. *Parsons v. Urie*, 104 Md. 238, 64 Atl. 927, 8 L.R.A.(N.S.) 559, 10 Ann. Cas. 278; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773. Of course the mere fact that intervener was a witness on the trial of the action would not alone be sufficient to bar him of his rights (*Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801); but that fact coupled with the further fact that the action was in his interest and for his benefit, and that he was present and participated in the trial, brings the case within the rule of estoppel by judgment as applied by the courts generally. Neither is it material that the contention here made, namely, that the Stublers hold title to the property as mortgagors of intervener, does not affirmatively appear to have been presented [405] in that action. It could have been presented therein and therefore comes within the bar of the judgment. *White v. Hewitt*, 119 Minn. 340, 138 N. W. 421; 2 Dunnell, Minn. Dig. § 5163, and cases there cited. In fact such claim, aside from the contention of intervener that he had a vendor's lien against the land, would seem from the record the only interest or claim which he held or could transfer by the Macdonnell deed. The Stublers presented the tax certificate as evidence of their title to the land. If such title was not absolute, but as between intervener and the Stublers defeasible, and subject to defeat by redemption, the facts should have been presented in the Macdonnell action, and whether presented or not, such rights are included in the adjudication that the Stublers owned the land in fee simple free from claims on the part of Macdonnell.

In addition to what we have heretofore stated the trial court found that Macdonnell was not an interested party in the action, was a nominal plaintiff only, and that the action was prosecuted to judgment in the interests of parties unknown to the court. This indicates that the title to the land was under process of some sort of manipulation by unknown persons, but the findings as a whole disclose without dispute that intervener was one of those parties. By his deed to Macdonnell he furnished the foundation for the action, and cannot now be heard to contend against the force and effect of the judgment.

The orders appealed from are affirmed.

## NOTE.

**Judgment Settling Title to Land as Conclusive between Successful Claimant and Grantor of Defeated Claimant.**

This note reviews the cases discussing the conclusiveness of a judgment settling the title to land when set up by the successful claimant against the grantor of the defeated claimant. Cases of grants of leasehold interests are not included.

It may be stated as a general proposition that, since a grantor of land does not derive title through his grantee, a judgment adverse to the title of the grantee, rendered in an action to which the grantor was not a party, is not conclusive as between the grantor and the successful assailant of the grantee's title. *Kapiolani Estate v. Atchery*, reported in full, this volume, at page 142. *Tennessee, etc. R. Co. v. East Alabama, R. Co.* 73 Ala. 426; *Cadwallader v. Harris*, 76 Ill. 370; *Warren v. Cochran*, 27 N. H. 339; *Shindler v. Robinson*, 150 App. Div. 875, 135 N. Y. S. 1056; *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416; *McKelvain v. Allen*, 58 Tex. 383; *Foster v. Andrews*, 4 Tex. Civ. App. 429, 23 S. W. 610. See also *Gordon v. Weaver* (Tenn.) 53 S. W. 740. Compare *Gathe v. Broussard*, 49 La. Ann. 312, 21 So. 839. "A grantee of real estate under some circumstances stands in privity to his grantor, but the grantor does not stand in privity to the grantee." *Kammann v. Barton*, supra. Accordingly in *Cadwallader v. Harris*, supra, it was held that a judgment against a vendee in possession under an executory contract of sale did not conclude the vendor in a subsequent action of ejectment for the land. And in *Looney v. Simpson* (Tex.) 25 S. W. 476, it was held that the holder of a vendor's lien was precluded by a judgment in an action to try title brought against the vendee, such holder not being made a party thereto. In *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, it was held that a judgment in favor of a mortgagee and against the grantee of the mortgagor was not conclusive as to the mortgagor in an action of foreclosure.

But where it appeared that a husband had fraudulently conveyed land to his wife, who brought an action to enjoin the execution of a sheriff's deed to the land, a judgment against the wife was held to be conclusive as against the husband in his subsequent action to recover possession and to remove cloud from title. *Shoemaker v. Finlayson*, 22 Wash. 12, 60 Pac. 50, wherein the court said: "The plaintiff in this action was a witness on the trial of the former action, and was fully acquainted with the character and object of that action and the issues made therein. He was directly interested in the

Ann. Cas. 1916E.—11.

result, and in sustaining the title of his grantee, which was assailed therein, and, under such circumstances, he is estopped by the judgment as fully as if he had been a nominal party thereto. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186, and cases there cited. See also *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445."

In the reported case it is held that a grantor who actually carries on the litigation to perfect title through his grantee is bound by a judgment rendered against the grantee, according to the well recognized rule of estoppel. See also in this connection *McNamee v. Moreland*, 26 Ia. 96.

**GLASGOW COAL COMPANY,  
LIMITED**

v.

**WELSH.**

England—House of Lords—March 6, 1916.

[1916] 2 A. C. 1.

**Workmen's Compensation Acts — What Constitutes Accident — Rheumatism.**

Rheumatism contracted by a workman as the result of an emergency employment wherein he was required to stand for several hours in water, is an accident arising out of and in the course of the employment within the meaning of a workmen's compensation act.

[See note at end of this case.]

[2] Appeal from an interlocutor of the Second Division of the Court of Session in Scotland, 1915 S. C. 1020, upon a case stated by the sheriff-substitute of Lanarkshire under the Workmen's Compensation Act, 1906.

The material facts found by the case were as follows:—

On October 23, 1914, the respondent was working in the appellants' employment as a brusher at their Newton Pit, Kenmuirhill Colliery, and on that date the water pump in the colliery broke down and a large quantity of water accumulated in the pit bottom, in consequence of which work in the pit was suspended. On October 28, 1914, at about 10 P. M. the respondent was directed to go down the pit, and went down in the belief that he was going to do his ordinary work as a brusher. When he got down the pit he was directed to bale the water therefrom. In order to do so it was necessary for the respondent to stand up to his chest, and he did stand up to his chest, in water; and he was engaged in this work for eight hours. The respondent thereafter, and for

two or three days, felt great stiffness and cold and pains in his joints, but continued to work until the morning of November 2, 1914, when he started to go to his work, but had to turn back owing to his physical condition. On November 3 he consulted a doctor, and was found by him to be suffering from sub-acute rheumatism and unfit for work. He continued in this condition from November 2, 1914, until January 25, 1915. From January 26 until March 2, 1915, he was able to work at reduced wages, and since March 2, 1915, his incapacity for work had ceased. The rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question.

The sheriff-substitute found in law that this was an injury caused [3] by accident arising out of and in the course of the respondent's employment with the appellants and awarded him compensation.

The question of law for the opinion of the Court was, Was there evidence upon which it could be competently found that the incapacity of the respondent was attributable to accident arising out of and in the course of his employment with the appellants?

The Second Division (the Lord Justice-Clerk; Lord Johnston, and Lord Guthrie) answered this question in the affirmative and affirmed the determination of the sheriff-substitute.

*William Watson, K.C., and Colin Smith* (for *Harold W. Beveridge*, serving with His Majesty's Forces), for appellant.

*A. H. B. Constable, K.C., and D. Oswald Dykes* for respondent.

*Beveridge, Greig & Co.* for *W. T. Craig*, solicitor, Glasgow, and *W. & T. Burness, W. S.*, Edinburgh, agents for appellant.

*Sewell, Edwards & Nevill*, for *O'Hare, Lyons & Co.* writers, Glasgow, and *J. Douglas Gardiner & Mill, S. S. C.*, Edinburgh, agents for respondent.

[4] **VISCOUNT HALDANE**.—My Lords, I do not think that the question raised by this appeal is really a difficult one. The sheriff-substitute has found that the rheumatism from which the respondent suffered "was caused by the extreme and exceptional exposure to cold and damp to which he was subjected" by complying with the direction given to him on October 28, 1914, to bale the water out of the pit, a direction which necessitated his entering the water and standing in it up to his chest for eight hours. In order to make out his claim under the Workmen's Compensation Act, 1906, a workman must prove that there was "personal injury by accident arising out of and in the course of the employment." The finding of the

arbitrator, who was in this case the sheriff-substitute, is made conclusive as to whether he has done so, unless there was on the face of the award error in law, or unless there was no evidence to support it. In the present appeal it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether, reading the award as a whole, this event could be in point of law an accident within the meaning of the Act, for if so the arbitrator certainly had before him evidence on which he could find that it had happened.

On the question so remaining I think that the judgment in this [5] House in *Fenton v. Thorley* [1903] A. C. 443, is conclusive. If the definition of accident within the meaning of the Act is "an unlooked for mishap or an untoward event which is not expected or designed," as stated by Lord Macnaghten, it covers the present case. If a qualification is added, as was proposed by Lord Robertson, to the effect that such mishap must arise from miscalculation of forces or inadvertence to them, I think the definition so qualified will still cover the case. For I interpret the finding of facts as amounting to this: that there was an entry into the cold water and prolonged exposure to it, the effects of which, being miscalculated, proved unexpectedly injurious. There is no suggestion of serious and wilful misconduct on the part of the workman which might, under s. 1, sub-s. 2 (c), of the Act, deprive him of the right to compensation. Indeed, it is plain that he went into the water to bale it out of the pit under directions from his employer, and he does not appear to have entertained such apprehensions of danger to himself as to induce him to disobey those directions. Had he died suddenly while so exposed, say of heart disease caused by the shock, there can be no doubt that this would have given a title to his dependants to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the Act.

For these reasons I have come to the conclusion that the appeal ought to be dismissed with costs, and I move accordingly.

**LORD KINNEAR**.—My Lords, I agree with the noble and learned Viscount that this ap-



peal must be dismissed. It cannot be disputed that on October 28, the respondent sustained an injury (to wit, a sub-acute rheumatism) arising out of his employment; and the only question is whether the injury arose by accident in the sense of the statute. I agree with the majority of the judges [6] in the Court of Session that this question is not to be answered by pointing to the breakdown of a water pipe on October 23. It may be that the inception of the disease may be logically traceable to the bursting of the pipe through a series of causes and effects following one another in order. But the connection is too remote to avail for fixing the right to compensation. It is trite doctrine that inasmuch as "it were infinite for the law to judge the causes of causes, it contenteth itself with the immediate cause." I, of course, accept the law laid down in this House in the cases of *Fenton v. Thorley* [1903] A. C. 443, and *Clover v. Hughes* [1910] A. C. 242, that the distinction of proximate from remote causes is not to be rigorously pressed in the application of the Workmen's Compensation Act. But the maxim, if it is not to be treated as an inflexible rule, may still be useful as "a guide," to use the language of a distinguished writer, "to the exercise of common sense." And this is quite in accordance with the opinion expressed by noble and learned Lords in the cases I have cited. For what they disapproved of was, in effect, the substitution of logical subtleties for the natural reading of plain facts. Accordingly, in the case of *Fenton* [1903] A. C. 443, 451, where a workman was ruptured while trying to turn a wheel which had stuck fast in consequence of an accidental leak in a part of the machinery, Lord Robertson says: "The plain fact is that he miscalculated or by inadvertence did not compare the relative resisting forces of the wheel and his body. In this state of facts I am of opinion that this personal injury arose by accident" in the sense of the statute, and he adds, "I do not rely on the historical circumstance that the sticking of the wheel was caused by an accidental leak. I think myself that the leak is too remote to impart its own accidental character to the injury which ultimately resulted to this man." In like manner Lord Macnaghten, after explaining the accidents which had impeded the working of the wheel, says [1903] A. C. 445: "I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that, if the mishap that befell *Fenton* was not of itself and apart from all other circumstances an accident within the meaning of that word as used in [7] the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortui-

tous element it was called—which would satisfy the terms of the enactment however narrowly it may be construed. In my opinion, they do not affect the question in the least."

I conceive that this decision, both on its negative and its affirmative side, is directly in point. On the other hand, in the case of *Coyle v. Watson* [1915] A. C. 1, it was held that the antecedent wreckage of a mine shaft was not too remote to be taken into account in determining the accidental character of the consequent exposure of a workman to a cold draught, whereby he contracted pneumonia. But this is in no way inconsistent with *Fenton's Case* [1903] A. C. 443, because the facts were altogether different. It was held in the later case that the incidents were indirectly connected and could not be treated as independent and detached factors. In this particular the present case is, in my judgment, distinguishable from *Coyle* [1903] A. C. 443, and not distinguishable from *Fenton* [1903] A. C. 443.

If the breakage of the pump must, therefore, be treated as an historical incident and not as a direct cause of injury, we have still to look for the true determining fact on which the case depends. And I think the ninth finding of the stated case leaves no room for doubt upon this matter. I observe that the learned sheriff-substitute distinguishes with precision between his findings in fact, which are final, and the decision which he bases on the facts so found, and which admittedly involves matter of law. The finding which I take to be conclusive is "that the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question." I agree with my noble and learned friend that the sheriff-substitute cannot be said to have misconstrued the statute when he found, farther, that "this was an injury by accident arising out of and in the course of his employment." On the particular occasion described the man exposed himself, in performance of his duty to his employer, to an extreme and exceptional degree of cold and damp, the character and effects of which he had miscalculated or through inadvertence had failed to foresee. If the sheriff-substitute thought that this was an untoward and [8] unlooked for mishap which was not expected nor designed, I see no ground in law for disturbing his decision.

The learned counsel for the appellants argued that in order to satisfy the Act there must be some distinct event or occurrence which taken by itself can be recognized as an accident, and then that the injury must be shown to have followed as a consequence from that specific event. But this is just the argument that was rejected in *Fenton v. Thorley*.

[1903] A. C. 443. It is unnecessary to say more; but I venture to add that the argument seems to me to rest upon a misreading of the statute, which can only have arisen from a failure to give any exact attention to the actual words. The statute does not speak of an accident as a separate and distinct thing to be considered apart from its consequences, but the words "by accident" are introduced, as Lord Macnaghten says, parenthetically to qualify the word "injury." The question, therefore, is whether the injury can properly and, according to the ordinary use of language, be called accidental. Another point which has been strenuously maintained in various cases could hardly have been stated were it not for the same deviation from the exact words of the statute. It is said that a disease is not an accident and is therefore excluded from the scope of the enactment. This seems to be suggested by an ambiguity in the use of the word "accident," which may either denote a cause or an effect; and the argument, assuming the latter meaning to be intended, is that no injury can be called accidental unless it be a visible hurt to the body, apparently caused by some external force. But there is no support for this notion to be found in the statute. For the statutory form of words gets rid of the double meaning completely. It is impossible to read the words "by accident" in the connection in which they occur as denoting only the apparent character of the harm sustained and not the cause or source from which it may have arisen. The conclusive answer, however, is that in the case of *Drylie* [1913] S. C. 549, where the argument was maintained with great force by Lord Salvesen, it was distinctly rejected by the decision of the Court, which was approved by this House in the case of *Coyle v. Watson* [1915] A. C. 1. This was in accordance with previous [9] decisions of the House; and I apprehend it must now be taken as settled that while a disease is not in itself an accident it may be incurred by accident, and that that is enough to satisfy the statute. On this point, indeed, the statute is its own interpreter. For the section which enables certain industrial diseases to be treated as accidents, although in fact they are not accidental, provides that this is not to affect the right of a workman to recover compensation in respect of a disease to which the section does not apply, "if the disease is a personal injury by accident in the sense of the Act."

I desire to add that I do not participate in the difficulties which Lord Johnston seems to have experienced in reconciling his opinion in the present case with the decisions in *Eke v. Hart-Dyke* [1910] 2 K. B. 677, and *Steel v. Cammell* [1905] 2 K. B. 232, 2 Ann. Cas. 142, and with the statutory conditions as to the

notice of accident which must be given to the employer. These decisions are based on the undisputed principle that disease unconnected with accident is not within the scope of the enactment; and as regards the facts it was held that a disease contracted gradually from continuous exposure to sewer gas, but which could not be related to any particular time or to any unforeseen and undesigned event as the origin of the mischief, could not properly be described as the result of accident. Whether this was right or wrong as an inference of fact it is unnecessary to inquire. But nothing could be further from collision with the principle on which the present case must be decided. I do not doubt that accident must mean something of which notice can be given. But the stated case sets out a perfectly definite event at a definite time and place, and there could be no difficulty whatever in complying with the condition for notice. What may have been the best form of notice in the present case it is not for us to consider, because we know nothing about the notice actually given, except that no objection has been taken to it, and we must assume that it satisfied the statute.

**LORD SHAW OF DUNFERMLINE.**—My Lords, the stated case narrates that the respondent was a brusher employed by the appellants in a coal mine. On October 28, 1914, on going down [10] the pit, he was directed to enter a body of water, which had been accumulating owing to the breakdown of a water pump five days before, and to bale out the water. He required to stand up to his chest in the cold water, and this he did for eight hours. He contracted sub-acute rheumatism. The sheriff finds "that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question."

I do not see how it can be argued that this finding was not one of fact; nor do I see how, that being so, it did not justify the finding in law that the words of the statute were affirmed, namely, that the appellant sustained "an injury by accident arising out of and in the course of his employment."

Injury by accident is a composite expression. It includes a case like the present, namely, the contraction of disease, arising from extreme and exceptional exposure. This expression—contraction of disease—might also, no doubt, be analytically treated, and it might be said that the disease was the injury and its contraction the accident; but that carries the matter no farther, and in both cases the composite synthetic expression brings the events together just as they happen in life and in fact. This construction, besides being most simple, prevents the confusion that is apt to arise by the supposed

difficulty of applying the Act because the event cannot be fixed in date. The disease and its contraction stand together so far as date is concerned; and in this case that date was October 28. The cases of Drylie, 1913 S. C. 549, in the Court of Session and Coyle [1915] A. C. 1, in this House dealt with physical occurrences analogous to that in the present instance, and the same principle as that now given effect to was there applied.

On the wider ground, apart from precedent, I do not doubt that the statute has been correctly applied, and that the appeal should fail.

**LORD PARMOOR.**—My Lords, the respondent was a miner who was working in the employment of the appellants as a brusher at their Newton pit, Kenmuirhill Colliery, when on October 23 the water pump broke down and a large quantity of water accumulated [11] in the pit bottom. These facts form part of the history of the case, but I think it is impossible to say that there is any connection between the injury in respect of which the claim is made and the accident of the breaking down of the water pump which occurred on October 23.

On October 28 the respondent was directed to go down the pit, and was employed to bale water from the pit bottom. It is not denied that in the course of this employment, and arising out of it, he contracted an attack of sub-acute rheumatism, rendering him unfit to work. The sheriff-substitute has held that it was established as a fact that the rheumatism, from which the respondent suffered, was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question, and found that there was an injury caused by accident, and that the appellants were liable to the respondent in compensation. This finding is final, subject to an error in law. It was, however, argued on behalf of the appellants that there was no evidence from which it could competently be found that the incapacity of the respondent was attributable to an injury by accident. The Court of Session affirmed the determination of the sheriff-substitute, and it is against this decision that the appeal is brought.

My Lords, I cannot doubt that there was evidence from which the sheriff-substitute could competently find that the incapacity of the respondent was attributable to an injury by accident, using the word accident in its ordinary natural sense. The immersion in water, under conditions of extreme and exceptional exposure to cold and damp, may be regarded either as an unforeseen, or an untoward, event, and in either alternative as an accident. This being so, it was within the competency of the sheriff-substitute to find in

favour of the respondent. The miscalculation of conditions, or carelessness as to conditions, is a common cause of accident, as in the case of a person being accidentally drowned through miscalculation of the depth of the water into which he has entered, or through carelessness in making no calculation as to its depth. There is no error in law, and this ends the case.

The decision of the Court of Session should be affirmed, and the appeal dismissed with costs.

[12] **LORD WRENBURY.**—My Lords, in this case the workman sustained "personal injury" in the form of a physical ailment or illness, namely, sub-acute rheumatism. For the purpose of the construction of the Act, it must be immaterial whether the "personal injury" is death, or the loss of a limb, or disease, or illness. In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the Act is "personal injury by accident." In this and in every case the inquiry must be whether the personal injury which has been sustained was sustained in such a state of circumstances as that it was sustained "by accident." I call particular attention to the fact that the language of the Act is not "personal injury by an accident," but "personal injury by accident." This means, I conceive, personal injury, not by design, but by accident, by some mishap unforeseen and unexpected; accidental personal injury.

While, on the one hand, it is true that the personal injury cannot be the accident which satisfies the phrase "by accident," yet, on the other hand, it is at the same time true that the result is a factor which assists in determining whether the injury was sustained by accident or not. If a man undresses on the beach in order to enjoy a bathe in the sea, goes voluntarily into the water, and is drowned by reason of the existence of a strong current, no one could deny that his death was accidental, that his death was by accident. In this case his going into the water was not accidental; the existence of the current was not accidental; but there was a factor which caused his death to be "by accident," and that was that unintentionally—perhaps by ignorance—he miscalculated the forces with which he had to do; he did not know of the current, or he thought that he was a strong enough swimmer to cope with it. He was wrong. The mishap which resulted from his bathing in this dangerous place was accidental. He had no intention or thought of going to his death. No other person intervened to conduce to the result. The sufferer's death was an unexpected event, an untoward result; it was by accident. If he had not been drowned it would be accurate

to say that happily there had been no accident. That which I endeavour to express is perhaps best summarized by saying that although the "personal injury" (the death or disease or whatever it is) cannot be the accident, [13] yet the contraction of the disease or the incurring of the death may be by accident. The fact of disease is not an accident, but the contraction of disease may be by accident. Sect. 8, sub-s. 10, in using the words "if the disease is a personal injury by accident," means, I think, "if the disease is a personal injury incurred by accident."

My Lords, after these general observations I do not feel that any useful purpose will be served by travelling through the numerous cases which have been cited. The question is whether such facts have been found as that the arbitrator could from those facts arrive at the conclusion that the rheumatism was contracted under such circumstances as that the personal injury was by accident. The only finding which I need set out is: "9. That the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp, to which he was subjected on the occasion in question." Suppose the events had been that under directions given by the employer the man had gone into the water, and it had proved unexpectedly to be eight feet deep, and that he had been drowned. No one, I think, would dispute that his death would have been by accident. The accident would have arisen from miscalculation or ignorance as to the depth of the water, by reason of which the man was exposed to danger and was drowned. Is there any difference of principle between the case in which the water went over his head and caused death and the case in which the water extended as high as his chest and caused rheumatism? I think not. In all these cases it is essential to bear in mind that the appellate judge has not to determine whether he would have arrived at the conclusion at which the arbitrator arrived, but has to see whether such facts are found as that the arbitrator could arrive at that conclusion. Here the sequence of the language in the case after the finding which I have quoted shows that the arbitrator's finding is that the rheumatism was an injury caused by the extreme and exceptional exposure to cold and damp; in other words, that the extreme and exceptional exposure to cold and damp was that which caused the personal injury to be by accident. I take this to mean that neither employer nor man anticipated that the cold and damp would have been so extreme as to cause the illness; that the exposure of the man to it was an untoward event; that [14] the result was

unexpected; that the outcome was a mishap; and that consequently the injury was by accident. Whether I should have been of that opinion or not, I think the arbitrator could properly so hold.

I may add that the events of October 23 have, in my judgment, no bearing upon the matter. There was an accident on October 23 no doubt, but that accident caused nothing in the events of October 28. Suppose there is a railway accident by collision, and that a breakdown gang is sent to deal with the matter, and that a member of the breakdown gang is injured when dealing with it. The fact that he is sent to deal with the results of an accident by collision does not show that he suffered from the accident by collision. The fact that there was such an accident has no bearing upon the question whether he was injured by accident or not. So here the fact that the water would not have been there if the pump had not accidentally broken down on October 23 has no relevance to the question whether on October 28 the man was the victim of an accident.

The conclusion at which I arrive is that upon the facts found the arbitrator could hold as matter of law that the injury was by accident. The appellant, I notice, by his supplementary statement submits that the question is whether "it could competently be held by the arbitrator that the respondent's incapacity was attributable to an accident." By this divergence from the words of the Act the appellant has, I think, fallen into an error which taints all the subsequent submissions in his case. In the next sentence he alters the language which he uses and adopts the language of the Act, but seemingly he fails to notice that he has done so.

In my judgment the appeal fails and must be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

#### NOTE.

The reported case holds that rheumatism contracted by a workman as the result of an employment by which he was required to stand in the water for several hours is an accident arising out of his employment entitling him to compensation under a workmen's compensation act. The cases discussing what is an accident arising out of and in the course of an employment within the meaning of a workmen's compensation act are collated in the notes to *Parker v. Hambrook*, Ann. Cas. 1913C 1; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B 495, and *Parker v. Ship Black Rock*, Ann. Cas. 1916B 1290.

WADE  
v.  
HORNER ET AL.

HAVIS  
v.  
PHILPOT.

Arkansas Supreme Court—November 9, 1914.

115 Ark. 250; 170 S. W. 1005.

**Intoxicating Liquors — Petition for License — Right to Sign — Validity of Statute Discriminating against Race.**

The Going Act (Acts 1913, p. 180), providing that when a majority of the adult white inhabitants of a city or town petition the county court, asking that a license for the sale of intoxicants be issued, the court may issue such license, if the majority of the votes cast at the last election was in favor of license, merely prescribes a condition precedent to the issuance of a license, and is not invalid under either the state or federal Constitution, as providing for an election from which electors of African descent were illegally excluded.

[See note at end of this case.]

**Same.**

The Going Act does not deprive colored citizens of the right of remonstrance against the issuance of a license; such persons having the same right to make themselves parties to a proceeding for the issuance of a license as any other elector, and to present their remonstrances in the same manner.

[See note at end of this case.]

**Same.**

As the colored electors are entitled to vote on the question whether the sale of intoxicants shall be licensed, which is submitted at the biennial general state elections, and may present a petition for the suppression of the sale of intoxicants, under the Three Mile Local Option Law (Kirby's Dig. §§ 5128-5132), it cannot be held that they are unlawfully deprived of any voice in the suppression of liquor traffic by the Going Act, which requires a petition, signed by a majority of white electors, as condition to the granting of a license.

[See note at end of this case.]

**Conditions to Issuance of License — Power to Prescribe.**

As the authority to sell liquor is a mere privilege which the state may grant or withhold, at its pleasure, it may require those desirous of permission to sell intoxicating liquor to procure a petition signed by a majority of the adult white inhabitants of the locality, as prescribed by the Going Act.

Appeal from Circuit Court, Garland county: COTHAM, Judge.

Petition by C. J. Horner et al., for license to sell intoxicating liquor, to which C. M. Wade et al., filed remonstrance. From judgment rendered, remonstrator appeals. **AFFIRMED.**

Appeal from Jefferson Chancery Court: ELLIOTT, Chancellor.

Action for injunction. Ferd Havis, plaintiff, and C. M. Philpot, defendant. From judgment rendered, petitioner appeals. **AFFIRMED.**

[251] The appeals in the above styled cases come from different courts, but involve the same questions and are, therefore, considered together.

In the appeal from the Garland Circuit Court, the facts are that a petition was filed by C. J. Horner, and others, in the county court of Garland County on January 1, 1914, by the adult white inhabitants of the city of Hot Springs, in that county, for the purpose of empowering the county court to grant license for the sale of intoxicating liquors under the provisions of the act of the Legislature numbered 59, entitled, "An Act to regulate the issuance of liquor license in Arkansas," approved February 17, 1913, as the same appears in the Acts of 1913, at page 180, and commonly known as the Going Act. On January 14, 1914, C. M. Wade filed his petition, "in behalf of himself and all others similarly situated," alleging that he was a citizen of the State of Arkansas, of African descent, a legal voter in the city of Hot Springs, Garland County, and residing within the incorporated limits of said city, and, as such inhabitant and voter, was interested, as well as all other colored citizens who were adult inhabitants of the said city of Hot Springs, in [252] the granting or refusal to grant liquor license in said city and county. That the law under which the petitioners, Horner and others, were proceeding was unconstitutional and void, for the reason that the same is in the nature of an election to determine whether license shall be issued or not, and limits the right to sign the petition to adult white inhabitants, and makes the action of the court on said petition depend upon the finding as to whether a majority of the white adults of the city have signed the same. That petitioner and members of the race to which he belongs were refused the right to sign the petition, and no provision was made for the exercise of the right of suffrage by them, but the court could consider only the signatures of members of the white race, and that such petitioners were given the exclusive right to dictate to all others whether license should be granted for the sale of liquors or not, or, at least, authorized the court's to act

in that behalf. It was further alleged that the court's action would affect all members of the African race in regard to their taxes, police regulations, and suffrage, and that the said act under which the proceedings were had was, and is violation of the following articles of the State Constitution, to wit: Sections 1, 3, 4, 8, 12, 18, 19 and 29, of article 2; section 1 of article 3; section 3 of article 3; and Amendment No. 10 of said Constitution. Petitioners aver that they proceed under the authority of section 13, of article 16, of the Constitution of the State, which provides "that any citizen of any county, city or town may institute suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exaction whatever," and further allege that the said act of the General Assembly of the State of Arkansas violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in as much as it makes an arbitrary classification of citizens who occupy exactly the same relation to the subject-matter with which it deals and grants privileges and advantages to citizens, or a class of citizens and inhabitants, which, upon the same terms, [253] circumstances and considerations, apply equally to all citizens and inhabitants, and for this reason the same is void and of no effect. The petition concluded with the prayer that "the petition of said C. J. Horner and others be dismissed, and that the court proceed in the matter of granting or refusing license in the same manner as if said petition had never been filed and said law never been enacted." The county court refused to take jurisdiction of the petition for the reason stated in its order; that the court was asked to declare the Going Act unconstitutional.

On the 27th day of January, 1914, the petition of Horner and others was granted by the county court, and certain white citizens of Hot Springs, who, on their motion, had been made parties to the proceeding, appealed to the circuit court, and, on the 20th of April, Wade and others prayed, and were granted, an appeal to the circuit court; and on June 1, 1914, the circuit court dismissed the petition of Wade "for and on account of the fact that the Supreme Court of Arkansas has held the law under which the petition of Horner and others was filed constitutional and valid, and for that reason alone." Wade excepted to this action of the court and has duly prosecuted this appeal.

In the other appeal the facts are that on the 12th day of January, 1914, appellant Ferd Havis, for himself and on behalf of numerous other persons who were members of the African race, brought an action against C. M. Philpot, as county judge of Jefferson County, to restrain him from considering a peti-

tion to be presented by F. M. Rosenberger, Henry Hanff, and others, in pursuance of the Going Act, for the reason that said act provided that only adult white inhabitants are permitted under said act to petition the county judge upon the question, whether liquor license shall be granted, and that petitioner, a negro, and others of his race, are denied the right to sign such petition or remonstrate, and that the same is oppressive and highly discriminative, and is in conflict with [254] the Constitution of the State of Arkansas and of the United States.

*Irving Reinberger and Davies & Ledgerwood* for appellants.

SMITH, J., (*after stating the facts*).—It is seen from the statement of facts that the same question is involved in each of these appeals. It does not appear in either case whether the appellants desired the issuance of liquor license or not, as neither of them state in their petition what action they desired the county court to take in that behalf. The burden of their complaint is that the county court in each instance should have proceeded to a consideration of the determination of its policy in regard to the issuance of liquor license without reference to the requirements of the Going Act, and that this is true because said act contravenes the various sections of the Constitution of this State and the Constitution of the United States set out in the petitions. Appellants argue that the act in question constitutes a discrimination against them on account of their race, in that they are alike interested with white citizens of the State in the [255] determination of the policy of the court in regard to the issuance of liquor license and that the Going Act prescribes a procedure which is, in effect, an election, and the exclusion of members of the African race from participation in the decision of this question is a deprivation of a privilege granted to them alike by the Constitution of this State and of the United States. It is argued that there are many communities in this State where the African race largely predominates and that in these, as well as in all other communities, they are deprived of any right to participate in the determination of the policy in regard to the issuance of liquor license.

These arguments are not new and are not now being presented for our consideration for the first time. The appellants in one of the cases recognize the force of our decision in the case of *McClure v. Topf*, 112 Ark. 342, 166 S. W. 174, but insist that that decision should not control here, because the parties to that litigation were not in a position to raise the questions now presented, for the reason that one of the parties to that liti-

gation were members of the African race, and that, as only a member of that race can raise these questions, the decision in the McClure case, *supra*, is not decisive of the present case. But we do not agree with this view. The opinion in the McClure case, *supra*, makes no mention of the fact that the parties to that litigation were members of the white race, and we there considered all the arguments now advanced, and the authorities were reviewed in the opinion of this court, and the Going Act was there upheld as a constitutional enactment. In that case we expressly held that a proceeding under the Going law was not an election, and it was further held that the right to sign the petition there provided for was not a privilege, but that the presentation of a petition, signed by a majority of the adult white inhabitants of any given municipality, was a mere condition which the Legislature had seen fit to impose before license to sell liquor might be granted to any one. It was pointed out in that case that the act did [256] not undertake to prescribe the class of persons to whom liquor license might be granted, and there is nothing in the act which gives to any white person the right to sell liquor, when the conditions of law have been complied with, which is denied to any other person. This act merely imposes a condition which must be complied with before any one may lawfully sell liquor, and contains no restriction as to whom license may be granted, when these conditions have been met. As has been said, the authorities were reviewed in the McClure case above, and it would be without profit to again review them here. In the recent case of Hickey v. State, 114 Ark. 526, 170 S. W. 562, in reviewing the opinion in the McClure case, it was said:

(1) "We held, in effect, that the statutory provision that a license to sell intoxicating liquors shall not be granted unless the applicant obtains the recommendation or consent of a majority of the adult white inhabitants of the city where he proposes to carry on business, is a lawful and proper police regulation, and is not objectionable on the ground that it violates either the State or Federal Constitution. We said that under the statute now under consideration the petition was a jurisdictional condition upon which the county court acts, when satisfied that it contains the names of the majority of the adult white inhabitants in the city in which the applicant seeks license to sell intoxicating liquors, and held that a statute imposing conditions on the business of retailing intoxicating liquors, though such conditions may be more onerous than those imposed upon another business, and though such conditions may be so burdensome as to render the business unprofitable and, on that

account, amount, in its practical results, to prohibition, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals and general welfare of the people than another business."

No arguments are now advanced which shake our faith in the correctness of that statement.

(2) When the terms and requirements of the Going Act have been met, there still abides with the judge of [257] the county court a discretion as to whether or not he shall adopt the policy of granting license to sell liquor, and this act merely imposes a condition which must be met before the judge may exercise that discretion.

(3) It is insisted that the Going law deprives the colored citizen of the right to remonstrate against the issuance of liquor license. But such is not the case. He may do so in any manner in which a white citizen may remonstrate. He has the right to be made a party to any proceeding under the Going law and to remand that its requirements shall be met before the county court shall adopt the policy of issuing liquor license, and if that court should ignore this law, or fail to find that its requirements had been complied with, the colored citizen thus made party to this proceeding, would have the same right to prosecute an appeal that any other citizen would have. And if it be found that the requirements of that act have been met, the colored citizen may be heard, and, of course, should be heard by the judge of the county court, as to the exercise of the courts discretion about granting license at all; and if so, then further upon the segregation of the traffic, or other questions relating to its control or regulation.

(4-5) It is further argued that no race suffers more from the baneful effect of the liquor traffic than the colored race, yet they are allowed no voice in its suppression, and that there are communities in this State in which the colored population very largely predominates, and that a minority of white persons have the exclusive right of determining that liquor shall be sold in such communities, and that the colored citizens are powerless to protect themselves from this traffic. But such is not the case. Under the law of this State, liquor cannot lawfully be sold in any county unless a majority of the electors voting on the subject of the issuance of license shall vote for the issuance of license: nor can liquor be sold in any township of any county, nor in any ward of any city, notwithstanding the vote of the county in which such township or ward may be situated, unless such township [258] or ward shall likewise vote for the issuance of license. If the vote on this question, which occurs at the

general State election on the second Monday in September of the even numbered years, is favorable to the issuance of liquor license, then a condition under which the county court may exercise its discretion in regard to the issuance of such license is met, but this favorable vote for license is, itself, a condition precedent to the exercise of this discretion. Another statute permits all adult persons to petition the county court to prohibit the sale of intoxicating liquors within three miles of any given point in this State, and no distinction is made on account of the race of the petitioner, and the court must make its order prohibiting the sale of liquor within three miles of the designated point, if such petition contains a majority to the adults, without any reference whatever to the race of such petitioners. This election, and this proceeding by petition under what is commonly known as the three-mile Local Option Law, are both mere methods by which the State exercises its police power in regard to this traffic. The State has this right, because the authority to sell liquor is a mere privilege, which the State may grant or withhold, as it pleases, or, if it grants this permission at all, it may do so under any conditions which, it cares to impose; and this is true, as has been stated, even though these conditions are so onerous as to amount to virtual prohibition of that traffic. The necessity of securing the petition of a majority of the adult whites of any given community is one of these conditions, and is valid as such. The Legislature, if it saw proper, could require that petitions be obtained securing the signatures of the majority of the adults of the colored race, and such requirement would be a valid exercise of the State's police power, even though none except members of the colored race were permitted to sign this petition.

Both the decree and the judgment are affirmed.

#### NOTE.

##### **Validity of Intoxicating Liquor Statute which Makes Distinction between Races with Respect to Granting of License or Otherwise.**

The holding of the reported case, to the effect that the legislature may require, as a condition to the issuance of license to sell liquor in any municipality, that a majority of the "adult white inhabitants" of the municipality shall have signed a petition favoring such license, is directly supported by the decision rendered in *McClure v. Topf*, 112 Ark. 342, 166 S. W. 174. In that case, which involved the validity of the same statute which is considered in the reported case, the

court said: "So much of the act as is necessary for a determination of the issues raised by the appeal is as follows: 'Section 1. It shall be unlawful for any court, town or city council, or any officer thereof, to issue a license or permit, or any other authority, to any corporation, person or persons, to sell, barter or give away, any alcoholic, malt, vinous or spirituous liquors, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, within the state of Arkansas, except as provided in this act. Section 2. When a majority of the adult white inhabitants living within the incorporated limits of any incorporated town or city in this state shall have signed a petition to the county court of the county in which said town or city is situated, asking that license for the sale of intoxicating liquors be issued for that town or city, then the said county court may issue such license for a period already provided by law. Provided, that the majority of the votes cast at the last general election in that county on the question of 'For License' and 'Against License' was in favor of 'For License.' In the act under consideration, members of the colored race are not excluded from engaging in the business of selling intoxicating liquors upon the same terms as members of the white race. The act under consideration provides that the county court may issue license when a majority of the adult white inhabitants of any incorporated town or city shall have signed and presented a petition asking that license be issued, provided that a majority of the votes cast at the last general election were 'For License.' It will be noted that the county court is not required even then to grant license, but it may do so if the conditions prescribed by the statute are complied with. As we have already seen, statutes requiring that licenses should only be issued on the recommendation of property holders, taxpayers and heads of families, etc., have been sustained. If the position assumed by counsel for appellees is correct, such statutes would be open to the objection that the class of signers which are designated are given privileges and immunities which are not granted other citizens. The law makers are presumed to be familiar with moral conditions as they exist in this state, and to know what class of citizens could best give proper information as to the evils that might result from the liquor traffic. The law makers doubtless thought that the class designated in the statute knew best whether the granting of license to sell intoxicating liquors would be dangerous to the morals of the community and likely to result in injury. Such action on the part of the legislature did not give the persons designated in the statute a privilege, but only imposed a condition upon



the traffic in intoxicating liquors." See also *Hickey v. State*, 114 Ark. 526, 170 S. W. 562.

It has furthermore been held that the legislature may provide for the separate accommodation of whites and blacks in saloons. *State v. Falkenhainer*, 123 La. 617, 49 So. 214. See also *Galloway v. Strauss*, 67 Fla. 426, 65 So. 588. Thus in the case first cited the court said: "The state has the right to adopt measures of police to regulate the sale of intoxicants. The legislature has adopted statutes regarding the accommodation of each race in traveling, also in the schools, one separated from the other. The legislation has been extended so as to include the further regulation of the liquor traffic. The first two: The regulation in matter of traveling and of schools, having been pronounced legal by both this court and the federal Supreme Court, there is no ground stated to declare the last measure, that relating to saloons, unconstitutional. The reasons which were upheld constitutional in the discussion in the *Plessy Case*, 45 La. Ann. 80, 11 So. 948, 18 L.R.A. 639, affirmed by the federal Supreme Court (163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256), have equal force in the present case. Now as to the asserted special privilege, which permits the sale to white persons at the bar, but does not give a privilege to sell to colored persons at a separate bar in the same building: this privilege, granted in accordance with a police regulation, is not violative of the fundamental law. The lawmaking power can make provision for separating the saloons. In order to obtain relief on this ground, it would be necessary to make it appear that the provision for separate saloons is substantially different from the laws making provision for separate cars and separate schools. The reasons suggested on that score are not at all persuasive. The lawmaking power is intrusted with discretion, with which the courts will not interfere except where it is very evident that the limitations of the fundamental laws have been disregarded."

For cases concerning the validity of statutes forbidding the sale of liquor to Indians, see the note to *State v. Nicolls*, Ann. Cas. 1912B 1088. And for cases discussing the use of intoxicating liquor by Indians as subject to state regulation, see the notes to *Ex p. Moore*, Ann. Cas. 1914B 648, and *People v. Daly*, Ann. Cas. 1915D 367.

## VAN BOSKERCK ET AL.

v.

## TORBERT.

United States Circuit Court of Appeals,  
Second Circuit—January 9, 1911.

184 Fed. 419.

## Statute of Frauds — Proof of Lost Memorandum.

The contents of a written memorandum of sale required by the statute of frauds, which has been lost, may be proved by parol, and proof of a statement by a defendant that an order for merchandise sent by letter had been accepted by mail is sufficient to establish such a written memorandum of sale, although the acceptance was not received by plaintiff.

[See note at end of this case.]

## Sufficiency of Memorandum — Sale of Goods.

An unsigned statement given by defendants to plaintiff, purporting to show the number of barrels of flour sold by defendants to plaintiff and remaining undelivered, which included a certain number of barrels sold on a certain date, is not a sufficient memorandum to take such sale out of the statute of frauds of New York, which requires contracts of sale of goods for the price of \$50 or more not delivered to be evidence by some note or memorandum in writing subscribed by the party to be charged or his agent.

## Delivery Avoiding Statute of Frauds — Proving Delivery under Particular Contract.

Where plaintiff sent orders by mail from time to time to defendants for flour for future delivery, the most of which were accepted in writing, but one was not, deliveries afterward made without any designation of the particular contract on which they were applied were presumptively intended to apply and were applied on the contracts in their chronological order, and, where there was not sufficient to fill the orders prior to the one not accepted, there is no ground for claiming a delivery thereon to take the sale out of the statute of frauds.

## Appeal — Cure of Error by Remittitur.

Where a judgment is excessive, but capable of correction by computation merely, it will not be reversed by an appellate court if the defendant in error files a remittitur of the excess.

Error to United States Circuit Court, Eastern District of New York.

Action by Edward A. Torbert, plaintiff, against George W. Van Boskerck et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. **AFFIRMED.**

*Tyler & Tyler* for plaintiffs in error.

*M. S. Lynch* for defendant in error.

Sitting: Lacombe, Coxe, and Ward, Circuit Judges.

[420] WARD, J.—The complaint sets up seven separate and independent purchases on different dates of flour by the plaintiff from the defendants for future delivery aggregating 6,250 barrels, all of which were at the price of \$3.75 per barrel except the last of April 30, 1907, which was at \$3.90 per barrel:

Oct. 29, 1906	1,250 bbls.	at \$3.75 per bbl.
Nov. 7, 1906	750	" " 3.75 " "
Nov. 13, 1906	250	" " 3.75 " "
Nov. 15, 1906	1,000	" " 3.75 " "
Nov. 26, 1906	500	" " 3.75 " "
Dec. 26, 1906	1,500	" " 3.75 " "
Apr. 30, 1907	1,000	" " 3.90 " "

It is admitted that the defendants delivered only 3,500 barrels, as follows:

Nov. 16, 1906	250 barrels
Dec. 7, 1906	250 "
Dec. 21, 1906	250 "
Jan. 11, 1907	250 "
Feb. 2, 1907	250 "
Feb. 16, 1907	250 "
Mch. 12, 1907	250 "
Mch. 19, 1907	250 "
Mch. 25, 1907	250 "
Apr. 13, 1907	250 "
May 6, 1907	250 "
June 22, 1907	250 "
June 28, 1907	250 "
July 2, 1907	250 "

The jury gave the plaintiff a verdict for the damages resulting from the failure to deliver 2,750 barrels. The contest in this court is as to the alleged sales of 1,000 barrels November 15 and 1,500 barrels December 26, 1906; the defendants denying that any such contracts were made and contending that, if made, they are void because not evidenced by a memorandum in writing as required by the statute of frauds, the relevant provisions of which are as follows (section 31 of the personal property law (Consol. Laws, c. 41)):

"Agreements required to be in writing. Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith or by his lawful agent, if such agreement, promise or undertaking . . . (6) is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money."

The plaintiff testified that, not having received any written confirmation of the sale of November 15th, of 1,000 barrels, at \$3.75, he complained to Thomas Van Boskerck, who replied that he had mailed the usual confirmation. It is contended that the case should be treated as if this had been done and the letter had miscarried. The contents of a written memorandum of sale which has been lost, required by the statute of frauds, may be proved by parol testimony. Reed on Statute of Frauds, § 326; *Jackson v. Livingston*, 7 Wend. (N. Y.) 136. This testimony, which must have been believed by the jury, seems to us sufficiently to establish the memorandum.

[421] The plaintiff further testified that he bought 1,500 barrels December 26th, for which he received no written confirmation, and that on or about January 10, 1907, he asked Thomas Van Boskerck, one of the defendants, for a statement of the amount of flour due him, who turned to his books and wrote off the following:

Oct. 29	1,750 sacks
Nov. 7	1,250 "
Nov. 13	350 "
Nov. 15	1,400 "
Nov. 26	700 "
Dec. 26	2,100 "
	<hr/> 7,550 sacks
	5
	<hr/> 7)37,750
	<hr/> 5,390
	1,250
	<hr/> 3,140

This memorandum is of sacks (of the same quantity) instead of barrels, and contains a mistake in subtraction; but its importance is that it recognizes the sales alleged by the plaintiff to have been made November 15th and December 26th. That in view of it the jury found such contracts had been made is not to be wondered at. The plaintiff contends that this memorandum satisfies the statute of frauds; but this is clearly not so, because it does not pretend to state a contract and is not signed. Next he says it is to be regarded as an account stated; but, if there can be an account stated of a balance of goods, it is a sufficient answer that the complaint is not upon an account stated.

Finally, the plaintiff relies upon the following confirmation of sale:

#### Plaintiff's Exhibit 1-F

New York, December 26, 1906.

We have this day sold to Daniel Mapes, Jr., one thousand bbls. flour branded King

Patent \$3.95 to be delivered in Jute sacks for account of E. A. Torbert, Jr.

George W. Van Boskerck & Son,

Per T. R. Van B.

Terms cash.

This, instead of being a memorandum of a sale by the defendants to the plaintiff, is a memorandum of a sale by the plaintiff to Mapes through the defendants, as his agents.

The only remaining question is whether the contract of December 26th was saved by the acceptance and receipt by the plaintiff of goods under it. The burden lay upon him to prove deliveries on the particular contracts. *Williams v. Morris*, 95 U. S. 444, 456, 457, 24 U. S. (L. ed.) 360. Both parties agree that the last three deliveries made were on the contract of April 30, 1907, which was for \$3.90 per barrel. All the other contracts were for \$3.75 per barrel, and there is no proof whatever of how deliveries were applied upon them. If we indulge the presumption that they were applied to the contracts in their chronological order, there was a delivery of 500 barrels on the contract of [422] November 15th and no delivery on the contract of December 26th. This leaves no ground for the plaintiff's recovery on that contract. We are compelled to the conclusion that there was error at least in the refusal of the defendants' request to charge that there was no evidence upon which the jury could find a contract of sale of the date of December 26th.

The presumption we have indulged as to the application of deliveries being the most favorable possible to the defendant, and the error being capable of correction by computation merely, there need be no new trial if the judgment is reduced by the proper amount. *Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 U. S. (L. ed.) 746.

Ordered, if the defendant in error within 10 days after this opinion is handed down file a remittitur of \$1,500 with interest from May 22, 1907, to the date of the verdict, in the office of the clerk of the Circuit Court of the United States for the Eastern District of New York, and a certified copy thereof in the office of the clerk of this court, the judgment, less the amount so remitted, will be affirmed, with costs of this court to the plaintiffs in error. But, if this is not done, judgment will be reversed, with costs of both courts to the plaintiffs in error.

#### NOTE.

#### Proof by Parol of Contents of Lost Memorandum Required by Statute of Frauds.

If a sufficient memorandum is made of a contract within the statute of frauds and it

is subsequently lost, a recovery may be had on the contract on clear and specific parol proof of the making and contents of the memorandum. *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Johnston v. Churchills*, Litt. Sel. Cas. (Ky.) 177; *Evans v. Miller*, 5 Ky. L. Rep. 606 (abstract); *Jelks v. Barrett*, 52 Miss. 315; *McCarty v. Kyle*, 4 Cold. (Tenn.) 348. See also *Ballingall v. Bradley*, 16 Ill. 373; *Davis v. Robertson*, 1 Mill Const. (S. C.) 71, 12 Am. Dec. 611; *Rains v. McMills*, 14 Tex. 614; *Ryan v. Salt*, 3 U. C. C. P. 83. And see the reported case. In *Jelks v. Barrett*, supra, wherein the memorandum was alleged to consist of an auctioneer's memorandum, made on an advertisement of the sale, it was said: "In February, 1864, Potter's office was burned, and with it perished all the deeds, the printed advertisement with the pencil memorandum thereon, and the maps made by the surveyor. Of the latter, however, Echols had made a copy of so much at least as bore upon the land in controversy, and this copy has been preserved, and is believed by Potter to be essentially correct. The loss of the papers, the long lapse of time, the confusion of memory incident to a civil war, and the death, before this suit was instituted, of David Collea, the active participant in all these matters, have necessitated a resort to parol proof, much of which, however, though ordinarily secondary, has become primary by the loss of that which was originally primary. Evidence which carries on its face no indication that better remains behind is not secondary, but primary. 1 Greenl. on Ev. § 84. That there should be some conflict and some presumptions necessary to be indulged, is unavoidable. The fullness of proof which has been preserved, and the satisfactory nature of it, is under the circumstances unusual and remarkable. While the conclusions to which we have arrived may not be incontrovertible, they are, we think, supported by the entire testimony, fairly considered." In *White v. Bigelow*, 154 Mass. 593, the court in passing on the sufficiency of a pleading said: "No action can be maintained upon the oral agreement unless the letter is a sufficient memorandum of it. But the fragment set forth is not the letter, but only a portion of it. Although the rest of the letter is alleged to have been lost, the entire contents, or the substance thereof, should be set out, that the court may see what the promise was, if any, that the intestate made."

However in *Elwell v. Walker*, 52 Ia. 256, 3 N. W. 64, the court, while assuming the admissibility of the evidence offered in that case and holding it to be insufficient, said that the argument against its admissibility was "forcible."

The parol proof of the contents of a lost memorandum required by the statute of

frauds must be clear and convincing. *McCarty v. Kyle*, 4 Cold. (Tenn.) 348. In *Van Horn v. Demarest*, 76 N. J. Eq. 386, 77 Atl. 354, it was said: "If evidence that a written memorandum once existed can satisfy the statute, it is a safe rule to insist that the proofs must be 'reasonably clear and certain.'" So in *Johnston v. Churchills*, Litt. Sel. Cas. (Ky.) 177, it was held that evidence showing the contents of the memorandum but failing to disclose by whom or how it was signed was insufficient. In *Elwell v. Walker*, 52 Ia. 256, 3 N. W. 64, the court said: "We undertake to say that not one of the witnesses in this case attempted to give the language of either of the letters, nor any of the language contained in them. The most that can be claimed for the evidence is that the witnesses gave their opinions of the meaning of the language used in the letters. This is not sufficient. The contents should be given so that the court might be enabled to judge therefrom whether there was a contract in writing."

# INGRAM-DAY LUMBER COMPANY

v.

## RODGERS.

Mississippi Supreme Court—June 9, 1913.

105 Miss. 244; 62 So. 230.

### Release — Consideration — Re-employment of Releasor.

The contract of defendant lumber company with plaintiff, in settlement of his claim for injuries, to give him a job for life, or so long as it remained in business, is uncertain and indefinite, and so will not support an action for its breach: it not specifying the position to be filled or the compensation to be paid.

[See note at end of this case.]

Appeal from Circuit Court, Harrison county: DODDS, Judge.

Action by W. E. Rodgers, plaintiff, against Ingram-Day Lumber Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Geo. P. Money and Flowers, Alexander & Whitfield* for appellant.

*Mize & Mize* for appellee.

[251] REED, J.—In his declaration the appellee alleges that he suffered a personal injury by being run over by a hand car while

in the employ of appellant as section foreman on one of its logging roads; that his claim for damages was settled by appellant agreeing to pay him for six months' work at two dollars and fifty cents per day and to give him a permanent job of such kind as he could fill, to continue as long as he lived, or as long as appellant operated its mill, the pay of the job to be the standard wage of a like position filled by other employees; and that the wages for six months have been paid, but that appellant has refused to carry out its agreement to give him permanent work.

Appellant pleaded the general issue, and also filed a special plea, stating that full settlement had been made with appellee for all of his claims and damages, by the payment to him of the sum of two hundred dollars, and [252] filed with the plea, as Exhibit A thereto, an instrument, duly signed by appellee, in which he acknowledged the receipt of two hundred dollars in full settlement of all claims for damages against the appellant on account of the injury he received. A certificate to this instrument, signed by appellee and attested by two witnesses, states that he had read the paper and understood it, and that he was satisfied with the settlement.

Appellee, in his replication to the special plea, alleges that at the time he signed the release his eyes were in bad condition, and that he could not read and did not read the same, and that he understood the instrument was a receipt for the balance of one hundred and thirteen dollars and fifty cents due him on the wages for six months at two dollars and fifty cents per day.

It is contended by appellant that the contract, as shown by the testimony, is not sufficiently certain in its terms; is not an enforceable contract, nor one for the breach of which damages could be recovered: it is not shown therein what job Rodgers was to receive, nor what he was to be paid therefor; in short, it fails to state material and necessary facts which would enable the court to determine precisely what the parties intended, and the jury to fix the amount of damages sustained by appellee.

In order to have before us fully and clearly the agreement which appellee claims was entered into by appellant, we quote from the testimony offered by appellee, plaintiff in the court below, on the trial of the case, relative thereto:

The following is from the appellee's own testimony: "Q. State to the court and jury the terms of that settlement. A. The terms of it: They were to pay me for six months at the rate of two dollars and fifty cents per day, and give me a job as long as they were in business there, or my lifetime. Q. Go ahead and state the terms of the contract.

A. They were to pay me six months' work at the rate of two dollars and fifty cents a day, [253] give me a job for my lifetime, or as long as they were in business."

The following is from the testimony of appellee's son, Milton Rodgers: "Q. State what you heard in that conversation. A. Mr. Mitchell was to pay him six months' full wages at sixty-five dollars a month, which amounted to about three hundred and ninety dollars, and he deducted all my father owed him out of this, which left one hundred and thirteen dollars and fifty cents he paid him in money, and also promised him a lifetime job, or so long as they were in business."

The following is from the testimony by appellee's wife: "Q. Did you hear any conversation about any settlement? What the terms of it was to be? A. Yes, sir. Q. What was it? A. Mr. Mitchell asked him to settle with him, and he told him, 'All right,' he would settle with him if anyways reasonable; so he gave him one hundred and thirteen dollars and fifty cents to settle, and promised to give him a job as long as he was in business."

The following is from the testimony of Ed Hart, a witness on behalf of appellee: "Q. What did you hear? A. I heard him tell him he need not worry about his job; he had a job as long as he lived, or he was in business there, and able to go to work."

When appellee rested his case, appellant moved the court to exclude the evidence, because the testimony did not show a contract sufficient to entitle the appellee to recover. This motion was overruled by the court. Likewise, at the end of the trial, the court refused to grant a peremptory instruction in favor of the appellant. The appellee demanded damages in the sum of two thousand dollars. The jury returned a verdict for five hundred dollars.

The court erred in overruling the motion and in refusing to grant the peremptory instruction for the defendant. We do not see that the agreement, as shown by the testimony in this case, is sufficient in its terms to [254] entitle the appellee to recover thereon. The contract is uncertain and indefinite. It does not show what job was to be given appellee, nor what amount he was to be paid for his services. The terms of the agreement are indefinite. According to the testimony, appellee was to be given a job for his life, or as long as appellant was in business at the place where then located. It does not show what special work was to be given him, nor what department of the mill or plant. It is well known that a sawmill company like that operated by appellant employs many men in a number of different positions and has several departments of work. The wages of the employees vary with the work they are called upon to do.

Instruction No. three for the plaintiff, directs the jury to assess appellee's damages "at such a sum as they think from the evidence he is entitled to, which was caused proximately by the breach of contract by defendant." As it is not shown in the contract what employment appellee was to be given, nor what wages he was to be paid, how could the jury have determined the amount of verdict rendered in the case? How can there be any intelligent ascertainment of the damages sustained by appellee on the contract which he claims he had with appellant?

We must keep in mind that this is a suit on a contract. The general rules governing contracts will apply. The terms of a contract must be complete and sufficiently definite to enable the court to determine whether it has been performed or not. The terms and conditions are not sufficiently definite, unless the court can determine therefrom the measure of damages in the case of a breach. This cannot be done in the present case. This contract lacks sufficient precision. There are not enough necessary and material facts stated to render it capable of enforcement.

Appellee's counsel cites and relies on the decisions in the cases of *Jackson v. Illinois Cent. R. Co.* 76 Miss. 607, [255] 24 So. 874, and *Hayes v. Atlanta, etc. Air Line Railroad Co.* 143 N. C. 126, 55 S. E. 437, 10 Ann. Cas. 737. In both these cases the job which was to be given to the plaintiff for life was specified. In the *Jackson Case*, the very place to be filled was designated, and *Jackson* was actually put to work for definite wages in the position, and held it for several years. In the *Hayes Case* it was shown that he was to be given work as a guard at a street crossing, and that he was to be paid twenty-five dollars per month for his services. It will therefore be seen that the facts of the present case are different from those in the *Jackson* and *Hayes Cases*. The difference consists of the absence in the present case of any stipulation specifying the position to be filled and the compensation to be received therefor.

This case, for the reasons stated, is reversed, and judgment entered here for appellant.

Reversed.

#### NOTE.

#### Validity of Release Given in Consideration of Re-employment of Releasor by Releasee.

The earlier authorities relative to the validity of a release given in consideration of the re-employment of the releasor by the releasee, are discussed in the notes to *Missouri*,

etc. *R. Co. v. Smith*, as reported in 4 Ann. Cas. 644, and 107 Am. St. Rep. 607, 618. It is intended in the present note to review the later decisions in regard thereto.

A release of a claim for personal injuries given in consideration of the re-employment of the injured person by the employer is ordinarily deemed to rest on a sufficient consideration. *Cleveland, etc. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485; *American Quarries Co. v. Lay*, 37 Ind. App. 386, 73 N. E. 608; *Illinois Cent. R. Co. v. Fairchild*, 48 Ind. App. 300, 91 N. E. 836; *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Kelly v. Peter, etc. Stone Co.* 130 Ky. 530, 113 S. W. 486; *Louisville, etc. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389; *Brighton v. Lake Shore, etc. Southern R. Co.* 103 Mich. 420, 61 N. W. 550; *Stearns v. Lake Shore, etc. Southern R. Co.* 112 Mich. 651, 71 N. W. 148; *Sax v. Detroit, etc. R. Co.* 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; *Jackson v. Illinois Cent. R. Co.* 76 Miss. 607, 24 So. 874; *Harrington v. Kansas City Cable R. Co.* 60 Mo. App. 223; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536; *Swanson v. Union Pac. R. Co.* 98 Neb. 373, 152 N. W. 744; *Quebe v. Gulf, etc. R. Co.* 77 S. W. 442, judgment affirmed 98 Tex. 6, 4 Ann. Cas. 545, 81 S. W. 20, 66 L.R.A. 734; *Gregory v. Pecos, etc. Texas R. Co.* 155 S. W. 648; *Tindall v. Northern Pac. R. Co.* 58 Wash. 118, 107 Pac. 1045. See also *Phares v. Lake Shore, etc. Southern R. Co.* 20 Ind. App. 54, 50 N. E. 306; *Stanton v. Erie R. Co.* 131 App. Div. 879, 116 N. Y. S. 375; *Hayes v. Atlanta, etc. Air Line R. Co.* 143 N. C. 125, 10 Ann. Cas. 737, 55 S. E. 437; *Vasquez v. Pettit*, 74 Ore. 496, 145 Pac. 1066.

Thus each of the following provisions for re-employment has been held to constitute a good consideration for a release: "a lifetime job," *Illinois Cent. R. Co. v. Fairchild*, 48 Ind. App. 300, 91 N. E. 836; "employment when recovered," *American Quarries Co. v. Lay*, 37 Ind. App. 386, 73 N. E. 608; "to re-employ said employee for such time only as may be satisfactory to it," *Cleveland, etc. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485; "steady and permanent employment as a switch tender," *Louisville, etc. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389; "furnish him steady work during the time he was able to work," *Kelly v. Peter, etc. Stone Co.* 130 Ky. 530, 113 S. W. 486; "to employ as baggage master during the releasor's natural life or his ability to do the work," *Stearns v. Lake Shore, etc. Southern R. Co.* 112 Mich. 651, 71 N. W. 148; "life employment," *Jackson v. Illinois Cent. R. Co.* 76 Miss. 607, 24 So. 874; "and employment for life, or for so long a time as he desired to work, at the same pay that he was receiving at the time of his injury," *Swanson v. Union Pac. R. Co.*

98 Neb. 373, 152 N. W. 744; "and in consideration of the promise of said company to employ me for one day as —, at the usual rate of pay," *Gregory v. Pecos, etc. R. Co. (Tex.)* 155 S. W. 648. In *Stanton v. Erie R. Co.* 131 App. Div. 879, 116 N. Y. S. 375, it was held that a valid contract existed for the breach of which an action would lie, it appearing that it was agreed on the part of the injured employee to withdraw an action and execute a general release in consideration of the promises made in the following provision: "The Erie Railroad Company will give you employment as engineer when you become physically able and are otherwise competent and qualified to discharge the duties of that position as required, and as soon thereafter as there is a vacancy, and such employment shall continue while the Company has work of that character to perform, and so long as you remain physically able, competent and otherwise qualified to perform such duties, subject to the right of the Company to discharge you for failure to faithfully perform such duties, to comply with its rules and regulations or for other misconduct."

In *Cleveland, etc. R. Co. v. Hilligoss*, 171 Ind. 427, 86 N. E. 485, the court in holding that a promise to re-employ was sufficient consideration for a release said: "Neither can he be heard to complain that there was a want of, or an inadequate, consideration. His recoverable damage, if any at all, was unliquidated and uncertain. It might be much or little, and whatever consideration he accepted as satisfaction for what he surrendered will be held as adequate. That he accepted appellant's covenant for re-employment in satisfaction is incontrovertible from the language of the release, and that was a sufficient consideration." The court in *Louisville, etc. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389, said: "If the contract was as stated by Cox [viz. steady and permanent employment as a switch tender], it did not lack mutuality for he gave a valuable consideration for the defendant's promise to employ him, and it cannot after receiving the consideration repudiate the contract with impunity. . . . It is not against public policy for a public service corporation to enter into a contract to give an employee permanent employment, for the reason that it is necessarily implied in such a contract that the servant is properly to perform his duties, and may be discharged by the master for any cause that would justify the discharge of a servant employed for a fixed term." In *Kelly v. Peter, etc. Stone Co.* 130 Ky. 530, 113 S. W. 486, the court said: "The contract alleged in the petition did not lack a consideration. On the contrary, it is expressly alleged that the plaintiff had been hurt in the employment of the defendant com-

pany, and had a claim against it for damages, which he was asserting, and that in settlement of this claim the defendant company paid plaintiff \$150 in cash, and in addition thereto contracted and agreed with him that, as soon as he was able to resume work, it would allow him to continue in its employment and furnish him steady work during the time he was able to work." In *Tindall v. Northern Pac. R. Co.* 58 Wash. 118, 107 Pac. 1045, it appeared that the release recited that there was no agreement on the part of the respondent to continue his employment for any length of time, but that he was "to be simply reinstated and allowed to work under the same circumstances as before the accident." In holding the release to be a valid one the court expressed its views as follows: "It is next urged that there was no consideration for the release. We cannot agree with this contention. The recoverable damage, if any, was unliquidated and uncertain. That which is of value to one of the parties or a detriment to the other is a sufficient consideration to support a contract, in the absence of fraud. To hold that the release is not binding upon the appellant would, in effect, destroy his power to contract. He desired re-employment by the respondent, and could not obtain it without releasing it from liability for any claim for damages resulting from his injury. He acted advisedly. He understood that it rested with him to determine whether he would stand upon his claim for damages and seek employment elsewhere, or acquit the respondent of liability and secure reinstatement. He chose the latter course, as he frankly stated, because he wanted to secure employment so that he could pay his bills."

In the reported case, however, it is held that an agreement to re-employ which is silent as to the nature and terms of the employment is too uncertain to uphold a release. For a similar holding, see *Ogden v. Philadelphia, etc. Traction Co.* 202 Pa. St. 480, 52 Atl. 9. See also in this connection, *Louisville, etc. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389. In *Freeman v. Morrow* (Tex.) 156 S. W. 284, it was held that a purported release in full was not supported by a valuable consideration where the recited consideration was re-employment at the usual rate of pay for one day, and for such additional time as might be satisfactory to the employer. So in *Texas Cent. R. Co. v. Johnson* (Tex.) 111 S. W. 1098, the release in question was declared void the recited consideration being one dollar which was admitted to have remained unpaid and an agreement that the "appellee would be permitted to remain in the service of the company under the same terms of employment as existed before the accident to him, to wit, employment by the month, and subject to the right of the defendant to discontinue his services at any time for any cause."

ant to discontinue his services at any time for any cause."

In *Louisville and Nashville R. Co. v. Cox*, 133 Ga. 763, 66 S. E. 1088, it appeared that a release was given containing among other conditions the following: "And when I will have recovered sufficiently, and when a vacancy in the service of the Georgia Railroad in the City of Atlanta, in any place which I am physically able to fill, and by training, education, habits, and character am fitted to fill (my fitness to be determined by the superior officer employing me), I will be given employment subject to the rules, regulations, and discipline of the service, and stand on the same footing as all other employees of said Railroad." The court in construing the writing gave it the force of a conditional release rather than that of a contract, and as to its effect said: "If the companies failed to comply with the conditions, the plaintiff's remedy was upon his original cause of action for the tort in maiming him; and if the railroad companies were liable under the facts of the case, they could not defeat that liability by pleading and proving the written settlement as a release, unless they showed compliance with its terms."

In *Clark v. Chicago Great Western R. Co.* 170 Ga. 452, 152 N. W. 635, wherein it appeared that the plaintiff had been paid his customary rate of compensation since the time of his injury and had received employment which was given to him only because of the execution of a release on his part, it was held that the payment and employment constituted a sufficient consideration for the release.

## BRINDLEY

v.

## STATE.

Alabama Supreme Court—June 3, 1915.

193 Ala. 43; 69 So. 536.

### Criminal Law — Bill of Exceptions — Establishment after Death of Judge.

Where a murder case was tried August 25, 1914, and the bill of exceptions was indorsed "Presented" on November 21, 1914, by the presiding judge, who died January 3, 1915, without signing the same as a bill of exceptions, and it was stipulated that the bill presented truly stated the points for decision, together with the facts in the case, it will be established on motion.

[See 2 R. C. L. tit. *Appeal and Error*, p. 147.]

**Conspiracy — Proof by Circumstances.**

It is not necessary to prove a conspiracy by positive evidence; but its existence may be inferred from circumstances attendant upon the doing of the act, and from the subsequent conduct of the parties.

[See 3 Am. St. Rep. 482.]

**Criminal Law — Evidence — Admissions of Accused.**

Declarations by defendant, both before and after the commission of the homicide with which he is charged, tending to connect him with it, are admissible as evidence against him.

**Evidence Procured through Dictaphone.**

In a prosecution for murder, testimony of a witness that, with interruptions, he overheard a conversation through a dictaphone installed in the room of the jail where the defendant and two other parties, who had been jointly indicted for the murder, were confined, to the effect that defendant asked one of the other parties if he knew what a certain named person had done, and that such other party replied that he had heard that the person named had turned state's evidence, that such other defendant said he could prove an alibi if he could find the right man, that defendant replied, "They all know I was up there at the saloon," that defendant asked the other party what he did with the guns, and why he did not get the father of the deceased, and was told that the guns were hid under a rail fence and that he "had to leave there too quick," is admissible, when accompanied by the witness' exhibition of a dictaphone and his explanation of its operation.

[See note at end of this case.]

**Declarations of Co-conspirator — After Crime Committed.**

The declarations of a codefendant and alleged conspirator, together with his manner and appearance after the homicide, do not constitute evidence against defendant.

[See 5 R. C. L. tit. *Conspiracy*, p. 1089.]

**Harmless Error — Immaterial Evidence.**

Questions to and answers by a witness are not prejudicial to the defendant, where they in no wise tend to connect defendant with the murder charged.

**Appeal — Objections Below — Admission of Evidence.**

Where defendant did not object to testimony offered at the trial, the question of the competency of any part of it cannot be made for the first time on appeal.

**Criminal Law — Evidence — As to Footprints of Animal.**

In a trial for murder, alleged to have been committed in conspiracy with other parties, evidence that witness had examined mule tracks in the woods near where the killing occurred, that they were fresh shod foot impressions, showing a rough calk not wedged at the end as usual, and that he saw some of the tracks of the mule made in town which were the same as those seen near where the killing occurred, and that the mule whose

tracks he saw in town was brought to the barn by one of the alleged conspirators, is admissible.

**Same.**

In such prosecution, where a witness testified that he saw fresh mule tracks in the woods near the place of the homicide, and stated that the calk of one shoe was larger than the other, and that he afterwards saw a mule in town driven by one with whom defendant was charged to have been in conspiracy, which was the mule whose tracks he had examined, there is no error in allowing him to be asked by the solicitor what was the measurement of the mule track, nor in permitting an answer that the track witness had measured was not as plain as where he found it out there, that he could not get the exact measurement of the heel, but the length of it was the same.

**Appeal — Review of Exclusion of Question — Necessity of Offer of Proof.**

In a trial for murder, there is no error in sustaining an objection to defendant's question to a witness, "What did you all say?" since the question is too general, and does not disclose that the answer sought to be elicited would be material, and since the defendant did not inform the court what was proposed to be proved, so that the court might see whether the evidence sought was proper.

Appeal from Circuit Court, Cullman county: SPEAKE, Judge.

Criminal action. Alpheus Brindley convicted of murder and appeals. The facts are stated in the opinion. **AFFIRMED.**

*F. E. St. John, George H. Parker and William H. Stoddard* for appellant.

*W. L. Martin and J. P. Mudd* for appellee.

[44] THOMAS, J.—(1) This cause was submitted on motion to establish a bill of exceptions and on the merits. The record informs us that the case was tried on the 25th day of August, 1914: that the bill of exceptions was indorsed, "Presented," on November 21, 1914, by Hon. D. W. Speake, the presiding judge; and that Judge Speake died on the 3d day of January, 1915, after failing to sign the same as a bill of exceptions. An agreement was incorporated in the record of the case, signed by the Attorney General of the state of Alabama and the solicitor of the eight judicial circuit of Alabama, [45] and by George H. Parker as attorney for the defendant, stipulating to the effect that the said document, purporting to be a bill of exceptions, and now presented to the Supreme Court to be established as such, correctly and truly states the points for decision, together with the facts in said cause.

Appellant's motion to establish his bill of exceptions is granted, and the cause will be heard on its merits.



The appellant, Alpheus Brindley, was tried for murder in the first degree in the circuit court of Cullman county, Ala., and was convicted and sentenced to the penitentiary for life. Appellant was indicted jointly with Clyde Patterson and John W. Patterson for the killing of Robert Miller, by shooting him with a gun. Severance was demanded, and granted, and the two Pattersons were tried and convicted, and sentenced to the penitentiary for life.—*Patterson v. State*, 191 Ala. 16, Ann. Cas. 1916C 968, 67 So. 997. On the trial of appellant, Brindley, the testimony for the state tended to show that on Monday, the 20th of July, 1913, the deceased, Bob Miller, his father, Mack Miller, and his kinsman, Rube Carter, came from their home into the town of Cullman, arriving in the morning, and that they departed in the evening in a wagon; that Robert Miller and his father were sitting on the wagon seat, and Carter was sitting in the back part of the wagon; that when they had proceeded about two miles, and reached a point where the road makes a sharp curve and is secluded by a dense wood, two shots were fired upon them, killing Robert Miller and Rube Carter. Clyde and John Patterson were recognized, standing with guns in hand, one pulling the breach of his gun; and both went away in the direction of the field and woods, whence their tracks were followed to the road. The vicinity where the shooting [46] occurred showed preparation for the homicide, and buckshot were taken from trees along the line of fire, and others, from the bodies of the deceased men, of the same kind and size. The evidence showed strong motive, and threats, on the part of the defendant Brindley and the Pattersons, against Miller.

(2) It would subserve no good purpose to set out the evidence. It is sufficient to say that from the whole evidence a conspiracy, on the part of Brindley and the Pattersons, to take the lives of the Millers, may be inferred. It is not necessary to prove a conspiracy by positive evidence, but its existence may be inferred from circumstances attendant upon the doing of the act, and from the conduct of the parties subsequent to its commission.—*Morris v. State*, 146 Ala. 66, 41 So. 274; *Buford v. State*, 132 Ala. 6, 31 So. 714; *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Williams v. State*, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; *Martin v. State*, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; *Elmore v. State*, 110 Ala. 63, 20 So. 323; *Evans v. State*, 109 Ala. 11, 19 So. 535; *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 363; *Scott v. State*, 30 Ala. 503. And no positive agreement to commit the crime need be shown.—*Marler v. State*, 67 Ala. 55, 66, 42 Am. Rep. 96; *Jones v. State*, 174 Ala. 53, 57 So. 31.

(3, 4) The testimony of witness Wren was that he overheard defendant Brindley, after being incarcerated in the Jefferson county jail, ask Patterson if he knew what Grady Harris had done, and Patterson said in reply that he heard Harris had turned state's evidence; that the conversation was then interrupted by the noise of a hammer on a building near by, and witness then heard Patterson say he could prove an alibi if he could [47] find the right man, and Brindley replied, "They all know I was up there at the saloon;" that there was another space of time in which witness could not hear what they said, after which witness heard Brindley ask Patterson what he did with the guns, and heard Patterson reply: "They are all right; they won't find them; they hid them under an old rail fence," and that witness further heard Brindley ask Patterson why he did not get the *old man*, and Patterson replied that he "had to leave there too quick."

Declarations made by a defendant, both before and after the commission of the homicide with which he is charged, tending to connect him with it, are admissible as evidence against him.—*Johnson v. State*, 87 Ala. 39, 6 So. 400. The witness Wren testified that he was acquainted with, and knew the voices of, the Pattersons and Brindley; that he heard the conversation above detailed through a "detectaphone," installed in the room of the jail where the defendant and the Pattersons were confined. He explained how the instrument was installed, how the "receiver" was imbedded in the wall of the cell where the defendant and the Pattersons were confined, and how the "transmitter" was situated in the room where witness was listening, and how the two instruments were connected by electric wiring charged by batteries. The detectaphone was shown to the jury, and explanation was made to them how it was installed, and how the conversation was overheard.

With the perfection, and widespread use, in modern life, of devices for electro-telephonic communication, by means of which direct communication is had over great distances and the human voice understood and recognized, it is but reasonable to assume that the explanations of the witness, of the device, and the exhibit thereof, [48] were within the practical comprehension of the jury; and it was therefore competent for this witness to detail to the jury the conversation between defendant and the others accused, and to exhibit to the jury a "detectaphone," explaining its operation to them.—*Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 314, 315, 45 So. 73; *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 51 So. 176, 137 Am. St. Rep. 35. Mr. Wigmore, in his work on Evidence (volume 1, § 669), discusses the admissibility of authentic information by telephone.—

Sullivan v. Kuykendall, 82 Ky. 487, 56 Am. Rep. 901; Oskamp v. Gadsden, 35 Neb. 7, 52 N. W. 718, 17 L.R.A. 440, 37 Am. St. Rep. 428; Globe Printing Co. v. Stahl, 23 Mo. App. 451; German Sav. Bank v. Citizens' Nat. Bank, 101 Ia. 530, 70 N. W. 769, 63 Am. St. Rep. 399; Wolfe v. Missouri Pac. R. Co. 97 Mo. 473, 11 S. W. 49, 3 L.R.A. 539, 10 Am. St. Rep. 331; Brown v. Com. 76 Pa. St. 319; People v. Ward, 3 N. Y. Crim. 483. In *Andrews v. State*, 33 Ohio Cir. Ct. Rep. 564, it was held that experiments made by the inventor and maker of a different dictagraph, and under different circumstances, from that used to obtain evidence and to prove the crime complained of, are properly admissible to demonstrate the construction and make autoptic preference of the scientific principles involved in the operation thereof.—See 18 Am. Dig. (Key-No. Series) p. 684, first column.

The question, then, is not a new one, though it is presented in a new form in the "detectaphone." There was no error in the admission of this testimony.—*Parker v. Rex* 14 C. L. R. Austr. 681, 3 British Rul. Cas. 68, 72; *Herlost v. Emperor*, 7 Crim. L. J. 406; *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077, 43 L.R.A. (N.S.) 1206; *Wharton, Crim. Ev.* (8th Ed.) 544; 1 *Widmore, Ev.* § 795; *Rogers, Expert Test* (2d ed.) § 140; *Jones, Ev.* (2d Ed.) § 581.

[49] (5, 6) There was no prejudicial error in the questions to, and the answers by, the witness Clifton, on the trial of the defendant Brindley. The declarations of Clyde Patterson, together with his manner and appearance, after the homicide, did not constitute evidence against Brindley; yet from a careful consideration of the two questions and answers, they were not hurtful to the defendant, for they in no wise tended to connect Brindley with the crime.

(7, 8) It is next insisted by appellant that the court committed error in allowing witness Sparks to testify to the measurement of the mule tracks near Byer's Opera House in Cullman. From an examination of the testimony of the witnesses, we find that the witness was allowed to state that he made an examination of some mule tracks in the woods a short distance from where the killing occurred, and that there was a peculiarity about these tracks; that they were fresh shod foot impressions, showing a rough calk—not wedged at the end as usual; that he saw some of the tracks of the mule made in town, and that the tracks in town where the tracks witness saw out there, showing a rough, peculiar calk like the ones out there; that the mule whose tracks he saw in town was brought to the barn by Clyde Patterson. The defendant did not object to this testimony, and the question of the competency of any part of it cannot now be made for the first

time on appeal. Witness Sparks gave the facts and peculiarities of correspondence or identity, and it was for the jury to find whether the mule driven by Patterson that evening or the next day in Cullman was the mule drawing the buggy in the woods near the scene of the homicide.—*Livingston v. State*, 105 Ala. 127, 16 So. 801.

[50] (9) The witness Connally testified to the fresh buggy tracks and mule tracks in the woods near the scene of the homicide, stating the peculiarity about the mule tracks—that the calk of one shoe was larger than the other—and, without objection, was allowed to state that he afterwards saw a mule in Cullman, driven by Clyde Patterson, and that it was the mule whose tracks were examined by Sparks and Biggers, and that the track of Patterson's mule had a large calk on one of the shoes.

There was no error in allowing the question to be asked by the solicitor, "What was the measurement of that mule track?" nor in permitting the answer, by the witness, "The track that I measured was not as plain as where we found it out there; I could not get the exact measurement of the heel, but the length was the same." This answer was competent to go to the jury, for what it was worth, in connection with what witnesses had testified as to the similarity of the mule tracks, in the woods, near the scene of the murder, to the tracks in Cullman made by Clyde Patterson's mule.—*Pope v. State*, 174 Ala. 63, 79, 57 So. 245; *Fuller v. State*, 117 Ala. 36, 23 So. 688; *Bushby v. State*, 77 Ala. 66; *Gilmore v. State*, 99 Ala. 154, 13 So. 536.

(10) There was no error in sustaining the objection to defendant's question to witness Patterson, "What did you all say?" The question was too general. It did not disclose that the answer sought to be elicited would be material. The question was not answered, and it is not made to appear what the answer would have been. When a question is so general that an answer cannot be said to be *prima facie* admissible, the party is required to inform the court what is proposed to be [51] proved, so that the court may see whether the evidence sought to be elicited is proper. The question in this case was susceptible of an answer that would have been wholly immaterial, and the court was not informed of its materiality.—*Birmingham R. etc. Co. v. Barrett*, 179 Ala. 285-291, 60 So. 262, and authorities there collected. The question, "What else was said in that connection?" in *Drake v. State*, 110 Ala. 9, 20 So. 450, cited by appellant's counsel, disclosed on its face that competent testimony was sought to be elicited "in connection" with the other testimony before the jury, explanatory of the threat proved by the state

Here the witness may have made answer to the question any immaterial conversation that may have taken place between the men in prison.

It follows from what we have said that no prejudicial error was committed on the trial of the cause. The case is affirmed.

Affirmed.

Anderson, C. J., and Mayfield and Sommer-ville, JJ., concur.

Rehearing denied June 30, 1915.

#### NOTE.

#### Admissibility of Evidence Received through Dictaphone or Dictagraph.

The reported case holds that testimony as to a conversation heard by the witness through a "dictaphone" is admissible. This holding finds support in cases from other jurisdictions in which evidence obtained by the witness through a dictagraph has been received without question as to its admissibility. *People v. Eng Hing*, 212 N. Y. 373, 106 N. E. 96; *Andrews v. State*, 33 Ohio Cir. Ct. Rep. 564. In *People v. Eng Hing*, supra, the affidavit of stenographers, setting forth conversations heard through a dictagraph, were submitted to the court of appeals on a motion for a new trial.

In *People v. Martin*, 91 Misc. 107, 154 N. Y. S. 324, conditions appeared which rendered the evidence offered inadmissible. In that case the court said: "After the arraignment of the defendant and while he was out on bail pending action by the grand jury, Scharfenburg and the defendant applied to Scharfenburg's mother for aid. They were referred to the mother's attorney and Martin went by appointment to the office of the attorney. A dictagraph had a few days previously been installed in the office of the attorney, and at a preconcerted signal given by the attorney to his stenographer in an adjacent room she took down stenographically a portion of the conversation as she heard it over the dictagraph between the attorney and the defendant and transcribed her selected and incomplete notes of such report. The stenographer was not in the room where the defendant was; she had never seen him before that time and she did not know or recognize his voice. She was not called as a witness to testify to statements made in her presence by the defendant, but her transcription of the incomplete notes which she had taken from the dictagraph was received in evidence against the defendant as primary or independent evidence of his admissions and not to contradict the defendant upon his cross-examination, nor as an aid to the recollection of a witness to a conversation

which she had heard. It is claimed that this was error, and I think it was, whether the interview between the attorney and the defendant who was seeking his aid be or be not regarded as privileged, as is the claim of the defendant."

Where evidence obtained through a dictagraph, is received, an explanation of the transmitting instrument may be made to the jury. *Andrews v. State*, 33 Ohio Cir. Ct. Rep. 564. And see the reported case. In *Andrews v. State*, supra, the court said: "This witness testified that he was the inventor of the dictagraph. He described it as an instrument that is supersensitive as to sound; that it would take up a minute sound, magnify it and make what would otherwise be an inaudible sound, audible. He testified at considerable length as to the construction of the dictagraph and the scientific principle involved in its operation, and on request of the prosecuting attorney that permission be given to make an autoptic profference of the scientific principal involved in the dictagraph before the jury, the witness was permitted to make the experiment or demonstration complained of. Since the dictagraph is an instrument of recent invention, and the scientific principle on which it operates but little understood, it was proper for the state to have the instrument explained and the principle on which it operates demonstrated. This could be done with an instrument different than the one used in the alleged detection of the plaintiff in error as well as with that one, and we are of opinion that the court committed no error in permitting the witness to explain, by actual demonstration, the scientific principle on which the instrument operates."

#### WINNIPEG ELECTRIC RAILWAY COMPANY

v.

#### CITY OF WINNIPEG.

Manitoba Court of Appeal—August 18, 1916.

35 Western Law Rep. 9.

#### Public Service Commissions — Review of Statute Creating.

A court authorized to hear an appeal from a public service commissioner "upon any question involving the jurisdiction of the commission" cannot on such an appeal determine whether the act creating the commission is valid. (By divided court.)

**Electrolysis — Power of Public Service Commission to Regulate.**

A public service commissioner may require a street railway company to prevent an escape of electricity from its rails whereby water pipes are injured by electrolysis. (By divided court.)

[See note at end of this case.]

**Same.**

The power to require a street railway company to prevent the escape of electricity from its rails is not affected by the fact that it has charter authority to break the surface of the street and lay its rails or by the fact that it is free from negligence. (By divided court.)

[See note at end of this case.]

Appeal from two orders of Public Utilities Commissioner. The material facts are stated in the opinions. **APPEAL DISMISSED.**

*J. H. Munson, K.C., E. Anderson, K.C., and D. H. Laird, K.C., for Winnipeg Electric Railway Company.*

*Hon. A. B. Hudson, K.C., for Crown.*

*J. B. Hugg for Utilities Commissioner.*

*T. A. Hunt, K.C., for City of Winnipeg.*

[10] **HOWELL, C.J.M.**—The Winnipeg Electric Railway Company (which I shall hereafter refer to as the Company) operate on the streets of the City of Winnipeg (which I shall hereafter refer to as the City) a street railway the motive power of which is electricity conveyed to the cars by the over-head trolley system. The authority to do this work is given by the Legislature of Manitoba, which ratified a by-law of the City and an agreement between the City and the Company set forth in 55 Vict. ch. 58, and the schedule thereto.

The City operates a waterworks system requiring iron pipes which are placed in the streets some distance below the surface, and thus the City also uses portions below the surface of the same streets occupied and used on the surface by the Company.

To operate the cars the electric current is carried by the trolley wire at high voltage to the top of the car and then through the motor to the wheels, and then to the rail, where, as a negative or return current at low voltage, it follows the rail back to the power house, and thus completes the circuit without which the electric power would not be available. To keep this negative current to a greater extent intact, the Company, after a time, connected the ends of the rails with copper devices, and sometimes at the request of the City, the other schemes or methods were taken.

Apparently, through the want of complete conductivity, some of the current escapes from or leaves the rails and, conducted by the moist

earth, reaches the iron water pipe of the City, and, by electrolysis, it does great damage. I gather from the evidence that owing to the high voltage brought into the City by the Company since they commenced using their water power, and owing to the great area which is now covered by their railway, this evil has greatly increased and to endeavour to control and prevent the escape of this current the order complained of was made.

The soil and freehold of the streets in the City are vested in His Majesty for the use of the Province, but the possession [11] of the streets is vested in the City. Sec. 721 of The City Charter, 1 & 2 Edw. VII, ch. 77, is as follows:

"721. No encroachment or nuisance whatever shall be made or left by any person in or on any roads or public highways under penalty of a fine not exceeding the sum of twenty dollars."

Sec. 878 authorizes the City to excavate for and lay down water pipes in and upon the streets and, in its language, "to repair, cut and dig up if necessary, and to lay down the said pipes . . . through, over or under the public ways, streets, street railways, lanes or other passages of the City."

The Company alone at the passage of this Act operated and had a right to operate, and it alone now operates, a street railway in the City, and this legislation, therefore, applies to it. Sec. 900 of the Act gives the City power to bring an action for any injury or damage done to the water pipes.

It is to be kept in mind that all this legislation, except secs. 878 and 900, was in force and applied to the City through The Municipal Act before the City procured a special charter, and was the law before and at the time of the enactment authorizing the Company to use the streets above mentioned.

Damages caused by escape of this current from the rails is not a new matter; it was considered more than 25 years ago in the United States in the case of Cumberland Telephone, etc. Co. v. United Electric R. Co. 42 Fed. 273. A case similar to this one between a waterworks company and an electric railway company was commenced in the United States in 1898, and after various reports and decisions it was decided in 1910 and is reported as Peoria Waterworks Co. v. Peoria R. Co. 181 Fed. 990.

The case is most instructive on the questions of fact in this matter and at length describes how this negative current has a tendency to leave the rails and to enter the iron water pipes. In that case, as here, the Company was authorized to operate their road by electricity, and there, as here, the single trolley system was used and the rails with copper connections were used to complete the

electric current and, as in this case, portions of the negative current left the rails and entered the water pipes to the great damage of the latter. In the Act permitting that Company to operate its street railway there are two clauses, as follows:

"Sec. 2. Said company shall operate said railway and propel its cars by electric motive power and not otherwise.

"Sec. 22. Said Central Railway Company shall be liable for and pay to the persons, companies or corporations injured, all damages which may result from the passage of this ordinance or from carelessness, negligence or misconduct of said company or any agent or servant of said company in the operation of said railway or railways which it may build, own, lease or control."

[12] Sec. 18 of the City by-law, part of the Schedule to The Company's Act, is as follows:

"The applicants shall be liable for and shall indemnify the City against all damages arising out of the construction or operating of their railways."

In considering this clause it would be well also to keep in mind sec. 721 of The City Charter above quoted.

In the American case last above referred to, the Company was enjoined from continuing the injury.

The case of *Eastern, etc. Tel. Co. v. Cape Town Tramways Co.'s* [1902] A. C. (Eng.) 381, 71 L. J. P. C. 122, decides that the escape of electricity from the rails of a street railway may create such an injury or disturbance to others that the rules in *Rylands v. Fletcher*, L. R. 3 H. L. (Eng.) 330, 37 L. J. Exch. 161, would apply; but in that case the rules in *Rylands v. Fletcher* were not applied to that part of the defendant's lines operated under statute, because, by their agreement with the town, they were in express terms permitted to use the rails to return the negative current.

The Company claim that under the by-law and agreement with the City and their Act they are similarly protected. The by-law contains the following clauses:

"2 (a). The construction of any line of railway on any street or highway, shall not be commenced until a plan thereof showing the location on street, position and style of the track, road-bed, rails, poles, wires and all other appliances shall have been submitted to and approved by the City Engineer.

"3 (a). The overhead or trolley system of electricity is to be adopted.

"(a. 1). All poles erected shall be of such size, height and material, and shall be placed at such distances apart on the boulevards or streets as shall be designated by the City Engineer and shall be erected, and said wire strung thereon, under the supervision and

subject to the inspection of the City Engineer, who may give directions as to the same from time to time, and shall be built so as to interfere as little as practicable with all other public uses of said streets, and both material and workmanship shall be of an approved class and kind. Trolley wires must be supported from poles on sides of streets, unless otherwise decided by Council, and the City will assist the Company, by taking such proceedings as shall not involve expense or cost to the City, as may be necessary and expedient in securing any requisite elevation of all wires, telephone or otherwise, so as to facilitate the operation of the Company's system by electricity.

"(a. 2). The location on streets, the position and style of the track, road-bed, rails poles, wires and all other appliances shall conform to and agree with the plans approved by the Engineer."

In discussing the rights of the Company it seems to me the matter can well be divided into two parts,—

1st. Aside from the question of negligence, is the Company liable for damages caused by them because of their bringing on their property this dangerous element? and

[13] 2nd. Are they negligent in their manner of carrying on this work?

Now, as to the first question: by sec. 18 of the by-law above quoted, the Company is to be liable for all damages arising out of the operating of the railways; and sec. 721 of The City Charter, above quoted, creates a liability for a nuisance made on the highway.

In *Shelfer v. London Electric Lighting Co.* [1895] 1 Ch. (Eng.) 287, 64 L. J. Ch. 216, the electric light company was empowered to operate in the City by electric plant; but their authority had in it this clause:

"Nothing in this order shall exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them;" and I gather from the judgment of Lord Halsbury that he thinks them liable apart from the question of negligence.

In *Midwood v. Manchester Corp.* [1905] 2 K. B. (Eng.) 597, 74 L. J. K. B. 884, the defendant, the City of Manchester, was authorized and empowered to lay down below the surface in the streets cables to conduct electric energy to various parts of the City for lighting and other purposes. The Board of Trade order authorizing this work contained the following two orders:

"Clause 67 of the order was as follows: "The undertakers shall be answerable for all accidents, damages, and injuries happening through the act or default of the undertakers, or of any person in their employment, by reason of or in consequence of any of the

undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies, and bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries.' Clause 70 of the order was as follows: 'Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.'

At p. 607 the Master of the Rolls, after referring to the *Sheffer Case*, says:

"It seems to me that that case is really on all-fours in point of principle with the present, and that by reason of the provision of clause 70 of the order what clearly amounted to a nuisance is unprotected, and therefore the defendants are liable to make good the damage occasioned to the plaintiffs, apart from any question of negligence. That is sufficient to decide the case."

Romer, L.J., at p. 609, uses the following language:

"I agree that by the order certain works are expressly authorized to be done by the defendants, and, therefore, as regards those works, it may properly be said that, upon the true construction of the order, they could not be treated as being in themselves a nuisance under clause 70. For example, express power is given to break up the streets for the purpose of laying mains, to lay mains, and to send electricity along them; but there is no authority, either expressly, or I think impliedly, given to the defendants by the order authorizing [14] them to allow a leakage of electricity from their mains so as to cause an explosion, or to injure the property of the plaintiffs in the way in which they have injured it. That being so, there is in my opinion an end of the case."

The case of *Charing Cross, etc. Electricity Supply Co. v. London Hydraulic Power Co.* [1913] 3 K. B. (Eng.) 442, 83 L. J. K. B. 116, and in appeal [1914] 3 K. B. (Eng.) 772, 83 L. J. K. B. 1352, discusses this subject. There the defendants, a waterworks company, were authorized to lay down water pipes below the surface in the streets and the plaintiffs, an electric light company, were authorized to lay down electric cables in the streets below the surface. The Act authorizing the defendants to do their work contained this clause:

"Nothing in this Act shall exempt the company from any indictment, suit, action or other proceeding at law or in equity in respect of any nuisance caused by them."

Apparently without any neglect the defendants' water pipe burst and injured the plaintiffs' cable—it was indeed found as a fact that the defendants were not negligent. It appears

that the defendant company occupied the streets with their water pipes before the plaintiffs did any work. Lord Sumner, at p. 781, states one of the arguments of the defendants in these words:

"We got there first and the plaintiffs came with their cables afterwards, and they must therefore take the place as they find it; one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover."

The Court held that the defendants were liable on the principles of *Rylands v. Fletcher*, *supra*, and that the question of negligence did not arise. They brought upon the premises a dangerous element, and if it escaped they must pay damages.

The Court also held that although the waterworks company got their rights and occupied the ground before the plaintiffs yet they were liable, as the plaintiffs were entitled to assume that although the defendants were entitled to excavate and lay down their water pipes, they were not beyond this act to permit any nuisance in the operation of the works.

In the cases above reviewed it was contended that as the Company was authorized to do the work, all damages and nuisances which were caused by construction and operation they were, by implication of law, protected against, on the principles laid down on this subject in *Railway cases*; but the above quotation from the *Midwood Case* shows how closely this principle is applied.

The case of *Vandry v. Quebec R. etc. Co.* 53 Can. Sup. Ct. 72, touches points akin to this case. However, Sir Louis Davies in that case held that clause creating liability for damages did not apply [15] to the accident, and I think the same may be said as to the judgment of Mr. Justice Duff. The other judges decided the case on the construction of *The Quebec Code*.

When in 1892 the Legislature granted the Company its rights, I assume it was known by all that a new, dangerous and to some extent experimental force was to be used and that some limitation should be put upon the Company to protect the rights of others. A system of waterworks then existed in Winnipeg, owned by a company and constructed and operated just as that of the City is now constructed and operated, and these works are now owned and operated by the City as part of their system.

The Company were by their Act and agreement authorized to enter upon the streets and break up the surface and put in ties to support the rails and lay rails with switches and erect poles and string wires. To do this they might disturb a foot in depth of the

streets and deeper where excavation is required for the poles, and in doing this work expressly authorized, it seems to me the Company can only be liable for negligence.

To the extent of the powers expressly or by necessary implication given by the Act to the Company, sec. 721 must be considered as amended, but only to that extent, and the damages referred to in sec. 18 of the by-law caused by the works thus expressly authorized, it seems to me, the Company would be protected against unless, of course, they are negligent.

I think I am safe in assuming that the legislature, the Company and the City officials, when the Act and the by-law were passed, had no thought or idea as to straying away of the return electric current and as to the damages which might arise from electrolysis. If the work had not since then been greatly extended by extending the lines of railway in all parts of the City and away beyond the City boundary, and by vastly increasing the voltage from the Company's hydraulic works, there probably even now would be but little damage from such stray currents. If the parties did not know that the negative current might stray away and cause a great damage and nuisance, it can scarcely be said that it was intended that the Company should be granted immunity from this damage. On the contrary, it might well be said that sec. 18 was put in for the very purpose of providing for unknown dangers, and sec. 721 of The City Charter could not have been intended to be amended so as to grant a right to commit such a great nuisance not then in contemplation of any of the parties.

[16] The defendants claim, however, that they complied with the regulations required by secs. 2 and 3 of the by-law above set forth, and as the road has been constructed and it is not shown that there has been a violation of these provisions I shall assume that these rules have been complied with and that the road was originally constructed with the approval of the City Engineer. Even so constructed the Company would be liable to a third party under sec. 18, but they contend that having constructed the works as above required they are not liable for damages to the City's property which arise from the operation of the road.

Very likely owing to the low voltage then in use and the limited area then covered by the Company's line of road any damages caused by electrolysis to the water pipes were negligible and extra means to take care of the negative current were not required. It might perhaps be urged also that the engineer was only given power to supervise the work which they performed and that he had no power to require them to construct

something extra or to more carefully conserve the return current.

However, it seems to me that sec. 18 merely provides that having constructed the road as required the Company are liable for damages. They would have been liable for this damage if the old Water Works Co. still owned the water pipes and on the principles above discussed they are, I think, still liable for damages to the pipes although at present owned by the City. The Company were to construct the road subject to the supervision of a public official and when so constructed they were to be liable for damages under sec. 18, and I see no reason for excluding the City from the protection of the section.

The City has suffered great damage from and arising out of the operating of the Company's railway within sec. 18 of the by-law, and this damage is continuing, and, from the evidence, I should think it can only be prevented by the Company in some way providing a better means for the return of the negative current, and for these damages I think the Company is legally liable to the City. If this were an ordinary action begun in the Court, I would think an injunction should be granted.

Counsel for the Company very strenuously urged that the Legislature, in establishing the Commission, really created a Court, and that the Act in authorizing the appointment of a Commissioner by the Lieutenant-Governor-in-Council was legislating on a subject wholly within sec. 96 of The British [17] North America Act, and therefore, beyond the power of the Legislature, and, as a consequence, the Commissioner had no power to hear this matter and to make the order complained of.

The statute provides that when a Commissioner is appointed under the Act and has pursuant to the Act heard a case, then, subject to many conditions, an appeal can be taken to this Court. Of course if he had been appointed by the Dominion authorities there could be no appeal, for there is no power of appeal given against any such order.

The Commissioner appointed by the local authorities is made a Court, not one appointed by the Dominion; and if there is an appeal it is only from the Commissioner locally appointed. If the legislation is *ultra vires* the order of the Commissioner is of no force and need not be obeyed and could be so declared by the Courts of this province in the ordinary way.

The appeal given by sec. 70 is limited to "any question involving the jurisdiction of the Commission," and I cannot think that the Legislature intended thereby to give this Court in this peculiar proceeding special power to decide whether the whole genius of the Act was *ultra vires*.

I think this question is not open to decision in this appeal.

Sec. 52 after giving very full and wide powers to the Commission, contains this clause:

"And shall have full jurisdiction to hear and determine all matters whether of law or of fact."

Sec. 69 of the Act is as follows:

"69. The decision of the commission upon any question of fact or law within its jurisdiction, and as to whether any company, municipality or person is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies and persons and municipal corporations and in all courts.

"(2). The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court, even when the question of its jurisdiction is raised."

It seems to me that the words "save as herein otherwise provided" refer only to this appeal provided for by sec. 70. Sec. 70 authorizes this appeal as follows:

"An appeal shall lie to the Court of Appeal . . . from any final decision of the commission upon any question involving the jurisdiction of the commission."

Before further considering these sections it is well to refer to the case of *Toronto R. Co. v. Toronto*, 19 Ont. L. Rep. 396, where [18] Chief Justice Moss, in giving the judgment of the Court of Appeal, at p. 399, states that under the Ontario Act the question of law alone is open to appeal and states "there being no appeal upon any question of fact, 6 Ed. VII, ch. 31, secs. 41 (3) and 43 (2)." Sub-sec. 3 of sec. 41 of that statute is like our sec. 69 above quoted except that it leaves out the words "or law" and thus in Ontario the facts found only and not the law are binding and conclusive in all courts. Again, sec. 43, sub-sec. 2 in the Ontario Act gives a right of appeal not only on the question of jurisdiction but also "upon any question of law" and thus gives to the appellate court much wider jurisdiction in these matters than is given here. If the right of appeal in Ontario had been as restricted as the Act in question here, I think there would have been no such decision in Ontario.

The Act applies to the Company and the Commissioner heard evidence and reports of electrical experts and heard counsel for the parties and made a full and clear report of his findings both of law and fact, and from

this finding and report, and the order made thereon this appeal is taken.

The Government of Manitoba was one of the complainants before the Commission asserting that electrolysis caused by the escape of the negative current was injuring the underground structures of the Government Telephone system, and the Attorney-General appeared to support this claim. The Commissioner, in clause S. of his report states as a fact that the order was necessary to protect this Government property.

After setting forth at length the facts which were brought before him, the Commissioner as to the facts and law relating to the City's claim disposed of them as follows:

"I held that there was nothing in the By-law 543 or the agreement thereunder to absolve the Company from the duty to apply the most approved methods of preventing injury to the property of others, including the City of Winnipeg.

"I assumed that the City had approved under by-law 543 the nature of the original construction of the works of the Company. There was no evidence to the contrary. In my view that did not prevent them from applying to this Commission for other remedial measures that should at a later date be found necessary and be available. This was not asking something else under the By-law. It was applying the general law of the province.

"I was guided by the principles which I held as a matter of law to exist, that a person using a dangerous element even lawfully, was bound to do everything reasonably within his power to avoid injury to others. And, as above stated, I could not construe By-law 543 and the agreement thereunder to exclude the application of that general principle here.

"I considered these questions to affect the merits in law and in fact, and to be therefore within the jurisdiction of this Commission."

[19] As a matter of law I think the Company is liable on the principles above stated under sec. 18 of the by-law for damages to the Government property.

With regard to liability of the Company on the ground of negligence which I have not discussed the Commissioner has, as above quoted, distinctly disposed of it against the Company, at all events, within the limits of the City of Winnipeg.

There is nothing before us to show the Company's rights to operate or construct street railway lines outside the territorial limits of the City and nothing to show that there is any restrictive clause binding the Company there similar to clause 18 of the City by-law. The outside municipalities were not represented on the appeal, unless the Attorney-General, appearing for the Commissioner, should be held to appear in support of the whole order. However, as the Commis-



sioner held the Company liable for negligence in law and in fact within the City to me it follows that he must also have thought them liable outside, connected as the whole system is by wires, rails and cars and all receiving the electric current within and through the City.

Again, I take up for consideration sec. 70; but it seems to me it must be read as explained by sec. 69. In that section there is a declaration that the Commissioner's finding of fact and law within his jurisdiction is binding "in all courts" and I agree with Chief Justice Moss that these words include this Court of Appeal sitting in appeal in this matter and I am fortified in this conclusion by the expressions in sec. 52 above quoted.

If I have correctly construed these sections, in an appeal under sec. 70 we must assume that the decision appealed against is sound in law and in fact.

The appeal then must be limited as the statute states "to the jurisdiction of the commission." I have already stated that in my view the Legislature did not intend, nor does the statute permit or contemplate an appeal because of the alleged infringement on The British North America Act.

The only matter then open to appeal in my view of the law is whether the Company, its structures and operations, are subject to the Act and if so whether the order made by the Commissioner is within the powers given to him by the Act.

It is clear that under sec. 3 the Company and its works and operations are subject to the Act. If this matter was an ordinary law suit and if the Court concluded on fact and law [20] as the Commissioner has, an injunction restraining the Company from continuing the damages would ordinarily follow as in the Peoria Case above referred to, and that case is also an authority for holding that the Court would only enjoin or restrain the Company from continuing the damages, and would have no power to direct certain specific things to be done, as the Commissioner has ordered in this case. Secs. 21 and 52 I think give the Commissioner power to make the order which he has made.

Holding as I do that the facts and law as found by the Commissioner are not open to review in this appeal, it was perhaps unnecessary to consider the liability of the Company under sec. 18 of the by-law aside from negligence, but the Commissioner not having considered this aspect of the matter, I thought it well to consider it.

To repeat, I think the Company is liable to the City and should be restrained from creating further injury to the water pipes by electrolysis because of clause 18 of the by-law, and of sec. 721 of The City Charter.

The Commissioner has found in fact and in law that the Company is liable for such negligence sufficient to justify this Court in restraining the Company from continuing the nuisance. The statute applies to the Company, and its works, and, to my mind, is wide enough to authorize the making of the order appealed from.

The appeal must be dismissed.

RICHARDS, J.A.—This matter has come to us as an appeal from a final decision of the Public Utilities Commission, and solely by virtue of sec. 70 of The Public Utilities Act.

That section says:

"70. An appeal shall lie to the Court of Appeal . . . from any final decision of the commission, upon any question involving the jurisdiction of the commission, . . ."

It does not specifically say that there shall be no appeal upon any other question; but I think the appeal is so limited by other sections of the Act.

Sec. 64 says:

"64. The decision of the commission upon any question of fact or law within its jurisdiction, shall be final, and be *res judicata*."

Sec. 69, sub-sec. (2) reads:

"2. The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act, or by any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any Court, even when the question of its jurisdiction is raised."

[21] The two last named sections—and particularly 69 (2)—distinctly, I think, show that nothing can be considered by us under sec. 70 except the question of jurisdiction.

The appellants the Street Railway Company argue that, under sec. 70, they can raise two questions of jurisdiction:

First, that the Act itself is *ultra vires* in that, because it creates a Court with extraordinary powers—greater than those of any other Court in Manitoba—and provides that the Lieutenant-Governor-in-Council may appoint the Commissioner to exercise these powers and constitute such Court, it infringes on the powers of appointment of judges reserved to the Dominion by The British North America Act.

Next, that even admitting the Act, and the appointment of the Commissioner under it, to be *intra vires*, the Commissioner has, in the orders in question, exceeded the powers which the Act purports to give him.

Dealing with the first point, it seems to me not open to this Court to consider. The ob-

ject of the Act is the creation of the Commission and the conferring of powers on it. It is true that sec. 79 provides that if any section or provision of the Act shall be held to be unconstitutional no other section or provision of the Act shall be affected thereby. But the real object of the Act is as above.

Sec. 70, conferring jurisdiction on this Court, limits us to the question of the jurisdiction of the Commission as to the matter before us. If the Act is *ultra vires* as to the appointment of the Commissioner then there has been no valid order for us to deal with and the Act is inoperative as to the purpose for which it was enacted.

I cannot think that, by sec. 70, the Legislature meant to confer on us power to say that the Act itself or any part of it is *ultra vires*. Ch. 38 of The Revised Statutes of Manitoba, 1913, is expressly provided to deal with such questions.

The objection is one that seems to go to the root of our jurisdiction under sec. 70, as well as to that of the Commission under the Act. If the one is invalid so is the other.

I express no opinion as to our powers, as a Court of Appeal, to deal with the question of the constitutionality of the Act if it should come by way of an appeal from any judgment of the Court of King's Bench, in a case where that constitutionality is in issue. But in an appeal under sec. 70 we can exercise only the powers the section gives us.

[22] I think therefore that we cannot consider the first ground.

Then, assuming the Act to be *intra vires* of the legislature, I think as stated above that we have no power to question the Commissioner's findings of fact or law. If I am right in that then it is not for us to say whether he is right or wrong in his holding that the Company are compellable to do what the orders require.

We can only say whether, assuming him to be right in the findings of fact and law implied by the orders, he had jurisdiction to make such orders. All questions of legal rights as between the City and the Company, including the construction of contracts and statutes, are matters of law. He has decided them, in so far as the orders before us affect them, and, so far as our powers under the Act are concerned, his decision is absolute. We cannot consider or interpret the contracts between the parties. Those are matters of law, and he has decided them.

Then, assuming the Act to be constitutional and assuming him to be right, as to both fact and law, in making the order had he jurisdiction, under the Act itself, to make such order?

Sec. 21 gives him a general supervision over all public utilities and empowers him to

make such orders regarding equipment, appliances, safety devices, extension of works or systems, . . . as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

The order in question seems to me to come within the above. It is in effect equipment, appliances, and, in a sense, safety devices, for the safety of the public, that the order really requires.

Sec. 40 enables the Commissioner to make such order as he thinks proper under the circumstances.

Sec. 59 implies that he may direct any structure, appliances, equipment or works to be provided, constructed, re-constructed, altered, repaired, installed, used or maintained.

Sec. 52 enables him to require any company to do—in any manner prescribed by him, so far as is not inconsistent with the Act or any other Act, any act, matter or thing which the company is or may be required to do under the Act or any other Act or any regulating order or direction of the Commission, or under any agreement, and to forbid the doing of things contrary to such Act, regulation, order, direction or agreement.

[23] By other sections much greater powers of enforcement of orders are given than are possessed by any other Court

If the Commissioner took the view that, under sec. 18 of the Company's contract with the City, the Company was liable for the injury caused by electrolysis (as apparently he did) we have no power, under sec. 70, to review such holding but must accept that view of the law as correct.

Then, so holding, it seems to me that he had power to make the order, the carrying out of which is intended to stop the injury caused by electrolysis.

The fact that the order does not expressly say the electrolysis is to be stopped but provides that the return currents are to be lessened to an extent which the evidence before him showed would have that result, does not seem to me to affect the matter. With so great a field of jurisdiction ordering that which will effect the purpose should be held sufficient.

Then again I can see no objection in the fact that he has not specified in the order how the return currents are to be so modified. It is not contended that there are not available methods for causing such modification. And, as it is the result, and not the means of getting that result, that is aimed at, it seems to me that the means were properly left unspecified.

I would dismiss the appeal with costs.

PERDUE, J.A. (*dissenting*).—An application to the Public Utility Commissioner was made by the City of Winnipeg to compel the Winnipeg Electric Railway Company to establish proper measures of prevention against damage to underground cables and mains by electrolysis caused by electrical currents from the Electric Railway system of the Company. Certain other municipalities were notified of the enquiry by the Commissioner. They did not appear and take part in it, but their interests were considered under the provision in the Act allowing the Commissioner to take up matters, of his own initiative. The certificate of the Commissioner shows the facts that were in evidence before him. Two orders, numbers 261 and 274, were pronounced by him, and this appeal is brought by the Winnipeg Electric Railway Company against these orders.

Number 261 is a lengthy document which I shall not set out in extenso. Briefly, it orders the Company to so construct and maintain its railway tracks and other parts of its system that a certain result may be attained in regard to the electrical conductivity of the rails. The object is to secure a free return of the current to the central station and lessen the danger of [24] electrolysis to underground metallic pipes or structures caused by electricity escaping from the rails. The order contains a number of directions of a highly technical character. It was made, as the Commissioner states, substantially in accordance with the recommendations of Mr. Ganz, an electrical expert of high standing.

By number 274 the costs of the enquiry before the Commissioner and his report were fixed at \$7,671.50, and were ordered to be paid by the Winnipeg Electric Railway Co. to the Secretary of the Commission.

A main ground of appeal is that The Public Utilities Act, R. S. M. 1913, ch. 166, is *ultra vires*; that the Act creates a Court and constitutes the Commissioner a Court of record, giving the Court such powers that it is in fact a Superior Court; that the Lieutenant-Governor-in-Council had no power to appoint the Commissioner; that the salary of the Commissioner is paid, not by the Dominion of Canada, but by the Province of Manitoba.

It is objected by respondents on the appeal that the constitutional question cannot be argued on this appeal, because the jurisdiction of the Court of Appeal to hear an appeal from the Commissioner is conferred by sec. 70 of the Act itself, that is, by the same Act that is attacked as being unconstitutional. Sec. 70 is as follows:

"70. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that Court from the Court of King's Bench or a Judge thereof, from any

final decision of the commission upon any question involving the jurisdiction of the commission, but such appeal can be taken only by permission of a Judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision, notice of which petition must be given to the parties and to the commission within said fifteen days. The costs of such application shall be in the discretion of the said Judge."

The jurisdiction of the Commissioner to make the orders in question was objected to upon the investigation and the objection was over-ruled by him.

It is well settled that an Act either of Parliament or of a Provincial Legislature may be declared *ultra vires* in part without invalidating the rest of the Act, if the part which is *ultra vires* is separate in its operation from the rest of the Act. See the authorities collected by Mr. Lefroy in his text book on Legislative Power in Canada, pp. 289-299; also *Montreal v. Montreal St. Ry.* [1912] A. C. (Eng.) 333, 81 L. J. P. C. 145, where sub-sec. (b) of sec. 8 of the Railway Act was declared to be *ultra vires*.

[25] Sec. 79 of The Public Utilities Act is as follows:

"79. If, for any reason, any section or provision of this Act shall be questioned in any Court, and shall be held to be unconstitutional or invalid, no other section or provision of this Act shall be affected thereby."

The introduction of this section into the Act showed the desire of the Legislature to preserve all that might be valid in the Act if certain parts of the Act should be declared to be beyond the power of the Legislature to enact. Sec. 70 confers the right to appeal to the Court of Appeal "upon any question involving the jurisdiction of the commission." The procedure upon the appeal and the power of the Court to entertain it are contained in secs. 71-76. These sections, 70-76, stand apart from the rest of the Act. The Commission is a Court of Law and from that Court there is by the statute an appeal to the Court of Appeal upon a question involving the jurisdiction of the Commission. The jurisdiction of the Commissioner to make the orders appealed from was raised before him during the progress of the investigation and he ruled that he had power to make the orders. See certificate of Commissioner, clause (m) and final clause. I take it from the last clause of the certificate that the power of the Legislature to pass the Act was called in question and a ruling made by the Commissioner. An appeal lies to this Court on the question there raised, as it involves the jurisdiction of the Commission. I am therefore of opinion that the question as to

the power of the Legislature to create the Court and appoint the Commissioner is properly before the Court of Appeal on this appeal.

The object of the Act seems to have been to create a commission to exercise powers over provincial public utilities resembling, but as to the class of subjects more extensive than, those conferred by the Dominion Railway Act upon the Railway Commission. I think the Legislature intended to create a tribunal which would be under Provincial control whose presiding officer would be appointed by the provincial Government, and would have exclusive jurisdiction in all matters assigned to the tribunal for adjudication. But if the Act creates a Court which has substantially the powers of a Superior Court, and purports to authorize the Lieutenant-Governor-in-Council to appoint the Judge of that Court and to pay his salary out of the Provincial treasury, then the Legislature is clearly exceeding its powers. The British North America Act confers upon the Legislature in each Province the right exclusively to make laws in relation to (sec. 92, sub-sec. 14) "the administration of justice in the province, including the constitution, maintenance and organization of Provincial Courts both of civil [26] and criminal jurisdiction and including procedure in civil matters in these Courts." But in no other provision of The British North America Act is there any power conferred on a Provincial Legislature in respect of Courts or Judges, or the appointment and qualification of Judges. By sec. 96, "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." By sec. 99: "The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

By sec. 100 it is enacted that:

"The salaries, allowances and pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada."

The provisions of The British North America Act for the creation of Provincial Courts, the appointment, payment and continuance in office of the Judges and the manner in which they may be removed, constitute a code in themselves. The province has power over the constitution, maintenance and organization of the Provincial Courts, both civil and criminal, and over the procedure in civil matters.

But the Court when constituted by the Province has no vitality until the Judge or Judges are appointed and, in the case of a Superior, District or County Court, the appointment rests wholly with the Federal authority. Further, the salaries of the Judges of these Courts are fixed and provided by the Parliament of Canada.

Sec. 5 of The Public Utilities Act is as follows:

"The Lieutenant-Governor-in-Council may appoint a commissioner, to be called 'The Public Utility Commissioner.' The commissioner shall constitute a Court, which shall be a Court of Record and shall have a seal of his office, bearing the words, 'Public Utility Commissioner.' Sec. 2 (b) defines at length the meaning of the expression 'public utility.' Shortly, that expression means and includes every corporation (other than a municipal corporation) and every person or association of persons who operate, manage, or control any system, works, etc., for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, etc., of water, gas, heat, light or power either directly or indirectly to or for the public, also the Manitoba Government Telephones and grain elevators. It may also include a municipality engaged in any of the above [27] businesses where it voluntarily comes under the Act (sec. 4). Secs. 20-28 set out the jurisdiction and powers of the Court. They include amongst other things all questions relating to the transportation of goods and passengers over any tramway, street railway or steam railway under the jurisdiction of the Province, the fixing of rates and the adjustment of disputes between a municipality and a public utility. The commission also has general supervision over all provincial public utilities, and may make orders regarding equipment, appliances, safety devices, extensions, etc. (sec. 21).

The Commission may investigate any matter concerning a public utility; it may impose and enforce regulations as to the protection of employees, and impose and enforce regulations for the prevention of accidents; it may compel railways or street railways to establish connections where they join or intersect (sec. 23). It may order the joint user of poles, conduits, etc. (sec. 24). For the purpose of clearing and improving streets the Commission may direct that the span wires of street railways may be affixed to private buildings abutting on the street (sec. 25). The Commission may require any public utility to comply with the laws of the province and conform to the duties imposed upon it by its own charter or any agreement

with a municipality or other public utility, to furnish proper service, to make extensions, to keep its books in a certain way, to carry a depreciation account and fix proper rates of depreciation and set apart the moneys therefor. The above are only some of the powers conferred on the Commission.

The Act applies to all public utilities owned or controlled by the Government, to all public utilities owned or operated by any company incorporated at or after the session of 1912, and to every person, company or corporation owning or operating any railway, street railway or tramway to which the jurisdiction of the province extended, but not including those operated by a municipality which has not voluntarily come under the Act.

In respect of its own class of subjects the territorial jurisdiction of the Court so constituted comprises the whole Province of Manitoba. It is not a District Court or a County Court. Can it be designated an inferior Court? Inferior Courts are so called in England because they were subject to the control and supervision of the Court of King's Bench, 9 Halsbury, p. 11. The view has been taken that a Provincial Legislature may create an inferior Court, such as a magistrate's Court for the collection of small amounts, and appoint officers to preside over them, so long as they do not interfere [28] with sec. 96 of The British North America Act. See discussion in Lefroy, Can. Fed. System, pp. 555-562. The Court created by The Public Utilities Act can in no sense be regarded as an inferior Court. By sec. 64, "the decision of the commission upon any question of fact or of law within its jurisdiction shall be final and be *res judicata*." It is also declared that the Court created by the Act has exclusive jurisdiction (sec. 69 (2)) "in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act." The Commission has sole jurisdiction and almost unlimited power over great interests involving immense sums of money. In many respects it has powers which are not possessed by any other Court in the province. I would refer to secs. 45, 46, 52, 55, 56.

Sec. 56 confers an extraordinary power. It provides that if a public utility has not complied with an order of the Commission and if the Commission is of opinion that there are no effectual means of compelling obedience, the Commissioner shall transmit to the Attorney-General a certificate setting forth the nature of the order and the default. The section proceeds:

"Such default so established shall be ground, after public notice in The Manitoba Gazette of the receipt of the said certificate by the Attorney-General, for an action to dis-

solve the public utility or to annul the letters patent incorporating it. The proceedings upon such action shall be governed by the rules in force under The King's Bench Act as nearly as may be." The Court in which such "action" is to be taken is not particularly mentioned. The King's Bench rules are to be applied, but that does not mean that the jurisdiction is conferred on that Court, but rather the contrary. If it were meant that the Court of King's Bench should be the Court in which the action should be tried, there would be no necessity for the provision contained in the last sentence of the section. Reading the section with secs. 40-44, 52, 64 and 69, it would appear that the action is to be brought in the Commissioner's Court. Apparently power is intended to be given in such action to dissolve a public utility even where it was incorporated by an Act of the Legislature. The question also arises whether dissolution of a corporation would necessitate compulsory winding-up.

The use of the expression *res judicata* in sec. 64 implies that the matter has come in question in a Court of competent jurisdiction, that it has been controverted and that it has been finally decided. See Langmead v. Maple, 18 C. B. (N. S.) 255, at p. 270, 114 E. C. L. 255.

[29] By sec. 69 "the decision of the commission upon any question of fact or law within its jurisdiction, and as to whether any company, municipality or persons is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies and persons and municipal corporations and in all courts." The Commission has "exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred upon it by this or any other Act, and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court, even when the question of its jurisdiction is raised." The exception in this quotation "save as herein otherwise provided," refers to the provision for an appeal given by sec. 70 where a question of jurisdiction is involved. Sec. 69 further declares that:

"In determining any question of fact the commissioner shall not be concluded by the finding or judgment of any other Court in any suit, prosecution or proceeding involving the determination of such fact but such finding shall, in proceedings before the commission, be *prima facie* evidence only."

The result is that the decision of the Commission on a question of fact or law within its jurisdiction is final, *res judicata* (sec. 64) and binding on all Courts (sec. 69), but the

judgment of any other Court, on a question of fact, tried and determined between the same parties, is *prima facie* evidence only before the Commissioner's Court: sec. 69 (4).

The Commission has, in respect of enforcing the attendance of witnesses, the awarding of costs, the production of books and documents, the enforcement of its orders, the entry on and inspection of property (sec. 44) "the punishment of contempt of Court and other matters necessary or proper for the due exercise of its jurisdiction, or for carrying this Act into effect, all such powers, rights and privileges as are vested in the Court of King's Bench or a Judge thereof, including the ordering of costs to be paid by any party in its discretion."

The Commission may issue commissions to take evidence outside Manitoba, sec. 43; Sheriffs, deputy sheriffs and other peace officers shall be *ex officio* officers of the Commission and aid it in the exercise of its jurisdiction, sec. 49. It may issue orders which are in effect orders of mandamus or injunction, sec. 52. It shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and shall, as respects witnesses, production, enforcement of orders and other matters necessary for the exercise of its jurisdiction or for carrying the Act or any other Act or any regulation, order, etc., into effect, have all the powers, rights, etc., of the Court of [30] King's Bench, sec. 52. It would, indeed, be difficult to define the limits of the Commissioner's power under this section. The numerous and extensive powers conferred upon the Commission show that the intention was to make it a Court with exclusive and absolute jurisdiction over interests of the very highest importance involving the rights of corporations, shareholders and bondholders. It is superior to the Superior Courts.

The clauses in The Dominion Railway Act constituting the Board of Railway Commissioners appear to have been used as precedents in framing the sections of The Public Utilities Act. The Manitoba Statute, however, covers a greater variety of subjects and its enactments are in many respects much wider. There may be an appeal from the Board of Railway Commissioners on a question of jurisdiction and also on a question of law. The decision of the Public Utility Commissioner upon a question of law binds all persons, corporations and Courts. But there is this wide difference between the powers of the Dominion and the Province: the Parliament of Canada may establish additional Courts for the better administration of the laws of Canada (B. N. A. Act, sec. 101) and may appoint the Judges of such Courts and pay their salaries. The Provincial Legislature may create Provincial Courts, but it has not been given the power of appointing and paying Judges.

The Ontario Railway and Municipal Board Act, R. S. O. 1914, ch. 186, was passed for the purpose of constituting a commission similar to but with powers much less extensive than, those possessed by the Public Utility Commissioner of Manitoba. The Ontario Act empowers the Lieutenant-Governor-in-Council to appoint a commission to be called "the Ontario Railway and Municipal Board." The Board is not created a Court, the use of that word is avoided, but it is declared that the Board "shall have all the powers of a Court of record and shall have an official seal which shall be judicially noted." I am not aware that these words have received judicial interpretation as to the meaning and effect to be placed upon them. It may be that the meaning is that the Board shall have the powers which are possessed by every Court of record, namely, to enroll its acts and judicial proceedings as records and to give to such records the evidential effects of judicial records: See Stephen Com. Vol. III. pp. 501, 502, Taylor, Ev. sec. 1667. The special powers assigned to the Board created by the Ontario Act are set out in the Act. By that Act the findings of the Board on fact only are conclusive (sec. 45), although it [31] may hear and determine questions of law or of fact (sec. 21-3). A question of law referred to the Divisional Court (sec. 46). An appeal lies from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law (sec. 48). Without assuming to pronounce upon the validity of the Ontario Act, it is evident that The Public Utilities Act of this province goes far beyond the Ontario Act in the powers conferred upon the Commissioner, and in the effect given to his decisions and orders. The words used in sec. 5 of The Public Utilities Act are taken from The Railway and Canal Traffic Act 1888, (Imp.) and are adopted without hesitation as to their constitutional effect. The Ontario Legislature, while conferring upon the Board created by it all the powers of a Court of record, avoided designating it a Court. It saw the danger, whether the means taken to escape it were sufficient or not. But the "Public Utility Commissioner" is declared to be a Court of record whose decision upon any question of law as well as fact within his jurisdiction shall be binding and conclusive upon all companies, persons and municipal corporations, and in all Courts. It is given many powers formerly exercisable by Superior Courts only, and within the ambit of its jurisdiction it exercises the functions of a Superior Court. The fact that the officer who performs the judicial functions of the Court is named "Commissioner" instead of Judge does not affect the matter.

In Colonial Inv. etc. Co. v. Grady, 8 West. W. Rep. 995; 31 West. L. Rep. (Alberta)

575, it was held by the Supreme Court of Alberta, sitting in appeal, that a Provincial Statute which confers upon a Master-in-Chambers the extraordinary powers of a Judge, in respect of actions for the enforcement of mortgages or agreements for the sale of land, is in conflict with the appointive power of sec. 96 of The B. N. A. Act, and is therefore *ultra vires*. The statute in question in that case still left all proceedings in matters covered by it to be taken in the Supreme Court of the Province, but enacted that a very special procedure should be taken before the Master-in-Chambers in that Court to enforce any right, remedy or obligation under a mortgage, encumbrance or agreement for sale. Stuart, J., said, in delivering the judgment of the Court:

"It is obvious that it was left entirely in the discretion of the Master to decide whether or not he should exercise powers which were undoubtedly as full and complete as those held by a Judge of the Supreme Court. He could, indeed, if he thought best, direct an action to be brought or an issue to be tried, but it was still open to him to hear oral evidence as at a trial, and to give as full and as final a judgment as a Judge of the Court could give, no matter what issue of fact, e. g., fraud or other ground, of defence, might have been raised. [32] He was to do all this 'in the Supreme Court.' It seems to me that it was impossible to avoid the conclusion that by such legislation the Master was constituted in effect a Judge of the Supreme Court, with a jurisdiction limited, indeed, to its extent, but not in its content; that is, limited to a certain very important branch of litigation, but practically unlimited within that sphere, and subject only, with respect to his final judgment, to an appeal to the Appellate Division in the same way as a final judgment of any ordinary Judge of the Supreme Court. For this reason I think the legislation was *ultra vires* of a Provincial Legislature, inasmuch as it was inconsistent with the appointing power expressly given to the Dominion in The B. N. A. Act."

I would also refer to the report of Sir John Thompson, Minister of Justice, on the disallowance of The Quebec Act, 51 and 52 Viet. ch. 20, to be found in Lefroy's Legislative Power in Canada, pp. 141-174. By that Act the Lieutenant-Governor-in-Council was authorized to abolish the Circuit Court sitting in the district of Montreal, a Court of record having jurisdiction up to \$200, and to establish a special Court of record under the name of "District Magistrates Court of Montreal." The new Court was to be composed of two justices to be appointed by the Lieutenant-Governor-in-Council and to be paid by the province. The report dealt with the constitutional question in a very instructive

manner and recommended that the Act should be disallowed. In Mr. Lefroy's later work on "Canada's Federal System," commencing at p. 525, there is a very useful discussion upon this point and a summary of the cases bearing upon it.

Sub-sec. 14 of sec. 92 and secs. 96, 99 and 100 of The B. N. A. Act contain within themselves the provisions relating to the constitution of Provincial Courts, the appointment of the Judges, their tenure of office and the payment of their salaries, allowances and pensions. The Imperial Parliament in allotting to Provincial Legislatures the constitution, maintenance and organization of provincial Courts both of civil and of criminal jurisdiction advisedly conferred upon the Dominion Government the power of appointing the Judges and the duty of fixing and paying their salaries. The Legislature of each Province was empowered to create Courts having both civil and criminal jurisdiction. The criminal law and procedure in criminal matters, although allotted as subjects of legislation to the Dominion Parliament, are administered in Courts constituted by the legislatures of the several provinces.

Rights respecting many subjects of civil jurisdiction, such as bills of exchange and promissory notes, banking, interest, legal tender, etc., are administered in the Provincial Courts although legislation in respect of such subjects was allotted to the Dominion Parliament. In such cases the Dominion [33] authority has to rely on Provincial tribunals for the administration of Dominion laws. It has in fact been held that the Dominion Parliament has power to impose new duties upon existing Provincial Courts. *Valin v. Langlois*, 5 App. Cas. (Eng.) 115 at p. 120; 49 L. J. P. C. 37.

A voice in the creation of the Provincial Courts was therefore given to the Dominion Government. The appointment of the Judges and the fixing and paying of their salaries was conferred upon that government. A Court cannot come into complete existence and exercise any powers without the appointment of a Judge or Judges. In fact the Judges sitting in their official capacity are commonly spoken of as "the Court." The result is that a Provincial Court is the joint creation of the Province and the Dominion, the first contributing the constitution and civil procedure and the latter the Judges.

The independence of the Judges was secured by sec. 99 of The B. N. A. Act. This section declares that the Judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons. The section was adopted from The Act of Settlement, 12 and 13 Wm. III. ch. 2, clause 3, article 7, and was made a part of the con-

stitution of Canada. It cannot therefore be interfered with either by Parliament or by a Provincial Legislature. The Public Utilities Act declares the Public Utility Commissioner to be a Court of Record. He is appointed by the Lieutenant-Governor-in-Council, his salary is paid by the Province and he may be removed at any time by the Lieutenant-Governor-in-Council for cause (sec. 6). This is a weak provision for securing the tenure of office and independence of a Judge, as compared with that provided by sec. 99 of The B. N. A. Act. If the Provincial Legislature can create a Court with powers as extensive as those assigned to the Commissioner by The Public Utilities Act, why can it not constitute other Courts presided over by commissioners, having absolute jurisdiction in respect of other classes of subjects within the legislative control of the Province? The result would be that the existing Courts might be deprived of jurisdiction in respect of many important subjects and these handed over to be dealt with by Judges appointed, paid and removable by the Provincial Government, Judges from whose decisions there would be no appeal. This, it appears to me, would be contrary to the provisions and intention of The B. N. A. Act. It might mean the taking away piece-meal of much of the jurisdiction of the Superior Courts, whose Judges are appointed by the Dominion Government, and conferring the jurisdiction [34] so taken away upon Courts whose Judges are appointed by the Provincial Government, and whose tenure of office is controlled by the same authority. This would be to "do that indirectly which you are prohibited from doing directly," contrary to established principles. See *Madden v. Nelson*, etc. R. Co. [1899] A. C. (Eng.) 626 at p. 627, 68 L. J. P. C. 148.

The fact that an act of a Provincial Legislature has not been disallowed by the Governor-General-in-Council does not of itself make the Act constitutional. *Lefroy*, Can. Fed. Sys. p. 217. The Dominion Government declined to disallow The Alberta Act of 1910, ch. 9, but the Act was afterwards declared to be *ultra vires* by the Privy Council; *Royal Bank of Canada v. Rex* [1913] A. C. (Eng.) 283, 82 L. J. P. C. 33; 3 West. W. Rep. 994; *Lefroy* Can. Fed. Sys. p. 42-44.

The Public Utilities Commissioner has performed excellent services in the past and the Commission would be a most useful one if its powers were limited to those which the Provincial Legislature might lawfully confer under the provisions of The B. N. A. Act. Some sections of the Act may be considered as substantive enactments, valid from a constitutional standpoint, and separable from the clauses dealing with the powers of the Commissioner. Examples of these may be found

in sec. 20, sub-secs. (a), (b), (d), sec. 31, except sub-sec. (3). But I think that the Provincial Legislature in constituting a person of its own selection a Court of Record under the name of the "Public Utility Commissioner" and conferring on that Court the complete and absolute jurisdiction conferred by the Act in respect of an important class of subjects, has exceeded the powers allotted to Provincial Legislatures under The B. N. A. Act.

Apart from the constitutional question, it is objected that the Act does not authorize the Commissioner to make the order from which this appeal is brought. The Winnipeg Electric Railway Company was originally incorporated under the name of "The Winnipeg Electric Street Railway Company" in the year 1892 by the statute 55 Vict. ch. 56. The corporation received its present name on its amalgamation with the Winnipeg General Power Company in 1904 under powers conferred by 1 and 2 Ed. VII. ch. 75 and 3 and 4ed. VII. ch. 87. In 1892 and prior to the incorporation of the Company, an agreement was entered into between the City of Winnipeg and James Ross and William Mackenzie whereby these two persons called the applicants, were given the exclusive right and privilege of constructing and operating street railways on the streets [35] of the City subject to the terms of the agreement. The City Council passed by-law No. 543 embodying the terms of the agreement. This by-law is to be found in schedule "A" to the Company's Act of Incorporation. The Act declares in sec. 34 that the by-law "is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province, and the said Company shall be entitled to all the franchises, powers, rights and privileges thereunder." The City consented to the ratification of the by-law by the legislature (by-law, clause 25), and that all the rights and privileges conferred under the by-law might be transferred to and become vested in a company to be formed by the applicants (by-law, clause 33). In accordance with the agreement set forth in the by-law the company was incorporated with the powers contained in the Act of Incorporation and the by-law was given the effect of an Act of the Legislature of Manitoba.

The following portions of the by-law are to be particularly noted in connection with this appeal:

"2 (a). The construction of any line of railway on any street or highway shall not be commenced until a plan thereof showing the location on street, position and style of the track, road-bed, rails, poles, wires and all other appliances shall have been submitted to and approved of by the City Engineer.



"3. The lines are to be built, equipped and operated subject to the following regulations and the applicants are to conform thereto:

"(a) The overhead or trolley system of electricity is to be adopted.

"(a. 2). The location on streets, the position and style of the track, road-bed, rails, poles, wires and all other appliances shall conform to and agree with the plans approved by the Engineer.

"4. If after seven years from the passing of this by-law the Council desires to change the character or application of the electric motive power for drawing or propelling the cars, three years notice of such desired change is to be given to the applicants and the said applicants shall within such period of three years make such changes and within said time shall operate their railway system lines and cars by means of such new electric motive power if practically and commercially feasible.

"18. The applicants shall be liable for and shall indemnify the City against all damages arising out of the construction or operating of their railways.

"32. The applicants paying the said sum of twenty dollars per car and such other sums as may be due from them and performing and fulfilling all the conditions, stipulations, restrictions and covenants in this by-law provided for, shall and may peaceably and quietly hold and enjoy the rights and privileges hereby granted without any let or hindrance or trouble of or by the City or any person or persons on its behalf."

Secs. 19, 20 and 22 provide for arbitration of questions which may arise between the City and the applicants.

[36] The contract to be executed pursuant to clause 35 of by-law No. 543 was entered into on June 4, 1892, by the Winnipeg Electric Street Railway Company and the City of Winnipeg, the rights of the applicants having been transferred to the company. This purchase and transfer were ratified in 1895 by the Manitoba statute 58 and 59 Vict. ch. 54, s. 2, and the contract of June 4, 1892, which repeats the agreement contained in by-law No. 543, was confirmed and validated by the same statute.

The street railway system of the Winnipeg Electric Railway Company has been in operation since the year 1892 and during that period has been operated by the overhead or single trolley system. It must be assumed that the construction of the railway was in accordance with the by-law and contract and received the approval of the City Engineer. It would follow that the style of the track, road-bed, rails, poles, wires and all other appliances were submitted to and approved by him in accordance with secs. 2 (a) and 3 (a. 2) of the by-law. The system of operat-

ing the road by an overhead single trolley as then known and used was adopted and this necessarily involved the use of the rails for the return current to reach the central station. The embodiment of the contract in the Act incorporating the Winnipeg Electric Railway Co., and the declaration in sec. 34 of the Act, gives to the terms of the contract the effect of statutory provisions. The City, which is the complainant before the Utilities Commissioner, was satisfied with the protection afforded by the statute. Besides the powers possessed by their Engineer of supervising the works contained in clauses 2 (a) and 3 (a. 2), clause 18 of the by-law declared that the Company shall be liable for and shall indemnify the City "against all damages arising out of the construction or operation of their railways." The Council of the City of Winnipeg and the Legislature of the Province were satisfied with these clauses as providing a sufficient protection to the interests represented by the City Council. There was no clause making the Company liable for nuisance. I need not attempt in this case to interpret the meaning and effect of clause 18. The relief afforded by the clause, whatever it may be, is to be enforced through the ordinary Courts having jurisdiction in the matter.

In 1895 when the agreement between the City and the Company was ratified by the Legislature for the second time, the danger from stray currents of electricity under the single trolley system was well known. In England, Lord Cross' Committee in 1893 made recommendations that certain precautions [37] should be employed in the use of electric power to guard against electrolytic action upon gas, water or other metallic pipes or structures. But in 1895 the Manitoba Legislature and the City were satisfied with the safeguards provided by the agreement and the statute, and no restriction was placed upon the Company's powers.

The single trolley system using the rails for the return current was specially authorized by the Act of the Legislature to be adopted by the Company. A certain escape of electrical current is inseparable from this system. In *Eastern, etc. Tel. Co. v. Cape Town Tramways Co.'s* [1902] A. C. (Eng.) 381, 71 L. J. P. C. 122, the electric tramway in that case was operated by means of the same system as that in use by the Winnipeg Electric Railway Co. The statute incorporating the Cape Town Tramways Co. contained a clause giving relief to the Council of Cape Town or other body or person "in the event of any electric leak taking place and damage being thereby caused at any time by electrolysis or otherwise." The same statute also provided that the use of the rails for the return current should require the consent of

the council. This consent was obtained under a condition providing for the making of a test to discover leakage of current and for the stoppage of cars until the leakage should be localized and removed. Lord Robertson, in giving the judgment of the Judicial Committee, said:

"The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus not contemplated as a condition of the working of the system. But the departure of the electricity from the rails arose from no defect, but from the necessary condition of things, if the tram cars were to run and the rails to be used as a return. The evidence shows clearly that, if uninsulated (as was the case here) the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going afield. Giving to the word "leak" whatever expression may be appropriate to its extension to electricity, their Lordships do not consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalized under the statutes."

The Legislature has authorized the Winnipeg Electric Railway Co. to use and employ electric power for the operation of its cars in the manner provided by the Act of incorporation and the contract embodied in that Act and made part of it. The safeguards provided are those contained in the clauses giving supervision of the construction and works to the City Engineer in addition to the relief afforded by clause 18 of the contract. No protection is specially given against the danger of electrolysis. If there had been no statutory authority for [38] the use of electricity by the company and the company had made use of it and electrical currents had escaped into the earth and had caused damage, the principle of *Rylands v. Fletcher*, 3 H. L. (Eng.) 330, 37 L. J. Exch. 161, would be applicable, and persons sustaining injury to themselves or to the ordinary use of their property by such currents would be entitled to maintain an action for damages. See *National Telephone Co. v. Baker* [1893] 2 Ch. (Eng.) 186, at p. 201, 62 L. J. Ch. 699; *Eastern, etc. Tel. Co. v. Cape Town Tramways Co.'s*, supra. But the Company in accumulating and using these great currents of electricity was acting under its statutory powers and unless it is shown that there has been negligence in the exercise of these powers the Company is not liable. A great number of cases establish this principle in regard to ordinary railways. The decisions asserting this principle began with *Rex v. Pease*, 4 B. & Ad. 30, 24 E. C. L. 17, 2 L. J. M. C. 26, and *Vaughan v. Taff Vale R. Co.* 5 H. & N. (Eng.) 679. It was established by the House

of Lords in *Hammersmith, etc. R. Co. v. Brand*, L. R. 4 H. L. (Eng.) 171, and approved in *Caledonian R. Co. v. Walker*, 7 App. Cas. (Eng.) 259; *London, etc. Coast R. Co. v. Truman*, 11 App. Cas. (Eng.) 45, 55 L. J. Ch. 354; *Atty.-Gen. v. Metropolitan R. Co.* [1894] 1 Q. B. (Eng.) 384, and other cases. In *National Telephone Co. v. Baker*, supra, *Kekewich, J.*, applied the same principle to electric tramways and it is, no doubt, applicable to all works authorized by the proper legislative power, subject of course to any restriction that may be contained in the enactment giving the authority. In *Geddis v. Bann Reservoir*, 3 App. Cas. (Eng.) 430, Lord Blackburn referring to this principle said:

"For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently."

I will assume that serious damage has been caused to water pipes and other underground metallic pipes by currents of electricity which have escaped from the rails of the Winnipeg Electric Railway Company. If this damage is the result of negligence on the part of the Company in the construction of the work the injured parties may seek the proper relief in the Courts in the ordinary way. The question of negligence is not properly before this Court on the present appeal. It would, however, appear from the material in the record that the Company has been making repeated efforts to prevent the escape of currents of electricity from the rails and has adopted and carried out the recommendation made by the City Engineer and the further recommendations made by Professor Herdt at the [39] request of the City, with the object of preventing such escape. Professor Ganz, whose report is the basis of the order appealed from, states that he is of opinion that the bonding of the tracks and special work in Winnipeg is now in generally satisfactory condition. The complaint of the City was based upon the alleged defective bonding of the rails.

Professor Ganz prefaced his recommendations to the Commissioner with this statement:

"I wish to point out in these recommendations relating to improvements in the railway system, I have avoided as far as possible specifying types of construction, and have generally recommended the results to be obtained, leaving the decision of the mode of obtaining these results to the railway company."

The Commissioner states that his order was made substantially in accordance with Professor Ganz' recommendations, with the possible exception of clause 13 of the order which was adopted from the English Board of Trade Regulations. The main clauses of the order, those to which particular objection is taken, direct that certain results shall be accomplished. The order does not direct, except in certain less important matters, that any appliances, equipment or special mode of construction should be adopted, in order to obtain particular results, but directs that specified results shall be attained whether the attainment of these is possible or not in view of the conditions respecting soil, climate, etc., and of other special circumstances that may exist. It is claimed on the part of the City that the Commissioner has power to make such an order under secs. 21, 31 and 52 of The Public Utilities Act. Sec. 21 in so far as it relates to the matter in question is as follows:

"The commission shall have a general supervision over all public utilities subject to the legislative authority of the Province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights."

It does not appear to me that this section gives power to the Commission to order, for example, that rail joints shall not possess more than a certain resistance, or that the rails shall be so designed and constructed, operated and maintained that the average potential difference between two points 1,000 feet apart during ten minutes time shall not exceed one volt, and so on. I think the section was intended to enable the Commissioner to order certain specified equipment, appliances, etc., deemed necessary for the safety and convenience of the public or for the proper carrying out of any contract, etc.

[40] Sec. 31 does not refer to a railway of any kind.

Sec. 52 enables the Commissioner to order a company, person or municipal corporation to do any act which the company, person or municipal corporation is required to do under the Act or any other Act. Its purpose is to enable the Commissioner to enforce the doing of things directed to be done by statute or his own order, and to forbid the doing of things which are contrary to any statute, order, agreement, etc.

But the object of the order in this case is to restrict the Company's statutory powers or to impose upon it in the exercise of these powers new obligations not contemplated by the contract or the statute.

There is a contract between the City and the Company, a contract which is statutory. The Company has also the powers set forth in the several Acts of the Legislature relating to it and its component companies. On the faith of the above it has undertaken and completed the works, expended large sums of money and incurred, as I understand, great obligations. As long as the Company uses its powers without negligence, the statutes protect it. If the proper use of these authorized powers cause damage or danger to other persons or corporations it is for the Legislature itself to intervene and provide a remedy if none already exists. The Legislature has power, if it deems proper, to enact the order of the Commissioner as a statute and in this way amend or add to the provisions of the existing statutes relating to the Company. But there is no power given to the Commissioner to repeal or amend or ignore any provision contained in a statute of the Province. I cannot find anything in the Act which would justify the conclusion that the Legislature, even if it has the power to do so, intended to delegate to the Commissioner its legislative functions in respect of public utilities. The authority to legislate or to interfere with existing legislation in the slightest degree would be a dangerous power in the hands of any officer, no matter how able or upright he might be. His actions would not be subject to the safeguards that surround ordinary legislation. It would be a delegation of legislative functions and unconstitutional. See Lord Selborne's dictum in *Reg. v. Burah*, 3 App. Cas. (Eng.) 889, at p. 905.

I have the very highest respect for the judicial ability, business capacity and experience of Mr. Robson, the Public Utilities Commissioner who made the order.

[41] He felt, no doubt, the pressing necessity of the situation and believed that he was fully justified, from every aspect, in making the order, and that the observance of its terms would accomplish the result desired. But the main terms of the order practically enact that the Company shall assume onerous obligations and make expensive changes in its system not contemplated in the agreement with the City or in the statutory enactments authorizing the work. The order in fact alters in material respects the terms of an agreement which has been enacted as a statute. With great respect for the Commissioner's opinion, I think that The Public Utilities Act does not give him power to make the order.

I would allow the appeal and set aside the orders.

HAGGART, J.A. (*dissenting*).—This appeal is brought before us under sec. 70, ch. 166, R. S. M. The Public Utilities Act.

The leave or permission was given by a Judge of this Court and his order was not appealed against, so that we have before us the questions open to appeal that were before the Commissioner, Mr. Robson, who made the order we are now reviewing.

The power of the Provincial Legislature to pass The Public Utilities Act is challenged on this appeal.

Sec. 92 of The British North America Act enacts that the Legislature may exclusively make laws in relation to, sub-sec. (13): "Property and civil rights in the Province," and sub-sec. (14):

"The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction and including procedure in civil matters in those Courts."

In *Union Colliery Co. v. Bryden* [1899] A. C. (Eng.) 580, 68 L. J. P. C. 118, Lord Watson, in delivering judgment of the Court, on p. 583, said:

"It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them, but when that point has been settled Courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not."

In *Atty.-Gen. v. Atty.-Gen.* [1898] A. C. (Eng.) 700, 67 L. J. C. P. 90, Lord Herschell, at p. 713, who gave the reasons for the judgment of the Court said:

"The suggestion that the power might be abused so as to amount to a judicial confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject [42] matter is always capable of abuse, but it is not to be assumed that it will be improperly used. If it is, the only remedy is an appeal to those by whom the legislature is elected."

Lefroy on Canada's Federal System, at p. 192, cites the above cases as authority for the proposition that injustice is no ground of invalidity as to such Provincial or Dominion legislation.

It is contended that the order of the Commissioner confers rights and imposes obligations which were not contemplated by the City or the Company when they entered into the contract set out in the schedule to by-law 543 of the City, which is validated and confirmed by ch. 56 of The Statutes of Manitoba for 1892, which statute creates the corporation known as "The Winnipeg Electric Street Railway."

Under the foregoing authorities I think that the Legislature could by direct legislative enactment impose on the Winnipeg Electric Railway Company all the burdens and

obligations set out in the order of the Commissioner even if a serious injustice should be done, that something like confiscation should be the result, that the charter and contract with the City which was their chief asset for raising money for the construction of the work should be rendered of much less value, that the security of the shareholders and bondholders should be impaired.

I think further that under sec. 92, sub-sec. (14) it had power to create a tribunal with the powers set out in secs. 20 to 29 in The Public Utilities Act.

In making this concession it does not follow that the Lieutenant-Governor-in-Council has power to appoint a judicial officer with the judicial, legislative and executive powers which the Legislature assumes to endow him with in The Public Utilities Act. Nor does it follow that the Legislature can accomplish the same object by delegating these extensive powers of legislation to some one whom the Act styles a Commissioner.

The Act would, of course, be in many respects inoperative without a Commissioner, but that is no reason for giving validity to the statute.

Here the Province is a party to the controversy. Not only is it claimed that the City water-mains are damaged, but the sheathed or coated telephone cables, the property of the province, are affected by this electrolysis, and it is just possible that the framers of The British North America Act had in [43] view the probable future existence of such circumstances as those mentioned above when by sec. 96 of The British North America Act it was enacted that "The Governor-General-in-Council shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

The powers of this New Court are extensive. It is declared to be a Court of Record. There is no limit as to the amount of money or property involved. Its territorial limits are the boundaries of the province; and the fact that there is delegated to the Commissioner extraordinary legislative and executive powers makes the tribunal none the less a Court.

There is no definition of a Superior Court in The B. N. A. Act or our Interpretation Act.

This question was recently discussed before the Supreme Court of Alberta sitting *En Banc* in *Colonial Inv. etc. Co. v. Grady*, 8 West. W. Rep. 995, 31 West. L. Rep. (Alberta) 575, where it was held that a provincial statute which confers upon a Master the extraordinary powers of a Judge in respect of actions for the enforcement of mortgages or agreements for the sale of land was in conflict with the appointive power of sec. 96 of The B. N. A. Act, which provides for

the appointment of Judges by the Governor-General-in-Council, and was therefore *ultra vires*.

Lefroy, on p. 527, thus discusses the subject of Dominion power over the appointment of Judges:

"In his report just referred to Sir John Thompson says that the view has been taken by nearly all the Ministers of Justice since the Union of the Provinces that the words of The British North America Act referring to Judges of the Superior, District and County Courts include all classes of Judges like those designated and not merely the Judges of the particular Courts which at the time of the passage of that Act happened to bear those names."

Wheeler, on Confederation Law of Canada, in discussing the effect of sec. 96, on p. 389, says:

"The Minister of Justice, John Macdonald (evidently Sir John) concurred in a report made by his deputy, 14th June, 1879, that it was beyond the powers of the local legislatures to allow the Judges of the County Courts (evidently the Superior Courts) fees for performing their duties as such Judges while they at the same time received a fixed salary from the Dominion Government for the performance of those duties. Reference was made to an Act of Ontario in 1869, 32 Vict. ch. 22, whereby the sum of \$1,000 each year was allowed to the Judges of the Superior Courts payable out of the moneys of the province. The opinion of the law officers of the Crown in England was taken and they were of opinion that the Act was incompetent. The then Minister of Justice expressed his own opinion that the Judges of the Superior Courts could not properly and without a breach of the provisions of The British North America Act receive emolument for performing the judicial duties from any person but the power which appoints and pays them the legal salary attached to the office."

[44] It is suggested that we have no right in this Court to consider the constitutionality of The Public Utilities Act because the right to appeal exists only under that Act.

I think we have jurisdiction sufficient to declare that the Commissioner had no jurisdiction to make the order appealed against.

It is not necessary to question the validity of the Whole Act. All that is necessary to justify the setting aside of the order numbered 261 is to declare that sec. 5, which assumes to authorize the Lieutenant-Governor-in-Council to appoint a Commissioner, and that secs. 20 to 29, which assume to clothe him with the extensive powers therein set out or either of them are *ultra vires*.

In fact, the Legislature, anticipating some such action as the present, by sec. 79, enacted that "If for any reason any section or provision of this Act shall be questioned in any

Court and shall be held to be unconstitutional or invalid, no other section or provision of this Act shall be affected thereby."

Relying upon the rest of the Act, The Winnipeg Electric Railway Company is properly before this Court.

Secs. 5 and 20 to 29 inclusive of The Public Utilities Act are, in my mind, *ultra vires* of the local Legislature. It is a Manitoba law repugnant to the Imperial statute. The province has assumed to deal with Dominion matters. The judicial official is appointed by the Executive Council of Manitoba and is paid out of provincial funds, and it is our duty to declare the enactment void.

Challenging the power and qualification of the Commissioner I think in substance raises a "question involving the jurisdiction of the Commission" as provided by sec. 70 of the Act.

I would allow the appeal. Appeal dismissed with costs.

#### NOTE.

The reported case upholds by an evenly divided court a decision of a public utilities commissioner requiring an electric street railway to prevent the escape of electricity from its rails, it appearing that by the escape thereof water pipes belonging to the municipality were injured by electrolysis. In rendering that decision two justices concur in sustaining the power of the commissioner, notwithstanding a finding by him that the escape of electricity was in no respect due to the negligence of the street railway company. Two justices dissenting maintain that the portion of the public utilities act conferring jurisdiction on the commissioner are *ultra vires* and void. For a full discussion of the subject of induction, conduction and electrolysis, see the note to Citizens Telephone Co. v. Ft. Wayne, etc. R. Co. Ann. Cas. 1916A 132.

#### UNITED RAILROADS OF SAN FRANCISCO

v.

#### SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO ET AL.

California Supreme Court—August 5, 1915.

170 Cal. 755; 151 Pac. 129.

#### Injunction — Power to Modify — Preliminary Injunction.

In view of Civ. Code, § 3421, providing that provisional injunctions are regulated by

the Code of Civil Procedure, and Code Civ. Proc. §§ 525-533, providing a complete system of law and procedure as to granting, refusing, modifying, and dissolving temporary injunctions, and of sections 939, and 963, allowing an appeal from an order granting or dissolving an injunction, a superior court, which, upon notice and hearing, has granted a temporary injunction absolutely restraining a defendant from the commission of certain acts during the pendency of the action, without reserving any right of revocation or modification, has no power subsequently to make an order staying the operation of the injunction until final determination of the cause or until a contemplated appeal has been heard.

[See note at end of this case.]

**Same.**

Under the rule that a superior court may not revoke, modify, or otherwise disturb its judgments and orders, regularly made in pursuance of plain statutory provisions, where the statute prescribed the method by which such judgments and orders may be reviewed, except as authorized by statute, a suspension of the operation of a temporary injunction absolutely restraining the commission of certain acts pendente lite constitutes a prohibited reversal of an order.

[See note at end of this case.]

**Statute Regulating Procedure — Validity.**

Code Civ. Proc. §§ 525-533, defining the power of a superior court as to granting, refusing, modifying, and dissolving temporary injunctions, are not invalid as encroaching upon the original jurisdiction of the court in equity cases granted by the Constitution of 1879.

Original application for writ of prohibition. United Railroads of San Francisco, petitioner, and Superior Court of City and County of San Francisco et al., respondents. The facts are stated in the opinion. WRIT GRANTED.

Wm. M. Abbott and Wm. M. Cannon for petitioner.

Percy V. Long for respondents.

Sullivan & Sullivan and Theo. J. Roche, amici curiae, for respondents.

[756] ANGELLOTTI, C. J.—This is an application to this court for a writ of prohibition restraining the superior court of the city and county of San Francisco from hearing or determining a certain motion and a certain order to show cause, in an action pending in said court wherein this petitioner is the plaintiff and the city and county of San Francisco is the defendant, said action being numbered 65435 in said court. There is no dispute as to the material facts. The action was one to obtain a decree perpetually restraining the defendant city and county from the commission of certain acts in the operation of its municipal railroad. Upon the

filing of the verified complaint, an order was duly made requiring the defendant city and county to show cause at a specified time and place why a temporary injunction should not be issued, restraining said defendant "during the pendency of this action and until its final determination from doing or continuing to do" any of said acts. Thereafter, summons and a copy of said order having been regularly served on said defendant, a hearing was regularly had on said order to show cause, both parties appearing and presenting their proofs, and the matter was submitted for decision. Thereafter, on July 7, 1915, the court (department No. 8, Hon. Geo. A. Sturtevant, judge), duly made its order granting the temporary injunction sought, upon the giving by the plaintiff of an undertaking, to be approved by the court, in the sum of one hundred thousand dollars. The order provided "that during the pendency of this action and until the final determination thereof" the defendant city and county desist and refrain from doing any of said acts. The required bond was given and approved, and thereupon, on said July 7th, the injunction was issued and served. On July 8, 1915, Hon. James M. Troutt, presiding judge of said court, made an *ex parte* order reassigning said action from department No. 8 of said court to department No. 1 thereof. On July 12, 1915, defendant city and [757] county served and filed its answer to the complaint in said action, denying material allegations thereof, and denying "the equities of plaintiff's action." Immediately thereafter defendant city and county gave notice of a motion for an order "staying the operation of the preliminary injunction" theretofore issued "until the final and full determination" of the cause, on grounds which it is not necessary to specify here further than to say that they presented no case for relief under section 473 of the Code of Civil Procedure and that all of them in effect went to the question of the propriety of granting the injunction in the first instance. On the same day the court (department 1, Hon. James M. Troutt, presiding) made an order requiring the plaintiff to show cause at the time and place specified in said notice why an order should not be made "suspending and staying the operation of the preliminary injunction heretofore issued in the above-entitled cause until the final determination of the above-entitled action or until a decision can be had upon the appeal about to be taken by defendant . . . from the order granting the motion of plaintiff for the issuance of said preliminary injunction." Upon the coming on of said motion and said order to show cause for hearing before Judge Troutt, objection was duly made to the court proceeding to

hear and determine said matters on the ground that it was without jurisdiction to in any manner interfere with the operation of said temporary injunction. The court overruled said objection and declared its purpose to hear and determine the motion and order to show cause. Thereupon application was made to this court for a writ of prohibition. An alternative writ having been issued and a hearing having been had, the matter has been submitted to us for decision.

As indicated by us at the argument, we are of the opinion that upon the facts stated, the only question presented is this: In view of the provisions of our law, constitutional and statutory, has a superior court, which, by order duly and regularly made upon notice and hearing, has granted a temporary or provisional injunction absolutely restraining a defendant from the commission of certain acts during the pendency of the action, without reserving any right of revocation or modification, the power to subsequently make an order staying the operation of said injunction until the final determination [758] of the cause, or until a contemplated appeal from said order has been heard and determined?

We entertain no doubt that this question must be answered in the negative.

It is declared by our Civil Code that "provisional injunctions are regulated by the Code of Civil Procedure." (Civ. Code, sec. 3421.) By sections 525, to and including 533 of the Code of Civil Procedure, in a title headed "Provisional Remedies in Civil Actions" there is provided a full and complete system of law and procedure as to granting, refusing, modifying and dissolving temporary injunctions. It is clearly and unequivocally provided therein in what cases such an injunction may be granted and in what cases it may not be granted; at what time and on what showing it may be granted, the law as amended in 1911 prohibiting the issuance of such an injunction except upon notice; that in the one case of an injunction applied for to prevent the diversion, diminution, or increase of the flow of water in its natural channels, an injunction may be refused upon the giving of a bond by defendant, though it be made to appear to the court that the plaintiff is entitled thereto, but that the issuance thereof pending the litigation will entail great damage upon defendant and that plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated; that "if an injunction is granted without notice to the person enjoined, he may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the same." when each party may fully present by affi-

davit and otherwise his evidence material to the question whether the injunction shall continue or be dissolved or modified; that if upon such application it satisfactorily appears that there is not sufficient ground for the injunction, it must be dismissed, or if it appears that the extent of the injunction is too great, it must be modified; that in case of an injunction to prevent the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear that great damage will be suffered by the person enjoined, in case the injunction is continued, and that the plaintiff can be fully compensated for any damage he may suffer by reason of the acts enjoined during the pendency of the litigation, the court in its discretion, may dissolve or [759] modify the injunction, upon the person enjoined giving a certain bond to secure the plaintiff against damage. It is provided elsewhere in the Code of Civil Procedure that an appeal may be taken from an order granting or dissolving an injunction. (Secs. 939, 963.)

We have stated the effect of the provisions of these sections to show the completeness of the scheme thereby provided and to show that the legislature has defined with precision, so far as it may do so, the extent of the power of trial courts in the matter of provisional injunctions. In view of the nature of a provisional injunction, an injunction designed simply to prevent certain acts causing injury *during the pendency of the litigation*, and the language of the sections referred to, it is apparent that the legislature intended to devise a scheme by which the *status pending decision on the merits* might be definitely and finally determined once for all, so far as the trial court is concerned (except in the single case of the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only), under which the only review allowed is a review on appeal. That the legislature has effectually provided such a scheme, so far as it has the power under our constitution to do so, appears to us to be beyond doubt. That such an injunction so granted on notice and opportunity to be heard may not subsequently be vacated or modified, pending trial on the merits, has several times been held by this court, under substantially similar provisions contained in our old practice act. In *Natoma Water, etc. Co. v. Clarkin*, 14 Cal. 544, 551, where the trial court upon the answer of the defendants dissolved such an injunction previously granted on an order to show cause, this court, holding that such action was improper, said: "By the statute the right to a temporary injunction pending the action is considered as adjudicated by the decision at the hearing

upon the order to show cause. The remedy of the defendants in such case, when the right to apply for dissolution upon the filing of the answer is not expressly reserved, is by appeal. The privilege of moving for dissolution, upon the filing of the answer, is limited to cases where the injunction is originally granted without notice to the adverse party. The injunction must be restored until the final determination of the case, when the propriety of dissolving it, or of rendering it perpetual, will be determined according to the judgment in [760] the ejectment." In *Hicks v. Michael*, 15 Cal. 107, 117, it was again substantially declared that the right to such an injunction is to be regarded as adjudicated by the decision at the hearing on the order to show cause why it should not be granted. In *Natoma Water, etc. Co. v. Parker*, 16 Cal. 83, an appeal from an order dissolving such an injunction that had been granted upon an order to show cause and after a full hearing, it was squarely held that under the statute the right to move for a dissolution or modification of such an injunction was limited to cases where the injunction was granted without notice, that it did not exist in any other case, and that where such an injunction was granted on notice, the only remedy open to the defendant was an appeal. (See also 2 Hayne on New Trial and Appeal, sec. 191; *Curtis v. Sutter*, 15 Cal. 265.) These cases were cited and followed by the district court of appeal of the first district in *Ots v. Superior Court*, 10 Cal. App. 168, 101 Pac. 431, in which an order modifying such a temporary injunction granted after notice and hearing was annulled on *certiorari*. If the decisions of this court already cited were correct, of which we have no doubt, it seems to necessarily follow that the decision is *Ots v. Superior Court*, to the effect that the superior court had no power to modify or dissolve such an injunction was also correct. Nothing is more firmly settled in this state than the doctrine that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made in pursuance of plain statutory provision, where the statute prescribes the method by which such judgments and orders may be reviewed, except as authorized by statute. (See *Holtum v. Greif*, 144 Cal. 524, 78 Pac. 11; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. 135; *Coombs v. Hibberd*, 43 Cal. 452.) As was said by the late Chief Justice Beatty in *Holtum v. Greif*, 144 Cal. 524, 78 Pac. 11: "The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and uniform to the effect that a

judgment or order once regularly entered can be reviewed and set aside only in the manner prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing, and if the order as entered is not the order [761] as made, the minutes may be corrected so as to make them speak the truth, but subject to these exceptions the order is reviewable only on appeal, and the decision of the trial court having been once made after regular submission of the motion its power is exhausted—it is *functus officio*."

It is claimed, however, that the relief sought by the motion and under the order to show cause herein involved, a suspension of the operation thereof until a determination on the merits of the determination of a contemplated appeal therefrom, would in no way reverse, modify, or vary the order against which relief is sought in the sense which precludes the granting of such relief by the superior court. In support of this claim the case of *Genet v. Delaware, etc. Canal Co.* 113 N. Y. 472, 21 N. E. 390, is cited. This case involved the question of the right of the trial court by independent order to suspend the operation of a final judgment in equity absolutely prohibiting the defendants from doing certain acts, pending appeal therefrom. It was said that if the effect of the order was "to reverse, modify, or vary the judgment for error in any point of substance, it would be clearly beyond its jurisdiction." But it was said that the order did not assume the existence of any such power, but merely suspended the operation of the judgment until the appellate court passed upon the law, and that while it might be said that the order, in some sense, interfered with the judgment, by postponing its enforcement, this was thought to be within the competency of the trial court in the exercise of its equitable jurisdiction. It was further said that "the incidental operation of the order in this way does not, we think, work any modification in the judgment in the sense which precludes the jurisdiction exercised." This conclusion was opposed to the view of the superior court, in general term, on appeal from such order, which had held that if the order meant a release of the defendants from the duty of obeying the injunction decree for a time, it was contrary to the terms of the judgment, and at least a "modification" of the judgment, beyond the power of the trial court to make. (*Genet v. Delaware, etc. Canal Co.* 56 Super. Ct. 290, 4 N. Y. S. 633.) We are of the opinion that this is necessarily so, and cannot appreciate the force of the distinction in this regard made by the New York court of appeals in *Genet v. Delaware, etc. Canal Co.* 113 N. Y. 472, 21 N. E. 390. In *Hulbert v. California Port-*



170 Cal. 755.

land Cement Co. 161 Cal. 256, [762] 38 L.R.A. (N.S.) 436, 118 Pac. 928, it was substantially said in the concurring opinion by Mr. Justice Sloss, signed by two other members of the court, with reference to a final injunction, that the effect of an order suspending the operation of a prohibitory injunction is to reverse, *pro tanto*, the judgment granting the injunction. This is perhaps more obviously apparent in the case of an order suspending the operation of an injunction *pendente lite*, as is stated in the concurring opinion referred to. The thing adjudicated by Judge Sturtevant here, and his order was "equally effective as if all the judges" of the superior court of the city and county of San Francisco had joined therein (Const., art. VI, sec. 6), was that the city and county be restrained from the commission of the specified acts at once and "during the pendency of this action and until the final determination thereof," which means, of course, until decree given on the trial on the merits. To say that a subsequent order by the same court suspending the operation of this order *during the pendency of the action and until the final determination thereof* would not be a complete setting aside and reversal of the former order is merely to trifle with words. The effect of such a subsequent order is manifest. Thereafter, and during the whole period covered by the first order, the defendant, instead of being enjoined from doing the prohibited things, would not be enjoined from doing any of them. And it is just as manifest that a subsequent order suspending the operation of the first order for any period embraced therein, is a reversal or setting aside *pro tanto* of the former order. Although what was said in *Hulbert v. California Portland Co.* 161 Cal. 256, 38 L.R.A. (N.S.) 436, 118 Pac. 928, in this regard, was said by only three of the seven members of this court, it was not disputed by any of the other justices, and we are satisfied that it was correct. Somewhat in line on this question is *Wolf v. Santa Clara County*, 143 Cal. 333, 76 Pac. 1108, where it was held that an order striking out a portion of a preliminary injunction order "had the effect of dissolving the injunction to that extent," and that it was therefore an appealable order as one *dissolving an injunction*.

It is further claimed that inasmuch as the state constitution of 1879 confers on the superior court "original jurisdiction in all cases in equity," and that as independent of statute, by virtue of such grant, such court would have the [763] power, incident to the exercise of that jurisdiction, to make such an order as that proposed, the legislature had no authority to thus limit the power of the superior court. We are not strongly impressed by the argument made in support of

this claim. We are aware of the fact that by our constitution very many limitations have been imposed upon the legislative department, but we are satisfied that there is nothing therein that expressly or impliedly prevents the legislature from enacting such regulations as to the exercise by the superior court of its "original jurisdiction in all cases in equity" as those pertinent to the matter before us, to which we have already referred. It is a sufficient answer to the claim of respondents in this regard to point out that such statutory provisions have been a part of the law of the state from the very beginning; that the constitution of 1849 contained a provision in regard to the jurisdiction in equity of our old district courts similar, so far as any questions here involved are concerned, to that contained in our present constitution, the only difference between the original provision and the provision as amended in 1862 (which was literally copied into the constitution of 1879) being that the original provision limited the jurisdiction of the district court in both law and equity to cases where the amount in dispute exceeded two hundred dollars, while the amendment gave such courts jurisdiction "in all cases in equity" regardless of the amount in dispute; that the validity of these statutory provisions was never questioned in any of the decisions, but that, to the contrary, they were applied and enforced by this court on several occasions; and that with this practical construction by this court of the effect of the provision in our old constitution the people in adopting the constitution of 1879 used substantially the same language as that contained in the old constitution. On this point what is said in *Camron v. Kenfield*, 57 Cal. 550, a case cited by respondents, is pertinent. It was there said: "The new constitution was framed in view of the construction of the language used in the former constitution, unanimously concurred in by the members of the highest tribunal of the state. Yet the framers of the present constitution repeated the words employed in the former. We are forced to the conclusion that they used these words in the sense which had been attributed to them by the supreme court."

[764] The case of *Pasadena v. Superior Court*, 157 Cal. 781, 21 Ann. Cas. 1355, 109 Pac. 620, relied on by respondents, is not opposed to our conclusion, nor is anything said in the opinion in that case, when considered in connection with the question there under discussion, so opposed. The question there, as aptly stated in the opinion of Mr. Justice Lorigan, was whether a superior court in an action brought to obtain a perpetual injunction, may in its final judgment denying the right to such injunction provide nevertheless for continuing in force pending

a final determination of the action, an injunction preliminarily issued; and again "the question here involves only the power of the superior court by its final judgment and in the exercise of its original jurisdiction" to make such provision. The order there assailed was held to be, in effect, a part of the final judgment. It was held that the superior court has the power in its final judgment to continue in force a preliminary injunction so as to maintain the *status quo* of the subject-matter of litigation pending an appeal, notwithstanding that the right to a perpetual injunction, which was the primary object of the action, may have been denied by the judgment itself. The conclusion was based upon the proposition that such a power existed in the chancery courts of England, and that, under our constitution, the same power must be held to exist here, in the absence of statutory provision unequivocally having a contrary effect. It was shown by numerous citations that the English courts of chancery had the power to thus preserve the subject-matter of litigation in *statu quo* pending the final determination of the controversy, in order that irremediable injury might not be done to the complainant before his right was finally determined. It was further shown that there was nothing in our statutes applicable to final injunctions which could fairly be construed as abrogating or limiting this power. In the action involved in that case the matter in issue was the right of the plaintiffs to maintain their poles and wires in the streets of the city of Pasadena, and the city was about to cut down the poles and destroy the system. The plaintiff sought by the action a perpetual injunction, and after trial of the action the court gave its final judgment denying the same, thus dissolving the temporary injunction and leaving the city of Pasadena at liberty to destroy the plaintiff's property pending an appeal, unless the *status quo* could be preserved [765] pending the appeal. It was a typical case of the class in which that jurisdiction was exercised by courts of chancery in England and there was nothing in our statutes expressly or by necessary implication precluding such relief pending appeal from the final decree as was granted, viz., the preservation of the property threatened with destruction pending determination of such appeal. Here, as we have seen, we are dealing not only with a different question, viz., the power of the court to withhold, pending appeal, the relief adjudged essential to a preservation of the complainant's rights, but also its power to withhold by subsequent order, pending a final determination of the action or until a contemplated appeal be determined, the relief adjudicated essential after notice and hearing, by an order for an injunction *pendente lite*. From

what we have said as to our statutory provisions on the subject of *such* injunctions, it is manifestly our opinion that they unequivocally have the effect of precluding any such exercise of power on the part of the trial court.

The case of *Pierce v. Los Angeles*, 159 Cal. 516, 114 Pac. 818, was an appeal from an order made after *final judgment* denying an injunction and dissolving a restraining order previously in force, which purported to continue such restraining order in force or to grant a new one. This order was made after the service and filing of a notice of a motion for a new trial, and was construed by both the district court of appeal and this court to be simply an order preserving the *status quo* of the matters embraced in the litigation "pending the hearing of the motion for a new trial" by the trial court. It was expressly conceded in the opinion that a court having once rendered a judgment, upon findings showing that no right to an injunction exists, dissolving a previous restraining order, could not in the same action, in the face of such findings and judgment, grant thereafter an injunctive order the effect of which would be to revive the previous restraining order, but it was thought that the court might thus maintain the *status* pending the determination by it of a motion for new trial lawfully pending before it. The case is manifestly not in point here.

Some cases are cited by respondents from other jurisdictions, in addition to *Genet v. Delaware*, etc. Canal Co. 113 N. Y. 472, 21 N. E. 390, to which we have already referred. None of these refers, so far as we have been able to find, to such a [766] situation as we have here, in view of the facts and the statutes of this state relative to injunctions *pendente lite*, nor have we found anything in the opinions in these cases which we deem opposed to our conclusion. They simply sustain and apply the proposition that has been affirmed in this state to the effect that, *except as changed by constitutional or statutory provision*, courts invested with original jurisdiction in cases in equity, have the power possessed on July 4, 1776, by the chancery courts of England in the exercise of that jurisdiction. Regardless of what the powers of such chancery courts were in regard to such a situation as this case presents, a matter we have not investigated, our statutes clearly and definitely prescribe and limit such powers in such a way as to preclude any such action as that invoked at the hands of the respondents by the defendant in the injunction suit.

It follows from what we have said that, entirely regardless of any question of the correctness of the order granting the injunction *pendente lite*, a question not here in-

volved, it may be reviewed or its operation suspended only in such ways as are authorized by our statutes, and that the superior court has no power to interfere with it in the manner proposed. The only remedy of the city and county of San Francisco, if aggrieved by the injunction issued, is an appeal from that order, or a trial of the action on the merits in the superior court. It is to be noted that section 527 of the Code of Civil Procedure, as amended in 1911, provides that when such an action is at issue, it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law, so that no good reason appears why the city and county may not immediately bring the case to trial on the merits.

The alternative writ heretofore issued is made peremptory.

Sloss, J., Shaw, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

**LAWLOR, J. (dissenting).**—I dissent. I have reached the conclusion that to prohibit the superior court from entertaining the pending proceeding is a serious interference with its broad constitutional authority in the exercise of original jurisdiction [767] in equity. But as the other members of the court are of the view that because of the urgent nature of the proceeding the prevailing opinion should be filed forthwith, I shall defer a more extended statement of my views.

Rehearing denied.

Lawlor, J., dissented from the order denying a rehearing.

#### NOTE.

#### Modification or Suspension of Preliminary Injunction before Trial.

Generally, a judge having the power to issue a preliminary injunction does not, in doing so, exhaust his power over the order, but may subsequently modify or suspend it before the trial where it appears that the injunction was improvidently granted or the continuance thereof in its original form would result in serious injury or unnecessary hardship. *Ex p. Simmons*, 105 Ark. 19, 150 S. W. 141; *Cresnor v. Nelson*, 23 Cal. 465; *Hobbs v. Amador, etc. Canal Co.* 66 Cal. 161, 4 Pac. 1147; *State v. King*, 46 La. Ann. 163, 15 So. 283; *Detroit, etc. Plank Road Co. v. Macomb Circuit Judge*, 109 Mich. 371, 67 N. W. 531; *Danciger v. American Express Co. (Mo.)* 179 S. W. 797; *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950;

*Cawker v. Central Bitulithic Pav. Co.* 133 Wis. 29, 113 N. W. 419. See also *Westerley Water Works v. Westerley*, 77 Fed. 783; *Denver, etc. R. Co. v. U. S.* 124 Fed. 156, 50 C. C. A. 579; *Sperry, etc. Co. v. Mechanics Clothing Co.* 128 Fed. 1015; *Christopher v. Condodge*, 128 Cal. 581, 61 Pac. 174; *Atlantic Coast Lumber Corp. v. E. P. Burton Lumber Co.* 89 S. C. 143, 71 S. E. 820. In *State v. King*, supra, in support of the rule, the court said: "Relators selected the particular judge for the granting of the injunction—they maintain here that his original action was valid and legal. If so the judge did not exhaust his powers in the premises, but retained control of the proceeding up to the allotment of the case. . . . It certainly was never contemplated, and we could not hold that an ex parte order of a judge which might have been improvidently granted, which might in fact be an absolute nullity, working the greatest injury, should be forcedly given full effect to until it could be set aside by regular proceedings with the usual notices and delays by the judge to whom the case would be ultimately allotted. . . . The fact that a particular case, when properly presented to a judge, may be of such a character as to make it his duty to issue an order of injunction does not exact that the injunction should necessarily be continued until final hearing. Whilst the injury complained of may justify an injunction it may not be such as to work irreparable injury. The judge, therefore, even in such cases, has some power of action in the matter."

It has been held that the modifying or suspending power will not be exercised by anyone other than the judge who made the order, except where there is urgency for immediate action or the power to act is given by statute. *Klein v. Flettford*, 35 Fed. 98; *Martin v. O'Brien*, 34 Miss. 21. See also *Muller v. Henry*, 5 Sawy. 464, 7 Rep. 772, 17 Fed. Cas. No. 9,916; *Westerley Water Works v. Westerley*, 77 Fed. 783; *Mavney v. Montgomery County*, 71 N. C. 486. Compare *Mason v. Cromwell*, 3 Okla. 240, 41 Pac. 82. In *Martin v. O'Brien*, supra, the court in stating the reason for this rule said: "When the jurisdiction of the cause becomes regularly vested in the court, it is necessarily exclusive, and no other judge has the power, pending the suit, to set aside the orders, or in any manner thwart the exercise of the jurisdiction. Such a course would be anomalous, and would lead to the most serious evils of multiplying litigation and producing confusion in the administration of justice, and conflicts of jurisdiction in relation to the same subject-matter of litigation. If any other court has the power to take steps and make orders in relation to a pending suit but the court in which the cause is pending,

any number of judges have the same power; and thus, instead of a suit and its incidents being subject to the exclusive jurisdiction of the court where it is pending, any or all the other judges of the state may interfere with it, and alter, set aside, or thwart the orders made by the court to whom the jurisdiction is committed by law."

But it has been held that where a suit was commenced and a preliminary injunction issued in a state circuit court, the transference of the action to the United States Circuit Court vested the power therein to modify the injunction. *Portland v. Oregon R. Co.* 6 Fed. 321, 7 Sawyer 122.

The rule has been laid down in certain jurisdictions that on the hearing of a motion brought to vacate a preliminary injunction the court has the power to modify it. *Edwards v. Perryman*, 18 Ga. 374; *Downing v. Reeves*, 24 Kan. 122; *Cawker v. Central Bitulithic Pav. Co.* 133 Wis. 29, 113 N. W. 419; *A. H. Stange Co. v. Merrill*, 134 Wis. 514, 115 N. W. 115. Similarly, it has been held that modification of a preliminary injunction may be had on the hearing of a motion to dissolve the same. *Downing v. Reeves*, 24 Kan. 122.

In certain jurisdictions the power of modification and suspension is provided for and governed by statute. See *Creanor v. Nelson*, 23 Cal. 465; *Butte Consol. Min. Co. v. Frank*, 24 Mont. 506, 2 Pac. 922. See also the reported case, and *Browne v. Edwards*, etc. *Lumber Co.* 44 Neb. 361, 62 N. W. 1070; *Devlin v. McAdoo*, 116 App. Div. 224, 101 N. Y. Supp. 546; *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859.

By virtue of a statute it has been held that where a temporary injunction is issued on notice and no reservation of modifying or suspending power is made therein, the court is not vested with the power to act. Under those circumstances the person seeking modification is deemed to be protected adequately when left to his right of appeal from the injunction order. *Butte Consol. Min. Co. v. Frank*, 24 Mont. 506, 62 Pac. 922. And see the reported case. Under the Oklahoma statute a contrary result has been reached. *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859. In *Keogh v. Pittston*, etc. *R. Co.* 195 Pa. St. 131, 45 Atl. 672, it was held that in the absence of a statute the fact that the injunction was granted on notice did not impair the power to modify it.

**MARSHAK**

v.

**MARSHAK.**

Arkansas Supreme Court—November 2, 1914.

115 Ark. 51; 170 S. W. 567.

**Husband and Wife — Agreement to Live with Husband's Parents — Validity.**

An agreement between parties about to be married that the wife should live with her husband at the home of his parents is an antenuptial contract which merges into the marriage contract and is of no binding force.

**Divorce — Excuse for Desertion — Conduct of Husband's Relatives.**

Where a husband without necessity refused to provide a separate home for his wife, or to furnish a home with her, except at the home of his parents, where she refused to live, but was willing to live with him under any other reasonable conditions, her refusal is not "desertion" sufficient to justify a divorce.

[See note at end of this case.]

**Evidence — Letters Written by Parties after Suit Begun.**

Letters written between husband and wife after the institution of a suit for divorce, each to obtain an advantage over the other at trial, will be accorded no weight.

Appeal from Yell Chancery Court: **SELLERS**, Chancellor.

Action for divorce. Joe Marshak, plaintiff, and Gustie Marshak, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[51] On the 25th day of May, 1912, Joe Marshak instituted an action of divorce against Gustie Marshak on the ground of desertion. The facts, as shown by the record, are substantially as follows:

Joe Marshak is thirty years of age, and is the son of a farmer residing near the town of Dardanelle, in Yell County. On the 6th day of February, 1910, he married [52] Gustie Lucas, the daughter of a neighboring farmer. She is twenty-four years of age. After their marriage they went to live with the father and mother of the plaintiff, each of whom is about seventy years of age. In July after the marriage the defendant left the plaintiff and stayed away from home three days. He went to her father's house, where she was, and she returned home with him. They continued to live with his parents until the first part of May, 1911, when she again returned to her father's home and has not lived with the plaintiff since.

During the pendency of the action and on the 31st day of March, 1913, the plaintiff

wrote to his wife that his father and mother had agreed to move from their place and go to live with another son, who resided in the neighborhood, if she would return and live with him. In his letter he asked her to let him know whether she would return or not. She answered the letter, and stated that she had hesitated because she feared his letter was not in good faith, and wrote him that his parents must move out and that she must be placed in charge of the home as its exclusive mistress, free from the domination of any one except himself, and that if, after further reflection, she could convince herself of his sincerity in the matter, she would return to him. The plaintiff did not reply to this letter, and says that he did not do so because she had left him, and he thought she should return without any further action on his part.

The defendant testified that during the time she lived with her husband at the home of his parents the latter constantly abused her and mistreated her; that they called her vile names, which she mentioned in her deposition, and that they were at all times ill-tempered and disagreeable toward her; that she told her husband that she had overheard his mother saying hard things about her, and that she could not live with her; that she told him that their remarks and abuse of her and bearing and temper toward her made it impossible for her to live in their house, and asked him to provide her a home at another [53] place; and that her husband did not accede to her request and did not in any way try to prevent his parents from mistreating her. She further stated that after she left him and before this suit was instituted she told him if he would provide a home for her she would go and live with him, but that she could not attempt to live with his father and mother any more, because of their mistreatment of her. She stated that more than once before the bringing of this suit she had told him that if he would provide a home for her she would be glad to go and live with him, and that he had replied that he could not make a living, and that since the bringing of this suit she had at different times offered to live with him if he would provide a home for her separate and apart from that of his parents. She stated in her deposition that she had been at all times ready and willing and was then willing to live with him if he would provide a home for her, and that she could not live with his father and mother.

She is corroborated in all her statements by her father, except that he stated that he did not know whether or not the parents of the plaintiff abused her or used the words toward her which she attributed to them.

The parents of the plaintiff testified that they had never applied any vile epithets to

the defendant, and that they had not mistreated her or abused her while she lived with them. They said she would go visiting three or four times every week, and that she would mistreat her husband. The mother of the plaintiff denied that she had quarreled with the defendant while she lived at their house, but stated that she had told the defendant that she did not think it right for her to be gone from home so much. She further stated that the defendant told her that she would not live with her husband any more.

The plaintiff corroborated his mother and father in their statements, and said that they never mistreated her while she lived with them.

The record shows that the father and mother of the plaintiff were well-to-do people, and had two other married sons living in the same neighborhood to whom they had deeded a part of their property. They had never [54] given the plaintiff any of their property, but it appears it was their intention to live with him and leave him their home place when they died. The record shows that they were in good financial circumstances, and were physically and mentally capable of taking care of themselves. They were in no sense dependent upon their children for support or for care and attention. The plaintiff was an able-bodied, hard-working young man, and had no bad habits.

The evidence on the part of the plaintiff tends to show that the defendant, after she left her husband, was seen several times in the company of some neighbor girls who did not bear a good reputation, but there is nothing whatever in the record from which it might be inferred that the defendant herself was not of good character. Other facts will be stated or referred to in the opinion.

The chancellor found that the plaintiff was not entitled to a divorce and dismissed his complaint for want of equity. The plaintiff has appealed.

*Appellant, pro se.*

*Bullock & Davis for appellee.*

[55] HART, J. (*after stating the facts*).—The sole ground upon which the plaintiff relied to obtain a divorce was desertion. The second subdivision of section 2872 of Kirby's Digest provides that the courts shall have power to dissolve a marriage contract where either party wilfully deserts and absents himself or herself from the other for a space of one year without reasonable cause. The record shows that the defendant has been absent from the home of the plaintiff for more than one year before the institution of this action. It is the contention [56] of the plaintiff that the husband, because he is legally responsible for the support of his family, has

an absolute right to choose and establish the domicile; it is also the contention of the plaintiff that the preponderance of the evidence shows that the parents of the plaintiff did not abuse and mistreat the defendant, and that her refusal to live with the plaintiff at the home of his parents was without reasonable cause, and amounted to desertion within the meaning of the statute.

On the other hand, it is contended by counsel for the defendant, as held by the Supreme Court of Nebraska in the case of *Brewer v. Brewer*, 79 Neb. 726, 113 N. W. 161, 13 L.R.A. (N. S.) 222, that every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as mistress; and that she is not guilty of desertion within the meaning of the statute where she refuses to live in the home of her husband's parents which is under their domination and control. To the same effect see *Powell v. Powell*, 29 Vt. 148; *Hall v. Hall*, 69 W. Va. 175, 71 S. E. 103, 34 L.R.A. (N.S.) 758.

(1) We have reached the conclusion that the chancellor did not err in refusing to grant a divorce to the plaintiff, but, in doing so, we do not deem it necessary to adopt in its entirety the contention of either party to this suit. It is apparent from the record that, while the parties to this suit may not have lived in perfect harmony, the principal subject of difference between them at any time was as to living with the mother and father of the plaintiff. The plaintiff testified that before the marriage the wife agreed to live with him at the home of his parents. This was an ante-nuptial contract and has no binding force. It was terminated by and merged into their marriage contract which bound them to live together as husband and wife.

(2) The principal question for us to determine is whether or not the wife wilfully remained away from the home of her spouse for a year without reasonable cause. We do not deem it necessary to determine whether or not under any circumstances the husband could establish [57] his domicile at the home of his parents and compel his wife to live there or be guilty of desertion within the meaning of the statute. It is true the parents of the plaintiff testified that they did not abuse or mistreat the defendant while she lived with them. In this respect they are corroborated by the plaintiff, but we do not deem that to be decisive of the rights of the parties in this case. The undisputed facts show that the parents had ample means of their own to support them, that they were not feeble in body or weak in mind, and that they did not need the services of their son to wait upon them. Besides, the record shows that they had two other sons, married and residing in the neighborhood, to whom they

had deeded a part of their property and with whom they were on affectionate terms.

If it be conceded that the parents of the plaintiff did not call the defendant vile names or abuse and mistreat her to the extent that she claims they did, still it is apparent from the record that the defendant could not get along with the plaintiff's parents and that their relations were unfriendly and unpleasant. The plaintiff's mother says that she did not quarrel with the defendant but admits that she did tell her that she was away from home too much. The defendant testified that after she left the plaintiff and before this suit was instituted that she told him she could not get along with his parents and live happily in their home, and that she was perfectly willing to live with him at any other home he might provide. We do not think the defendant left her husband because she did not desire to live with him, but, on the contrary, she left him because she was not able to live happily in the home of his parents. There was no necessity for her to live there. The plaintiff was a strong, able-bodied young man, and was able to provide her a home at another place. Under the circumstances, we think a just and affectionate husband should have listened to the pleadings of his wife and should not have arbitrarily confronted her with a decision of either living unhappily with him at his parents' home or living separate and apart from him at another place.

[58] We do not regard the letters of the parties to each other written after the institution of the suit as of any importance in the case. It seems that these letters were written by each one simply for the purpose of obtaining an advantage over the other in the trial of the case. If the parties were sincere in the statements they made in their letters, there seems to be no reasonable cause why they should not again live together. They are both young, and of good moral character. It is true, the evidence shows that the defendant was seen in the company of some neighbor girls who bore a bad reputation, but there is nothing whatever in the record from which it might be inferred that the defendant herself has been guilty of any improper conduct. Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government. For that reason, the State has an interest in every divorce suit, and the marital relation, once established, continues until the marriage contract is dissolved upon some ground prescribed by the statute. The law presumes that when parties enter into the bands of matrimony they do so with a full realization of the frailties of human nature and with full recognition of their duty of mutual forbearance of the faults of each other.

The decree will be affirmed.

**NOTE.**

**Right of Wife to Leave Marital Home because of Conduct of Husband's Relatives.**

The purpose of the present note is to collect the recent cases affecting the right of a wife to leave the marital home because of the conduct of relatives of her husband. The earlier cases on this subject are collated in the note to *Buckner v. Buckner*, Ann. Cas. 1914B 628.

It is held in the reported case that a husband is not entitled to a divorce on the ground of desertion by the wife where it appears that the wife left the marital home because she was unable to live there happily with the parents of her husband, and it further appears that she was willing to live with her husband in any other than the home of his parents, and that the husband was able to provide another home.

The conduct of relatives of the husband was likewise considered by the court in *Coulter v. Coulter*, 175 Mo. App. 1, 161 S. W. 281. In that case, which was an action for support and maintenance by the wife, the husband defending on the ground of desertion, it appeared that the wife had left the home provided for her because it was with her husband's mother, who would not allow the family of the wife to come to the house. While the decision in favor of the wife was based on the consent of the husband to his wife's living elsewhere, the court said: "It is still the law in this state 'that the wife is bound to follow the fortunes of her husband and to live where he chooses to live and in the style and manner he may adopt.'"

But this rule is not intended to make the wife the slave of her husband nor to give him the right to subject her to avoidable indignities. The duty of a wife to forsake her family and cleave to her husband is no greater nor more sacred than the corresponding duty of the husband. Neither spouse has the right to demand in wantonness or mere caprice the estrangement of the other from his or her parents. For a husband to take his wife where she is unreasonably denied the privilege of seeing members of her own family who are of good repute would be an indignity no faithful husband would visit upon his wife." In *Geisinger v. Conners*, 130 La. 922, 58 So. 815, it was held that a husband was not entitled to a separation on account of the refusal of his newly wed wife to come and live with him in a room in a flat occupied by his mother, whose disposition toward the wife was unfavorable. In that case the court said: "Considering the disposition of the mother, we do not think the premises in question can be said to constitute a matrimonial domicile within the intentment of the code, Ann. Cas. 1916E.—14.

which the defendant owes the legal duty, under the circumstances of the case, to go and occupy with plaintiff. What would be the legal situation if he were unable to do better for her we do not undertake to say, for she took him 'for better and for worse,' but the evidence shows that he can do better. Let him do it."

In *Elder v. Elder* (Mo.) 186 S. W. 530, wherein the husband sued for a divorce on the ground of indignities, alleging, inter alia, that the wife had left home, the wife set up in defense the conduct of the husband, which included kissing the wife of his cousin who was temporarily at his home. In holding that the plaintiff husband was not an innocent party and was not entitled to a divorce, the court said: "Plaintiff's conduct with the wife of his cousin, whose presence in the home the evidence shows he knew was obnoxious to defendant, cannot be viewed in any other light than that of a serious breach of marital duty."

**STATE, FOR USE OF MILLS ET AL.**

**AMERICAN SURETY COMPANY OF  
NEW YORK.**

Idaho Supreme Court—December 14, 1914.

26 Idaho 652; 145 Pac. 1097.

**Default — After Remand from Federal Court.**

Where a defendant has been sued in a state court, and summons has been served upon him, and, prior to the expiration of the term within which he is required to answer under the statute and without appearing or answering, he files a petition for a removal to the federal court, and an order denying the removal is made by the state court, and the record is thereafter transferred by the defendant to the federal court, when, on motion in the latter court, the cause is remanded to the state court for want of jurisdiction in the federal court, and the clerk of the district court enters the default of the defendant for failure to appear and answer, it is held, that the action of the clerk in entering the default of the defendant is regular and valid and within the authority and direction of sections 4140 and 4360, Rev. Codes, and that such default is not void for want of jurisdiction.

**Same.**

Where the default has been entered by the clerk against the defendant, as was done in this case, the court has jurisdiction to hear the proofs submitted by the plaintiff and to enter judgment thereon.

**Same.**

Under the above facts, where the defendant moves to have the default vacated on the ground of inadvertence, surprise, or excusable neglect, it is held, that under the excuse presented and the facts of this case, as shown by the record, the trial court did not err in refusing to set aside said default.

**Same.**

Section 4140, Rev. Codes, fixes the time within which a defendant shall appear and answer, and the fact that, prior to the expiration of that time, the defendant undertook to have the cause removed to the federal court, and it was thereafter remanded, such action on the part of the defendant to change the forum will not serve to extend the time for answer in the state court, and will not relieve the defendant from a default which it thus allows to be entered against it.

**Appearance — What Constitutes — Petition for Removal of Cause.**

The filing of a petition and bond for a removal to the federal court is not an appearance in the state court, under the provisions of the Revised Codes of Idaho.

**Invalid Attempt to Remove Cause — Power of State Court to Proceed.**

When a defendant attempts to remove an action which he is not entitled to remove, and the state court refuses to surrender its jurisdiction, the state court may proceed with the cause, and its subsequent proceedings are valid.

**Default after Attempt to Remove — Time for Entry.**

It is held, under the facts of this case, that the default was not prematurely entered.

**Bank Examiners — Liability for Breach of Duty.**

The Legislature, in enacting section 3001, Rev. Codes, making it the duty of the bank commissioner to make an examination of state banks, imposed such duty for the benefit and protection of the depositors as well as the public.

[See note at end of this case.]

**Same.**

A bank commissioner, in the exercise of discretionary duties, is not responsible to any one receiving an injury through a breach of his official duty, unless he acts maliciously and wilfully wrong or clearly abuses his discretion to the extent of acting unfaithfully and in bad faith.

[See note at end of this case.]

**Action on Bond of Examiner — Conditions Precedent.**

In an action by an injured party against the surety on the bond of the bank commissioner executed under section 191, Rev. Codes, for failure of said commissioner to faithfully perform his duty, it is not necessary to first proceed and have the damages of the injured party adjudged against the commissioner.

**Joinder of Defendants.**

Under a joint and several bond executed pursuant to section 191, Rev. Codes, it is not necessary to sue jointly the principal and

surety, but suit may be maintained against either severally.

**Complaint Sufficient.**

It is held that the complaint herein states a cause of action.

**"Unfaithfully," "Improperly" and "Illegally" Defined.**

The word "unfaithfully" signifies bad faith. The word "improperly" implies such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of. The word "illegally" means unlawfully and contrary to law (citing Words and Phrases, Unfaithfully; see also Words and Phrases, First and Second Series, Illegal).

**"May" as Meaning "Must."**

The word "may," as used in Rev. Codes, § 3005, providing that, when the bank commissioner has reasonable cause to consider a bank insolvent, he may immediately apply for a receiver, must be construed to mean "must," where to construe it otherwise would give the bank commissioner such an absolute power that he would be incapable of an abuse of discretion.

Appeal from District Court, Blaine county:  
WALTERS, Judge.

Action on bond, by state, for use of Clara Mills et al., plaintiff, and American Surety Company of New York, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Richards & Haga* and *McKeen F. Morrow* for appellant.

*J. H. Peterson* and *Sullivan & Sullivan* for respondent.

*W. B. Davidson* and *William C. Bristol*, amici curiae.

[659]TRUITT, J.—This action was brought by the state of Idaho for the use and benefit of fifty-five depositors, or their assignees, in the Idaho State Bank at Hailey against the American Surety Company of New York as surety on the bond of William G. Cruse, former bank commissioner of the state of Idaho, for the failure of said Cruse to faithfully discharge the duties of his office. Said depositors are among those who [660] made deposits during the last four months the bank was open, and subsequent to the time said Cruse had knowledge of its unsafe and insolvent condition and subsequent to May 12, 1910, which latter date was one year after said bank commissioner's last examination of said bank.

It is not claimed in this action that the deposits of these depositors or other depositors prior to May 12, 1910, could be recovered. On May 15, 1909, a bond was executed by said William G. Cruse, as principal, and the American Surety Company of New York,



as surety, as required by sec. 191, Rev. Codes, conditioned as follows:

"Now, therefore, if the said William G. Cruse shall well, faithfully and impartially discharge the duties of his office and pay over to the person entitled by law to receive it, all money coming into his hands by virtue of his office, and that he will pay any and all damages and costs that may be urged against him, under the provisions of chap. 12, title 2, Political Code, and chap. 13, title 4, of the Civil Code of Idaho, and shall well and truly perform all the duties of such office required by any law to be enacted subsequent to the execution of this bond, then this obligation to be void, otherwise to remain in full force and effect."

The plaintiff to and for the use of certain parties claims the right to bring this action under sec. 295, Rev. Codes, which is as follows:

"Every official bond executed by any officer pursuant to law, is in force and obligatory upon the principal and sureties therein to and for the state of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

It is alleged in the complaint that on August 31, 1910, the Idaho State Bank of Hailey closed its doors and suspended payment and had been unable to meet the demands of its creditors and has been in the hands of a receiver ever since; that William G. Cruse was appointed state bank commissioner [661] on March 6, 1909; that said Cruse and the American Surety Co. executed a bond conditioned as required by said sec. 191, Rev. Codes.

The 7th and 8th paragraphs of said complaint are as follows:

"VII. That, under the provisions of chap. 12, title 4 of the Civil Code of Idaho, it was, among other things, provided that it shall be the duty of the bank commissioner, when he shall deem it necessary, and at least once in each year, without previous notice, to visit and make complete report and examination of the affairs of each bank falling within the provisions of said chapter, which included the said Idaho State Bank.

"VIII. That, notwithstanding the obligations of said bond, the said William G. Cruse, after the making of said bond and during and before the expiration of his said office, as aforesaid, did not well, faithfully, and impartially discharge the duties of his said office, according to law and the provisions of said chapter, nor did he observe, fulfill and perform the said conditions of said bond,

but, on the contrary, he wholly failed, neglected, omitted and refused so to do, and acted unfaithfully, improperly and illegally in this:

"First, That said W. G. Cruse did not, at least once in each year during his said term of office, without notice, visit and make a complete report and examination of the affairs of said bank, as he made an examination on the 12th day of May, 1909, and did not thereafter visit and make another examination thereof until the 31st day of August, 1910, the day he caused said bank to close its doors and suspend payment;

"Second, That, further, on or about the 12th day of May, 1910, and for some time prior thereto, said William G. Cruse had knowledge of the unsafe condition of said bank, and that the same was being conducted contrary to the provisions of said chapter 13, title 4, of the Civil Code of Idaho, and that the books and accounts of said bank were being falsified, which should have caused him to deem it necessary to visit and make a complete report and examination of its affairs, but, nevertheless, he failed, neglected and omitted so to do."

[662] It is also alleged in said complaint that if said Cruse had at least once in each year and when he had cause to deem it necessary, made an examination of said bank, he would have found that it had been and was then guilty of violating each and every duty and requirement prescribed by our banking laws, and would have found that the books were then falsified in many items and accounts, these items being specifically enumerated, and that he would have then and there found reasonable cause to consider said bank insolvent; that when he had found such a condition, which he would have found had he made an examination, it would have been obligatory upon him in the discharge of his duties to have closed said bank and applied immediately in his official capacity for the appointment of a receiver of said bank; that by reason of the failure of said Cruse to faithfully and impartially discharge his duties, certain depositors, for whose benefit this action was brought, who had deposited certain sums in said bank subsequent to May 12, 1910, suffered loss and damage in certain specified amounts by reason of the failure, neglect and omission of said Cruse to faithfully and impartially discharge the duties of his office. Then followed the usual allegations of ownership of the amount in controversy, and the demand, and that the sums had not been paid, that no dividends had been declared by any of the receivers of said bank, and that the different amounts due said depositors had been wholly lost to them.

There are forty-seven separate and distinct causes of action stated in said complaint, and

each cause of action is for an amount less than \$2,000.

The record in this case shows that the defendant before its time for appearance had expired in the lower court, filed a petition and bond for the removal of said cause to the United States district court, but did not file any demurrer or appearance in the state court therewith, or within the statutory time allowed to plead in said court; that the time for appearance in the state court expired on October 14, 1912; that on October 7th plaintiff was served with notice of a motion for removal and in said notice the plaintiff was notified that the [663] defendant would, on October 14, 1912, at 1:30 P. M., at the courthouse in Hailey, move for an order of removal of said cause to the United States district court of Idaho. In response to said notice, counsel for plaintiff went from Boise to Hailey to appear on the day designated in said notice, to protest against and oppose an order for said removal. At the time noted, to wit, 1:30 P. M., of October 14th, counsel for plaintiff appeared before the district court at Hailey, Idaho. No one appeared on behalf of defendant, and the hearing upon defendant's motion was continued at the request of counsel for plaintiff until the following day at 1:30 P. M., for the purpose of giving counsel for defendant an opportunity to be present at said hearing. Counsel for plaintiff again appeared in said court at the time fixed for hearing said motion on that day, but no one appeared therein for the defendant. The court then heard counsel for plaintiff, and being of the opinion that the cause was not removable, it made an order denying the removal, a part of which order is as follows: "It is hereby ordered that the said petition and application on behalf of said defendant be, and the same is, hereby denied. Upon request of counsel for plaintiff, it is further ordered that this court, upon proper showing, will again hear the matter on a motion of defendant to vacate and set aside the order herein made, if said motion be made within proper time."

It thus appears that the plaintiff could have had default in said case entered on October 15, 1912, because no appearance had been made by answer, demurrer or otherwise, in said court at that time by the defendant. On October 16th, no appearance by the defendant having been made, plaintiff filed a *praeceipe* for default which was duly entered by the clerk of said court, and thereupon judgment of default was entered by said clerk. On October 17th, three days after plaintiff was noticed for the hearing on removal, counsel for defendant telegraphed or telephoned requesting a hearing to set aside the order of the court theretofore made denying the removal of said cause, which request was

granted. The matter was thereafter duly argued by respective counsel and at the close [664] thereof counsel for plaintiff, in the presence of counsel for defendant, stated in open court that a default had already been entered by the clerk in said case.

The court on October 30th refused to alter its former order of October 15th or to set the same aside, and an order to this effect was thereafter duly entered. The defendant then proceeded on October 28th and filed its record of removal of said cause in the United States district court. The plaintiff thereupon moved to remand to the state court, which motion was granted by the United States district court, and an order to that effect transmitted and filed in said federal court on December 10, 1912. On December 10, 1912, after the United States court had remanded said cause and after the state court had refused to set aside the default therein, and fifty-seven days after its time had expired to appear in the state court, being ninety-seven days after defendant was served, for the first time it entered its appearance in the state court by filing a demurrer. On December 10, 1912, the defendant, besides going on with its removal proceedings in the United States district court, filed a motion in the state court to set aside said default. A hearing was had on said motion on November 9, 1912, and the court on December 11th refused to set aside the default of the clerk, but granted the motion of defendant to set aside the judgment on said default entered by the clerk. On December 12, 1912, the defendant filed a renewal of said motion in the state court to set aside said default. Objections to a hearing of the renewal motion were filed by plaintiff, but were overruled by the court and a full hearing granted. Upon this hearing, all of the grounds urged by defendant were fully presented and considered by the court, and another order was thereafter entered by it, denying the renewal motion to set aside said default.

On May 20, 1913, during the next term of the state court, a hearing was had for the purpose of having the court assess the damages in said case. Proofs were submitted over the objection of counsel for the defendant who was present, and the damages were assessed by the court on each cause of action [665] and judgment entered, and from that judgment this appeal was taken.

Appellant assigns the following errors: (1) That the court erred in not holding and deciding that, appellant having filed a petition for removal of the cause to the federal court and given the required bond and notice, the time for defendant to plead was extended until the cause was remanded to the state court; (2) That the court erred in refusing to vacate or set aside the simple default en-

tered against appellant by the clerk of the court on October 16, 1912; (3) That the court erred in not making an order transferring the cause to the federal court; (4) That the court erred in entering any judgment against appellant; and (5) That the court erred in not dismissing the action at plaintiff's costs, because the complaint did not state facts sufficient to constitute a cause of action against the defendant.

These assignments of alleged error are so related that they may be considered under three heads, viz.: (1) Error of the court in refusing an order of removal of the cause to the federal court, and error of the clerk in entering the default against defendant; (2) Error of the court in refusing to set aside said default; and (3) Error of the court in holding that the complaint stated a cause of action.

The alleged error of the court as to refusing the order of removal and alleged error in regard to the entering of default against defendant by the clerk of the court may be considered together. The record shows that the default was taken after the expiration of the statutory time to plead had expired. But counsel for appellant contend that the default was prematurely taken because of the removal proceedings in the state court; that the filing of the petition and bond for removal of the cause to the United States court constituted a legal appearance in said action in the state court; that when the state court entered an order refusing to grant the removal, it should have ordered that the defendant plead further within the time fixed by said court, or, in other words, that the rule *respondeat ouster* obtained, and that the filing of said petition and bond for removal suspended the jurisdiction [666] of the state court until the cause had been remanded to said court, and therefore the default entered by the clerk of said court was null and void because it was entered between the filing of the petition for removal and the order of the federal court remanding the cause.

The above contentions of appellant are without merit for the reason that the filing of the petition for removal and the bond is not an appearance in the state court, and does not extend the time to appear therein. The defendant might have demurred or answered at the time it filed its petition for removal, which is the usual practice, without prejudice to its petition for removal, and it would have waived no right by doing so.

These points were distinctly in issue in the case of *Morbeck v. Bradford-Kennedy Co.* 19 Idaho 83, 113 Pac. 89, and after full consideration it was in that case held as above set forth, and the court there laid down the correct rule. Not having made any appearance in the state court within the time re-

quired by our statute, the entry of default by the clerk was within the scope of his authority. (*Morbeck v. Bradford-Kennedy Co. supra.*)

The contention of appellant that the filing of the petition and bond on removal was an appearance, and that the default was prematurely entered, is also without merit. The rule of *respondeat ouster* does not apply in such cases. If the state court had signed an order for removal and thereby voluntarily relinquished its jurisdiction, appellant might with some force claim that a default entered between the time of the filing of the order granting a removal and the filing of the order of the federal court remanding the cause was entered by the clerk without authority.

In this respect there is a marked difference between the case at bar and the *Morbeck-Kennedy* case. In that case the state court voluntarily relinquished its jurisdiction for a time by signing an order for the removal, while in the case at bar the state court considered the matter and refused to relinquish its jurisdiction, entered an order refusing a removal and thereby claimed and retained its jurisdiction. This difference [667] makes the reason stronger in favor of sustaining the default herein than it was in that case, since in the case at bar there was at no time a break in the jurisdiction of the state court. The trial court all the time had jurisdiction of this action; it refused to surrender such jurisdiction; it acted consistently throughout, and all of its proceedings were valid. The rule is well settled that if an action is removable and a proper petition and bond filed for removal, it makes no difference whether the state court signs an order removing the cause or refusing to remove it. In fact, no order whatever is necessary or required by the federal law, but the defendant can proceed and file his record for removal to the federal court within the required time and the state court cannot legally proceed further in the matter, and if it does proceed, all of such proceedings are void in case the cause is removed. On the other hand, if the action is one which the defendant is not entitled to remove, and the state court, as in this case, refuses to relinquish its jurisdiction by ordering a removal, then the defendant acts at his peril if he proceeds with the removal and does not protect himself in the state court, as all proper proceedings in the state court will be regular and valid if the case is remanded. So the contention that the mere filing of a petition and bond on removal, whether the same be a case which the defendant is entitled to remove or not, prevents the state court from proceeding further in the action, is untenable. The contentions of appellant are in conflict with all the state and

federal decisions which hold that a state court is not bound to surrender its jurisdiction upon petition for removal until a case has been made which on its face shows that the petitioner has a right to a transfer, and not until such a showing is made is the state court prohibited by the federal statutes from proceeding further in the cause; and if the petition in connection with the pleadings does not show that the cause is removable, the jurisdiction of the state court is not ousted and its subsequent proceedings are valid. (*Phoenix Ins. Co. v. Pechner*, 95 U. S. 183, 24 U. S. (L. ed.) 427; *Amory v. Amory*, 95 U. S. 186, 24 U. S. (L. ed.) 428; *Gregory v. Hartley*, 113 U. S. 742, 5 S. Ct. [668] 743; 28 U. S. (L. ed.) 1150; *Stone v. South Carolina*, 117 U. S. 430, 6 S. Ct. 799, 29 U. S. (L. ed.) 962; *Burlington, etc. R. Co. v. Dunn*, 122 U. S. 513, 7 S. Ct. 1262, 30 U. S. (L. ed.) 1159; *Crehore v. Ohio, etc. R. Co.* 131 U. S. 240, 9 S. Ct. 692, 33 U. S. (L. ed.) 144; *Brown v. Murray*, 43 Fed. 614; *Chesapeake, etc. R. Co. v. McCabe*, 213 U. S. 207, 29 S. Ct. 430, 53 U. S. (L. ed.) 765; *Springer v. Howes*, 69 Fed. 850; *Monroe v. Williamson*, 81 Fed. 977, 984; *Mannington v. Hocking Valley R. Co.* 183 Fed. 133; *Golden v. Northern Pac. R. Co.* 39 Mont. 435, 104 Pac. 549, 18 Ann. Cas. 886, 34 L.R.A.(N.S.) 1154; *Debnam v. Southern Bell Telephone, etc. Co.* 126 N. C. 831, 36 S. E. 269, 65 L.R.R. 915; *Chicago, etc. Co. v. Brazzell*, 33 Okla. 122, 124 Pac. 40; *Dillon on Removal of Causes*, sec. 136; *Moon on Removal of Causes*, sec. 177; *Foster's Fed. Prac.* sec. 391; 2 *Rose's Code of Fed. Prac.* sec. 1188 (c and g); 18 *Enc. Pl. & Pr.* 388, 351; 39 *Cyc.* 1305, 1308.)

The federal court having decided that the cause was not removable, we conclude that the default was not prematurely entered, and that the clerk had authority to enter the same. In our opinion, the *Morbeck* case is conclusive upon the question above discussed, to wit, the legality of the default and the question of the removal of said cause.

Counsel for appellant also contend that the court erred in refusing to vacate and set aside said default entered by the clerk.

The appellant based its first motion to set aside the default on the ground of inadvertence, surprise and excusable neglect. The excuse offered was that counsel for appellant was of the opinion that it was not necessary for it to plead, answer or demur in said cause in the state court, and that it would have thirty days after duly certified copies of the record had been filed in the federal court to plead in that court. This excuse was one of a mistake of law.

In 1 *Black on Judgments*, sec. 335, it is stated: "When statutes authorize the vacation of a judgment entered against a party through his 'mistake,' it is to be understood

that they mean a mistake of fact. Mistake of law—that is, the party's ignorance of the law, or mistake as to his legal rights or duties [669] in the premises—will not warrant the setting aside of the judgment." And in the case of *Plano Mfg. Co. v. Murphy*, 16 S. D. 380, 102 Am. St. Rep. 692, 92 N. W. 1072, it is held: "Where a defendant suffered a default by reason of his belief that the service of summons made by plaintiff's agent was invalid because not made by an officer, the default was the result of a mistake of law and therefore not ground for setting aside the judgment as procured through defendant's mistake or excusable neglect."

A motion to renew its motion to vacate said default was thereafter filed by appellant, and a further excuse offered, namely: That there was a uniform practice and custom in said state court that when motions, demurrers and interlocutory matters were ruled on not to take default without inquiry from opposing counsel if he intended to proceed further. This was met by plaintiff with an affidavit of a practicing attorney in said district court to the effect that no such custom or practice prevailed in said district court. But even if this excuse had not been met by a counter-affidavit, we question whether the practice or custom in a state court could be considered by this court. (*Powell v. Springston Lumber Co.* 12 Idaho 723, 88 Pac. 97.)

It was recited in the renewal motion that it would be based upon the records and files and upon the affidavit filed in the first motion. On said renewal motion the additional excuse of a mistake of fact and the excuse of a mistake of law above referred to were fully argued and considered by the court. The court, on hearing said renewal motion, considered each and every ground of said motion and thereupon overruled the same.

Counsel cites many cases dealing with defaults where the defendant did not appear within the statutory time and some valid excuse for not appearing was offered. These cases were not applicable to one like the case at bar where the defendant did come into court before his time had expired to plead, and attempted to take the wrongful procedure. In such a case another principle is involved; that is, What are the rights of the plaintiff where the defendant does appear and attempts [670] to gain what it thinks is an advantage over the plaintiff and a benefit to defendant? In such cases, the defendant becomes an actor; it is aggressive in its own interests and seeks to use its time in an unlawful procedure for its own advantage. It is then that courts considering the rights of both parties hold that the plaintiff cannot be charged with such acts of the defendant, and in dealing with substantial justice will require the defendant to assume the risk

and consequences that follow its wrongful and unsuccessful procedure. Under the facts of this case, we hold that the trial court did not err in refusing to set aside said default.

As stating these views and showing that the defendant takes his chances when he attempts to remove a case not removable, and that this question is well settled in this state, see *Finney v. American Bonding Co.* 13 Idaho 534, 90 Pac. 859, 91 Pac. 318, *Mills v. American Bonding Co.* 13 Idaho 556, 91 Pac. 381, and *Morbeck v. Bradford-Kennedy Co.* supra. The views of this court on this question are well stated in the *Morbeck* case, as follows: "It seems to use proper and entirely just to both litigants to hold that when a defendant petitions for the removal of a cause from a state to a federal court, he becomes the actor in that particular, and that he must assume the risk and consequences that follow if he is unsuccessful and in the meanwhile has failed to protect and preserve his right under the state statute and the rules of practice prevailing in the state court. . . . The fact that appellants exhausted a part of their time in a vain endeavor to get out of the state court into the federal court is neither the fault of the law, the courts, nor the adverse party. If they saw fit to exhaust a part of their 'day in court' in an effort to get into another forum and failed, the consequence should justly and properly fall upon them and upon no one else. It should not serve as a means of extending the time allowed them by statute or of delaying the adverse party in getting his case to trial after the question of jurisdiction has been determined."

We will next consider the question whether the complaint is sufficient and states a cause of action. The appellant contends that the complaint is insufficient in the following particulars: [671] (1) That it is not alleged that the bank commissioner neglected any duty that he owed to plaintiff; (2) that a public officer invested with certain discretionary powers is not liable when acting within the scope of his authority, unless he acts maliciously or wilfully wrong; (3) that the words used in sec. 3001, Rev. Codes, "at least once in each year," refer to a calendar year; (4) that it is not alleged that the damages claimed have been "adjudged against him," the said bank commissioner.

The first question above enumerated involves a construction of sec. 3001, Rev. Codes, which, in part, is as follows: "It shall be the duty of the bank commissioner, when he shall deem it necessary, and at least once in each year, without previous notice, to visit and make complete report and examination of the affairs of each bank falling within the provisions of this chapter." The law seems to be well settled that an individual has no

right of action against a public officer for breach of a duty which he owes to the public only, even though such individual is specifically injured thereby. (*Gorman v. Boise County*, 1 Idaho 655; *Warden v. Witt*, 4 Idaho 404, 95 Am. St. Rep. 70, 39 Pac. 1114; *People v. Hoag*, 54 Colo. 542, 131 Pac. 400, 45 L.R.A.(N.S.) 824; *Miller v. Ouray Electric Light, etc. Co.* 18 Colo. App. 131, 70 Pac. 447; *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L.R.A. 630; *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843; *School Dist. No. 80 v. Burress*, 2 Neb. (Unofficial) Rep. 554, 89 N. W. 609; *Board of Education v. Bladen County*, 113 N. C. 379, 18 S. E. 661; *Lowe v. Guthrie*, 4 Okla. 287, 44 Pac. 198; *Cotton v. Oregon City*, 98 Fed. 570; *South v. Maryland*, 18 How. 396, 15 U. S. (L. ed.) 433.)

But it is equally well settled that if the plaintiff can show that the duty was imposed for his benefit and that the legislature had in mind his protection in passing the act in question, and intended to give him a vested right in the discharge of that duty, then this will give him such an interest as will support an action.

[672] In *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169, it was held: "In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him." We think the rule is well settled that in cases of this kind the plaintiff must show that he has an interest in the performance of the duty by the public officer, and that the duty was imposed for his benefit. But the above does not imply that the duty was imposed for his sole benefit; it is sufficient if it appears that besides having in mind a public duty, the legislature also has in mind an additional duty to the individual.

In *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843, it is stated: "The failure to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance."

In *School Dist. No. 80 v. Burress*, 2 Neb. (Unofficial) Rep. 554, 89 N. W. 609, on this point it is stated: "On the other hand, though there may also be a duty, or even a primary duty, to the public, if there is in addition a duty to and right in the individual, he may maintain an action." Here, then, the real question is, whether the legislature, in passing sec. 3001, Rev. Codes, had in mind the depositors solely, or in connection

with the public, and intended that the duty it was imposing on the bank commissioner to make examination was for the benefit of the depositors, thereby making them interested parties in his performance of such duty. In determining this, and in construing said sec. 3001, we must take into consideration the subject matter with which the legislature was dealing, the language used, and the object and purpose of the law being enacted, and the particular duty in question. The matter of consideration in such a case is well stated in vol. 1, Street's Foundations of Legal Liability, p. 175, quoting from *Atkinson v. Newcastle*, etc. *Waterworks Co.* (2 Exch. D. (Eng.) 441) as follows: "that the question whether or not the breach of a statutory duty gives a private right of action in any case must always depend [673] upon the object and language of the particular statute." In reading said sec. 3001 and taking such matters into consideration, as just above referred to, we think it is clear that the legislature in prescribing this particular duty of the bank commissioner had uppermost in its mind the protection of depositors and people dealing with state banks, or at least had in mind a double duty, one owing to the public, and one owing to the depositors; or stating it in still another way, that in the public duty was involved also a duty to depositors as individuals; that the duty of examining state banks was one of the most important elements in our banking law; that the examinations required by law were of particular interest to the depositing public; that the duty prescribed was for the benefit of depositors, although it might not have been for their sole benefit; that it was intended by said sec. 3001 to give the depositors a vested right in the discharge of the duty therein prescribed.

It must be borne in mind that the respondent does not contend that the bank commissioner, under the facts of this case, would be liable to all the depositors of said bank at the time it is alleged he should have closed said bank, by reason of his failure to faithfully perform said duty, or that his surety is a guarantor thereof, but said respondent contends that the depositors who may recover are those that made deposits after the time, May 12, 1910, when said bank commissioner should have closed the bank, that such depositors suffered loss by reason of his unfaithfulness in the performance of a duty, which, if performed, would have prevented their loss, and that the duty violated by him was one which was imposed for their benefit; and that thus being interested parties and intended to be such by the legislature, in the performance of the duty of examination, as prescribed in said sec. 3001, the surety is then liable on its bond for the violation of a duty covered by said bond.

This court has already held in *Palmer v. Pettingill*, 6 Idaho 346, 55 Pac. 653, that where the plaintiff is a party whom the statute was intended to benefit or protect, then the surety is liable. It was also held that "The sureties of an officer [674] mentioned in sec. 403 of the Revised Statutes [same as 295, Rev. Codes] are liable to any person injured or aggrieved by a wrongful act done by the officer in his official capacity."

We will now consider the question of the liability of a public officer and his surety for a breach of a discretionary duty. Here we may say that the cases cited by appellant, and in the brief of counsel appearing as *amici curiae* herein, do in the main lay down the correct principle of law applicable to such cases, which is quoted from *Reed v. Conway*, 20 Mo. 43, as follows: "The doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a *quasi* judge, is not responsible to anyone receiving an injury from such act, unless the officer act maliciously and wilfully wrong, is most clearly established and maintained." (*Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Wilson v. New York*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; *Wilkes v. Dinsman*, 7 How. 89, 12 U. S. (L. ed.) 618; *Gould v. Hammond*, 1 McAll. 235, 10 Fed. Cas. No. 5,638; 29 Cyc. 1443 et seq.; *U. S. v. Clark*, 31 Fed. 710; *Kendall v. Stokes*, 3 How. 87, 11 U. S. (L. ed.) 506.)

In the beginning of the discussion on this point, it may be well to divide acts of negligence into two classes, namely: (1) Acts of commission, or positive wrong; and (2) acts of omission, or breach of duty. In other words, the division would be along the lines of affirmative commission and negative omission.

In examining the cases above cited, it will be found that most all of them involve acts of commission, and in alleging a breach of duty by acts of commission, it was charged that the acts were committed maliciously or wilfully. In other cases, however, and especially where the breach alleged was an act of omission, such words were used as "abuse of discretion," "bad faith," "did not act in good faith," "illegally," "fraudulently," "unlawfully," "wrongfully," "unfaithfully," "knowingly," and words of like meaning.

[675] So from all the cases, including the cases where the breaches were acts of commission and acts of omission, the sound rule seems to be that some words beyond the mere allegations of negligence and failure to perform should be alleged, showing intent to act wrongfully, wilfully, maliciously, unfaith-

fully, or in bad faith, or, in other words, showing evil intent, and then allege such facts as did constitute such intent.

It then follows that it is necessary to examine the complaint herein and determine whether there are sufficient allegations therein to show not only neglect or failure of the public officer to perform a discretionary duty, but also that he clearly abused his discretion to the extent of acting unfaithfully and in bad faith, and with a wilful design not to perform his duty as such officer.

In paragraph 8 of the complaint, as will appear from the copy thereof heretofore set out in this opinion, it is alleged that said William G. Cruse "did not well, faithfully and impartially discharge the duties of his said office," but "on the contrary he wholly failed, neglected, omitted and refused so to do, and acted unfaithfully, improperly and illegally," and then sets forth the particular breach of his duty complained of. The word "unfaithfully" signifies "bad faith." (8 Words & Phrases 7174.) The word "improperly" implies such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of. The word "illegally" means "unlawfully" and "contrary to law."

In the second breach set forth in the complaint, it is further alleged that said Cruse, prior to the time and at the time it is claimed he should have closed said bank, had knowledge of its unsafe condition, that the same was being conducted contrary to the provisions of said chap. 13, title 4, of the Civil Code of Idaho, being our banking law at that time, and that the books and accounts of said bank were being falsified, which should have caused him to deem it necessary to visit and make a complete examination of its affairs. Said allegations of knowledge of such facts were sufficient to show such a condition in said bank as would make it necessary [676] under sec. 3001 for him to make an examination of said bank, and when taken in connection with the words "wholly failed," "neglected," "unfaithfully," "improperly" and "illegally," as used in the complaint herein, are sufficient to charge an evil and wrong intent with a wilful design to refrain from performing his duty which would amount to bad faith, if he then, under such circumstances, failed or refused to make an examination of said bank.

Having held that said bank commissioner abused his discretion and acted in bad faith when he did not deem it necessary, and wilfully failed to examine said bank under the circumstances as alleged in the complaint, we now pass to a consideration of the further question as to whether the allegations in the complaint as to the condition he would have found there had he made an examina-

tion of the bank on or before May 12, 1910, were sufficient to give him reasonable cause to consider said bank insolvent, and then if so, was he required to close the bank and immediately apply for a receiver?

Sec. 3004, Rev. Codes, treats of the duty of the bank commissioner when it appears that the capital of a bank is reduced by impairment, or otherwise, below the amount required by sec. 2970; and sec. 3005 provides that if the bank commissioner shall find that a bank is violating its charter, or the provisions of the chapter relating to banks, he shall by an order direct the discontinuance of such illegal practices.

Appellant contends that the condition alleged may have been of such a character that it would have justified a notice to the bank, as provided in sec. 3004, or an order to said bank to discontinue such illegal practices, as is provided for in sec. 3005. But we cannot agree with this contention, as said sec. 3004 and the first part of sec. 3005 deal with conditions which the legislature evidently did not consider as reaching insolvency.

In the next part of said sec. 3005, following the above, the legislature dealt with a condition of insolvency and provided a remedy where the bank commissioner has reasonable [677] cause to consider a bank insolvent. This part of said sec. 3005, referred to, is as follows:

"If such bank shall refuse or neglect to comply with such order, or whenever such commissioner has reasonable cause to consider such bank insolvent, he may immediately apply, in his official capacity, to the district court of the county in which such bank has its principal place of business, for the appointment of a receiver for such bank, who, if he be appointed, shall proceed to administer the assets of the bank in accordance with law."

Here, again, in so far as the matter of the bank commissioner having reasonable cause to consider a bank insolvent is concerned, we have to deal with what may be termed another discretionary duty of the commissioner, and the general rules as hereinbefore discussed would apply. We must, therefore, in considering this question, again go to the complaint to see what the allegations are as to what condition the bank commissioner would have found if he had made an examination on or before May 12, 1910.

In paragraph 9 of the complaint, it is alleged as follows:

"That if said William G. Cruse had, at least once in each year, after his examination of May 12, 1909, or on or about the 12th day of May, 1910, when he had cause to deem it necessary to make an examination of the affairs of said bank, as aforesaid, visited said bank and made a complete report and ex-

amination thereof, as was his duty so to do, as aforesaid, he would have found that said bank had been, and was then, guilty of violating each and every duty and requirement prescribed in the provisions of the different sections of said chapter 13, title 4, and would have further found that the books of said bank had been, and were then, falsified in respect to accounts and items of Loans and Discounts, Overdrafts, Bonds and Warrants, due to and from Bank and Bank Accounts, Cash on Hand, Surplus Funds, Undivided Profits, Individual Deposits, Time Certificates of Deposit, Accounts of Officers and Directors and their liabilities, so as to make a proper legal report under date of April 27, 1910, which had been called for a short time prior thereto by said William [678] G. Cruse, as such Bank Commissioner, in accordance with law, and said William G. Cruse, from an examination of said bank, at said time, would then and there had reasonable cause to consider said bank insolvent."

If the bank was in fact violating "each and every" provision of the banking law, it would indeed be a serious matter and would call for immediate action by the bank commissioner; and we must take it as true that this condition of the bank as alleged in said paragraph of the complaint was true, because in passing upon the sufficiency of the complaint such would be the rule. And further, if the bank, besides violating "each and every" provision of the banking law, was also falsifying almost, if not all, of the principal items and accounts, it would be still more serious and require immediate and drastic action by the commissioner; and following these charges, it is alleged that said William G. Cruse from an examination of said bank at said time would then and there have had reasonable cause to consider said bank insolvent.

These allegations present a condition which should have caused him to consider the bank insolvent. Such being the case, what was his duty? It clearly was to adopt the only remedy given him under the law, and close the bank and apply for the appointment of a receiver. And if he failed so to do, then it would be a clear abuse of his discretion, and under such facts and circumstances as alleged, would amount to bad faith and show a wilful design not to perform his duty.

The argument that the word "may" in said section 3005 is not mandatory and does not mean "must" is without force under such allegations as are contained in this complaint. When such conditions arose under the old banking law, under which this action is brought, in a bank of this state, as alleged in the complaint herein, then the word "may" should be construed to mean "must," otherwise the power of the bank commissioner would have been absolute and there would

be no such thing as an abuse of discretion, or of holding him liable for bad faith and corruption.

This court has already in effect held in *Blomquist v. Bannock County*, 25 Idaho 293, 137 Pac. 177, that certain [679] duties of the assessors involved the exercise of their legal discretion or individual judgment, but that such legal discretion must be exercised in good faith, and if not, then an officer who fails to perform his duty is liable for such failure to faithfully perform his duties. In that case the court says: "If an officer exercises his legal discretion in good faith and without fraud, then he is performing his duty under the law, otherwise not; and if not, then he fails to perform his duty and is liable for a failure to faithfully perform his duties."

The next question for consideration is, whether the words "at least once in each year" as used in sec. 3001, Rev. Codes, refer to a calendar year. The complaint in paragraph 8 alleges two breaches of duty under sec. 3001 as to examination by the bank commissioner: (1) That said W. G. Cruse did not, at least once in each year, make an examination of said bank, and that his last examination before the bank was closed on August 31, 1910, was made on May 12, 1909; and (2) that on or before the 12th day of May, 1910, said Cruse had knowledge of the unsafe condition of said bank, its violation of the banking law, and its falsification of the books, and other acts of said bank, as hereinbefore more particularly set forth. We have already discussed the second breach set out in paragraph 8 of the complaint, and held that the facts alleged in regard thereto were sufficient to constitute a breach of the duty of the bank commissioner under sec. 3001, wherein it is provided that it shall be the duty of the bank commissioner, when he shall deem it necessary, to make an examination of state banks. From the conclusion we there reached, it follows that a cause of action is stated in the complaint regardless of the first breach of duty by said commissioner alleged in said paragraph. It is, therefore, unnecessary to discuss or consider the breach of duty first alleged in said paragraph to determine whether or not the phrase "at least once in each year" means a calendar year or once in twelve months.

There still remains for consideration the question as to whether or not in this action it was necessary that the damages claimed should be first adjudged against the bank commissioner. [680] Sec. 191, Rev. Codes, provides that the bank commissioner shall execute a bond with three conditions, as follows: (1) That he shall faithfully and impartially discharge the duties of his office; (2) pay over to the persons entitled by law



to receive it all money coming into his hands by virtue of his office; and (3) conditioned further for the payment of all damages and costs that may be adjudged against him under the provisions of title 2, chap. 13 of the Political Code, and under title 4, chap. 13 of the Civil Code.

The legislature intended by the enactment of said sec. 191 to require a bond covering the faithful and impartial discharge of the duties of said office as a distinct subject matter or condition of the bond; and it next intended to require the bond to cover the paying over of all moneys coming into the hands of the commissioner, as a second distinct subject matter or condition; and, lastly, having in mind that in sec. 3005, Rev. Codes, it had provided that where the commissioner had proceeded maliciously or without reasonable cause in closing a bank and having a receiver appointed, he was liable to such bank on his official bond for any damages, expenses and costs resulting therefrom. The legislature further intended to require a bond covering such damages and costs specifically mentioned in said section 3005, or in any other section of said chapter, and did not intend anyone injured or aggrieved by the failure of the commissioner to faithfully perform his duties, to first proceed and have his damages adjudged against the bank commissioner before he could bring suit against the sureties on said bond. Said three conditions required are separate and distinct. The first words "and conditioned further" imply that it is an additional condition to the two former conditions.

We do not in this decision, in passing upon said third condition, hold that even in a cause brought thereunder, that the injured party would be required to have his damage first adjudged against the bank commissioner before proceeding against his sureties. We reserve a decision on this question until it is properly before us. Under the bond in question, the principal and surety are jointly and severally liable, and [681] an action on said bond might be brought jointly against said bank commissioner and his sureties, or might have been brought against either of them severally.

We do not consider that the other questions presented in the brief of *amici curiae*, not raised by appellant and not dealing with the sufficiency of the complaint, are properly before us, and we will, therefore, not pass upon these questions further than to state that from our examination of the same, the points are not well taken when applied to this case.

The judgment of the court below must therefore be affirmed, and it is so ordered, with costs in favor of respondent.

Budge, J., and Guheen, District Judge, concur.

## ON PETITION FOR REHEARING.

(February 4, 1915.)

GUHEEN, J.—A petition for rehearing has been filed by counsel for the appellant in the above-entitled action.

The court, after carefully considering the same, finds that all of the material questions discussed by the learned counsel for the appellant in his petition for rehearing were fully covered in the briefs and oral arguments upon the original hearing of said cause, and upon a re-examination of the entire record, we are fully satisfied that we understood the facts and applied the law to the particular facts in this case; that the decision of this court was correct and in harmony with the decisions of this court as heretofore announced.

The petition for rehearing is denied.

Budge, J., concurs.

## NOTE.

**Bank Examiners.****Examiners of State Banks:**

Appointment and Status, 219.

Powers, 220.

Liability, 220.

Examiners of National Banks, 222.

**Examiners of State Banks.****APPOINTMENT AND STATUS.**

A state legislature has the power to create the office of state bank examiner, and to prescribe the qualifications and fix the salary of the incumbent thereof. *Byrd v. Conway*, 5 Ark. 436; *State v. Young*, 137 La. 102, 68 So. 241 (constitution fixed term of office and directed legislature to define duties and fix compensation).

Where the statute fixes the term of office the term cannot be shortened at the discretion of the governor. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 1914B 519. And where the fees are fixed by statute the examiners have no authority to alter the rate of compensation. *State v. Benton*, 31 Neb. 44, 47 N. W. 477.

A bank examiner is not an officer or agent of a bank of which he has taken charge. *Scribner State Bank v. Ransom*, 35 S. D. 244, 151 N. W. 1023, wherein it was held that the examiner in charge of an insolvent bank had no authority to waive protest of a note indorsed by the bank. See also *infra*, the subdivision *Examiners of National Banks*.

Bank commissioners, charged with the duty of examining banks, are not "district, county,

municipal, or township officers." *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.

#### POWERS.

The powers of the bank examiners are statutory. *State v. Union Bank*, 4 Rob. (La.) 499; *Com. v. Farmers', etc. Bank*, 21 Pick. (Mass.) 542, 32 Am. Dec. 290. And it has been held that a public examiner has no authority outside of that conferred upon him by the statute law. *Scribner State Bank v. Ransom*, 35 S. D. 244, 151 N. W. 1023.

Where the constitution does not permit a delegation of legislative power, the authority conferred on the public bank examiner to make rules cannot exceed the making of reasonable administrative rules. *State v. Struble*, 19 S. D. 646, 104 N. W. 465; *St. Charles State Bank v. Wingfield* (S. D.) 155 N. W. 776. In the case last cited, the court said: "We are clearly of the view that an order of the public examiner which directly declares that bank reserves in whole or in part shall be kept within the state, and designates certain cities as 'reserve cities,' and confers special rights, privileges, and immunities upon banks within those cities does involve an exercise of legislative power and discretion which cannot be delegated. Further than this we find it unnecessary to go. In holding this particular rule promulgated by the public examiner to be void, we are not to be understood as denying the public examiner full authority to adopt and promulgate any rule or regulation necessary or proper in the discharge of particular administrative duties imposed by the statute. In all such matters he may properly exercise reasonable discretion in the adoption of administrative rules within the purview of the particular provision of the statute which imposes the duty. By way of illustration, the statute imposes upon the public examiner the duty and authority to approve banks as reserve depositaries. In the discharge of this duty he may adopt any reasonable rule as to the method of procedure, or the showing required, upon which such approval will be given." And in *State v. Struble*, 19 S. D. 646, 104 N. W. 465, wherein the validity of a statute allowing the public examiner to prescribe the form of reports was upheld, the court said: "Resources and liabilities are the material substance concerning which the public examiner is authorized to inquire, and it would defeat the purpose of the statute to anticipate the method of detecting mismanagement or limit the investigation by prescribing the form of a report to be universally employed."

A statute charging the superintendent of banks with the duty of investigating the condition of certain banks for the purpose of

deciding whether it is his duty to take possession has been held not to authorize the superintendent, after taking possession, to conduct an investigation for the purpose of determining the cause of the bank's failure. In *re Union Bank*, 204 N. Y. 313, 97 N. E. 737, reversing 147 App. Div. 593, 133 N. Y. S. 62, wherein the court said: "Either in person, or through competent examiners, the superintendent shall visit such banks at least twice a year and 'on every such examination inquiry shall be made as to the condition and resources of the corporation, the mode of conducting and managing its affairs, the action of its directors, the investment of its funds, the safety and prudence of its management, the security afforded to those by whom its engagements are held, and whether the requirements of its charter and of law have been complied with in the administration of its affairs, and as to such other matters as the superintendent may prescribe.' These directions of section eight very plainly relate to the periodical examinations which the superintendent or his examiners are required to make at least twice in each year; and it is interesting to note that the language of this section has been very closely followed in the affidavits used on behalf of the superintendent to maintain his right to the examination now in progress. We are at a loss to know in what portion of the above quoted part of this section there is to be found any authority for any examinations except such as are made periodically for the purpose of enabling the superintendent to determine whether a going bank is properly conducting its business, safely investing its funds, prudently managing its affairs, adequately securing those by whom its engagements are held and in every other way complying with the provisions of its charter and of law. Every sentence of that part of the section plainly negatives the idea that the superintendent of banks may first take possession of a bank and then proceed to hold a public investigation."

In *Oklahoma* it has been held that the state examiner is authorized to examine the records of the bank commissioner as to the collection and disbursement of the depositors' guaranty fund and of the assets of insolvent banks, and is further authorized, in order to verify the records, to examine the books and papers of an insolvent bank while it is in the custody of the bank commissioner. *State v. Cockrell*, 27 Okla. 630, 112 Pac. 1000.

#### LIABILITY.

In at least one jurisdiction the rule is established that the bank examiner is invested with discretion while he is making his investigation and up to the point where he

becomes satisfied that the bank has unlawfully refused to pay its depositors or has become insolvent, but at this point his discretion ends and it becomes his mandatory duty to close the bank, a duty the failure to perform which renders him and the surety on his official bond liable to depositors who lose their money as a direct result thereof. *State v. Title Guaranty, etc. Co.* 27 Idaho 752, 152 Pac. 189. And see the reported case. In *State v. Title Guaranty, etc. Co. supra*, the court said: "Instructions V. and VI. contain such a clear statement of the law relative to the duty of a bank commissioner in cases of this kind that they will be here quoted: 'V. Whenever a statute imposes certain duties upon an executive officer like a bank commissioner, and directs that he shall use his discretion in passing upon certain matters, he is not liable for a mere mistake in judgment or opinion committed by him in exercising such discretion. Accordingly, if the bank commissioner in the exercise of his discretion shall merely make a mistake in passing judgment upon the question of whether or not the capital of a bank was impaired and reduced below the amount required by law, or upon the question as to whether or not the bank had unlawfully refused to pay a depositor in accordance with the terms of his deposit, or upon the question as to whether said bank had become insolvent, such bank commissioner would not be liable for such mistake in judgment, no matter what might be the consequences. VI. However, if upon exercising his discretion and using his own judgment, the bank commissioner of the state becomes satisfied in his own mind that any bank or trust company has unlawfully refused to pay its depositors in accordance with the terms of their deposits, or that such bank has become insolvent, it becomes his duty to forthwith take possession of the books, records and assets of every description of such bank and hold the same, and to collect all debts, dues and claims and sell or compound all doubtful debts and to sell all real and personal property on such terms as the court of said judicial district shall direct.' Where a statute imposes a duty upon one for the protection and benefit of others and does not invest him with discretionary power in the matter, if he neglects to perform the duty he is liable to those for whose protection the statute was enacted for any damage resulting proximately from his neglect, whether he be actuated by malice, a corrupt motive or otherwise."

An action on the bond of an examiner is not prematurely brought, although it may appear that there probably will be additional funds distributed to the creditors of the bank when its assets can be collected; for when the additional funds are realized, the surety, on

payment of the judgment, can be subrogated to the rights of the plaintiffs. *State v. Title Guaranty, etc. Co.* 27 Idaho 752, 152 Pac. 189.

It has been held that an examiner acting within the scope of his authority is not liable for damages resulting from his action in closing a bank, although his action may have been prompted by improper motives. *Sanders State Bank v. Hawkins (Tex.)* 142 S. W. 84, wherein the court said: "The solvency of a bank whose only resources are its capital stock, a large portion or all of which has been loaned to private parties, and the remainder invested in other property, and the propriety of its further continuance in business, in view of the methods pursued by its officers, may be questions about which different minds might reach different conclusions. When an emergency arises in which the determination of those questions becomes essential to the performance of a public duty, they must of necessity be referred to some official or tribunal whose judgment shall be decisive. The legislature, apparently recognizing the difficulty of providing in detail for all the contingencies which might arise in the conduct of the business of state banks and trust companies that would be calculated to jeopardize the safety and security of creditors and depositors, both present and prospective, saw fit to lodge that power or discretion with the superintendent of banking. When this officer in person examined a bank, it was his duty to the public to suspend its business and close its doors if, in his opinion, the bank was insolvent, or the conduct of the business was such that its continuance would jeopardize the safety and security of creditors and depositors. Again, when an examiner, after having made an examination, made a report to the superintendent which revealed such conditions, and recommended the closing of the bank, the law made it the duty of the superintendent, if he approved the report, to order the business suspended and the bank closed. Such a provision of the law clothed the superintendent with judicial functions. When such a report was made, clearly he had the power to direct the closing of the bank or not, as his judgment might dictate; or, even without such a report, he had the right to in person enter upon the inquiry into the bank's condition, and determine for himself whether or not it was solvent, or if its business was being properly conducted. And if he determined either of these questions against the bank, it was his duty to close its doors and suspend its business. The existence of a power is one thing; the propriety of its exercise under given conditions is another. Clearly, if he had the right to determine the propriety of closing the doors,

he also had the power to carry his judgment into effect. It would be useless to clothe an officer with powers to judicially determine a question, and provide no means for enforcing his judgment. If he closed the bank at a time when it was not insolvent, and when its business was in all things being properly conducted, his action would be simply erroneous, and not in excess of his actual authority."

Under the South Carolina statute, a bank examiner although neglectful of duty, is not subject to removal from office by the Governor. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 1914B 519, wherein the court said: "The General Assembly in creating the office of State Bank Examiner might have provided that the term should be four years subject to be shortened by removal by the Governor or on the happening of any other contingency. But it did not see fit to do so. The wisdom of legislative action is without the sphere of judicial inquiry. It may be that fixing the term of the office of State Bank Examiner rigidly at four years in the last statute, when by the earlier statute it had been fixed at two years subject to be shortened by removal, was an oversight; or it may be the change was due to an intention to make an officer, clothed with so much discretion and power and charged with such great responsibility in safeguarding, by his supervision, enormous public and private interests, entirely independent of any outside influence and removable only by a civil action under the Code of Procedure. These questions are not for us. The Court can only declare that under the law as it exists the State bank examiner is not subject to removal at the discretion of the Governor."

For neglect of duty in not ascertaining the insolvency of a bank, bank commissioners are not liable to prosecution under a criminal statute applying to "district, county, municipal, or township officers." *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.

#### *Examiners of National Banks.*

Congress has made provision for the examination of national banks; and it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with such banks or their officers in the exercise of the powers bestowed upon them by the Federal government. *Easton v. Iowa*, 188 U. S. 220, 23 S. Ct. 288, 47 U. S. (L. ed.) 452.

The following provisions of the Federal Reserve Act govern examiners of national banks: "Sec. 21. Bank examinations. Section fifty-two hundred and forty, United States Revised Statutes, is amended to read

as follows: The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary: Provided, however, That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of state banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency. The Federal Reserve Board, upon the recommendation of the Comptroller of the Currency, shall fix the salaries of all bank examiners and make report thereof to Congress. The expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the banks examined in proportion to assets or resources held by the banks upon the dates of examination of the various banks. In addition to the examinations made and conducted by the Comptroller of the Currency, every Federal reserve bank may, with the approval of the Federal reserve agent or the Federal Reserve Board, provide for special examination of member banks within its district. The expense of such examinations shall be borne by the bank examined. Such examinations shall be so conducted as to inform the Federal reserve bank of the condition of its member banks and of the lines of credit which are being extended by them. Every Federal reserve bank shall at all times furnish to the Federal Reserve Board such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank. No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized. The Federal Reserve Board shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Federal Reserve Board shall order a special examination and report of the condition of any Federal reserve bank. Sec. 22. No member bank or any officer, director, or employee

thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5,000, or both; and may be find a further sum equal to the money so loaned or gratuity given. Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given; and shall forever thereafter be disqualified from holding office as a national-bank examiner. No national bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof. Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank. No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this section shall be punished by a fine of not exceeding \$5,000 or by imprisonment not exceeding one year, or both." (Act Dec. 23, 1913, §§ 21, 22; Fed. St. Ann. 1914 Supp. pp. 281-2.) An earlier act referring to the provisions for which the foregoing act was substituted provided that "No association shall be subject to any visitatorial powers other than such as are authorized by this Title, or are vested in the courts of justice." (Rev. St. U. S. § 5241, 5 Fed. St. Ann. p. 188.)

A national bank examiner is not an officer or agent of the bank, and cannot bind the bank by any act in its behalf. *Witters v. Sowles*, 32 Fed. 762; *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L.R.A. 811. Thus, in the case last cited, the court said: "It was outside of the duties of the examiner, and outside of the authority conferred upon him,

to negotiate for the replenishing of the assets of the bank . . . in regard to these negotiations, the comptroller, through the examiner, acted rather as a disinterested arbitrator between the officers of the bank, who were desirous of opening its doors, and the creditors of the bank, for the protection of whose interests he had intervened, than as the agent of either party. Any information that he might give to either party interested would be entirely voluntary on his part. When the friends of Mrs. Chamberlain went to the examiner for information they did so at their own risk, and cannot hold the bank responsible for his statements. It is very clear that Mr. Griffith was not the agent of the bank in the transaction in question. 'He had no authority, as such (examiner), to act for the bank in any manner, and could not bind it by any act done or undertaken in its behalf. He represented a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not; but it does none for them, other than to wind up their affairs for their creditors. The examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business. His reports might be favorable or otherwise, as any advice he should give might be followed. He doubtless acted for the best interests of the creditors of the bank in giving this advice, but what was done in following it had no more effect than as if it had been done without it.'"

In *Cox v. Montague*, 78 Fed. 845, 24 C. C. A. 364, *appeal dismissed* 18 S. Ct. 944, 42 U. S. (L. ed.) 1213, wherein it appeared that a national bank examiner wrote to a stockholder in a bank requesting information concerning the bank president, and the stockholder answered, volunteering in addition that he had become alarmed and disposed of his stock, it was held that the letter to the examiner was not privileged, but was admissible in evidence against the stockholder to prove the motive of his transfer.

## BENNETT

v.

## KALAMAZOO CIRCUIT JUDGE.

Michigan Supreme Court—December 18, 1914.

183 Mich. 200; 150 N. W. 141.

### Grand Jury — Striking Report from Records — Procedure.

A prosecuting attorney may move the circuit court to expunge from its records a

report of a grand jury assailing his official conduct without serving notice of motion on any member of the grand jury.

**Same.**

A prosecuting attorney, seeking an order of the circuit court expunging from its records a report of a grand jury assailing his official conduct, should, before applying to the Supreme Court for relief by mandamus, obtain from the circuit court a decision on his application to strike out the report.

**Powers of Grand Jury — Report Criticizing Public Officer.**

Under Comp. Laws 1897, §§ 1395, 11443, authorizing a grand jury to make reports or presentments relating to trespass on public lands and violations of election laws, and sections 11891, 11893, providing how indictments shall be found, without providing for the filing of a report or presentment reflecting on the conduct of public officials, a grand jury has no right to file a report reflecting on the official conduct of the prosecuting attorney, unless followed by an "indictment," which is a written accusation that one or more persons have committed a crime, presented on oath by a grand jury; for a "presentment," as distinguished from an "indictment," is a notice taken by a grand jury of any offense from its own knowledge or observation without a bill of indictment laid before it at the suit of the commonwealth, and is generally regarded in the light of instructions on which an indictment must be found.

[See note at end of this case.]

Original action for mandamus. Milo O. Bennett, relator, and Kalamazoo Circuit Judge, respondent. The facts are stated in the opinion. WRIT GRANTED.

*Milo O. Bennett, in pro per.*

*Alfred J. Mills for respondent.*

[201] BROOKE, J.—Relator asks for mandamus to compel the respondent to make an order striking from the files of the circuit court of Kalamazoo county a certain report presented to the said court by a grand jury. The report in question follows:

**"STATE OF MICHIGAN.**

**"To the Circuit Court for the County of Kalamazoo:**

"We, the members of the grand jury now in session, beg leave to report, in addition to the reports already made, that our investigations have disclosed the existence of a state of affairs in connection with the office of prosecuting attorney for this county which we deem it our duty to call to the attention of the court.

"1. The evidence disclosed that the prosecuting attorney of this county has violated the laws of the State by drawing from the treasury of the county the sum of \$245,

claiming that amount as fees for services rendered in certain divorce cases, to which we believe he is not legally entitled. Act No. 586 of the Local Acts of the State of Michigan for the year 1907 provides that the salary of the prosecuting attorney for the county of Kalamazoo shall be fixed by the board of supervisors, and that such compensation shall be in full for all services that may be rendered for which the county may be liable, and in lieu of all fees which are fixed by law.

"2. That he was advised, as the evidence shows, before drawing said amount that he was not entitled thereto; notwithstanding which he drew the same from the treasury of the county and retains the amount so drawn, and has neglected and refused, and still neglects and refuses, to return the money so drawn to the treasurer of the county.

"3. Our investigation further shows that he has refused to attend sessions of the grand jury, though [202] often requested by the circuit judge to do so, thereby subjecting the county to a great expense of having a special prosecutor to perform the duties for which he was elected and for which he is paid by the county.

"4. Without going into details our investigations further show that, from the time the grand jury was summoned, and since it has been in session, that the prosecuting attorney of this county has, through the public press and otherwise, sought to cast discredit upon and to obstruct, hinder, and delay any efforts of the jury to get at the truth or falsity of the many rumors of alleged criminal irregularities within the county and city of Kalamazoo; that he furthermore in furtherance of his schemes has not hesitated to apply the most vile, profane, obscene, and vulgar epithets (too filthy, vile, and disgusting to be embodied in this report), not only to the chief executive of the State, the head of the legal department thereof, but to others who have been engaged in an honest effort to arrive at the truth of matters under investigation.

"5. Our investigation has disclosed in the conduct of criminal business of the county that he is utterly incompetent to discharge properly the duties of the office to which he has been elected. His neglect of duty and his conduct has been of so serious a nature that we feel it our duty to bring the same to the attention of the court and to request that this report or a copy thereof be forwarded to the governor of the State for consideration and for such action as to him shall seem proper.

[Signed] "The Grand Jury of Kalamazoo County,

"By Byron J. Carnes,

"Foreman of Grand Jury."

The relator charges that the averments and innuendoes contained in said report are false and malicious, and wrongfully tend to impute a lack of integrity on the part of petitioner.

He filed a petition with the circuit judge demanding that said paper be summarily stricken and expunged from the files and records of the court. Respondent's [203] return to the order to show cause, issued by this court, shows that in fact relator's petition filed in his court has never been acted upon, for the reason that no notice has been given by relator to members of the grand jury making the report, nor has any hearing upon said petition been demanded by relator. Respondent, however, returns that if he had acted upon said petition, as he is at present advised, he would have denied the prayer of the same for the following reasons:

"(a) Because, as matter of law, it is his judgment that the said grand jury had the lawful right to make said report to the court for the purposes therein set forth.

"(b) Because in the judgment of the respondent, said report was made to the court by said grand jury in good faith, and not from malicious or improper motives.

"(c) Because an *ex parte* decision to strike said report from the files and proceedings of the court would, in the judgment of respondent, be an adjudication which might embarrass the grand jury and the several members thereof, and render them, at least *prima facie*, guilty of libeling relator.

"(d) Because the lawful rights of the relator, the members of the grand jury, the court, and the people of Kalamazoo county are such, in the judgment of respondent, as to render it improper to strike said report from the files and proceedings of said grand jury and award the relief prayed by relator in and by his petition to strike same from said files.

"(e) Because the relator's remedy, if any, in the premises, is not by writ of mandamus, but by suit, as against the grand jurors and all who may have taken part in the preparation and publication of said report, if the matters embraced therein are false and untrue, and if said report was not made by said grand jury in good faith and without malicious motives, and respondent states and avers that if all the matters and things stated, alleged, and averred in the relator's petition in this matter are true, which [204] this respondent does not concede, he is not entitled to the relief prayed, and respondent demurs thereto for that reason."

We are of the opinion that it was unnecessary for relator to serve notice of his motion to strike said report from the files upon any member of the grand jury. The paper, having been filed, became a part of the

Ann. Cas. 1916E.—15.

records of the circuit court for the county of Kalamazoo and, as such, was peculiarly within the custody and control of respondent. Touching the failure of relator to demand a hearing upon said petition, it is, we think, true that relator should have secured action, one way or the other from respondent, upon his petition before applying to this court for relief. However, we are not inclined to dispose of the case upon this technicality, in view of respondent's return, and in view of the further fact that counsel for respondent has asked us to disregard the technical defense, and dispose of the question upon its merits. We will, therefore, consider the matter in this court as if, in fact, the respondent had refused upon proper application to expunge the report from the records of the court.

In order to determine the question in issue, it becomes necessary to ascertain, if possible, what duties and functions devolve upon the grand juries in this jurisdiction. Blackstone, in his Commentaries, book 4, page 301, defines the procedure as follows:

"The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by presentment or indictment.

"1. Presentment by indictment. A presentment, generally taken, is a very comprehensive term; including not only presentments, properly so called, but [205] also inquisitions of office and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offenses in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so

presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

"2. An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer and terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which, on the part of our lord the king, shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain: which seems to be *casus omisus* (omitted cases), and as proper to be supplied by the legislature as the qualifications of the petit jury, which were formerly equally vague and uncertain, but are [206] now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of King Ethelred. (*Exeant seniores duodecim thani, et præfectis cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*) (Let twelve elder freemen, and the foreman with them, retire and swear upon the holy book which is given into their hands that they will not accuse any innocent person, nor screen any criminal.) In the time of King Richard the First (according to Hoveden) the process of electing the grand jury ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the

finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."

The definition of a "presentment" as distinguished [207] from "indictment" is set out in 20 Cyc. p. 1335, § B-2, as follows:

"A presentment in its limited sense is the notice taken by a grand jury of any offense from its own knowledge or observation without a bill of indictment laid before it at the suit of the Commonwealth. It is generally regarded in the light of instructions upon which an indictment must be found. In some jurisdictions either under statute or apart from statute, grand juries have the power to make presentment of offenses which are within their own knowledge and observation or are of public notoriety and injurious to the entire community. But in other jurisdictions it is held that the grand jury has no power to present any person for a criminal offense except by indictment."

It is said in *Hirsh on Juries*, p. 209, § 725, par. 2:

"In addition to bills of indictments and specific offenses, the grand jury have the right to present to the court such public wrongs as in their judgment should be brought to the notice of the court."

In a charge to a grand jury delivered by Mr. Justice Field, and reported in 2 Sawy. (U. S.) 667 (Fed. Cas. No. 18,255), the following definition of "presentment" is found:

"A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed.

"This form of accusation has fallen in disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the grand jury and advise them in their investigations."

The identical question here presented seems to have arisen in the State of New York in the case of *Matter of* [208] *Osborne*, 68 Misc. 597, 125 N. Y. S. 313. There a grand jury was summoned to take action regarding the American Ice Company. The deputy attorney general attended the grand jury and



instructed them to find "no bill," because of lack of evidence. The grand jury, however, did present to the court a report assailing the conduct and integrity of the deputy attorney general. This is a late case, being tried in 1910. In ordering the report expunged from the records, the court says:

"It has become a custom of almost invariable occurrence that the grand jury, at the close of its term, makes a presentment on some subject on which, frequently, no evidence has been heard. This, no doubt, proceeds from the zeal of its members to promote the general welfare by calling attention to certain conditions which they believe should be remedied. So long as they are confined to matters of general interest, they are regarded as harmless, even though a waste of time and effort, and after the ephemeral notice of the day has passed they are allowed a peaceful rest. But it is very different when the motives and conduct of the individual are impugned, and he held to reprobation, without an opportunity to defend or protect his name and reputation, for it must be borne in mind that, if the gentlemen of the grand jury were to meet as an association of individuals and give expression to the sentiments contained in a presentment, little attention would be paid to them, and a healthy regard for the responsibility of utterances injurious to the individual would, in all probability, restrain exaggerated and unfounded statements. The mischief arises from a prevalent belief that a grand jury making the conventional presentment speaks with great authority and acts under the sanction of the court, thereby giving to its deliverance a solemnity which impresses the mind of the public. This is a grave error. The powers and duties of a grand jury are defined by law. No matter how respectable or eminent citizens may be who comprise the grand jury, they are not above the law, and the people have not delegated to them arbitrary or plenary powers to do [209] that, under an ancient form, which they have not a legal right to do. . . .

"Some States have abolished the grand jury system. This State yet preserves it, and it may be wise that it does so, for it is an institution that has indelibly impressed upon the pages of history a record for the protection of the citizen against the arrogance and oppression of power and has inspired in the hearts of the lawless and corrupt a healthy fear of its powers and honesty. But its action should be checked when, from thoughtlessness or misconception . . . it arraigns the citizen in phrases accusing him of acts or conduct which in themselves are not criminal, thereby precluding him from the right guaranteed by the Constitution to every

man to meet his accusers face to face before a jury of his peers, but which are the most insidious and harmful because they must remain without answer or denial. Such is this case, and in the interests of justice I am constrained to protect the attorney general and his deputies from an injustice by directing that the paper presented to the court by the grand jury, bearing date the 7th day of April, 1908, and entitled 'a presentment,' be stricken from and expunged from the records of this court."

In the case of *Rector v. Smith*, 11 Ia. 302, which was an action for libel against grand jurors for filing a report reflecting upon the conduct of plaintiff as county judge, it was held that the plaintiff could not recover, on the ground that the presentment was made without malice and supposedly in discharge of duty. The court, however, made the following comment upon the duties of the grand jury:

"It is made the duty of the grand jury when they find that an indictable offense has been committed within their county, to present the same by indictment. See Code, § 2897. By section 2992 it is made the special duty of the grand jury to inquire into the matters specified in the four subdivisions of this section. It is under the provisions of this section that the defendant claims that the law authorized and justified him in presenting to the court, as a grand juror, [210] the report in regard to the actions of plaintiff as county judge. The grand jury have no power, nor is it their privilege or duty to present any person for a criminal offense except by indictment. If the misconduct of an officer does not amount to a crime, and is not of such magnitude as will justify the jury in finding an indictment, their powers over the offense complained of are at an end."

It would appear that the statutory enactments relative to the duties of grand juries in Iowa were without effect upon the determination.

In *State v. Darnal*, 1 Humph. (Tenn.) 290, it is said:

"The presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it. In England, as we have had occasion heretofore to observe, an offender never was put upon trial upon a presentment, but on a return of a presentment by the grand jury, which was merely an informal information of the offense having been committed, the attorney general prepared a bill of indictment thereon, stating an offense in legal and technical form, and, upon this the person charged was put upon his trial. But such has not been the practice in the State of Tennessee. Here, when the grand jury, or any one of their body, is cog-

nizant of an offense, the practice is to inform the attorney general thereof in the first instance, who prepares a bill of indictment upon the information, which is delivered to the grand jury and is by them returned, instead of the old informal presentment."

In the case of *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313, in speaking of presentments, the court said:

"Like an indictment, however, it must be the act of the whole jury, not less than 12 concurring in it. It is, in fact, as much a criminal accusation as an indictment, except that it emanates from their own knowledge, and not from the public accuser; and, except that it wants technical form, it is regarded as instructive for an indictment. That a grand jury may adopt such a course of procedure without a previous [211] preliminary hearing of the accused is undoubted; it is equally true that in making such a presentment the grand jury are entirely irresponsible, either to the public or to individuals aggrieved, the law giving them the most absolute and unqualified indemnity for such an official act."

In the case of *Jones v. People*, 101 App. Div. 55, 92 N. Y. S. 275, decided in 1905, a report or presentment was filed by the grand jury criticising certain officials of the court. It was sought to have the same expunged from the records. This relief was denied by the court, but at page 58 of 101 App. Div. 92 N. Y. S. 277, it is said:

"I think that if under the guise of a presentment the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged, but I do not think that a presentment as a report upon the exercise of inquisitorial powers must be stricken out if it incidentally point out that this or that public official is responsible for omissions or commissions, negligence, or defects."

In this State there are but two matters upon which a grand jury have statutory right to make reports or presentments, i. e., trespass on public lands, 1 Comp. Laws, § 1395, and violation of the election laws, § 11443 (5 How. Stat. [2d ed.] § 14910). 3 Comp. Laws, §§ 11891, 11893 (5 How. Stat. [2d ed.] §§ 15062, 15064), provide how indictments shall be found, but contain no provisions for the filing of a report or presentment reflecting upon the conduct of public officials.

An examination of the report filed by the grand jury in the instant case shows that it contains reflections of the gravest character upon the official conduct of the petitioner, if it does not actually charge him with the commission of a felony.

[212] A review of all the cases cited upon both sides of the question, and such others as we have been able to examine, leads us to the conclusion that inherently, apart from statutory sanction, the grand jury has no right to file such a report, unless it is followed by an indictment. The evils of the contrary practice must be apparent to all. While the proceedings of the grand jury are supposed to be secret, it is clear that in the present instance that secrecy was not inviolate, for the objectionable report found its way into the press of Kalamazoo within a few hours after it had been filed. Whether the matter contained in such report be true or false, it can make no difference with the principle involved. In either event the accused person is obliged to submit to the odium of a charge or charges based, perhaps, upon insufficient evidence, or no evidence at all, without having the opportunity to meet his accusers and reply to their attacks. This situation is one which offends every one's sense of fair play and is surely not conducive to the decent administration of justice. Upon the coming in of said report, we are of the opinion, that it was the duty of the trial court to have refused to accept it, or file it with the records of his court. Having received and filed it, upon the application of the petitioner, it was plainly his duty to have expunged it from the files. The writ will issue as prayed.

McAlvay, C. J., and Kuhn, Stone, Bird, Moore, and Steere, JJ., concurred with Brooke, J.

OSTRANDER, J.—I concur in the result. I think the paper in question was not a "presentment" by the grand jury.

#### NOTE.

#### Power of Grand Jury to Report Crime or Misconduct Otherwise than by Indictment or Presentment.

As a general rule a grand jury has no power to report crime or misconduct otherwise than by an indictment or a presentment. *Parsons v. Age-Herald Pub. Co.* 181 Ala. 439, 61 So. 345; *Poston v. Washington, etc. R. Co.* 36 App. Cas. (D. C.) 359; *Rector v. Smith*, 11 Ia. 302; *Matter of Osborne*, 68 Misc. 597, 125 N. Y. S. 313; *In re Woodbury*, 155 N. Y. S. 851. And see the reported case. See also *McKinney v. U. S.* 199 Fed. 25, 117 C. C. A. 403. Compare *Rion v. Com.* 1 Duv. (Ky.) 235; *Jones v. People*, 101 App. Div. 55, 16 N. Y. S. 275, appeal from order dismissed, 181 N. Y. 389, 74 N. E. 226. Thus in *Parsons v. Age-Herald Pub. Co.* supra, an action for libel, it was held that the part of the grand

jury's report dealing with the official conduct of the plaintiff was no part of any "judicial proceeding" within the rule of qualified privilege recognized by the common law in respect to the publication of such proceedings. The court said: "It is the duty of every grand jury to investigate any alleged incompetency or misconduct of any public officer in the county; and, if they find that any county officer ought to be removed from office for any impeachable offense named in section 7099 of the code, they shall so report to the court, 'setting forth the facts, which report shall be entered on the minutes of the court.' They are neither required nor authorized by any statute to report the result of such investigations when they fail to find any impeachable fault or offense; and when they report and criticize any misconduct, real or fancied of lesser grade, it cannot be for the purpose of invoking any judicial action, and is in fact no part of any judicial proceeding, actual or potential. Of course, these observations do not apply to the duties specially enjoined upon the grand jury by law to examine and report upon the several public matters named in sections 7287-7292 of the code, with which we are not here concerned." So in the case of *In re Woodbury*, 155 N. Y. S. 851, the court granted a petition to have a report in the guise of a presentment expunged from the records, Marcus, J., said: "It is unnecessary, in my determination of this question, to decide whether 'presentment' and 'indictment' are synonymous. Much has been learnedly written on this subject, and the weight of authority still seems to be that the grand jury have a right to make presentments, even though they be not followed by an indictment; but the courts seem to be equally emphatic in insisting that a presentment cannot be used by the grand jury merely as a guise to accuse and thereby compel a person to stand mute, if the presentment would warrant an indictment so that the accused might answer, and that when a presentment is merely a guise used by the grand jury to accuse, the presentment should be expunged from the record."

But in *Jones v. People*, 101 App. Div. 55, 16 N. Y. Ann. Cas. 15, 19 N. Y. Crim. R. 59, 92 N. Y. S. 275 (appeal from order dismissed 181 N. Y. S. 389, 74 N. E. 226) it appeared that a divided court refused to expunge from the records a report by a grand jury censuring a public official. Jenks, J., in the prevailing opinion said: "I think that if under the guise of a presentment, the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged; but I do not think that a presentment as a report upon the exercise of in-

quisitorial powers must be stricken out if it incidentally point out that this or that public official is responsible for omissions or commissions, negligence or defects." Woodward, J., in a dissenting opinion said: "All of the old forms of criminal pleading being abolished, the people being limited to an indictment, which shall charge the commission of a definite crime, and state the acts constituting such crime, and a presentment being the equivalent of an indictment in the common law as it was understood at the time of making our state Constitution, it follows that any other action on the part of a grand jury in dealing with a citizen is without authority in law."

**HALSELL**

v.

**MERCHANTS' UNION INSURANCE COMPANY.**

Mississippi Supreme Court—June 9, 1913.

105 Miss. 268; 62 So. 235, 645.

**Building and Loan Associations — Exemption from Usury Laws — Validity.**

Laws 1912, c. 187, is "An act providing for organization of domestic and foreign building and loan associations, or other corporations whose business is loaning money on real estate to be paid in monthly instalments." Section 2 provides that the term "building and loan association" shall include all corporations and associations organized to enable members, "or borrowers who are not members," to acquire, make improvements on, or to remove incumbrances from realty, or to loan money on real estate, to be paid in monthly instalments on a loan for not less than two years, or for the "accumulation of the fund to be returned to its members who did not obtain advances thereon." Section 9 provides that all associations may contract for loans to members, or to borrowers who are not members, at the rate of interest not exceeding 10 per cent. It is held, that the business of such associations differentiates them from other lenders of money, so that the permission to charge interest at 10 per cent does not violate Const. 1890, § 90, prohibiting special laws regulating the rate of interest on money.

[See note at end of this case.]

Appeal from Chancery Court, Jones county: WHITMAN, Chancellor.

Action by R. E. Halsell, plaintiff, against Merchants' Union Insurance Company, de-

fendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*R. E. Halsell* for appellant.

*Mayes & Mayes, Price & Price, R. H. & J. H. Thompson and Clayton D. Potter* for appellee.

[276] *COOK, J.*—It appears from the record before us that appellant filed a bill of complaint in the chancery court of Jones county, alleging that he was the owner of certain described real estate and, being desirous of borrowing five hundred dollars, he applied to the Merchants' Union Insurance Company, appellee, for a loan, offering said real estate as security for the payment of the borrowed money. It is also alleged that appellee loaned him the money taking, as security, a mortgage on the land, the loan to be paid in monthly payments fixed by the contract, and the interest charged being at the rate of ten per cent per annum. The bill charges that the rate of interest which he contracted to pay is usurious.

The bill admits that appellee is a building and loan association, within the definition of section 2, chapter 167, of the Laws of 1912, but charges that said chapter is [277] invalid, because in violation of section 90 of the Constitution, providing that the Legislature shall not pass "local, private, or special laws . . . regulating the rate of interest on money." The bill prays for a cancellation of the contract, and for an injunction restraining appellee from attempting to enforce same. A demurrer was interposed and sustained.

The question presented by the briefs of counsel is the validity of chapter 167 of the Laws of 1912, entitled "An act providing for the organization, regulation and supervision of domestic and foreign building and loan associations or domestic or foreign corporations, whose business is loaning money on real estate, to be repaid in monthly installments of principal and interest." This act provides in some detail the method for the supervision and regulation of the associations and corporations mentioned therein. Section 2 of the act is as follows: "The term 'building and loan association,' as used in this act, shall apply to and include domestic and foreign corporations, companies, savings associations, societies or associations organized for the purpose of enabling its members, or borrowers who are not members, to acquire real estate, make improvements thereon, remove incumbrances therefrom or loan money to be repaid in monthly installments, or for the accumulation of a fund to be returned to its members who do not obtain

advances thereon." Section 9 of the act reads thus: "All associations, whether foreign or domestic, now organized, or that may hereafter be organized, shall be permitted to contract for loans to its members, or to applicants or borrowers who are not members in this state at a rate of interest not to exceed ten per cent per annum, payable in equal monthly installments for the average time or duration of such loans, but to not be of less duration than two years."

It is urged by appellee that the act in question is neither a local, private, nor special law, but is a general [278] law applicable to all who come within the classification prescribed by section 2. For the purpose of this decision it may be admitted that the business of a building and loan association falls within a class peculiar to itself, and that the Legislature, in the exercise of the police power, could confer upon such associations the privilege of charging a greater rate of interest upon its money than others are permitted to contract for. What are the distinguishing features of a building and loan association, which places this sort of organization in a class to itself? "The building association, as now existing, is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members, and continuing their fixed periodical installments in addition, all of which payments, together with the nonborrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of a member into the society, and such other revenues, go into the common fund until such time as that the installment payments and profits aggregate the face value of all the shares in the association, when the assets, after payment of expenses and losses, are prorated among all members, which in legal effect cancels the borrower's debt, and gives the nonborrower the amount of his stock." Thompson on Building Associations, sec. 2; 6 Cyc. 120.

Mr. Endlich, in section 1 of Law of Building Associations, has this to say: "The building association is an institution in modern society. Its plan was designed to meet the wants and accommodate itself to the peculiarities of men whose little earnings can be only slowly raised to an effective bulk. It is a creature of legislative [279] policy, and not of legislative caprice. In its essential plan and nature, it is the same all over the world, springing from the same consid-

erations, ministering to the same necessities, achieving the same result. The similarity existing between statutes and usages relating to building associations in the various states and countries is neither accident nor merely imitation. It is at once the evidence of the recognition of identical requirements of society in the various communities."

Section 2 of the act under consideration does not confine the operations of the associations and corporations defined thereby to its members, but confers a power to loan to "borrowers who are not members." In other words, the building and loan association defined by the act is a new kind of *building association*, in no sense different from corporations and persons following the business of lending money on real estate, except it is not usual with banks and individuals to make contracts providing for monthly installment payments.

A building and loan association proper is composed of its members, and its funds are accumulated from payments made by its members, and are loaned to its members to enable them to build or improve their homes. It appears that appellant was not a member, but merely a borrower, and so far as the record discloses there is no pretense that the money was loaned to enable him to buy or improve real estate.

The facts of this case illustrate the character of the legislation we are here considering. Stripped of details, and of its regulation, supervision, and license features, we find an effort to confer special immunities and privileges upon certain defined associations engaged in the ordinary business of loaning money. This is to be accomplished by naming the preferred class building and loan associations. The law fixes the contractual limit of interest charges, and it was not within the power of the Legislature to exempt, by special act, the associations [280] and corporations defined from the general law, under the guise of an artificial and purely imaginary special classification of the preferred class.

Reversed and remanded.

#### OPINION ON SUGGESTION OF ERROR.

(July 14, 1913.)

COOK, J.—When the original opinion was filed in this case, the court was of opinion that chapter 167 of the Laws of 1912 violated section 90, par. "d," of the Constitution of the state. It is suggested that we erred, and it is urged that we misinterpreted the act in question; that we failed to give a proper value to some of the provisions of the act.

The gist of the original opinion is embraced in the last two paragraphs of same, viz.:

"The facts of this case illustrate the character of the legislation we are here considering. Stripped of details, and of its regulations, supervision, and license features, we find an effort to confer special immunities and privileges upon certain defined associations, engaged in the ordinary business of loaning money. This is to be accomplished by naming the preferred class building and loan associations.

"The law fixes the contractual limit of interest charges, and it was not within the power of the Legislature to exempt, by special act, the associations and corporations defined from the general law, under the guise of an artificial and purely imaginary classification of the preferred class."

Undoubtedly the Legislature has the power to define a building and loan association, and our former decision does not question this power; but we then thought that the definition of the statute was arbitrary and unreasonable, for the purpose of evading the letter and spirit of section 90 of the Constitution. It seemed to us that the associations bearing the statutory label were in no [281] essential particular different from all lenders of money upon the security of real estate, except in the monthly payment feature. Section 90 is both prohibitory and mandatory; local, private, or special laws shall not be passed by the Legislature in the enumerated cases, and the Legislature must pass general laws governing the subjects named.

We said the Legislature obeyed the constitutional mandate by passing general laws "regulating the rate of interest on money," and by chapter 167 of the Laws of 1912, the Legislature attempted, by arbitrary and unreasonable classification, to nullify the constitutional prohibition. This conclusion is challenged by the suggestion of error, and we will now proceed to examine the question anew.

The act under consideration, in its first section, places all building and loan associations now organized, or hereafter to be organized, under the supervision of the state auditor. Section 2 defines building and loan associations. Section 3 provides for the issuance of the stock of such associations, and how the same may be paid for. Section 4 is as follows: "Foreign building and loan associations and savings associations whose business is to loan money on real estate for a period of not less than two years, to be repaid, principal and interest, in equal monthly installments, may be admitted to do business in this state upon compliance with the conditions of this act."

Sections 5, 6, and 7 relate to the supervisory features of the act; section 8, how unpledged stock may be withdrawn. Section 9 reads this way, viz.: "All associations, whether foreign or domestic, now organized,

or that may hereafter be organized, shall be permitted to contract for loans to its members, or to applicants or borrowers who are not members, in this state, at a rate of interest not to exceed ten per cent per annum, payable in equal monthly installments for the average time or duration of such loans, but to not be of less duration than [282] two years." Section 10 and 11 contain the penal parts of the law.

The distinguishing characteristics of the associations mentioned in the act are: (a) Lending money on real estate; (b) loans to be payable in equal monthly installments for the average time or duration of such loans; (c) loans not to be of less duration than two years; (d) the associations are placed under the supervision of the state. Thus it appears that the right to do business and collect a rate of interest greater than the general law authorizes depends upon three conditions not imposed upon ordinary loans of money, viz.: (1) The security must be real estate; (2) the loans must not be payable in less than two years; and (3) loans to be paid in equal monthly installments.

In the original opinion the only condition noted by us was the monthly payments, and we then believed that the supervision reserved in the state was merely a detail tacked on as an excuse for the granting of special privileges to a fictitious class not enjoyed by the banks and flesh and blood lenders of money. We missed the other distinguishing feature of the law requiring loans to be of not less than two years' duration, which we have now come to believe is a requirement of prime importance, which differentiates the business of these associations from any other class. After a careful reconsideration of the act in all of its details, and in its entirety, we have reached the conclusion that our former views were entirely too narrow, and that we confined the power of the Legislature within restricted bounds not justified by the well recognized rules for the construction of statutes.

We now believe that there were reasons which justified the classification made by the law, and that the act is not repugnant to section 90 of the Constitution, and we therefore affirm the lower court, and decree here that the bill be dismissed.

#### NOTE.

#### Constitutionality of Statutes Exempting Building and Loan Associations from Usury Laws.

In accord with the decision in *Spithover v. Jefferson Bldg. etc. Assoc.* 225 Mo. 660, 20 Ann. Cas. 1248, the majority of the recent cases hold that statutes exempting building

and loan associations from the operation of usury laws are constitutional. *Mulrooney v. Irish-American Sav. etc. Assoc.* 249 Mo. 629, 155 S. W. 804; *Spies v. Southern Ohio Loan, etc. Co.* 24 Ohio Cir. Ct. Rep. 40. And see the reported case. *Compare Louisville v. Kuntz*, 104 Ky. 584, 47 S. W. 592; *The Safety Bldg. etc. Co. v. Ecklar*, 106 Ky. 115, 50 S. W. 50. Thus in *Mulrooney v. Irish-American Sav. etc. Assoc.* supra, the court said: "The unconstitutionality of certain sections of our law governing building and loan associations, . . . is urged by appellant. This point, since the appeal herein was taken, and since the order of transfer was made by the St. Louis Court of Appeals, has been decided adversely to plaintiff's contention in the case of *Spithover v. Jefferson Bldg. etc. Assoc.* 225 Mo. 660. This is a well-considered case, with which we are not inclined to differ, but approve all that is said in that case upon the facts involved." So in *Spies v. Southern Ohio Loan, etc. Co.* supra, *overruling Mykrantz v. Globe Bldg. etc. Assoc.* 10 Ohio Cir. Dec. 250, the court said: "We have not time to discuss this case at length, but we have investigated this matter fully and carefully under the decisions of the Supreme Court, and are satisfied that the decisions of the Supreme Court are in favor of the companies. We have heretofore sustained cases in which the building and loan association law has been held constitutional; and now sustain these charges in this case as being reasonable under a constitutional law."

On the other hand in the *Safety Bldg. etc. Co. v. Ecklar*, 106 Ky. 115, 50 S. W. 50, a statute exempting building and loan associations from the operation of the general usury laws was held to be unconstitutional as conferring special privileges, etc., on one set of men as against other men. The court said: "In this case we are asked to review the question of usury under our building and loan statute. We have the advantage of the brief of one who is familiar, not merely with the legal aspects of his client's cause, but familiar as well with the practical working of a successfully conducted modern building and loan association,—so successful indeed, that the association, in a long course of business, has never declared less than a 13 per centum dividend. The real plea offered as a reason for a revision and reversal of the *Simpson* case [101 Ky. 496] (19 Ky. L. Rep. 1176) [41 S. W. 570, and 42 S. W. 834] is that the statute, as understood generally, has afforded an unusually profitable field for the investment of money secured by mortgage on real estate, and the opportunity, after legal advice, has been seized by thousands of investors. We do not mean to say that the advantages secured to the borrower by this system of investments has not been urged, but, with can-

dor, counsel has conceded that the borrower pays excessive interest for these advantages. . . . It was in view of our conviction that these associations were exercising powers far beyond those which could be exercised as building and loan associations proper, and which placed them, in our judgment, on a level with other corporations engaged in loaning money and dealing in stocks, that induced us, in the Simpson case, to deny them the right to collect special and usurious rates of interest on their loans. The question, in a sense, was one of fact as well as one of law. If we were right in the assumption that these associations were so engaged under legislative authority so empowering them, then the legislature, we declared, was incompetent to confer such authority, and, we might have added, incompetent to make such a vicious, arbitrary and unnatural classification. We assert it to be elementary that the true test whether a law is a general one, in the constitutional sense, is not alone that it applies equally to all in a class—though that is also necessary—but in addition, there must be distinctive and natural reasons inducing and supporting the classification. A law does not escape the constitutional inhibition against being a special law merely because it applies to all of a class arbitrarily and unreasonably denied. . . . And, moreover, to the extent that such powers are conferred, the legislature thereby destroyed the distinctive marks which characterize building and loan associations. And when on this hybrid it attempted to confer special privileges, it went beyond its constitutional power.”

In a number of recent cases the courts have applied statutes exempting building and loan associations from the operation of usury statutes, without questioning their constitutionality. *Sosa v. Pettaway*, 67 Fla. 18, 64 So. 433; *McIntosh v. Thomasville Real Estate*, etc. Co. 138 Ga. 128, Ann. Cas. 1914C 1302, 74 S. E. 1088; *Moore v. Calvert Mortg. etc. Co.* 13 Ga. App. 54, 78 S. E. 1097; *German American Sav. etc. Bldg. Assoc. v. Trainor*, 185 Ill. App. 345; *Mississippi Bldg. etc. Assoc. v. McElveen*, 100 Miss. 16, 56 So. 187; *Holmes v. Royal Loan Assoc.* 166 Mo. App. 719, 150 S. W. 1111; *Holmes v. Webb City Bldg. etc. Assoc.* 189 Mo. App. 95, 174 S. W. 122; *New Bern Bldg. etc. Assoc. v. Blalock*, 160 N. C. 490, 76 S. E. 532; *Lindsay v. Chickasha Bldg. etc. Assoc.* 39 Okla. 12, 130 Pac. 570; *Stoddard v. Myers*, 52 Pa. Super. Ct. 179; *Stoddard v. Jarrett* (W. Va.) 85 S. E. 251; *Guertin v. Sansterre*, 27 Can. Sup. Ct. 522.

## THE ZAMORA.

England—Privy Council—April 7, 1916.

[1916] 2 A. C. 77.

### War — Prize — Effect of Orders in Council.

A prize court is required to administer the rules of international law, and royal orders in council cannot be accepted as a binding declaration of that law.

### Right to Requisition Neutral Property.

A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

[See note at end of this case.]

[78] Appeal from an order of the Prize Court (England); reported [1916] P. 27.

The appeal related to a cargo of about 400 tons of copper shipped at New York on board the Swedish steamship *Zamora* by the American Smelting and Refining Company, and consigned to the appellants, the Swedish Trading Company, of Stockholm.

The *Zamora* sailed on March 20, 1915, and on April 8 was stopped by a British cruiser between the Faroe and the Shetland Isles, and a prize crew was put on board. The *Zamora* was taken to Kirkwall to be searched, and thence to Barrow-in-Furness. On April 19, 1915, a writ in prize was issued claiming a decree of condemnation of the ship and cargo on the ground that the cargo was as to more than one-half thereof contraband of war; or, in the alternative (under an Order in Council of March 11, 1915, framing “Reprisals for restricting further the commerce of Germany”), for an order for the detention and/or for the sale of the cargo, on the ground that the ship sailed from a port other than a German port after March 1. [79] 1915, having on board cargo which had an enemy destination or was enemy property. Thenceforth the ship and cargo remained in the custody of the marshal pending the hearing of the cause upon the judgment in which their condemnation or release would depend.

At the instance of the War Department a summons was then taken out by the Procurator-General for an interlocutory order that the copper should be released and delivered up to the Crown under Order XXIX. r. 1, of the Prize Court Rules, 1914, as amended by an Order in Council of April 29, 1915, upon an undertaking to be given by the proper officer of the Crown to pay into Court the appraised value of the copper in accordance with r. 5 of the Order.<sup>1</sup>

The appellants objected that the provisions of Order XXIX. material to the present question violated the law of nations, and that the Prize Court ought not to act upon them.

The summons, which was adjourned into Court for argument, was heard by the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans).

On June 14, 1915, his Lordship made an order that the copper should be released and delivered to the Crown, and reserved his statement of reasons to a subsequent date. On June 21 he gave the reasons for his decision. He held that the order could be made under the inherent powers of the Prize Court without infringing the law of nations, as well as under the powers conferred by the Order in Council under which Order XXIX. had been made, and that the appellants were not entitled to have the property retained in specie until adjudication.

*Sir Robert Finlay, K. C., Roche, K. C., Leslie Scott, K. C., Balloch and Baty* for appellants.

*Sir Frederick Smith, A.-G., Sir George Cave, S.-G., Branson and C. R. Dunlop* for respondent.

*Botterell & Roche*, solicitors for appellants.

*The Treasury Solicitor*, solicitor for respondent.

[88] LORD PARKER OF WADDINGTON.—On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. It is admitted, on the one hand, that the copper

was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was by means of transshipment or otherwise, in fact, destined for the enemy.

On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President, at the instance of the Procurator-General, made an order under Order XXIX. r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order XXIX. r. 5. This appeal is from the President's order of June 14, 1915.

It will be convenient in the first place to consider the precise terms of Order XXIX. of the Prize Court Rules. In so doing it must be borne in mind that though the Order in terms applies to ships only, it is by virtue of Order I. r. 2, of the Prize Court Rules equally applicable to goods. The first rule of Order XXIX. provides that where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition, [89] on behalf of his Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given in accordance with r. 5 of the Order, the ship shall be released and delivered to the Crown. The 3rd rule of the Order provides that where in any case of requisition under the Order it is made to appear to the judge on behalf of the Crown that the ship is required for the service of his Majesty forthwith, the judge may order the same to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown is to be fixed by the judge under r. 4 of this Order. The 5th rule of the Order provides that in every case of requisition under the Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship or of the amount fixed under r. 4 of the Order, as the case may be, at such time

<sup>1</sup>Order XXIX.: "(1) Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with rule 5 of this Order the ship shall be released and delivered to the Crown."

"(5.) In every case of requisition under this Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship . . ."

By Order I. r. 2, "Unless the contrary intention appears the provisions of these rules relative to ships shall extend and apply, mutatis mutandis, to goods."



or times as the Court shall declare that the same or any part thereof is required for the purpose of payment out of Court.

The first observation which their Lordships desire to make on this Order is that the provisions of r. 1 are *prima facie* imperative. The judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule and the judge is, as a matter of law, bound thereby, there is nothing more to be said and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the judge, it will have, if possible, to be construed in some other way. Their Lordships purpose, therefore, to consider in the first place whether the rule construed as an imperative direction to the judge is to any and what extent binding.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894, or *otherwise*. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX. r. 1, construed as [90] an imperative direction to the judge is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the judge is minded in exercise of some discretionary power inherent in the Prize Court to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX. r. 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which

creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships [91] will take that quoted by Lord Mansfield in *Lindo v. Rodney* (1782) 2 Dougl. (Eng.) 612, note, 614, note, as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purpose accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while

dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other [92] or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story, J. in the case of *The Invincible*, 2 Gall. 29, 44, 13 Fed. Cas. No. 7,054, "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long

been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of [93] justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Sillesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majes-

ty's Courts of justice, which are equally open and indifferent to foreigner [94] or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in *re minime dubia* by all the tribunals and afterwards by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of prize . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." See *Collectanea Juridica*, vol. 1, pp. 138, 147, 152. This report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox*, *Edw. Adm.* 311; 2 *Eng. P. C.* 61. The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made [95] by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law

of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy*, *Edw. Adm. (Eng.)* 122.

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in *The Maria* 1 *C. Rob.* 237, 297; 1 *Eng. P. C.* 152, 153, a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct the Court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation: see *The Franciska*, 10 *Moo. P. C.* 37; 2 *Eng. P. C.* 346. Moreover, in *The Lucy*, *Edw. Adm. (Eng.)* 122, above referred to, Lord Stowell had, in effect, refused to give effect to the Order in Council on which the captors relied.

[96] Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore (*International Law*, 3rd. ed. vol. 3, s. 436). It is said to have been approved by Story J. in the case of *Maisonnaire v. Keating*, 2 *Gall.* 325, 16 *Fed. Cas. No.* 8,978, but it will be found that Story, J.'s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the Courts of other nations. He is in effect repeating the opinion he expressed in the case of *The Invincible*, 2 *Gall.* 29, 13 *Fed. Cas. No.* 7,054, to which their Lordships have already re-

ferred. An act, though illegal by international law, will not on that account be justifiable in the tribunals of another Power—at any rate, if expressly authorized by order of the Sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate prior to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act, 1864, confers such a power. Under that Act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The Act, however, by s. 55, while saving the King's prerogative on the one hand, saves, on the other hand, the jurisdiction of the Court to decide judicially and in accordance with international law. Subject, therefore, to any express provisions contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are (1.) those contained in s. 13 (now repealed and superseded by s. 3 of the Prize Court Act, 1894), conferring a power of making rules as to the practice or procedure of Prize Courts, and (2.) those contained in s. 53, conferring power to make such orders as may be necessary for the better execution of the Act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question the law therefore remains the same as it was before the Act, nor has it been affected by the substitution under the Supreme [97] Court of Judicature Acts, 1873 and 1891, of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown,

which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of *The Odessa* [1916] A. C. (Eng.) 145, the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or admiralty droits are now made part of the Consolidated Fund, and do not replenish the Privy Purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. Thus, an Order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter the blockaded [98] ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established: see *Wheaton's International Law*, 4th English ed. pp. 25 and 26.

On this part of the case, therefore, their Lordships hold that Order XXIX. r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the ves-

sel or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act, 1893, and on reference to that Act it will be found inapplicable to Orders in Council, the validity of which depend on an exercise of the prerogative. It is reasonable, therefore, to assume that the words "or otherwise," contained in the Order in Council, refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the Court as to the sale or realization of property in its custody pending decision of the question to whom such property belongs. It cannot, in their Lordships' opinion, be held that the Court has any such inherent power as laid down by the President in this case. [99] The primary duty of the Prize Court (as indeed of all Courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realization is confined to cases where this cannot be done, either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the Court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the Court in directing a sale of the res merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

It remains to consider the third, and perhaps the most difficult, question which arises on this appeal—the question whether the Crown has, independently of Order XXIV. r. 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the Court as to their condemnation or release. In arguing this question the Attorney-General again laid considerable stress on the Crown's prerogative, referring to the recent decision of the Court of Appeal in this country in *Matter of Right* [1915] 3 K. B. (Eng.) 649. There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a Court which administers international law. The fact, however,

that the Crown possesses such a right in this country, and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent Power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation.

In support of the former alternative, which is apparently accepted [100] by Albrecht (*Zeitschrift für Völkerrecht und Bundesstaatsrecht*, VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent Power ought, according to international law, to render it subject to the municipal law of this jurisdiction. The argument is certainly plausible and may in certain cases and for some purposes be sound. In general, property belonging to the subject of one Power is not found within territory of another Power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the *lex loci*. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of any one whose consent might impose obligations on the owner. Nevertheless, even here, the vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs, or may differ, from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give

compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be [101] ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognized the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German war of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized British ships and sunk them in the Seine. They also seized certain Austrian rolling stock and utilized it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one of necessity," and he referred to Phillimore's *International Law*, 3rd ed. vol. 3, s. 29. He did not rely on the municipal law of either France or Germany.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" (*Law of Nations*, book vi. s. 7), and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient (*Le Droit des Neutres*, p. 154, 2nd ed. Berlin, 1876). It is difficult to

see how the acts of [102] the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilize Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand (*Droit maritime de l'Europe*, vol. 1, ch. iii. art. 5, p. 292), thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent Power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli (*Droit International*, s. 795 bis) and in the only British prize decision dealing with this point.

The case to which their Lordships refer is that of *The Curlew*, Stew. Vice-Adm. Rep. (Nova Scotia) 312. The ships in question, with their cargoes, had been seized by the British authorities as prize in the early days of the war with the United States of America, which broke out in 1812, and had been brought into port for adjudication. The Lieutenant-Governor of the province and the Admiral and Commander-in-Chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Dr. Croke lays it down that though as a rule the Court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defense supersedes and dispenses with the usual modes of procedure. He held that such a case had in fact arisen, and accordingly granted the prayer of the petitioners: (1.) as to certain small arms "very much and immediately needed for the defense of the province;" (2.) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax; and (3.) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into Court.

It should be observed that with regard to ships and goods of neutrals in the custody of the Prize Court for adjudication there [103] are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is sus-

pendent. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail, that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. The 25th section of the Naval Prize Act, 1864, now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the Crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In *The Memphis*, Blatchf. Prize Cas. 202, 16 Fed. Cas. No. 9,412; in *The Ella Warley*, Blatchf. Prize Cas. 204, 8 Fed. Cas. No. 4,370, and in *The Stephen Hart*, Blatchf. Prize Cas. 387, 22 Fed. Cas. No. 13,364, Betts, J. allowed the War Department to requisition goods in the custody of the Prize Court and required for purposes in connection with the prosecution of the war. In the case of *The Peterhoff* (1863) Blatchf. Prize Cas. 381, 19 Fed. Cas. No. 11,023, he allowed the vessel itself to be similarly requisitioned by the Navy Department. The reasons of Betts, J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law, or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

[104] On March 3, 1863, after the decisions above referred to, the United States Legislature passed an Act (Congress, 1863, Sess. III. c. 86) whereby it was enacted (s. 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorized to take any captured vessel, any arms or munitions of war, or other material for the use of the Government, and when the same should have been taken, before being sent in for adjudication or afterwards, the Department for whose use it was taken should deposit the value of the same in the Treasury of the

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United States, subject to the order of the Court in which prize proceedings might be taken, or, if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this Act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the Act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their Lordships regard the passing of the Act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts, J. In the second place, it tends to weaken all subsequent decisions of the United States Prize Courts on the right to requisition vessels or goods, as authorities on international law, for these Courts are bound by the provisions of the Act, whether it be in accordance with international law or otherwise. In the third place, their Lordships are of opinion that the provisions of the Act go beyond what is justified by international usage. The right to requisition recognized by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances and for certain purposes only. Further, international usage requires all captures to be brought promptly into the Prize Court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the Court, and not the Executive of the belligerent State, to decide whether the right claimed can be lawfully exercised in any particular case.

[105] It appears that the British Government, shortly after the Act was passed, protested against the provisions of the 2nd section. The grounds for such protest appear in Lord Russell's despatch of April 21, 1863. The first is the primary duty of the Court to preserve the subject-matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures, known at the time when they are made to be unwarrantable by law, merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exer-

cised before the property seized is brought into the Prize Court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the Court be exercised through the Court and be confined to cases in which there is really a question to be tried, and the vessel or goods cannot, therefore, be released forthwith, the objection is obviated.

It further appears that the United States took the opinion of their own Attorney-General on the matter (*Opinions of Attorneys-General of the United States*, vol. 10, p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney-General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the Court below upon what is known as "the right of pre-emption," but in their Lordships' opinion these cases have little if any bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such [106] stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase-money paid into Court. It is obvious, therefore, that this "right of pre-emption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect, the question whether the vessel or goods should or should not be condemned as prize.

On the whole question their Lordships have come to the following conclusion: A belligerent Power has by international law the right to a requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their Lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security, as [107] conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see *Warrington, L. J.* in the case of *Matter of Right* [1915] 3 K. B. (Eng.) 666, already cited), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrat-



ing at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordships' opinion, the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard of course to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

[108] With regard to the third limitation, it is based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the Court will at the instance of any party aggrieved compel them so to do. From the moment of seizure the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a Court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the Court, but because the judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the Director of Army Contracts, following the words of Order XXIX. r. 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances the normal course would be to discharge the order appealed from without prejudice to another application by the Procurator-

General supported by proper evidence. But the copper in question has long since been handed over to the War Department, and, if not used up, at any rate cannot now be identified. No order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure the proper course would have been to give the appellant, in case his claim to the copper be ultimately allowed, leave to apply to the Court for any damage he may have suffered by reason of its having been taken by the Government under the order.

[109] It was, however, suggested that the procedure prescribed by the existing Prize Court Rules precludes the possibility of the Court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. This result would, in their Lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the Prize Court Rules ought to be construed so as to avoid it, and, in their Lordships' opinion, the Prize Court Rules can be so construed.

It will be observed that, by Order I. r. 1, the expression "captor" is, for the purposes of proceedings in any cause or matter, to include "the proper officer of the Crown," and "the proper officer of the Crown" is defined as the King's Proctor or other law officer or agent authorized to conduct prize proceedings on behalf of the Crown within the jurisdiction of the Court.

It is provided by Order II. r. 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I. r. 2) goods shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II. r. 7, in a cause instituted against the "captor" for restitution or damages the writ is to be in the Form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted against the proper officer of the Crown, any argument to the con-

trary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule No. 5 of the Prize Court Rules under the Order in Council dated March 11, 1915. It is not, however, necessary to decide this point.

Order v. provides for proceedings in case of failure to proceed [110] by captors. Under rr. 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors or the proper officer of the Crown who ought to have instituted proceedings. Under r. 3, however, which contemplates that proceedings have been instituted, it is provided that, if the captors (which, in the case of an action for condemnation, must of course mean the proper officer of the Crown) fail to take any steps within the respective times provided by the rules, or, in the opinion of the judge, fail to prosecute with effect the proceedings for adjudication, the judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order vi. proceedings may be discontinued by leave of the judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This again contemplates that in an action for condemnation the claimant may have a right to costs and damages, and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII. is concerned with releases. They are to be issued out of the registry and, except in the six cases referred to in r. 3, only with the consent of the judge. One of the excepted cases is when the property is the subject of proceedings for condemnation, that is, of proceedings in which the Crown by its proper officer is plaintiff, and when a consent to restitution signed by the captor (again by the proper officer of the Crown) has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By r. 4 no release is to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the judge

In the cases last [111] referred to "captor" must again mean the proper officer who is suing on behalf of the Crown.

Order XLIV. deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the judge. In cases of appeals from a condemnation, or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favour of the Crown, and, if costs can be awarded in favour of, it follows that they can similarly be awarded against the Crown.

It is to be observed that, unless the judgment or order appealed from be stayed pending appeal, r. 4 of this Order contemplates that persons in whose favour it is executed will give security for the due performance of such Order as His Majesty in Council may think fit to make. Their Lordships were not informed whether such security was given in the present case.

In their Lordships' opinion, these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten in *Johnson v. Rex* [1904] A. C. (Eng.) 817, subject to exceptions.

Their Lordships, therefore, have come to the conclusion that, in proceedings to which under the new practice the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case, is to declare that upon the evidence before the President he was not justified in making the order the subject of this appeal, and to give the appellants leave, in the event of their ultimately succeeding in the [112] proceedings for condemnation, to apply to the Court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

## NOTE.

**Right of Belligerent Power to Requisition Goods of Neutral.**

As is noted in the reported case, several decisions of the United States district court have affirmed the doctrine that a belligerent government has the power to requisition to its own use property of a neutral brought in as a prize, in advance of a condemnation thereof by a prize court. The *Ella Warley*, Blatchf. Prize Cas. 204, 8 Fed. Cas. No. 4,370; The *Memphis*, Blatchf. Prize Cas. 202, 16 Fed. Cas. No. 9,412; The *Peterhoff*, Blatchf. Prize Cas. 381, 463, 19 Fed. Cas. Nos. 11,023, 11,024. See also The *Stephen Hart*, Blatchf. Prize Cas. 387, 22 Fed. Cas. No. 13,364. In the *Ella Warley*, supra, it was said: "The prerogative right of the captors to take the property seized to their own use is modified only in subserviency to the modern law of war, that, in case a judicial confiscation of it is not secured, the captors are responsible over for its value to the lawful proprietor. That responsibility may be secured to the claimant by bail, in court, for its worth, or other equivalent protection to such contingent right. The usage of this court is, to place the value in deposit in the registry of the court, or in the United States treasury, subject to the authority of the court, to be restored and paid to the claimant in case of the acquittal of the property, in place of relying upon individual undertakings or responsibilities therefor."

The federal statute authorizing an appropriation of captured goods by the Secretary of the Navy or the Secretary of War (Act Cong. 1863, c. 86, § 2) commented on in the reported case was repealed in the following year and a substitute enacted (Act June 30, 1864, c. 174, Rev. St. § 4624, 6 Fed. St. Ann. 72). The latter act gives no express authority to take captured property but provides merely that if it is taken the value shall be ascertained and secured in a prescribed manner. In an opinion by the Attorney-General (16 Op. Atty.-Gen. 339) it was held that the act was declaratory of the practice theretofore obtaining, referring to the decisions heretofore cited.

The well-established power of a military commander in hostile territory to requisition the property of private persons in case of military necessity has been held to be applicable to the property of a neutral residing in the enemy's country. *Gallego v. U. S.* 43 Ct. Cl. 444.

The reported case, which declares authoritatively the law of England, upholds the right of requisition so far as it is conferred by international law, but holds that the rights given by that law cannot be extended by a

royal order. It imposes on the right to requisition neutral goods brought in as a prize three limitations, as follows: "First, the vessel for goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable." See also *The Curlew Stew.* Vice-Adm. Rep. (Nova Scotia) 312, stated at length in the reported case.

MYERS

v.

BENDER.

Montana Supreme Court—January 20, 1913.

46 Mont. 497; 129 Pac. 330.

**Attorneys — Contract for Contingent Fees — Construction — Value of Land Recovered.**

Under a clause of a contract between an attorney and client, providing that the attorney should receive 12½ per cent of the value of all the land and money recovered by compromise or in any manner whatsoever in an action pending against a railroad company over the title to certain land, the attorney is entitled to 12½ per cent of the value of all lands to which his client secured title by a compromise agreement, though such title was obtained through a relinquishment by the railroad company to the government, in order that the client might obtain title directly from the government.

**Same.**

Under such clause the attorney is entitled to recover the 12½ per cent in money and not in land, though the preceding clause provided that plaintiff should receive "12½ per cent of all land and money recovered."

**Same.**

The attorney's compensation in such case became due when the compromise agreement was signed; and hence the 12½ per cent is based on the value of the land at such time, though the patent from the government was not obtained until a later date.

**Interest on Attorneys' Fees — From What Time Computed.**

Failure of a client to pay an attorney his fee when it became due under the contract between them is "a breach of an obligation

arising from contract," within Rev. Codes, § 6048, providing that the measure of damages for such a breach, unless otherwise expressly provided, is the amount which will compensate the aggrieved party for the detriment approximately caused thereby, or likely to result therefrom; and hence the measure of damages for such breach was the principal amount due, together with interest at the legal rate up to the time of trial, allowing credit for payments made at their respective dates.

[See note at end of this case.]

**Contingent Fee Contract — Parol Evidence to Explain.**

In an attorney's action for compensation under a contract entitling him to a certain per cent of the value of land recovered, estimated at the time of the signing of a compromise agreement, evidence of the value of the land at a time subsequent to such agreement is improper.

**Appeal — Objection Not Made Below.**

An objection to the admission of evidence cannot be considered on appeal when not made below.

**Evidence — Value of Land — Availability for Particular Use.**

In an action for a certain per cent of the value of land as an attorney's fee, evidence that the land was available for city lot purposes is competent to establish its market value at the time the debt accrued, though it was not then being used for such purposes.

Appeal from District Court, Custer county:  
HENRY, Judge.

Action for services. George W. Myers, plaintiff, and Henry Bender, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

*George W. Farr* for appellant.

*Donald Campbell* and *Fred H. Hathhorn* for respondent.

[502] BRANTLEY, C. J.—Plaintiff brought this action on April 8, 1908, to recover a judgment for services as an attorney and counselor at law, rendered to the defendant in an action in the United States district court, at Helena, Montana, in which the defendant was plaintiff and the Northern Pacific Railway Company and others were [503] defendants. The purpose of that action was to obtain a decree declaring the railway company a trustee of the title to lands herein-after described, lying within the limits of the federal grant originally made to the Northern Pacific Railroad Company, for the benefit of the defendant herein, he claiming that he had made settlement upon them, and filed his declaratory statement prior to the definite location of the line of the railway, and that the patent under which it then held the en-

tire section, which included the lands embraced in his settlement, had been issued to it by the federal authorities in violation of his right as a settler. At the time the action was brought it was verbally agreed that the plaintiff should receive as his compensation \$150 in cash and twelve and one-half per cent of the value of any lands recovered in the action or to which title should be secured by suit, compromise, arbitration or otherwise. Subsequently the agreement was reduced to writing and signed by the parties. The writing bears date January 16, 1906, the action being then about to be determined by compromise agreement. Omitting formal parts, it reads as follows:

"The said G. W. Myers agrees to use due diligence in prosecuting said suit to a final determination in said court or by compromise settlement out of court; and it is agreed and understood by both parties hereto that the said G. W. Myers is to be paid for such legal services by said Henry Bender the sum of \$150 cash, and is to be further paid by the said Henry Bender twelve and one-half per cent of all the land and money recovered either by suit or by compromise in said case, this contract includes all of plaintiff's claims known as D. S. No. 3621, comprising the west one-half of the southwest one-fourth, and the southeast one-fourth of the southwest one-fourth, and lot Four of Section 27 in Township 8 North of Range 47 East, containing 133 and 36-100 acres, intending hereby that said G. W. Myers is to be paid for such legal services the said sum of \$150, and twelve and one-half per cent of the value of all the land and money so recovered either by suit, compromise or arbitration or otherwise in any manner whatsoever; and should land other than the above described be obtained or recovered by said suit, [504] compromise or arbitration then the said G. W. Myers is to further receive for such legal services twelve and one-half per cent of the value of all such land so obtained or recovered and it is understood and agreed by both parties hereto that the valuation to be placed upon any part of the claim known as D. S. No. 3621 that may be recovered is not to be less than \$75.00 per acre, and further the said Henry Bender agrees to pay all expenses connected with said suit. It is further agreed to and understood that the said \$150 is to be paid before the termination of said case and if not so paid before termination or settlement of said case then to be paid out of any money or land so obtained or recovered at the time of settlement of the said case."

On February 17, 1906, an agreement was reached between Bender and the railway company, its codefendants being its grantees of a part of the lands in controversy, and one of its purposes in defending the action being

to protect them as such. By the terms of the compromise Bender agreed to waive his claim to the south half of the southwest quarter of section 27, by executing and delivering to the company a quitclaim deed, and to dismiss the action. The railway company on its part agreed to quitclaim to the United States the northwest quarter of the southwest quarter and lot 4 of said section 27, containing 53.36 acres, and to convey to Bender by warranty deed lot 3 and that portion of lot 2 lying south of a line extending east and west across this lot at a distance of fifty rods south from the north line of the section and parallel therewith, and containing 34.02 acres. The railway company also agreed to pay to Bender \$2,000 in cash. The purpose of the quitclaim by the railway company to the United States was to enable Bender to secure a patent to the 53.36 acres directly from the United States, under the provisions of the Act of Congress approved July 1, 1898 (30 Stats. at Large, p. 597). The agreement was executed, with the result that Bender became vested with title to the 34.02 acres by deed from the railway company dated June 14, 1906, and to 53.36 acres by homestead patent from the United States dated December 5, 1907.

[505] The complaint alleges, in substance, that the plaintiff fully performed the services required by the contract, and that they resulted in securing to the defendant title to lands to the extent of 87.38 acres, together with \$2,000 in cash; that these lands were at the date of the compromise, and ever since have been, of the value of \$75,000; that under the terms of the contract plaintiff became entitled to receive from the defendant the sum of \$9,375 in addition to the sum of \$150, which he was entitled to receive in any event, or a gross sum of \$9,525, and that no part of this has been paid, except the sum of \$916.50, leaving a balance of \$8,609.40, which the defendant has failed and refused to pay, though demand has heretofore been made for payment. Judgment is demanded for this amount with interest at eight per cent per annum from January 12, 1907, the date at which demand was made. The controversy at the trial was as to the value of the lands acquired by the compromise settlement, and hence as to whether plaintiff was entitled to recovery in any amount, the defendant insisting that inasmuch as title to the 53.36 acres was obtained by patent directly from the United States, they constituted no part of the recovery had in the action, and that the evidence as to them should be excluded. The court held that under the terms of the contract the plaintiff was entitled to twelve and one-half per cent of the value of all the lands obtained through the services rendered by him in connection with the settlement, whether title was obtained directly from the railway

company or not. Evidence was also admitted, over defendant's objection, as to such value at any time subsequent to the date at which the compromise was reached and up to the date of the commencement of the action; and the jury were instructed that in determining the amount, if any, which they should find the plaintiff entitled to recover, they should take into consideration the highest reasonable market value of the lands shown by the evidence, at any time from the completion by the plaintiff of his services under the contract until the commencement of the action. The jury found for the plaintiff and awarded him damages in the sum of \$2,244. Judgment was entered accordingly. [506] The defendant has appealed from the judgment and an order denying his motion for a new trial.

The brief of counsel contains many assignments of error upon specific rulings made during the progress of the trial. It will not be necessary to notice them in detail. The principal questions submitted for decision are whether the court correctly construed the agreement, and whether the rule adopted for the ascertainment of damages, as indicated by the admission of the evidence referred to and the instruction submitted to the jury, is the one applicable to this case.

The plaintiff and the defendant both stated that the writing contains the terms of their agreement as it was originally made. The intention is expressed that the plaintiff should, in addition to the cash payment, receive twelve and one-half per cent of the value of all lands to which the defendant should secure title at the final outcome of the action; for the language employed is "intending hereby that said G. W. Myers is to be paid for such legal services the said sum of \$150, and twelve and one-half per cent of the value of all the land and money so recovered either by suit, compromise or arbitration or otherwise in any manner whatsoever." This language clearly indicates that the parties intended to make all the lands obtained by the defendant, in connection with this action, from whatever sources the title might be derived, together with any amount of money paid to him, the basis upon which his contingent compensation should be calculated. The court's construction of the agreement was therefore correct.

The very purpose of the action was to have determined Bender's right to the area covered by his settlement. When the parties came to arrange their compromise, Bender might have taken a conveyance of the 53.36 acres directly from the railway company; for it held title under patent from the United States. Instead of pursuing this course, for some unexplained reason of his own he preferred, as the evidence shows, to obtain title directly from the United States. That he accom-

plished this result by requiring the railway company to relinquish its title under the provisions of the statute so as to put him in position [507] to obtain recognition of his settlement right by the authorities of the land department and the issuance of patent directly to himself, did not render these lands any less a part of the recovery in the action. It was not the intention that the plaintiff should have any interest in the lands recovered, for though it is recited in the agreement that the plaintiff "is to be further paid by the said Henry Bender twelve and one-half per cent of all the land and money recovered," the clause immediately following this and quoted above expresses in explicit terms that the intention was that, aside from the \$150 in cash to be paid in any event, the amount of the additional compensation was made contingent upon the money value of the recovery and was to be payable in money. It is equally clear, from the last clause of the agreement, that whatever amount plaintiff became entitled to receive, he was entitled to receive it when his services had been completed. These were completed when the compromise agreement was effected; for he did not, under the terms of the agreement, assume the obligation to perform any other service than to secure a settlement of the controversy over the title, and this was accomplished by the signing of the compromise agreement. The result of it was that the defendant, so far as plaintiff was concerned, became the owner of the lands in controversy, though he received formal conveyances at times subsequent to the time at which it was signed by the parties. The basis upon which his percentage was to be calculated was, therefore, the value at that time of the lands recovered with the cash payment added. The obligation of the defendant to pay then became absolute, the amount to be paid to be determined by the reasonable market value of the recovery at that time, subject only to the condition that the value of the 53.36 acres, for which patent was thereafter to be obtained, should not be fixed at less than \$75 per acre. The failure of the defendant to pay the amount which thus became due was a breach of his obligation to discharge the contract by payment. "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party [508] aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." (Rev. Codes, sec. 6048.) If the defendant had made full payment upon the completion of plaintiff's services, he would have fully performed his contract. Since he did not make such payment, he is to be held to compensate plaintiff for the detriment

"proximately caused" by the delay. "In the ordinary course of things," the only detriment which could result to him was the loss by plaintiff of the use of the money. Therefore, full compensation for the detriment thus caused is to be measured by the principal amount due, together with interest at the legal rate up to the date of trial, allowing, of course, credit for such payments as have been made, at their respective dates. The court was therefore in error in admitting evidence to show the value of the recovered lands at any time subsequent to the date of the compromise agreement and in directing the jury to consider it in ascertaining the basis for calculating the amount plaintiff was entitled to recover. It is true the complaint alleges a demand on January 12, 1907, and the prayer is for the balance due with interest from that date. Except in so far as by this allegation the plaintiff shortened the time during which he was legally entitled to interest and to this extent diminished the amount which he would otherwise have been entitled to recover, the case should have been submitted to the jury upon the theory we have indicated. The statute embodies the common-law rule, and the authorities generally agree that the damages recoverable in such cases must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. In no case is the plaintiff entitled to recover anything more than he would have received had the contract been performed by the defendant on his part, assuming that it had been performed. (*O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; *Bates v. Diamond Crystal Salt Co.* 36 Neb. 900, 55 N. W. 258; *Mihills Mfg. Co. v. Day*, 50 Ia. 250; *Wells [509] v. Abernethy*, 5 Conn. 222; *Hickok v. W. E. Adams Co.* 18 S. D. 14, 25 N. W. 77; *Ross v. Carter*, 1 Humph. (Tenn.) 415; *Marr v. Prather*, 3 Metc. (Ky.) 196; *Alexander v. Webster*, 6 Md. 359; 1 *Sutherland on Damages*, sec. 50.) Because of the error in this behalf, the defendant must be awarded a new trial.

The Bender lands adjoin the corporate limits of Miles City. It appears that after the title was secured by Bender a part of the lands were platted and made an addition to the city. The lots were then put upon the market for sale. Evidence was introduced tending to show the value of this portion of the lands for city lot purposes. It is argued that the court erred in admitting it. A sufficient answer to this contention is that the evidence went in without objection on the ground now urged; but the objection, if made,

would properly have been overruled. The competency of such evidence to establish market value of land was considered by the supreme court of the territory in the early case of *Montana R. Co. v. Warren*, 6 Mont. 275, 12 Pac. 641. In that case the court said: "Respondent was allowed to prove the value of the land for town lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not as to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not he so used it." The rule thus stated has since been recognized and followed by this court. (*Northern Pac. etc. R. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571; *Sweeney v. Montana Cent. R. Co.* 25 Mont. 543, 65 Pac. 912.)

The contention is made that the evidence is insufficient to sustain the verdict. We shall not undertake to examine it in detail. Very little of it tends to establish definitely the value of any portion of the lands in controversy at or within a year subsequent to the date of the compromise agreement. We shall not presume that the plaintiff on another trial will not be able to show that their value at that time was such as to warrant the jury in awarding him a substantial amount.

[510] The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

Holloway, J., concurs.

Sanner, J., being disqualified, did not hear the argument, and takes no part in the foregoing decision.

#### NOTE.

##### Interest on Attorney's Fees.

Generally, 249.

Rule in Illinois, 250.

Rule in England, 250.

##### Generally.

It may be stated as a general rule that interest on attorney's fees is recoverable from the time they become due and payable. *Morrow v. Pike County*, 189 Mo. 610, 88 S. W. 99; *Adams v. Ft. Plain Bank*, 36 N. Y. 255, reversing 23 How. Pr. 45; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90, affirming 1 Lans. 55; *Carver v. J. S. Mayfield Lumber Co.* 29 Tex. Civ. App. 434, 68 S. W. 711. And see the reported case. See also *Gribble v. Ford* (Tenn.) 52 S. W. 1007. Compare *Louisville Gas Co. v. Hargis*, 33 S. W. 946, 17 Ky. L. Rep. 1190. Thus in *Morrow v. Pike Coun-*

*ty*, supra, it appeared that a contract between an attorney and his client relative to a suit provided that the attorney should "defend said suit to a final determination thereof in the court to courts of last resort to which the same may be taken." A statute provided for interest on money due under a written contract from the time the money is due. It was held that the services under the contract were performed when a final decision was rendered by the supreme court and that the fees for the services performed then became due and drew interest. And in *Carver v. J. S. Mayfield Lumber Co.* supra, an action brought on a note providing for interest and attorney's fees, it was held that "where attorney's fees are included in the judgment they bear interest at the same rate as the principal sum." In *Gribble v. Ford* (Tenn.) 52 S. W. 1007, it was held that as neither the amount of an attorney's fee nor the time for its payment was fixed by agreement it was in the discretion of the court to refuse interest.

Unless the time for the payment of attorney's fees is determined by a contract they become due when demand for payment is made and will thereafter draw interest. *Whitney v. New Orleans*, 54 Fed. 614, 4 C. C. A. 521; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063, practically overruling *Colorado Coal, etc. Co. v. John*, 5 Colo. App. 213, 38 Pac. 399; *Trimble v. Kansas City, etc. R. Co.* 180 Mo. 574, 79 S. W. 678 (citing § 3705 R. S. 1899); *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90, affirming 1 Lans. 55; *Rexford v. Comstock*, 3 N. Y. S. 876; *Gray v. Van Amringe*, 2 Watts & S. (Pa.) 128; *Remington v. Minnesota Eastern R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321; *Whiteway v. Newfoundland* [1897-1903] *Newfoundland L. Rep.* 482, reversing [1897-1903] *Newfoundland L. Rep.* 414. Compare the reported case. And the commencement of a suit is a sufficient demand to start the running of interest. *Mulligan v. Smith*, supra; *Trimble v. Kansas City, etc. R. Co.* supra. In *Whitney v. New Orleans*, 54 Fed. 614, 4 C. C. A. 521, interest on an attorney's fee was allowed from the time the attorney moved for a rule to have his fees determined.

When a client discharges his attorney the compensation of the latter at once becomes due and payable and interest on the charges begins to run. *Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112; *Com. v. Terry*, 11 Pa. Super. Ct. 547. See also *Hover v. Heath*, 3 Hun (N. Y.) 283, 5 Thomp. & C. 488; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90, 1 Lans. 55. Compare *Louisville Gas Co. v. Hargis*, 33 S. W. 946, 17 Ky. L. Rep. 1190. Thus in *Com. v. Terry*, supra, it was said: "The action of the client put an end to the employment of his attorneys and determined the services and expenses to be con-

sidered in fixing the compensation which they were equitably entitled to receive. The client having dissolved his relations with his attorneys, the latter were at once entitled to be paid for the services which they had rendered. It was the duty of the client to pay, and, having failed to do so, he was liable for interest on the amount due and unpaid." In *Boyd v. G. W. Chase, etc. Mercantile Co.* 135 Mo. App. 115, 115 S. W. 1052, it was held that the same rule applies where the client performs some act which is equivalent to a termination of the relation of attorney and client. In that case it appeared that an attorney had a contract with a client by which he was to receive a percentage of the amount recovered and the attorney served notice of the contract on the defendant in accordance with a statute creating attorney's liens. The client compromised the cause of action without the knowledge of the attorney by an agreement obligating the other party to pay the attorney's fee. In an action for the recovery of the attorney's fees it was held that interest was to be computed from the time of the compromise.

It has been held in several cases that no interest should be allowed on attorney's fees where the demand is unliquidated. *Hadley v. Ayres*, 12 Abb. Pr. N. S. (N. Y.) 240; *Godfrey v. Moser*, 3 Hun 218, *affirmed* 66 N. Y. 250; *Gallup v. Perue*, 10 Hun (N. Y.) 525.

In the case of *Matter of Edgecombe Road*, 128 App. Div. 432, 112 N. Y. S. 845, it appeared that an attorney was employed under a contract providing for a contingent fee to obtain an award for property which was to be taken under the power of eminent domain. The award in the eminent domain proceeding provided for the allowance of interest. In a proceeding to enforce his lien it was held that the attorney was entitled to interest from the time the property was taken.

In *Gaylord v. Nelson*, 7 Ky. L. Rep. 821, it was held that while the claim of the attorney for a fee in that case was by statute a lien on the judgment, yet it was in form an open account until it was allowed and the allowance or non-allowance of interest was discretionary with the court.

Where an attorney instituted a proceeding to enforce his lien on a fund which had been paid to a city chamberlain to be held by him until it was officially determined to whom it belonged, it was held that all the interest to which the attorney was entitled was that which was received by the chamberlain. *Matter of Heinsheimer*, 164 App. Div. 265, 149 N. Y. S. 631.

It has been held that a judgment for the recovery of attorney's fees properly provides for interest from its date. *Hoyt v. Beach*, 104 Ia. 257, 73 N. W. 492, 65 Am. St. Rep. 461 (*citing* Code 1873 § 2078). See also

*Louisville Gas Co. v. Hargis*, 33 S. W. 946, 17 Ky. L. Rep. 1190.

#### *Rule in Illinois.*

Under the Illinois statute an attorney is not entitled to interest on his fees unless they have been withheld "by an unreasonable and vexatious delay of payment." *Levinson v. Sands*, 74 Ill. App. 273, wherein it was held that the question as to the unreasonable and vexatious delay of payment was one for the jury.

#### *Rule in England.*

In England, Rule 7 of the General Order made under the Solicitors' Remuneration Act of 1881 provides that "a solicitor may charge interest at 4 per cent per annum on his disbursements and costs, . . . from the expiration of one month from demand from the client." In *re McMurdo* (1897) 1 Ch. 119, 66 L. J. Ch. 67, 75 L. T. N. S. 576, 45 W. R. 244. In the case of *In re Maraden*, 40 Ch. D. 475, 58 L. J. Ch. 260, 60 L. T. N. S. 696, 37 W. R. 525, it was held that the rule did not apply where the costs were payable out of a fund.

Formerly the rule seems to have been that a solicitor was not entitled to interest on his bills of costs except by agreement. *Lyddon v. Moss*, 4 De G. & J. 104, 5 Jur. N. S. 637, 7 W. R. 433; *Moss v. Bainbrigge*, 6 De G. M. & G. 292, 43 Eng. Rep. Reprint 1246; *In re Smith*, 9 Beav. 342. See also *Ex p. Philipps*, 1 Deac. 368, 38 E. C. L. 508, 2 Mont. & A. 526. *Compare* *Berrington, etc. v. Phillips*, 1 M. & W. 48, 1 Tyrw. & G. 322, 4 Dowl. 758, 5 L. J. Exch. 127.

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**HOKE ET AL.**

v.

**GLENN ET AL.**

North Carolina Supreme Court—December 23, 1914.

**167 N. Car. 594; 83 S. E. 807.**

#### **Pleadings — Construction as against Demurrer.**

Under the Code rule that pleadings are to be liberally construed, a demurrer cannot be sustained to a complaint if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts for that purpose can be fairly gathered from it, however inartificially it may have been drawn or however uncertain, defective, or redundant may be its statements.



**Charities — Hospital — Liability for Acts of Employees.**

Though a hospital is a "charitable institution" and not within the rule respondeat superior, it nevertheless is liable for injuries to patients resulting from its negligence in the selection of its agents and servants.

[See note at end of this case.]

Appeal from Superior Court, Haywood county: JUSTICE, Judge.

Action for damages. Amelia Hoke et al., plaintiffs, and E. B. Glenn et al., defendants. Demurrer overruled. Judgment for plaintiffs. Defendant Clarence Barker Memorial Hospital appeals. **AFFIRMED.**

[594] Action to recover damages, caused, as the plaintiff alleges, by the negligence of the defendants E. B. Glenn, a physician, and the Clarence Barker Memorial Hospital.

It appears from the complaint that plaintiff was the patient of the defendant Glenn, and that he placed her in the defendant hospital for treatment, where she was at the time of her injury.

The defendant, the Clarence Barker Memorial Hospital, filed a demurrer to the complaint, which was overruled, and it appealed.

*Harkins & Van Winkle* for appellant.

*Smathers & Clark* and *Gilmer & Gilmer* for appellees.

ALLEN, J.—It is the purpose of the Code system of pleading, which prevails with us, to have actions tried upon their merits, and to that end pleadings are construed liberally, every intendment is adopted in behalf of the pleader, and "a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, [595] defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne*, 154 N. C. 472, 70 S. E. 947.

Applying these principles to the pleadings, we are of opinion the demurrer was properly overruled, conceding that the defendant hospital is a charitable institution, and cannot, therefore, be held responsible for the negligent acts of its agents and employees, because the complaint alleges that the hospital, as a corporation, was negligent in that it failed to exercise ordinary care in the selection of its agents, and that the plaintiff was injured

by this negligence, and these facts are admitted by the demurrer.

We had occasion at this term, in *Green v. Biggs*, 167 N. C. 417, 83 S. E. 553, to consider the liability of private hospitals, maintained for profit and gain, to persons committed to their care, and preliminary to the discussion stated as the result of our investigations that "The principle seems to be generally recognized that a private charitable institution, which has exercised due care in the selection of its employees, cannot be held liable for injuries resulting from their negligence, and the rule is not affected by the fact that some patients or beneficiaries of the institution contribute towards the expense of their care, where the amounts so received are not devoted to private gain, but more effectually to carry out the purposes of the charity."

The clear inference from this statement of the law is that there is liability if due care is not exercised in the selection of agents and employees, and this is in line with the weight of authority. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Joel v. Woman's Hospital*, 96 N. Y. 74, and cases collected in note to *Duncan v. Nebraska Sanitarium*, etc. Assoc. Hospital, Ann. Cas. 1913E 1127.

The reasons assigned for the nonliability of charitable institutions for the negligent acts of their employees vary greatly, and are stated very fully in the note to *Parks v. Northwestern University*, 4 Ann. Cas. 105, from which we quote: "In *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 122, 109 Fed. 294, it was said: 'One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able not only to provide for one wounded man, but to establish a hospital for the care of a [596] thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If in

their dealings with their property, appropriated to charity, they create a nuisance by themselves or by their servants; if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders like any other individual or corporation. The purity of their aims may not justify their torts; but if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected.' In *Union Pac. R. Co. v. Artist*, 60 Fed. 365, it was said: 'If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of *respondeat superior* has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of *respondeat superior* no longer applies, because by fair implication he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities or in dispensing the charitable gifts of others intrusted to them to administer.' . . . In *Downes v. Harper Hospital*, 101 Mich. 555: 'If the contention of the learned counsel for the plaintiff be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects and builders, upon whose judgment reliance is placed as to plans and strength of materials; of physicians employed to treat patients, and of nurses and attendants. In this way the trust fund might be entirely destroyed, and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus [597] thwarted by negligence for which the donor is in no manner responsible. If in the proper execution of the trust a trustee or employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards

the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the Legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.'

The Supreme Court of Rhode Island, in a very able and learned opinion in *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 123, 42 L.R.A.(N.S.) 1144, holds that a charitable institution is liable for the negligence of its employees, but the party injured in that case was not a patient; and the Supreme Court of Missouri, in an opinion equally strong and persuasive in *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, absolves such an institution from all liability for negligence, whether the result of the acts of its employees or of failure to exercise due care in their selection.

We prefer to adopt the middle course, which exempts from liability for the negligence of employees and requires the exercise of ordinary care in selecting them, as more consonant with authority and with the purposes for which such institutions are established.

The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established.

It is, therefore, better for those committed to their care and for the institutions, and necessary to effectuate the purpose of their creation, to require the exercise of ordinary care in selecting employees, and in supervising them.

In the application of this principle the distinction between the negligent act of the employee and the negligence of the corporate body in selecting employees must be kept steadily in view, as it is only the latter which creates liability.

Affirmed.

Hoke, J., did not sit.

#### NOTE.

The reported case, reviewing the several views as to the liability of a charitable hos-

pital for negligence, adopts that view which exempts such an institution from liability for the negligence of its employees, but requires the exercise of ordinary care in selecting them. The cases discussing the liability of a charitable institution for the negligence of its employees are reviewed in the notes to *Parks v. Northwestern University*, 4 Ann. Cas. 103; *Bruce v. Central M. E. Church*, 11 Ann. Cas. 150; *Duncan v. Nebraska Sanitarium, etc. Assoc.* Ann. Cas. 1913E 1127; *Schloendorff v. New York Hospital Soc.* Ann. Cas. 1915C 581, and *Gallon v. House of Good Shepherd*, 133 Am. St. Rep. 387.

### WEIRLING

v.

### ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Arkansas Supreme Court—December 7, 1914.

115 Ark. 505; 171 S. W. 901.

#### Carriers of Passengers — Duty to Insane Passenger.

A railroad company must bestow upon a passenger any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or that might have been reasonably anticipated from one in his mental and physical condition, tending to increase the danger to be apprehended and avoided, and if the employees of a railroad company, after discovering the condition of a passenger who became insane while on the train, failed to use such care when they could have reasonably done so, and thereby prevented her from jumping from the car window, the company is liable in damages for her death, caused by injuries thereby sustained.

[See note at end of this case.]

#### Same.

In an action for the death of a passenger who became insane while riding on the train, and attempted, to the knowledge of the porter and brakeman, to throw her baby from the car window, and after being prevented from so doing, and after apparently quieting down, threw herself from the window, instructions held to have correctly declared the law and the measure of the carrier's duty toward the passenger.

[See note at end of this case.]

Appeal from Circuit Court, Marion county:  
REED, Judge.

Action for death by wrongful act. B. H. Weirling, administrator, plaintiff, and St. Louis, Iron Mountain and Southern Railway Company, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[505] On the 13th day of August, 1910, Mrs. B. H. Weirling was a passenger on appellee's train. She boarded the train at Aurora, Mo., and her destination was Yellville, Ark. Two or three years prior to that time she was physically broken down, but at the time she started on her journey she was apparently in good health. She was [506] accompanied by her two children, Gertrude, who was six years of age, and Virginia, who was nearly three years old. She was sitting with her children on the right side of one of the day coaches, four or five seats from the end next to the sleeper. She was observed by passengers on the train to be very nervous. Her smallest child was lying on the seat in front of her, apparently in a comatose condition. Mrs. Weirling changed seats frequently. "She would sit in the front end of the coach a while and then move back carrying the child in one arm and her suitcase in the other." The train passed through two or three tunnels and the gas was very disturbing in passing through them and seemed to distress Mrs. Weirling. A commotion was heard in the car and passengers, on looking around, saw the little child in the seat crying and Mrs. Weirling standing up, partly between the seats, striking at the negro porter on the train, who was holding his hands in front of his face, warding off her blows. Passengers gathered around them. Mrs. Weirling was talking excitedly, but the porter said nothing. The porter went to the rear of the coach. It was ascertained that Mrs. Weirling had endeavored to throw her baby out at the window and the porter had prevented her from doing so. A brakeman, who was a white man, came upon the scene during the trouble. Mrs. Weirling, who had resumed her seat in the meantime, when the brakeman arrived, arose and said to him, "You will be my friend?" The brakeman assured her that he would, and she then sat down again. An old gentleman, a passenger on the train, sat down by Mrs. Weirling and talked to her. The passengers closed the windows on the side of the coach where Mrs. Weirling was seated. Things quieted down, and the passengers were of the impression that everything was all right. About that time, and after the brakeman had gone toward the front of the car, a passenger observed that Mrs. Weirling had her baby apparently out of the window on the opposite side from where she had been sitting, with one hand on the sill and her knees on the seat. Passengers grabbed at her clothing but it [507] tore loose and she plunged down

over a trestle, still holding her child in her arms. She struck the trestle as she fell and the child fell from her arms, both falling to the ground. Mrs. Weiriling died almost instantly and the little child lived several hours.

After the train had passed through the tunnel Mrs. Weiriling was heard to remark that she would never come over that road again on account of the gases being disagreeable. During the commotion occasioned by her attempt to throw her child out of the window, a lady passenger, one Mrs. Griffith, began talking to Mrs. Weiriling, and an old gentleman sat down by her and she quieted down, and it was thought that there was no further danger. After she had quieted down the porter went away to get the conductor. At the time he left Mrs. Griffith and the old gentleman were with her. The witness stated that he thought that she had quieted down and that he thought that all danger was over. If he had not thought so he would have stayed right with her himself.

One witness said that he had been in the car where Mrs. Weiriling was something like three or four minutes, and that there were people standing up in the aisle and seated in front of the seats where Mrs. Weiriling was located. He saw Mrs. Weiriling jump out of the window and saw a gentleman grab her as she went out.

Other witnesses stated that when Mrs. Weiriling attempted to throw her child out of the window they saw the colored porter catch the child and pull it back. It was then that Mrs. Weiriling jumped up screaming and began hitting the porter in the face. The porter pulled the child back and laid it down on the seat. After this commotion, witnesses agree that the spell had seemed to pass off and that she stepped back in between the seats and took the child and seemed to be perfectly quiet. One passenger who was observing her says that "she would close her eyes tight and then open them, but remained perfectly quiet." That he "saw her raise up deliberately with her child in her arms and start across the car." He thought she had gotten up to warm. She [508] walked deliberately between the seats and all at once put her head down and jumped through the window with her baby. He saw what she was going to do and grabbed at her foot as she went out of the window but failed to catch it. Another person grabbed her clothing but it was not strong enough and gave way.

All agreed that after Mrs. Weiriling had first attempted to throw her baby out at the window she quieted down, and several passengers stated that they thought that all danger had passed. Mrs. Griffith testified that Mrs. Weiriling sat on the seat behind her for a while. At the time of the accident she had two seats turned together, just in front of

the witness. Mrs. Weiriling spoke to some gentleman and asked about tunnels and asked if any one ever got killed going through them and he told her no. After that they passed through another tunnel and witness's attention was called to Mrs. Weiriling by the little girl saying, "Mamma, don't throw the baby out of the window," and just about that time the porter grabbed the baby and pulled it back in, and she began striking at the porter, but the porter acted very gentlemanly toward her and did nothing except to keep her from destroying the child. While she was striking the porter witness went to where they were and began talking to Mrs. Weiriling. Witness told the porter to get the conductor, and the porter at once started for him. Witness offered to sit down with the lady and ride through the tunnel with her and help her with her baby, but she refused to allow witness to do so, and, as she quieted down, witness returned to her seat. When witness returned to her seat, after the porter had left. Mrs. Weiriling was perfectly quiet, and as witness was sitting down in her seat Mrs. Weiriling must have been going across the aisle. She saw her then go out at the window. At the time witness left Mrs. Weiriling witness did not think that there was any danger of any further trouble.

The porter testified that while passing through the coach in which Mrs. Weiriling was sitting all at once she [509] took her baby and threw it out of the window. He caught it by the leg and pulled it back. Then she struck him. He let the window down, and told her not to throw her baby out at the window. At that time she sat down and a lady across the aisle and an old gentleman from the other end of the car came up and the lady asked Mrs. Weiriling for her baby and she refused to let her have the child, saying she could attend to her own children. A lady passenger and an old gentleman said, "Get the conductor." About the time they said this the brakeman walked up. Then Mrs. Weiriling had sat down and was perfectly quiet. The lady passenger said to the witness, "Go and get the conductor; we will see after her." When witness got on the car platform he met the brakeman and the conductor on their way back to the car where Mrs. Weiriling was. When the witness started away to get the conductor Mrs. Weiriling was sitting down perfectly quiet and had her eyes closed.

The conductor testified that the brakeman came after him, and both the porter and the brakeman told him about the peculiar conduct of Mrs. Weiriling. The brakeman stated to him that a lady was acting very strangely in the day coach. He immediately went back to see about her. He saw the porter as he was going back to see what the matter was. By the time he got back to the coach where

Mrs. Weirling was she had jumped out of the window. He immediately stopped the train and went back to Mrs. Weirling and the child. He stated that the brakeman and the porter were under his control. If anything went wrong it was their duty to notify the conductor. He was asked if it was the duty of both the brakeman and the porter to leave a crazy person trying to get out of the window to go and hunt up the conductor, and answered, "They would hardly have occasion for that." He said it was their duty to come at once and notify him when anybody got into trouble. He was asked, "Is it their duty for both to go and hunt you and tell you about it, to both come at once, is that right?" and answered, "No." He stated that it was their duty to notify him; it didn't require [510] both of them to come; all that was required was notice to him, and a passenger could come and tell him.

After a question was propounded, in which the condition of Mrs. Weirling was recited, the conductor was asked the following question: "I will ask you whether or not there are any regulations of the railroad company or under any law, where the woman was in peril of the kind mentioned, if the brakeman and porter should walk off after she had tried to throw her baby out of the window, and leave the lady if that occurred, if you know?" and answered as follows: "Yes; in case of emergency in which they pulled that cord." He was further asked: "You stated a little while ago that there was no rule made for the porter and brakeman as to what to do at all times. No rule at all?" and answered, "No."

Q. When troubles come up, of this kind, they are to exercise their own judgment, are they?

A. Their own judgment in cases like that. Their own views fix it.

Upon the above facts, the appellant, as administrator of the estate of his wife, Edna Weirling, for the benefit of the estate and also for the benefit of himself, the next of kin, brought suit against the appellee, alleging that Mrs. Weirling became insane while she was a passenger on appellee's train, and that after this fact became known to the employees and agents of appellee in charge of the train they failed and neglected to use ordinary care and prudence for her protection, but let her jump from a window, by reason of which she was mortally injured.

The appellee answered, denying the allegations of negligence.

After the above facts were developed by the evidence the court instructed the jury, at the instance of the appellant, as follows:

"1. I instruct you, gentlemen of the jury, if you find from a preponderance of the evidence in this case that Edna Weirling, de-

ceased, was a passenger on defendant's train at the time and place mentioned in the complaint, [511] and that while she was such passenger lost her mind and became deranged to such an extent as to render her incapable of caring for and protecting herself, and that the employees of the railway company knew of her condition, then I instruct you that it became their duty to bestow upon her any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for her safety considering any manner of conduct or disposition of mind manifested by her, or conduct or disposition that might reasonably be anticipated from one in her mental and physical condition which would tend to increase the danger to be apprehended and avoided. And if the agents and employees of the defendant, after discovering the condition of her mind, failed to use such care, when they could have reasonably done so, and by so doing they could have prevented the deceased from jumping from the car window, and you further find that by jumping from the car window she sustained injuries from which she died, your verdict should for plaintiff."

The court refused to give appellant's prayer for instruction No. 3, which is as follows: "Although you may find from the evidence in this case that Mrs. Edna Weirling was surrounded by passengers of mature age, discretion and prudence, and that they knew the condition of Mrs. Edna Weirling as well as the porter and brakeman, and that she was left in the care and presence of said passengers by the porter and brakeman while they went for the conductor, still there would be no legal duty on the part of said passengers to protect her from harm, and the defendant could not relieve itself of liability in this case by its said employees leaving her in the presence and care of said passengers, provided that you find that the act and conduct of the porter and brakeman at the time and under the circumstances was a failure on their part to use the care and prudence due to a passenger in the condition and situation of the deceased, as explained in instruction 1."

[512] The court, at the request of the appellee, granted its prayer No. 4, which, in effect, told the jury that, even though the porter and brakeman may have thought or may have had reason to believe that Mrs. Weirling was insane, they should find for the appellee if they believed from the circumstances that the porter and brakeman thought the safest plan was to notify the conductor, and if under the circumstances they acted as reasonable and prudent persons in so doing, and that during their absence, while so doing, Mrs. Weirling was killed, they should find for the appellee.

In prayer No. 5 the court told the jury that if, under the circumstances, it was reasonable for the porter and brakeman to leave Mrs. Weiriling in the care of the passengers while they went for the conductor, that their doing so was not an act of negligence.

In appellee's prayer No. 5½ the court told the jury that they should take into consideration the circumstances by which the porter and brakeman were surrounded, as they appeared to them acting as reasonable and prudent men at the time and the impression of such circumstances were likely to produce and did produce on said employees, and if, guided by such impressions, they, with due diligence, bestowed upon the deceased such attention as they, in good faith, believed her condition demanded, their verdict should be for the defendant.

And in appellee's prayer No. 11, the court told the jury that before they could find for the plaintiff they must believe from a preponderance of all the evidence in the case that the employees, knowing the mental condition of Mrs. Weiriling, failed to exercise such care and prudence as reasonably prudent persons occupying their positions would have used under the circumstances.

The verdict and judgment were in favor of the appellee, and this appeal has been duly prosecuted.

*Hamlin & Seawell, Jones & Seawell and Sam Williams* for appellant.

*E. B. Kinsworthy, McCaleb & Reeder and T. D. Crawford* for appellee.

[513] *Wood, J. (after stating the facts).—*In *Price v. St. Louis, etc. R. Co.* 75 Ark. 479-491, 88 S. W. 575, 112 Am. St. Rep. 74, we announced the duty which carriers owe to their passengers who are laboring under disability as follows:

(1) "The railway company must bestow upon one in such condition any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended [514] and avoided. If its servants, knowing the facts, fail to give such care and attention, and injury results as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury. It is bound to exercise all the care that a reasonably prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and

mode of travel." See also *St. Louis, etc. R. Co. v. Woodruff*, 89 Ark. 9, 15, 16, 115 S. W. 953.

In *Thompson on Carriers of Passengers*, section 5, pages 270-271, it is stated: "It is consistent not only with common humanity, but with the legal obligations of the carrier, that if a passenger is known to be in any manner affected by a disability, physically or mentally, whereby the hazards of travel are increased, a degree of attention should be bestowed to his safety beyond that of an ordinary passenger, in proportion to the liability to injury from the want of it. But in order that the carrier may be invested with this duty, it is necessary that the condition and wants of the passenger in this respect should be made known to him or his servants." *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L.R.A. 241. See also *Croom v. Chicago, etc. R. Co.* 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L.R.A. 602; 4 *Elliott on Railroads*, § 1577, p. 371; 6 *Cyc.* 598, and note; *Adams v. St. Louis S. W. R. Co. (Tex.)* 137 S. W. 437.

(2) The instructions of the court, considered as a whole, correctly declared the law. It is unnecessary to comment upon each one of the instructions. The measure of appellee's duty to Mrs. Weiriling was defined in conformity with the law as announced by this court in the cases mentioned in the first instruction given at the instance of the appellant. The court submitted the issue as to whether or not appellee was guilty of negligence in instructions which, when construed together, in effect told the jury that if the employees of appellee failed to exercise the care that reasonably prudent persons would have exercised under the circumstances to prevent the injury [515] and death of Mrs. Weiriling, that appellant would be guilty of negligence, otherwise it would not be.

The instructions are not open to the criticism which appellant's counsel make of them, and they fairly submitted the issue of negligence to the jury.

There was evidence to sustain the verdict. The judgment is therefore correct and it is affirmed.

#### NOTE.

#### **Duty and Liability of Carrier with Respect to Insane Passenger.**

This note, reviewing the recent cases concerning the duty and liability of a carrier with respect to an insane passenger, is supplemental to the note to *Louisville, etc. R. Co. v. Brewer*, Ann. Cas. 1913D 151.

Knowledge on the part of a carrier that one of its passengers is insane imposes on the

carrier the duty of exercising a high degree of care to prevent injury to the passenger or to others on account of his condition; and if necessary in the exercise of such care, it is the duty of the carrier to restrain the action of the insane passenger. *Chicago, etc. R. Co. v. Sears (Tex.)* 155 S. W. 1003. See also *Layne v. Chicago, etc. R. Co.* 175 Mo. App. 34, 157 S. W. 850. And see the reported case. But the carrier is not liable for failing to prevent an insane passenger from leaving the train and thereby incurring injury, where it appears that the insanity was of a progressive nature and that at the time of leaving the train the passenger had sufficient intelligence to keep out of danger. *Chicago, etc. R. Co. v. Sears (Tex.)* 130 S. W. 1019. And although the carrier knows that a passenger is under a delusion, yet if it does not appear that he is dangerous or obnoxious to other passengers or liable to do violence to himself, the carrier cannot be held liable for a failure to restrain or guard him. *Adams v. St. Louis Southwestern R. Co. (Tex.)* 137 S. W. 437; on a second appeal in the same case, *St. Louis Southwestern R. Co. v. Adams (Tex.)* 163 S. W. 1029, the court said: "The evidence quoted presents the facts upon which appellee relies for a recovery very fully, and, in our opinion, falls short of showing liability on the part of appellant for the unfortunate accident which resulted in injury to appellee. The allegations of negligence, upon which the right of recovery is based, are, in substance, that appellee, after leaving Texarkana, became delirious and crazy from sickness and thereby rendered incapable of taking care of herself: that as a consequence of this mental condition she unconsciously jumped out of the window of the car while it was running at a very high rate of speed, and received certain personal injuries; that the employees of appellant in charge of the train negligently failed to take any precaution to prevent her from jumping out of the car window or otherwise escaping from the car in which she was riding, or to in any way guard or restrain her, although they had knowledge of her condition. It is the duty of a common carrier to exercise for the safety of a passenger who, after being received as such, becomes, within its knowledge, by reason of sickness, insanity, or other cause, unable to care for himself all the care that a very cautious and prudent person would to protect him from the dangers incident to his surroundings and mode of travel (*St. Louis Southwestern R. Co. v. Adams, supra*, and cases cited), and that the conductor in charge of the train from which appellee jumped on the occasion in question knew that she was suffering from some character of mental disturbance may be conceded, but that he, or any other member of the train crew, knew that her condition of mind was

such that if not guarded and restrained she would probably injure herself by jumping from a rapidly moving train, and were therefore guilty of actionable negligence in not providing a nurse or an attendant to remain constantly with her and prevent such action, is not, in our opinion, affirmed and sustained by the evidence."

In the absence of proof of negligence on the part of the carrier in failing to guard a passenger who is mentally deranged, the doctrine of *res ipsa loquitur* does not apply to an injury to the passenger. *Adams v. St. Louis Southwestern R. Co. (Tex.)* 137 S. W. 437.

In *Boyd v. Alabama, etc. R. Co. (Miss.)* 71 So. 164, wherein it appeared that an insane passenger jumped from a train through no fault of the carrier, the court said: "It is contended, . . . that the railroad company was under a duty to back its train and pick up the fallen and injured passenger. On the facts of this case, we cannot say that such a duty existed. In the first place, it is assumed that the railroad company knew, or had good cause to know, that the man was in fact seriously hurt or injured. As a matter of fact, the railroad company did not know that the necessity existed. In the next place, there is no evidence that the train could have safely been backed without a collision with other trains, or without materially inconveniencing many passengers and causing them to miss regular connections with other railroads. Then the evidence does show that Mr. McCallom, the brother-in-law of the deceased and the one standing as sponsor and serving as caretaker for Mr. Boyd, was permitted to leave the train for the purpose of rendering any needed assistance, and that he did promptly, by the help of neighbors, remove the injured man to a creditable and nearby sanatorium, where physicians administered such relief as they could afford, and the evidence therefore utterly fails to show that the employees could have prevented the death of the passenger by going back and picking him up, or even that they could have in any wise more effectually relieved his suffering. The gravamen of this suit is a claim of \$25,000 for the death of H. V. Boyd caused by the failure of the railroad company to perform its duty toward him as a passenger. The evidence fails to show that his death could have been avoided by any assistance which the employees could possibly have rendered in addition to those that actually were rendered by his faithful companion and good Samaritan neighbors."

It is the duty of the carrier to remove an insane person, where that course is necessary for the protection and comfort of the other passengers; but in performing that duty the carrier must not neglect its duty to provide reasonable safety and comfort for the insane

passenger. *St. Louis, etc. R. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953, wherein the court said: "While a railway company has the undoubted right to eject an insane passenger, it must be done in a reasonable manner, due regard being had to the time, place and circumstances, so as to provide for the temporary protection and comfort of such passenger. . . . Appellee, in law, was not an insane person at large. She was the passenger of appellant still, although ejected from its train. She was, at the time the sheriff took charge of her, in appellant's waiting room and in the care of appellant's night operator, to whom she had been intrusted when she was ejected from appellant's train. True, the evidence discloses that this operator went out at the window when appellee went into the waiting room. Still, under the law, he was in charge of her as appellant's agent. His discretion, it appears, caused him to abandon in haste the poor unfortunate left in his care. But the law required that his discretion should be exercised in the direction of her comfort and safety, and not in leaving her to her fate. His duty was to exercise such as any reasonably prudent person should, under the circumstances, to protect her against harm and to provide for her comfort. If he was so alarmed that he could not do this himself, it was his duty to call to his assistance others who could. He wholly failed to discharge this duty, and for any injury that resulted to appellee from this cause appellant was liable."

## YANCEY

v.

## BOYCE.

North Dakota Supreme Court—July 6, 1914.

28 N. Dak. 187; 148 N. W. 539.

### Pleading — Judgment on Pleadings — Admissions by Motion.

A motion for judgment upon the pleadings admits the truth of all well-pleaded facts in the pleading of the opposite party.

### Variance — Express or Implied Contract.

When the plaintiff alleges an express contract as the basis for recovery, he cannot recover on an implied contract or quantum meruit, especially in the absence of any allegations of value. *Lowe v. Jensen*, 22 N. D. 148.

### Infants — Repudiation of Contract for Services — Right to Recover.

Sections 4014 and 4015, Rev. Codes 1905, permit a minor to make contracts with cer-

tain exceptions, in the same manner as an adult, subject to his power of disaffirmance, and permit him to disaffirm contracts, except for necessities, and statutory contracts, either before his majority or within one year thereafter, when the contract is made while he is under the age of 18; if made when over the age of 18, disaffirmance may be had by his restoring the consideration or paying its equivalent, with interest. Held, that a minor cannot disaffirm his express contract when partially performed and recover in an action based on the contract. Held, further, that an infant having elected to disaffirm his contract when partially performed, the disaffirmance relates back to the inception of the contract, and the contract is totally destroyed and the parties left to their legal rights and remedies the same as though there had never been any contract.

[See note at end of this case.]

### Same.

Plaintiff, a minor, made a contract to work for defendant, a farmer, during the season of 1912, and at the end of the season he was to be paid \$30 per month for his services. He disaffirmed this contract and left defendant's employ in August, and subsequently sued upon the contract to recover wages for the time he worked. It is held that the action cannot be maintained, and that the question of defendant's rights to recoup or offset damages sustained by the breach of the contract is therefore eliminated from the case.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Cass county: POLLOCK, Judge.

Action on contract. George H. Yancey, by H. P. Long, his guardian ad litem, plaintiff, and Herman Boyce, defendant. Judgment for plaintiff. Defendant appeals. MODIFIED.

[189] This is an action by George H. Yancey, a minor, by his guardian *ad litem* against Herman Boyce. The complaint alleges the minority of the plaintiff, and that about the 1st day of April, 1912, they entered into a contract, under the terms of which plaintiff was to work for defendant as a farm hand in Cass county, and was to receive therefor the sum of \$30 per month if he stayed through the entire season, and \$26 per month if he quit before the 1st of November, 1912; that pursuant to such contract plaintiff worked for defendant from the 1st day of April, 1912, until the 6th day of August, 1912, and judgment is demanded for \$96.25, the amount claimed to be due on the contract. The answer alleges that the plaintiff began work on the 2d day of April, 1912, under a contract by which the plaintiff agreed to work for defendant during the season of 1912, at the agreed wage of \$30 per month, and that the defendant agreed to pay plaintiff at the close



of the season of 1912 the sum of \$30 per month for such services properly rendered. It is then alleged that the plaintiff, without reason or cause and without the consent and against the will of the defendant, and in violation of the terms of the contract referred to, on the 6th day of August, 1912, quit his employ; that by reason of such facts he was compelled to employ other help to do the work, which the plaintiff would have done had he lived up to the terms of his contract, and to pay an advance wage in the amount of \$74 more than would have been due the plaintiff under his contract, had he completed it. The answer admits that, after deducting from the wages earned by plaintiff said sum of \$74, there is a balance of \$39 due plaintiff, and tenders judgment for that sum, with costs.

The case was regularly called for trial, whereupon counsel for plaintiff submitted a motion to the court for judgment upon the pleadings. The grounds upon which the motion was based were, that it appeared upon the face of the pleadings that the action was to recover wages by a minor by his guardian *ad litem*, and that the defense interposed admitted the minority of plaintiff, and set up a contract more favorable to the plaintiff than set forth in the complaint, and sought to recoup damages, by reason of the fact that the minor had left defendant's employ before the contract expired. It was stipulated that counsel [190] for both parties stood upon such motion; that, if plaintiff's motion was sustained, judgment should be entered in his favor for the amount demanded in the complaint, and, conversely, that judgment should be entered according to the offer of the defendant. The learned trial court rendered judgment in favor of the plaintiff in accordance with the prayer of his complaint. From such judgment the case is here on appeal.

J. F. Callahan for appellant.

W. J. Courtney for respondent.

SPALDING, Ch. J.—The question for determination seems to be, may an infant sue on an express contract, which he has disaffirmed after partial performance, and, if so, may the defendant recoup or offset damages for its breach by the infant? The statutory provisions pertinent to the question are found in § 4014, Rev. Codes 1905, providing that a minor may make any contract other than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter, and subject to the provisions of the chapter on marriage and on master and servant. The exceptions referred to have no application to this case. Section 4023 empowers a minor to enforce his rights by civil action or other

legal proceedings in the same manner as a person of full age, except that a guardian must be appointed to conduct the same. Section 4015 permits the infant to disaffirm his contracts, except those for necessities and any expressly [191] authorized by statute; and if the contract is made when he is under the age of eighteen years, he may disaffirm it either before his majority or within one year's time afterwards, while if the contract is made while he is over the age of eighteen, it may be disaffirmed by him upon restoring the consideration or paying its equivalent, with interest.

In an application for judgment upon the pleadings, the motion admits the truth of all well-pleaded facts in the pleading of the opposite party (31 Cyc. 606; Walling v. Bown, 9 Idaho 184, 72 Pac. 960); hence, for the purpose of this action the contract is as set forth in the answer of the defendant (Willis v. Holmes, 28 Ore. 265, 42 Pac. 989). This eliminates all consideration of the allegation contained in the complaint, that the plaintiff was to receive \$26 per month, if he quit the services of the defendant before the close of the season.

When the plaintiff alleges an express contract as a basis for recovery, he cannot recover on an implied contract or *quantum meruit*. Lowe v. Jensen, 22 N. D. 148, 132, N. W. 661, and authorities cited; Tharp v. Blew, 23 N. D. 3, 135 N. W. 659. This question has been so recently passed upon by this court that no discussion is necessary. It is apparent in the case at bar that, if the plaintiff might recover upon *quantum meruit*, the complaint contains no allegations of the value of the services. Hence, no foundation is laid for such a recovery.

We need not consider what the rights of the parties would be, had this action been brought upon *quantum meruit*, as that question is not involved under the pleadings, nor under the motion for judgment on the pleadings and the stipulation made by the parties in open court, to which reference has been made.

Legislatures and courts have sought to protect the rights of minors by rendering their contracts void in some cases and voidable in others. The contract pleaded was voidable only at the instance of the plaintiff. The theory of the legislatures and courts seems to have been that minors are, by reason of mental immaturity and lack of experience, unable to deal with adults on an equality, or to protect their own rights and interests. There is a great conflict of authority on every phase of contracts of infants, and particularly upon those which have been partially performed and disaffirmed by the infant before reaching majority. Some courts have carried the doctrine of their incapacity to such

a limit that its application seems to work greater injustice than [192] would be caused by its abrogation; but we are dealing, in a measure, with legislative provisions and inhibitions, which are not altogether clear or comprehensive. In fact, the distinguished legal authority, the late Mr. A. C. Freeman, analyzes and comments upon the provisions of the California statute, which are in all material respects identical with our own, including the sections quoted, as follows: "The Civil Code of California contains several sections on this subject, which, as amended, exhibit a minimum acquaintance with the general law and a maximum obscurity of thought. The sections certainly have not the 'pride of ancestry,' and we will venture to predict that in an intelligent community they have not the 'hope of posterity.'" After further analyzing and commenting upon them, he says: "These distinctions made by the codifiers are perfectly senseless." 18 Am St. Rep. 580, note.

The minor cannot disaffirm his express contract when partially performed, and in a suit on the contract recover his wages for the time he worked. The reason for this is that he cannot both disaffirm and affirm his contract at the same time. He cannot disaffirm it for the purpose of escaping the burdens it imposes upon him, and affirm it for the purpose of obtaining all or any part of the benefits which accrue to him. It is neither a contract or it is not a contract. If he elects to disaffirm it, and having elected to disaffirm it, the disaffirmance relates back to the inception of the contract and from the beginning it is no longer a contract. 22 Cyc. 616. He cannot affirm in part and disaffirm the rest. *Biederman v. O'Conner*, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463; *Bigelow v. Kinney*, 3 Vt. 363, 21 Am. Dec. 589.

Mr. Labatt, in his recent Commentaries on the Law of Master and Servant, vol. 2, § 700, says: "Several decisions embody the doctrine that in an action brought by a minor servant, who has exercised his privilege of abandoning a contract, which is not obligatory by reason of his minority, the master is entitled to set off any damages which he may have sustained by reason of the withdrawal." See authorities cited under note 2. He continues: "The rationale of this doctrine is that, 'as the plaintiff had not performed the special contract, he cannot recover upon that, and being driven to his *quantum meruit*, he can only recover so much as he reasonably deserves to have under all the circumstances.'" See authorities under notes 2 and 3. However, this [193] learned author continues: "Some courts, on the other hand, refuse to make any allowance on this score, being of opinion that the logical consequence of the avoidance of the con-

tract is that the rights of the parties should be determined in every respect on the same footing as if the contract had never been made. This doctrine, it is submitted, is the correct one. . . . If, under the supposed circumstances, the abandonment does not constitute a breach of any obligation, its effects as regards the master's business cannot properly be taken into account." The effect of the election of the minor to disaffirm a voidable contract is a total, and not a partial, destruction; and the parties are left to their legal rights and remedies, the same as though there had never been any contract. 1 Labatt, Mast. & S. § 107; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Campbell v. Cooper*, 34 N. H. 49; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; authorities cited in note in 18 Am. St. Rep. 681.

If these conclusions are correct, it must be clear that this plaintiff cannot maintain his action in the form in which it was brought (22 Cyc. 628), and that the authorities, relating to the abstract question of the right of the defendant to maintain an action for damages for the breach of a contract, and to recoup or offset such damages in an action for the value of the services rendered, are not applicable to the case before us. Unquestionably an action may be maintained for the value of the services rendered (22 Cyc. 617); but the authorities are greatly divided on the question of recoupment, some holding that it may be had, others that it may be in effect taken into consideration by the jury or court, in connection with all the circumstances surrounding the services rendered, while still others hold that, inasmuch as there never was a contract, there is no breach of duty in quitting the services of the employer, and hence no such offset or recoupment can be had.

The parties having stood upon the motion for judgment on the pleadings, that motion having been for judgment for the amount claimed by the plaintiff, and it having been stipulated that, if the motion should be granted the judgment should be for the full amount, while if not granted, the judgment should be for \$39, our conclusion is that the court was in error in fixing the amount of recovery, and that it should have been for \$39 only. The same result would be [194] attained, we think, if we were to hold that the minor could maintain an action on the contract after disaffirmance, because in such case it would be most unjust and inequitable to permit him to stand upon his contract, in so far as it was beneficial to him, and repudiate it as to other provisions, especially without any showing that the contract was unreasonable or that advantage had been taken of his minority. If he is allowed to institute an action upon the contract, he must

suffer all the consequences which properly inhere in the contract. He could not reject it in part. Sec. 4023, *supra*, does not apply to a voidable contract which has been disaffirmed. It protects the infant in his rights as fixed by the statute, and enables him to bring and maintain appropriate actions. The District Court is directed to modify its judgment in accordance with this opinion. The appellant will recover his costs in this court.

#### NOTE.

#### Right of Infant Who Repudiates Contract for Services to Recover Therefor.

##### *In General.*

It is well settled that an infant may repudiate a contract of employment and thereafter maintain an action to recover the reasonable value of the services which he has rendered.

*United States.*—The Hotspur, 3 Sawy. 194, 7 Chi. Leg. News 65, 12 Fed. Cas. No. 6,720; Burdett v. Williams, 30 Fed. 697; Belyea v. Cook, 162 Fed. 180.

*Illinois.*—Ray v. Haines, 52 Ill. 485. See also Myers v. Rehkopf, 30 Ill. App. 209.

*Indiana.*—Dallas v. Hollingsworth, 3 Ind. 537; Wheatly v. Miscal, 5 Ind. 142 (*overruling* Harney v. Owen, 4 Blackf. 337, 30 Am. Dec. 662); Van Pelt v. Corwine, 6 Ind. 363; Meredith v. Crawford, 34 Ind. 399; Kerwin v. Myers, 71 Ind. 359. See also Garner v. Board, 27 Ind. 326; Purviance v. Shultz, 16 Ind. App. 94, 44 N. E. 766.

*Kentucky.*—See Barr v. Shields, 9 Ky. L. Rep. 357 abstract.

*Maine.*—Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Vehue v. Pinkham, 60 Me. 142.

*Massachusetts.*—Moses v. Stevens, 2 Pick. (Mass.) 332; Vent v. Osgood, 19 Pick. (Mass.) 572; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Dube v. Beaudry, 150 Mass. 448, 28 N. E. 222, 15 Am. St. Rep. 228, 6 L.R.A. 146; Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

*Michigan.*—Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251.

*Missouri.*—Lowe v. Sinklear, 27 Mo. 308; Thompson v. Marshall, 50 Mo. App. 145; Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490; Skinner v. Young, 106 Mo. App. 615, 81 S. W. 464.

*New Hampshire.*—Lufkin v. Mayall, 25 N. H. 82 (*overruling* Weeks v. Leighton, 5 N. H. 343); Danville v. Amoskeag Mfg. Co. 62 N. H. 133; Hagerty v. Nashua Lock Co. 62 N. H. 578.

*New Jersey.*—See also Voorhees v. Wait, 15 N. J. L. 343.

*New York.*—Whitmarsh v. Hall, 3 Denio (N. Y.) 375; Medbury v. Watrous, 7 Hill (N. Y.) 110 (*overruling* McCoy v. Huffman, 8 Cow. (N. Y.) 84).

*Ohio.*—Fisher v. Kissinger, 27 Ohio Cir. Ct. Rep. 13 (*distinguishing* Abbott v. Inskip, 29 Ohio St. 59).

*Rhode Island.*—Dearden v. Adams, 19 R. I. 217, 36 Atl. 3. See also Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640.

*Vermont.*—Abell v. Warren, 4 Vt. 149; Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690; Hoxie v. Lincoln, 25 Vt. 206; Meeker v. Hurd, 31 Vt. 639. See also Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Forsyth v. Hastings, 27 Vt. 646.

*Canada.*—See Rutherford v. Purdy, 21 Nova Scotia 43.

Thus in *Kirwin v. Myers*, 71 Ind. 359, it was held that an infant, who had repudiated, within a reasonable time after his arrival at the age of twenty-one, a contract of apprenticeship made for him by his mother could recover the value of the services rendered under that agreement. So in *Dallas v. Hollingsworth*, 3 Ind. 537, it appeared that an infant had agreed to work for the defendant for a period of six months at a stated wage per month and was to receive no pay in case the whole period was not worked out. At the end of about three months the infant stopped work and later sued for the value of his services. It was held that he could recover therefor. In *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 15 Am. St. Rep. 228, 6 L.R.A. 146, it was held that an infant, after he had come of age and had repudiated a contract by which he had agreed to work for the defendant for a certain sum per week, one half to be paid to the minor and the other half to be credited on a debt owed the defendant by the infant's deceased father, could recover the balance of the wages due to him where it appeared that the weekly sum which he had actually received was not as much as his services were worth. Likewise in *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3, it was held that a minor was not bound by a contract of service by which she had agreed to give two weeks notice before quitting the employment and that in action for her wages she was entitled to recover what her labor was reasonably worth. Similarly in *Vent v. Osgood*, 19 Pick. (Mass.) 572, it appeared that an infant, with the consent of his living parent, shipped on a whaling boat for the whole voyage. He deserted at a foreign port before the voyage was completed, and afterwards sued to recover the value of his services. It was held that he had elected to avoid the contract by deserting and that he was entitled to recover for his services on a *quantum meruit*. The court said: "The general rule is, that infants may make valid contracts for necessaries.

They are protected against all other contracts. They may avoid such other contracts. What is meant by avoiding? We think the obvious meaning is the true and legal one. It is to nullify and render void ab initio, not prospectively. It is a total, not a partial destruction. If it were otherwise, the infant might and practically would be ruined by a part execution of the contract. A partial or prospective avoidance would afford no protection at all. By the avoidance the contract was annihilated, and the parties are left to their legal rights and remedies, just as if there had never been any contract at all." In *Bishop v. Shepherd*, 23 Pick. (Mass.) 492, it appeared that a minor, who was in his father's service and living with him, shipped on a whaler, signed the shipping articles, and performed his duties as one of the crew for a period of more than three years. He then deserted and his father brought an action for the wages due to the son. It was held that he could recover against the ship-owner, as on an implied contract, a reasonable compensation for the services of the son. It was held in *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429, that an infant employee who had purchased two shares of the capital stock of the corporation for which he worked and who was paying for the stock by allowing the company to deduct two dollars weekly from his wages, could repudiate the transaction, and on the return of the shares could recover the amount which had been deducted from his pay.

An infant who misrepresents his age when he secures employment is not thereby estopped from avoiding his contract of employment and recovering a proper compensation on a *quantum meruit*. *Burdett v. Williams*, 30 Fed. 697, wherein it was held that an infant had not affirmed a contract of employment so as to bar him from later avoiding it and recovering on a *quantum meruit* merely because he had, four months after his majority, become a co-libellant with another seaman in a suit for wages due, where it appeared that he was not an intelligent or a provident person and had probably made no full statement of his case to a lawyer whom he consulted when he learned that his fellow seaman had commenced an action.

If, however, an infant agrees to give his services in return for his board, clothing, and education, and it appears that the contract is reasonable and has been executed, the minor will be bound thereby as for a contract for necessaries. *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654. To the same effect see *Wilhelm v. Hardman*, 13 Md. 140; *Squier v. Hydliiff*, 9 Mich. 274. See also *Breed v. Judd*, 1 Gray (Mass.) 455. This rule is applicable even though it is shown that the services were worth more than the

agreed compensation, *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; or that the agreement was for board and a salary. *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

It has been held that a minor cannot sue and recover on a contract for services which he has abandoned and rescinded. *The Hotspur*, 3 Sawy. 194, 7 Chi. Leg. News 65, 12 Fed. Cas. No. 6,720; *Skinner v. Young*, 106 Mo. App. 615, 81 S. W. 464. See also, *Hoxie v. Lincoln*, 25 Vt. 206. And see the reported case.

In *Hobbs v. Godlove*, 17 Ind. 359, it appeared that a father had hired out his minor son to a certain person for the term of six years, and for his services the infant was to be paid, at the expiration of the six years, "one horse, saddle, bridle and martingale, and one suit of good clothing." The minor quit his job before the six years expired, and later when he came of age he and his father accepted the sum of \$175 in full payment of all claims against the employee. The son then brought suit to recover the value of the services he had rendered, and it was held that such an action was barred by the settlement he had made.

It was held in *Murphy v. Johnson*, 45 Ia. 57, that in a suit by a minor for services rendered the jury should have been instructed in the words of a statute which provided that "where a contract for the personal services of a minor has been made with him alone, and those services performed, payment made therefor to such minor in accordance with the contract is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time."

In *Robinson v. Van Vleet*, 91 Ark. 262, 121 S. W. 288, it was held that an infant could not repudiate a contract for services which he had executed without dissent, provided the contract, under all the circumstances of the employment, was reasonable, or not so unreasonable as to be evidence of fraud or undue advantage.

It was said in *Myers v. Rehkopf*, 30 Ill. App. 209, that where an infant had repudiated his contract for services the rights and obligations of the parties thereafter were governed by the law and not by their contract.

#### *Measure of Recovery.*

It has been held that an employer when sued by an infant on a *quantum meruit* after the minor has avoided his contract of employment may have deducted from the reasonable value of the services the fair value of food, clothing or schooling furnished to the infant during the period of employment. *Meredith v. Crawford*, 34 Ind. 399; *Meeker*

v. Hurd, 31 Vt. 639. Similarly the employer may deduct such sums of money as he has advanced, from time to time, to the minor. *Belyea v. Cook*, 162 Fed. 180; *Dallas v. Hollingsworth*, 3 Ind. 537; *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229; *Vehue v. Pinkham*, 60 Me. 142; *Abell v. Warren*, 4 Vt. 149.

But an employer cannot have a deduction for the damages he has suffered by reason of the minor's repudiation of the contract of employment. *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251; *Danville v. Amoskeag Mfg. Co.* 62 N. H. 133; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375. On this point there is, however, authority for an opposite view. *The Hotspur*, 3 Sawy. 194, 7 Chi. Leg. News 65, 12 Fed. Cas. No. 6,720; *Lowe v. Sinklear*, 27 Mo. 308; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L.R.A. 211 (contract with father); *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206. In *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286, the court said: "The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor. We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated it, he must pay the damage. Such a doctrine cannot be maintained."

It has been held that an infant, in order to disaffirm a contract made by him while a minor, must return any consideration which he has received if he yet has it, or the fruits of it, but the fact that it is impossible for him to make a return of the consideration does not deprive him of his right to repudiate the agreement. *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490. On the

other hand it has been held that a minor need not, in order to avoid a contract which he has entered into for his services, put the other party in statu quo, or return any consideration which he has received. *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 15 Am. St. Rep. 228, 6 L.R.A. 146; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

## AARONS

v.

## STATE.

Mississippi Supreme Court—June 30, 1913.

105 Miss. 402; 62 So. 419.

## Contempt — Evading Service of Process.

A witness, who, to evade service of subpoena to be issued, absconds and conceals himself at the request of a brother of one indicted for murder, is guilty of constructive contempt of court.

[See note at end of this case.]

Appeal from Circuit Court, Amite county: BROWN, Judge.

Contempt proceeding. M. V. Aarons adjudged guilty of contempt of court and sentenced to pay fine, and appeals. The facts are stated in the opinion. Affirmed.

R. S. Stewart for appellant.

Geo. H. Ethridge for appellee.

[405] SMITH, C. J.—Appellant, upon an information filed by the district attorney, was adjudged in contempt of court and sentenced to pay a fine of one hundred dollars.

The facts are: At the October term of the court below one Marvin McDaniels was indicted for murder. He was arrested while the court was in session, and two or three days thereafter had a subpoena issued for appellant as a witness in his behalf. This subpoena was returned "Not found," and thereupon other subpoenas were issued, directed to the sheriffs of Amite, Franklin, and Lincoln counties, all of which were returned "Not found." When his case was called for trial, McDaniels obtained a continuance on account of the absence of appellant and another. Appellant was in the town where the court was being held at the time of McDaniels' arrest, but immediately left, and, instead of going to his home, absconded and

concealed himself, so that he could not be found when the subpoenas were issued for him.

The court was well warranted in believing that he absconded and concealed himself at the request of a brother of McDaniels, for the purpose of evading the service of the subpoena afterwards to be issued. This conduct of appellant was calculated and intended to impede, embarrass, and obstruct the administration of justice, and [406] therefore constitutes constructive contempt of court. *Durham v. State*, 97 Miss. 549, 52 So. 627. There is no merit in any of appellant's contentions. Affirmed.

#### NOTE.

The reported case holds that a witness who wilfully absconds and conceals himself for the purpose of evading service of a subpoena which is afterwards issued is guilty of an act which is calculated to obstruct the administration of justice and which therefore constitutes a constructive contempt of court. The cases discussing obstructing or delaying the service or execution of process as constituting contempt are reviewed in the note to *Bryan v. State*, Ann. Cas. 1913A 908.

#### ANTHONY

v.

#### KIEFNER ET AL.

Kansas Supreme Court—July 10, 1915.

96 Kan. 194; 150 Pac. 524.

#### Automobiles — Negligence of Driver — Imputation to Occupant.

A mother accepted the invitation of her son to ride in his automobile merely as his guest and as she had no control and took no part in the management of the automobile she is not responsible for injuries inflicted upon another by the negligence of her son in driving the automobile.

[See note at end of this case.]

#### Same.

If the journey had been undertaken as a joint enterprise to accomplish a common purpose for the benefit of both one of them might have been regarded as the agent of the other and she might have been responsible for injuries inflicted by the negligent operation of the automobile, but it is held that, her mere request of her son that some time during the ride he should call at a certain house and obtain a cake that a friend had promised to make for her did not make the trip a joint

enterprise nor make her responsible for the negligence of her son nor for injuries to which she did not personally contribute.

[See note at end of this case.]

#### Same.

The mere fact that the mother, who was sitting by the side of her son and as his guest, did not protest against his action when he drove his automobile at an excessive rate of speed for the distance of a little more than a city block, at the end of which an injury was inflicted, cannot be held as culpable negligence on her part which would make her liable for his negligence and the resulting injury.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Sedgwick county: WILSON, Judge.

Action for death by wrongful act. Fred Anthony, plaintiff, and Ida A. Kiefner et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. MODIFIED.

*S. B. Amidon, D. M. Dale, Jean Madalene and S. A. Buckland* for appellants.

*W. A. Ayres, J. D. Houston, C. H. Brooks and Earl Blake* for appellee.

[195] JOHNSTON, C. J.—Fred Anthony brought this action against Ida A. Kiefner and her son, Lynn Kiefner, to recover damages for negligently and carelessly causing the death of his wife, Josie May Anthony. From a judgment against them defendants appeal.

It appears that on May 24, 1913, at about six o'clock p. m., Mrs. Anthony, accompanied by her three small children, was driving westward on the north side of Douglas avenue in the city of Wichita. Upon coming to Poplar street she crossed the intersection diagonally toward the south, passing in front of an east-bound street car which had stopped at the crossing to discharge passengers. Before Mrs. Anthony had driven quite to the west side of Poplar street her buggy was struck by the automobile being driven, in an easterly direction, by defendant Lynn Kiefner, and she was thrown over the top of the automobile and a distance variously estimated by the witnesses at from thirty to seventy-five feet. From the injuries sustained Mrs. Anthony died shortly afterward. There was testimony that the automobile was being run at a rate of about thirty miles an hour and in a careless manner. The jury found that there was nothing to prevent Mrs. Anthony from seeing the approaching automobile had she looked before, passing in front of the street car, and also that if either of defendants had exercised reasonable care the accident could have been

avoided. The ordinances of the city regulating the speed of automobiles and fixing the right of way of vehicles on the principal streets were introduced in evidence. The evidence tended to prove that the automobile was owned and managed solely by Lynn Kiefner, and that Ida A. Kiefner, his mother, [196] was riding in it at his invitation. Defendants' separate demurrers to plaintiff's evidence were overruled. The jury found for plaintiff against both defendants for \$5,500, and returned answers to special questions submitted by defendants. Separate motions for a new trial were overruled, and defendants bring the judgment rendered to this court for review.

The principal complaint is of the judgment against Ida A. Kiefner and of rulings affecting that judgment. Of the negligence of Lynn Kiefner there can be no question, and while there is a claim that Mrs. Anthony, who was killed in the collision, was guilty of contributory negligence, there is nothing substantial in the claim that it bars a recovery. The most that can be said of his contention is that the testimony raised a question of fact as to her negligence which the jury has decided against him.

In respect to Mrs. Kiefner it is contended that she had nothing to do with the operation or control of the automobile, and therefore her separate demurrer to plaintiff's evidence should have been sustained. She also contends that the verdict and findings of the jury are without support and were probably induced by the instructions of the court about which complaint is also made. She insists that she was a mere guest or passenger in the automobile, and that the negligence of Lynn Kiefner, the owner and driver of the automobile, is not imputable to her. If she was only a guest of his and had no control of the automobile or of the operator his negligence cannot be imputed to her. It was determined in *Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309, that a person riding in a private conveyance by invitation of its owner is not responsible for his action, and that his negligence which contributes to an accident cannot be imputed to the guest. In *Reading Tp. v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355, a man accompanied by his wife was driving over a defective highway and she was injured. In her action to recover from the township it was insisted that her husband was guilty of contributory negligence and that she was chargeable with his negligence. There was no personal negligence on her part, but it was claimed that in a sense her husband was her agent, that the visit was undertaken on her solicitation, and that, therefore, negligence on his part [197] which contributed to the injury was imputable to her. Upon these claims the court said:

"The fact, if it be such, that the journey was undertaken at the solicitation of the wife, possesses no weight. It cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon herself or himself all risk of the driver's negligence *en route*. To so hold would minimize the problem for consideration into a mere question of fact as to which of the travelers solicited the other; the one the favor of a journey, or the other the pleasure of company. If the one who asks to be carried, hence is the master, so on the other hand the one who invites to a ride is also the master. If the maiden who begs of her escort a carriage drive is the mistress throughout the journey, so the gallant who invites his lady would likewise be the master until her safe return. It may be conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one in furtherance of the common scheme is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife." (p. 801.)

It was there recognized that there was a conflict in the authorities upon the question, but it was held that negligence could not be imputed to a guest or passenger, and it was further stated that:

"The doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts, and has been very infrequently applied in our own." (p. 803.)

In *Bush v. Union Pac. R. Co.* 62 Kan. 709, 64 Pac. 624, a finding that a lady riding with her escort for mutual pleasure was herself guilty of contributory negligence was upheld, but the decision against her right of recovery was based upon her own negligence and not upon that of another imputed to her. *Missouri, etc. R. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261, is somewhat like the case last cited, but, as in that case, the subject of imputed negligence was not presented for consideration nor applied in the decision. The question came up again for decision in *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148, in which it appears that a woman and her children were riding in a buggy drawn by a horse driven by the husband, and a person driving an automobile in the opposite direction negligently collided with the horse and buggy and injured her. In her action to recover damages it was contended that her husband was negligent, and that his negligence was imputable to her [198] and barred a recovery. It appears that she did not exercise or attempt to exercise any control over the horse, buggy or driver, and it was held

that she had a right to trust her husband to drive the horse safely, and that his negligence could not be imputed to her. In the late case of *Corley v. Atchison, etc. R. Co.* 90 Kan. 70, Ann. Cas. 1915B 764, 133 Pac. 555, a man was riding in an automobile as the guest of the driver. In a collision with a railway train the occupants of the automobile were killed. The wife of the guest brought an action on the basis that her husband's death was due to the negligence of the railway company. It was claimed by the railway company that the collision resulted from the negligence of the driver of the automobile and that the guest was chargeable with his negligence. In speaking of the claim the court said:

"The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L.R.A.(N.S.) 59, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. (Note, 9 Ann. Cas. 408; Note, 19 Ann. Cas. 1225; Note, Ann. Cas. 1913B 684; see also *Denton v. Missouri, etc. R. Co.* 90 Kan. 51, 133 Pac. 558.) This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. (29 Cyc. 548-550; Note, 8 L.R.A.(N.S.) 648; 7 Am. & Eng. Enc. of Law (2d ed.) 447, 448.)" (p. 73.)

The chief reliance, however, of plaintiff was that Mrs. Kiefner was herself guilty of negligence by participating in and approving the unlawful speed. It appears that the automobile had been recently purchased by Lynn Kiefner and was exclusively owned by him. Mrs. Kiefner had never ridden or even seen the automobile before the time in question, although she had driven and operated other cars. She accepted his invitation to ride in the car and, for the purpose of trying the car, during the ride she took her place at the wheel and drove the car for about three blocks, whereupon her son resumed his place at the wheel. In answer to a question the jury said that while she was at the wheel she had driven the car at an immoderate rate of speed. This is not a material matter, but the answer is not supported by the testimony, as the evidence [199] given by plaintiff's witnesses as well as that of the defendant was to the effect that during the short time she was at the wheel she drove at a moderate rate of speed. Of course, if she aided or par-

ticipated in the wrong she is responsible for the resulting injury. The jury found that both her son and herself were managing the car when the accident occurred, and in answer to a question what she had to do with the management answered, "Directing its destination." The only basis for the finding is that while on the ride as the guest of her son she told him that she would like to stop at the Norris place and get a cake which Mrs. Norris promised to make for her, and Lynn Kiefner expected to call there during the journey. This request and circumstance did not indicate that she had either management or control of the car, nor did it give the journey the character of a joint enterprise. If they had set out on a business errand, to collect cakes or the like, instead of a pleasure ride, or if in executing any common purpose in which both were exercising control, or in any case where one might be said to be the agent of the other, it might be held that there was a joint adventure and a joint liability. The call proposed to be made on the trip was a mere incident of the ride and created no more responsibility for the driver's act than if he had been operating a taxicab or some other public conveyance. In no sense did her request create the relation of principal and agent or master and servant between them, nor give the journey the character of a joint enterprise. The fact that an owner of an automobile who has invited a guest to ride with him takes a particular course at the request and for the pleasure or convenience of the guest does not indicate management of the automobile nor result in responsibility of the guest for the conduct of the owner and operator. That was the holding in the Telfer case, where the driver went upon a visit at the request of his wife. It was expressly decided that the fact that the journey was made at her solicitation added no weight to the claim that she herself was negligent or that she was responsible for her husband's negligence, the court saying:

"It cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon herself or himself all risk of the driver's negligence *en route*." (*Reading Tp. v. Telfer*, 57 Kan. 798, 801, 48 Pac. 134, 57 Am. St. Rep. 355.)

[200] In *Zimmermann v. Union R. Co.* 28 App. Div. 445, in 51 N. Y. S. 1, it was held:

"A gratuitous passenger, riding with the owner of a vehicle, and taking no part in the management of the horse, is not rendered chargeable with the driver's negligence merely because he makes suggestions concerning the route to be taken." (Syl.)

In *Robinson v. New York Cent. etc. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1, it was decided that:



"A female who has accepted an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence, and contributory negligence on his part is no defence to an action against a railroad corporation for injuries resulting from a collision." (Syl. ¶ 1.)

(See also *Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *Hajsek v. Chicago*, etc. R. Co. 68 Neb. 539, 94 N. W. 609; *Little v. Hackett*, 116 U. S. 366, 6 S. Ct. 391, 29 U. S. (L. ed.) 652; *Union Pac. R. Co. v. Lapsley*, 51 Fed. 174, 4 U. S. App. 542, 2 C. C. A. 149, 16 L.R.A. 800; *Babbitt, The Law Applied to Motor Vehicles*, § 608.)

The cases cited deal with the question of the personal negligence of the guest as well as the imputed negligence, and most of them are cases where the guest or passenger is seeking a recovery for injuries resulting from the negligence of a third party and to which the driver's negligence may have contributed. In some of the cases, as in *Bush v. Union Pac. R. Co.* 62 Kan. 709, 64 Pac. 624, and *Missouri*, etc. R. Co. v. *Bussey*, 66 Kan. 735, 71 Pac. 261, a recovery was denied because the guest or passenger did not take the required care for himself, and counsel for plaintiff inquire whether a passenger owes a greater duty towards himself than to others. A person is required to take reasonable care for his own protection, and where he is injured and seeks a recovery for the negligence of another he may be held to have been guilty of contributory negligence if he rides with one known to be a reckless driver or in a vehicle known to be unsafe. If in starting upon a trip he discovers that the driver is running the car recklessly it may devolve upon him to insist that the driver shall stop the car and allow him to alight or to take some suitable steps for his own protection, and if he failed in this regard he might be denied a recovery for injuries subsequently sustained. In such case and where the passenger has no control of the automobile [201] he might be held guilty of contributory negligence, whereas another passenger who had likewise no control of the automobile and no relation to the driver other than that of guest or passenger would not be liable to one injured by reason of the negligence of the driver. (*Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778; *Davids, The Law of Motor Vehicles*, § 236.) As already stated, if Mrs. Kiefner had undertaken to keep an outlook and failed, or if she had even a slight share in the management of the car or if the unlawful speed had been made at her instance and request, or if in any way she had personally participated in inflicting the injury,

she might be held liable for the resulting injury. It appears that the unlawful speed was attained by the driver while traveling a little more than a block. She was sitting alongside of the driver, it is true, and it is said made no protest against the speed nor any effort to stop the driver. It is difficult to understand how so great a speed was attained in going from a full stop in the distance of a little over a block, but the testimony is that at the time of the collision the car was going at a rate of thirty miles an hour. It is clear that the rate was unlawful, but the question is, What could the guest have done in that distance and what should she have done? There is nothing to show that she encouraged or approved the speed, and while a guest may make a suggestion or protest against the method of operating an automobile it might be that the attempt, however well intended, to stop the car or interfere with the control of the driver might bring greater hazards and worse results than would come from undue speed alone. There is no basis for the theory of the plaintiff and the jury that Mrs. Kiefner consented to the unlawful speed beyond the fact that she did not protest or interfere with the operation of the automobile in the few seconds that elapsed while they were traveling a little more than the length of a city block. It is clear that the finding of the jury that she was managing the car by directing its destination is contrary to the evidence and that neither the evidence nor the findings justify the verdict rendered against Ida A. Kiefner.

Whether there is any testimony which even tended to support the claim that the injury was due in part to Mrs. Kiefner's negligence and made it a question of fact for submission to a [202] jury is a subject about which there may be a division of opinion. It is the view of the court, however, that the testimony produced did not show that she had anything to do with the management or control of the automobile, did not tend to prove that the journey was in any sense a joint adventure of the driver and herself by which one can be regarded as the agent of the other, nor did it show that there was any personal negligence on her part which would make her liable for the collision and the resulting injury.

The demurrer of Ida A. Kiefner to the plaintiff's evidence, therefore, should have been sustained and judgment should have been given in her favor, and hence a modification of the judgment must be made. The judgment against Lynn Kiefner is affirmed, while that rendered against Ida A. Kiefner is reversed and the cause remanded with directions to enter judgment in her favor.

**NOTE.****Negligence of Driver as Imputable to Occupant of Automobile.**

Introductory, 268.  
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**Introductory.**

The earlier cases discussing the negligence of the driver of an automobile as imputable to an occupant thereof, are collected in the notes to *Dale v. Denver City Tramway Co.* 19 Ann. Cas. 1223; *Wachsmith v. Baltimore, etc. R. Co.* Ann. Cas. 1913B 679; *Corley v. Atchison, etc. R. Co.* Ann. Cas. 1915B 764; and *Hampel v. Detroit, etc. R. Co.* 110 Am. St. Rep. 275, 291. This note reviews the recent cases on that point. Cases discussing the contributory negligence of the driver of an ordinary vehicle, as imputable to the occupant thereof, are collected in the note to *Christopherson v. Minneapolis, etc. R. Co.* reported post, this volume.

**General Rule.**

The general rule that the negligence of the driver of a private vehicle is not to be imputed to an occupant thereof who is injured through the combined negligence of the driver and a third person, when such occupant is without fault, and has no control over the driver, has been applied in a number of recent cases involving the corresponding relation between the driver of a private automobile and an occupant thereof.

*Alabama.*—*Birmingham-Tuscaloosa R. etc. Co. v. Carpenter*, 69 So. 626; *Perkins v. Galloway*, 69 So. 875.

*California.*—*Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927, L.R.A.1915E 588.

*Florida.*—*Porter v. Jacksonville Electric Co.* 64 Fla. 409, 60 So. 188.

*Indiana.*—*Indiana Union Traction Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *Lake Erie, etc. R. Co. v. Reed*, 57 Ind. App. 65, 103 N. E. 127; *Pittsburgh, etc. R. Co. v. Kephert*, 112 N. E. 251.

*Illinois.*—*Gaffney v. Dixon*, 157 Ill. App. 589.

*Iowa.*—*Hubbard v. Bartholomew*, 163 Ia. 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443; *Withey v. Fowler Co.* 164 Ia. 377, 145 N. W. 923; *Lawrence v. Sioux City*, 154 N. W. 494.

*Kansas.*—*Denton v. Missouri, etc. R. Co.* 90 Kan. 51, Ann. Cas. 1915B 639, 133 Pac. 558, 47 L.R.A.(N.S.) 820; *Denton v. Mis-*

*souri, etc. R. Co.* 155 Pac. 812. And see the reported case.

*Kentucky.*—*Louisville v. Zoeller*, 155 Ky. 192, 160 S. W. 500; *Beard v. Klusmeier*, 158 Ky. 153, Ann. Cas. 1915D 342, 164 S. W. 319, 50 L.R.A.(N.S.) 1100; *Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074; *Collins v. Standard Acc. Ins. Co.* 170 Ky. 27, 185 S. W. 112.

*Maryland.*—*United Rys. etc. Co. v. Crain*, 123 Md. 332, 91 Atl. 405.

*Massachusetts.*—*Littlefield v. Gilman*, 207 Mass. 539, 93 N. E. 809.

*Minnesota.*—*Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; *Carnegie v. Great Northern R. Co.* 128 Minn. 14, 150 N. W. 164.

*Missouri.*—*Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136.

*New York.*—*Jerome v. Hawley*, 147 App. Div. 475, 131 N. Y. S. 897.

*North Carolina.*—*Hunt v. North Carolina R. Co.* 170 N. C. 442, 87 S. E. 210.

*Ohio.*—*Toledo Rys. etc. Co. v. Mayers*, 112 N. E. 1014.

*Oregon.*—*Tonseth v. Portland R. etc. Co.* 70 Ore. 341, 141 Pac. 868.

*Pennsylvania.*—*Yaehing v. Baltimore, etc. R. Co.* 233 Pa. St. 468, 82 Atl. 756; *Trumbower v. Lehigh Valley Transit Co.* 235 Pa. St. 397, 84 Atl. 403; *Sisson v. Philadelphia*, 248 Pa. St. 140, 93 Atl. 936; *Farquhar v. Webster, etc. St. R. Co.* 50 Pa. Super. Ct. 536.

*Rhode Island.*—*Hermann v. Rhode Island Co.* 36 R. I. 447, 90 Atl. 813.

*South Carolina.*—*Latimer v. Anderson County*, 95 S. C. 187, 78 S. E. 879.

*Tennessee.*—*Knoxville R. etc. Co. v. Vangilder*, 132 Tenn. 487, 178 S. W. 1117, L.R.A. 1916A 1111.

*Utah.*—*Lochhead v. Jensen*, 42 Utah 99, 129 Pac. 347.

*Washington.*—*Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

In *Hunt v. North Carolina R. Co.* 170 N. C. 442, 87 S. E. 210, the court said: "It is held by the great weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this state."

The same rule has been applied in the case of the negligence of the driver of a hired automobile. *Long Island R. Co. v. Darnell*, 221 Fed. 191, 136 C. C. A. 1; *Thompson v. Los Angeles, etc. R. Co.* 165 Cal. 748, 134 Pac. 709; *Seaboard Air Line Ry. v. Barrow (Ga.)* 89 S. E. 383; *Roby v. Kansas City Southern R. Co.* 130 La. 880, 58 So. 696, 41 L.R.A.(N.S.) 355; *Donnelly v. Philadelphia & R. Ry. Co.* 53 Pa. Super. Ct. 78; *Kerr v. Philadelphia, etc. R. Co.* 53 Pa. Super. Ct.

83. Thus the negligence of the chauffeur of a taxicab has been held not to be imputable to a passenger. *Long Island R. Co. v. Darnell*, 221 Fed. 191, 136 C. C. A. 1. And the negligence of the driver of a sight-seeing automobile has been held not to be imputable to a passenger. *Seaboard Air Line Ry. v. Barrow* (Ga.) 89 S. E. 383.

It has also been held that the negligence of a person driving and controlling a motorcycle will not be imputed to a companion sitting on the rear seat. *Parmenter v. McDougall* (Cal.) 156 Pac. 460; *Sampson v. Wilson*, 89 Conn. 707, 96 Atl. 163; *Sanders v. Taber* (Ore.) 155 Pac. 1194.

The negligence of a husband, who is driving an automobile of which his wife is an occupant, will not be imputed to the wife if she is without fault and is exercising no control over the driving. *Gaffney v. Dixon*, 157 Ill. App. 589; *Denton v. Missouri*, etc. R. Co. 90 Kan. 51, Ann. Cas. 1915B 639, 133 Pac. 558, 47 L.R.A.(N.S.) 820; *Denton v. Missouri*, etc. R. Co. (Kan.) 155 Pac. 812; *Louisville v. Zoeller*, 155 Ky. 192, 160 S. W. 500; *Knoxville R. etc. Co. v. Vangilder*, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A 1111. But see *Fogg v. New York*, etc. R. Co. (Mass.) 111 N. E. 960, wherein it was held that the administrator of a woman who was killed, while riding in an automobile driven by her husband, could not recover, if the wife trusted to the care and caution of her husband, and he was negligent.

#### *Exceptions to Rule.*

Where the driver of an automobile is under the direction and control of the occupant, the negligence of the driver will be imputed to the occupant. See *Bastien v. Ford Motor Co.* 189 Ill. App. 367. The mere fact that the guest of an automobile owner gave directions to the chauffeur as to the places he wished to go, has been held not to be exercising such control over the chauffeur as to cause his negligence to be imputed to the guest. *Collins v. Standard Acc. Ins. Co.* 170 Ky. 27, 185 S. W. 112; *Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113. Where it appeared that a disabled automobile was being towed by an auto truck, it was held that the question whether the occupants of the towed automobile exercised control over the driver of the auto truck, was for the jury. *McLaughlin v. Pittsburgh Rys. Co.* (Pa.) 97 Atl. 107.

Another exception to the general rule is where the driver of an automobile and an occupant thereof are engaged in a joint or common enterprise. In that case it is held, in the majority of jurisdictions, that the negligence of the driver will be imputed to the occupant. *Van Horn v. Simpson*, 35 S. D.

640, 153 N. W. 883; *Wentworth v. Waterbury* (Vt.) 96 Atl. 334; *Washington, etc. Ry. v. Zell*, 118 Ga. 755, 88 S. E. 309. See *Withey v. Fowler Co.* 164 Ia. 377, 145 N. W. 923. To constitute a joint enterprise, it has been held that the occupant of the automobile must be in a position to assume the control, or control in some manner the means of locomotion. *Lawrence v. Sioux City* (Ia.) 154 N. W. 494. It has been held that the fact the driver and the occupant were mutually engaged in a pleasure ride did not create a joint enterprise. *Withey v. Fowler Co.* 164 Ia. 377, 145 N. W. 923; *Beard v. Klusmeier*, 158 Ky. 153, Ann. Cas. 1915D 342, 164 S. W. 319, 50 L.R.A.(N.S.) 1700. But it has been held that persons engaged in riding in an automobile, in mere companionship for pleasure, are engaged in a mutual adventure, and that it is as much the duty of the occupant as of the driver to take observations of dangers and avoid them, if practical, by suggestion and protest. *United Rep. etc. Co. v. Crain*, 123 Md. 332, 91 Atl. 405. And the driver and an occupant of an automobile who were jointly engaged in taking young ladies to view a lake, have been held to be engaged in a joint enterprise so that the negligence of the driver would be imputed to the occupant. *Wentworth v. Waterbury* (Vt.) 96 Atl. 334. And if the driver and the occupant are partners, and at the time of the accident are engaged in the prosecution of partnership business, the negligence of the driver will be imputed to the occupant. *Van Horn v. Simpson*, 35 S. D. 640, 153 N. W. 883. In Texas the foregoing exception to the general rule has been denied. *Kansas City, etc. R. Co. v. Durrett*, 187 S. W. 427, wherein the court said: "The thirty-seventh, thirty-eighth, thirty-ninth, and fortieth are that the court erred in refusing to submit to the jury the issue as to whether plaintiff and one Greber, who was also in the car at the time of the accident, were engaged in a joint enterprise, for the reason that in such case, if the jury so found, his negligence would be imputed to plaintiff. We know of no authority for such a proposition of law, and appellant has cited none."

In Pennsylvania in a case wherein the driver of a car and the occupant were engaged in a common purpose it was held that the negligence of the driver would not be imputed to the occupant but that the occupant would be held to a higher degree of duty than that required of an ordinary passenger for hire. *Dunlap v. Philadelphia Rapid Transit Co.* 248 Pa. St. 130, 93 Atl. 873.

#### *Care Required of Occupant.*

While it is well settled that the negligence of the driver of an automobile is not ordinari-

ly imputed to an occupant thereof, it is equally well settled that the occupant must not be guilty of independent contributory negligence; hence it is essential to the right of an occupant of an automobile to recover for his injuries that he should have been in the exercise of reasonable care at the time of the accident. *Denton v. Missouri*, etc. R. Co. (Kan.) 155 Pac. 812; *United Rys. etc. Co. v. Crain*, 123 Md. 332, 91 Atl. 405; *Littlefield v. Gilman*, 207 Mass. 539, 93 N. E. 809; *Carnegie v. Great Northern R. Co.* 128 Minn. 14, 150 N. W. 164; *Toledo Rys. etc. Co. v. Mayers* (Ohio) 112 N. E. 1014; *Yaehing v. Baltimore*, etc. R. Co. 233 Pa. St. 468, 82 Atl. 756; *Trumbower v. Lehigh Valley Transit Co.* 235 Pa. St. 397, 84 Atl. 403; *Farquhar v. Webster*, etc. St. R. Co. 50 Pa. Super. Ct. 536; *Hermann v. Rhode Island Co.* 36 R. I. 447, 90 Atl. 813; *Latimer v. Anderson County*, 95 S. C. 187, 78 S. E. 879; *Knoxville R. etc. Co. v. Vangilder*, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A 1111.

Whether the occupant has exercised reasonable care under the circumstances is usually a question for the jury. *Thompson v. Los Angeles*, etc. R. Co. 165 Cal. 748, 134 Pac. 709; *Gaffney v. Dixon*, 157 Ill. App. 589; *Denton v. Missouri*, etc. R. Co. (Kan.) 155 Pac. 812; *United Rys. etc. Co. v. Crain*, 123 Md. 332, 91 Atl. 405; *Toledo Rys. etc. Co. v. Mayers* (Ohio) 112 N. E. 1014; *Sisson v. Philadelphia*, 248 Pa. St. 140, 93 Atl. 936; *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39. See also *McLaughlin v. Pittsburgh Rys. Co.* (Pa.) 97 Atl. 107.

But the courts have declared certain conduct on the part of the occupant to be negligence as a matter of law. Thus it has been held to be negligence on the part of the occupant to fail to remonstrate with the driver when he is engaged in reckless driving. *Jefson v. Crosstown St. Ry.* 72 Misc. 103, 129 N. Y. S. 233. And it has been held that if the passenger was aware that the operator was carelessly rushing into danger, it was incumbent on him to take proper steps for his own safety, but when the road was strange to the passenger and there was nothing to make him aware of approaching danger, it could not be said as a matter of law that he was negligent in failing to call the chauffeur's attention to the danger of the situation. *Thompson v. Los Angeles*, etc. R. Co. 165 Cal. 748, 134 Pac. 709. The occupant of an automobile has been held to be guilty of contributory negligence in riding in a motor car on a dark night, without lights over roads which neither the driver of the car, nor any of the persons with him in the car were familiar. *Rebillard v. Minneapolis*, etc. R. Co. 216 Fed. 503, 133 C. C. A. 9, L.R.A.1915B 953.

Continuing to ride in an automobile after knowledge that the chauffeur is intoxicated,

has been held to show independent negligence on the part of the passenger. *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927, L.R.A.1915E 588. See also *Pittsburgh*, etc. R. Co. v. *Kepher* (Ind.) 112 N. E. 251. And in a case wherein it appeared that both the driver and the occupant were drunk, the occupant was held to be guilty of independent negligence. *Cunningham v. Erie R. Co.* 137 App. Div. 506, 121 N. Y. S. 706.

To charge a wife with independent negligence in riding with her husband when he was not in a physical condition to manage the automobile, it has been held that it was not only necessary that the wife should know what her husband's physical condition was, but it must appear that she knew or should, in the exercise of ordinary care, have known that because of that condition he was unable to manage the automobile with ordinary safety. *Gaffney v. Dixon*, 157 Ill. App. 589.

It has been held that where an occupant was familiar with the place of the accident, saw the headlight of an approaching train, and agreed with the driver that they had time to cross, he was guilty of negligence. *Farquhar v. Webster*, etc. St. R. Co. 50 Pa. Super. Ct. 536.

#### *Rule in Michigan.*

In Michigan, the rule prevails that the negligence of the driver of a private vehicle will be imputed to the occupant, and this rule has been held to be applicable to passengers in a private automobile. *Colborne v. Detroit United Ry.* 177 Mich. 139, 143 N. W. 32; *Granger v. Farrant*, 179 Mich. 19, 146 N. W. 218, 51 L.R.A.(N.S.) 453. But the Michigan court has not extended the foregoing doctrine to the case of an automobile which is being used as a common carrier, such as a taxicab. In such a case it has been held that the negligence of the driver will not be imputed to the occupant. *Galloway v. Detroit United Ry.* 168 Mich. 343, 134 N. W. 10.

#### **STATE EX REL. BURDICK**

v.

#### **TYRRELL.**

Wisconsin Supreme Court—October 27, 1914.

158 Wis. 425; 149 N. W. 280.

#### **Municipal Corporations — Election by Council — Effect of Disregarding Valid Ballot.**

Where a ballot taken by the common council of a city for city attorney, resulting in

three votes for one person, two votes for other persons, and one blank ballot, elected the person receiving the three votes, the election is not invalidated by the fact that the members of the council mistakenly held that he was not elected, nor by their vote to defer action upon the election of a city attorney.

#### **Reconsideration of Appointment.**

After the election of a city attorney by the common council of a city and his acceptance and qualification, the council had no power to reconsider their action and elect another person.

#### **Failure to Announce and Certify Appointment.**

Where the result of a ballot of the common council of a city electing a person as city attorney was declared and recorded, the person elected was not deprived of his office by the mayor's failure to declare him elected, or by the failure of the city clerk to comply with St. 1913, § 925—29a, providing that to the person appointed to any office the city clerk shall issue a certificate that such person has qualified for such position, since the duty of the clerk was ministerial and no part of the appointing power, and an appointment is made when the last act required of the person vested with the power has been performed.

#### **Power of Majority of Quorum.**

Under Lake Geneva Charter (Laws 1885, c. 322) § 1, providing that all officers other than elective officers shall be appointed by the common council, section 7 providing that the common council at its first meeting may elect a city attorney, St. 1913, § 925—49, providing that the mayor and aldermen of cities shall constitute the common council, and that whenever a majority or certain proportion of the members is required to take action or form a quorum the mayor shall not be counted, and that he shall have no vote except in case of a tie, and section 925—51, providing that two-thirds of the members shall constitute a quorum for the transaction of business, where the mayor and the six aldermen were present when a ballot was taken for city attorney, resulting in three votes for one person, two votes for other persons, and one blank ballot, the person receiving the three votes was elected, as in the absence of any statute to the contrary the majority of a quorum is sufficient to elect, and a majority of the votes cast where all the aldermen are present is sufficient, though some do not vote, and whether, accurately speaking, the common council elects or appoints a city attorney, the power is to be exercised by the common council as a collective body, acting in its capacity as common council.

[See note at end of this case.]

#### **Same.**

St. 1913, § 4971, providing that words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons unless otherwise expressly declared, does not apply to the election of a city attorney under Lake Geneva charter (Laws 1885, c. 322) § 7, providing that the common council may elect a city attorney, as the authority is not a joint

authority given to the aldermen and the mayor, but an authority given to the common council in its collective capacity as common council.

[See note at end of this case.]

Appeal from Circuit Court, Walworth county: GRIMM, Judge.

Action to try title to office. H. A. Burdick, relator, and F. J. Tyrrell, defendant. Judgment for relator. Defendant appeals. AFFIRMED.

[426] This is an action to try the title to the office of city attorney of the city of Lake Geneva. The relator claims that he was elected to the office April 23, 1912, and the defendant claims that he was elected July 16, 1912. The common council of Lake Geneva consists of the mayor and six aldermen. The proceedings of the council out of which the controversy arose are as follows:

"Apr. 23, 1912.

"Pursuant to adjournment of April 16, 1912, the common council of the city of Lake Geneva, Wis., met in the council chambers of said city, April 23, 1912, at 8 o'clock P. M.

"Present, Mayor Augesky, Aldermen Nichols, Powers, Briegel, Agern, Flemming and Kroll.

"Your committee on Rules respectfully recommends the following:

"1. Roll call at 8 o'clock sharp.

"2. Reading of minutes.

"3. Election of officers in the following order: Board of [427] health and its physician, chief of police, night police, street commissioner, city attorney.

"Alderman Nichols moved that in the election of officers, same be by ballot, the first ballot to be an informal ballot. Motion seconded by Alderman Agern and carried.

"Informal ballot for city attorney resulted as follows: Six votes cast, H. A. Burdick received three, L. G. Brown one, F. J. Tyrrell one, one blank.

"First formal ballot resulted as follows: Six votes cast, H. A. Burdick received three, L. G. Brown one, F. J. Tyrrell one, one blank.

"Second formal ballot, six votes cast, of which H. A. Burdick received three, L. G. Brown one, F. J. Tyrrell one, and one blank.

"Third formal ballot, six votes cast, of which H. A. Burdick received two, L. G. Brown three, blank one.

"Fourth formal ballot, six votes cast, of which H. A. Burdick received three, L. G. Brown two, one blank.

"Alderman Nichols moved that the election of city attorney be deferred to the next regular meeting. Motion seconded by Alderman Briegel and carried."

"May 7, 1912.

"A regular meeting of the common council of the city of Lake Geneva, Wis., was held in the council chambers of said city May 7, 1912, at 8 o'clock P. M.

"Present, Mayor Augesky, Aldermen Nichols, Powers, Briegel, Agern, Flemming and Kroll.

"Alderman Briegel moved the following corrections of the minutes: 'that in the election of a city attorney, all ballots after the first formal ballot be stricken off the records.' Motion was seconded by Alderman Nichols.

"Alderman Nichols moved as an amendment, 'that the minutes be declared correct as read.' Motion as amended was seconded by Alderman Kroll. Roll call on the amendment resulted as follows: Ayes, Aldermen Nichols, Powers, Kroll. Nays, Aldermen Briegel, Agern and Flemming.

"Mayor declared amendment lost.

"Roll call on original motion resulted as follows: Ayes, Aldermen Briegel, Agern and Flemming. Nays, Nichols, Powers, Kroll.

"Mayor declared the motion lost.

[428] "Alderman Nichols moved that the rules be suspended and communication from L. G. Brown read.

"Motion was seconded by Alderman Agern and carried.

"The resignation of L. G. Brown as city attorney was then read.

"Alderman Kroll moved that the resignation be accepted as read. Seconded by Alderman Powers and carried.

"Alderman Powers moved that the services of a city attorney be dispensed with for six months. Seconded by Alderman Kroll. A tie vote resulting, the mayor declared the motion carried."

"July 16, 1912.

"A regular meeting of the common council of the city of Lake Geneva, Wis., was held in the chambers of said city at 8 o'clock P. M. July 16, 1912.

"Present: Mayor Augesky, Aldermen Nichols, Powers, Briegel, Agern, Flemming and Kroll.

"Alderman Kroll moved the members of the common council to rescind and reconsider the action heretofore taken for the election or appointment of a city attorney. Seconded by Alderman Briegel. Carried.

"Alderman Briegel moved that we proceed by ballot to elect a city attorney, first ballot to be informal. Seconded by Alderman Agern. Carried.

"Result of informal ballot: H. A. Burdick, 3; F. J. Tyrrell, 3.

"Result of the formal ballot: H. A. Burdick, 3; F. J. Tyrrell, 3.

"The result being a tie vote, the mayor cast ballot declaring F. J. Tyrrell duly elected to the office of city attorney."

The city of Lake Geneva operated under a special charter (ch. 322, Laws of 1885) until

May, 1909, when it adopted the general charter law. Sec. 1 of ch. II of the special charter named the elective officers of the city and provided that all other officers, which included the city attorney, should be appointed by the common council. Sec. 7 of ch. III provided that the common council might at its first meeting elect a city attorney to conduct the law business of the corporation, or omit such election and when necessary provide [429] or employ such attorney or counsel as it might desire, and further provided the duties of the city attorney.

The case was tried on stipulated facts which show the proceedings heretofore recited and also additional facts, among others that on May 3, 1912, the relator filed his oath of office, and that on July 17, 1912, the defendant filed his oath of office, and that the relator since the filing of his oath of office has been able, ready, and willing to perform the duties of said office, and that no protest or objection was made by the relator personally to the common council because of proceedings had before it, but that the relator was not present at any of the meetings of the common council; that the office of the city attorney carried no salary, said attorney being paid reasonable compensation for services rendered; and that no certificate of election was ever issued to the relator or defendant.

The court below held that the relator was duly elected city attorney and entitled to the office, and judgment was rendered accordingly, from which this appeal was taken.

*Thompson, Myers & Kearney* and *Thomas M. Kearney* for appellant.

*D. B. Barnes* and *Wallace Ingalls* for respondent.

[430] KERWIN, J.—At the time of the alleged election of the relator the city of Lake Geneva was operating under the general charter, but under its provisions the election of officers was continued in the manner provided by the special charter. The provisions of the general charter which in any way relate to the matter under consideration are as follows:

"*City officers; methods of choosing.* Section 925—25. 1. The mayor, treasurer, comptroller, aldermen, justices of the peace and supervisors shall be elected by the people. The other officers shall be elected or otherwise selected as provided by ordinance approved by the electors of the city; provided, that in case any such officer, except policemen, shall be appointed by the mayor, such appointment shall be subject to confirmation by the council. In cities where the clerk performs the duties of comptroller, the clerk shall be elected by the people.

"*Methods under general charter.* 2. In all cities operating [431] under the general law, officers, except as herein specified, shall continue to be elected or appointed in the manner now provided by law. In cities adopting the general law all officers shall continue to be elected or appointed in the manner prevailing in such cities at the time of the adoption of the general law, until changed in the manner herein provided, except as herein otherwise provided."

"*Terms.* Section 925—26. All officers shall hold their offices respectively for the term of one year, except justices of the peace and aldermen, who shall hold for two years and until their successors are qualified, unless the council shall, by ordinance, provide a longer term for said officers or any of them, or unless a different term of office is expressly provided in this charter; provided, that this section shall not extend the terms of any city officers beyond the terms for which they were originally elected or appointed. The common council may provide that the terms of the aldermen first elected after the adoption of this provision shall expire in different years, and thereafter part of the aldermen shall be elected each year and hold for the full term."

Sec. 925—34 provides that every person elected or appointed to any office shall, before he enters upon the discharge of his duties, take and subscribe the constitutional oath of office and file the same with the city clerk within ten days after notice of his election or appointment.

Sec. 925—49 provides that the mayor and aldermen shall constitute the common council, and that whenever a majority or a certain proportion of the members of the council is required to take action or form a quorum, the mayor shall not be counted in determining such majority or proportion, and that the mayor shall have no vote except in case of a tie.

Sec. 925—51 provides that the council shall determine the rules of its proceedings; that two thirds of its members shall constitute a quorum for the transaction of business, excepting in cities wherein the council does not exceed five members, and in such cities a majority of the members thereof shall constitute a quorum, and that in all confirmations by the council the vote shall be taken *viva voce* and shall be recorded [432] by the clerk in the journal, and a concurrence of a majority of all the members shall be necessary to a confirmation.

Sub. 68 of sec. 925—52 provides that all laws, ordinances, regulations, and by-laws shall be adopted by an affirmative vote of a majority of all the members of the council.

There is no provision in the charter requiring a majority of the members of the council in the election or appointment of officers by the council. The council in the Ann. Cas. 1916E.—18.

instant case, as it had a right to do, adopted a rule of proceeding in the election of city attorney and provided that the election be by ballot and that the first ballot be informal. The first formal ballot taken on the 23d day of April, 1912, resulted in three votes for the relator, one for Brown, one for defendant, and one blank. The next formal ballot resulted the same.

The contention of the appellant is that neither of these formal ballots elected the relator for several reasons, which will be considered. It is insisted that the proceedings show that the council understood that no selection of city attorney had been made. It may well be that the members of the council thought that the votes of three aldermen under the circumstances did not elect, but what the aldermen did must control. The fact that the aldermen made a mistake of law in holding that the three votes cast for the relator did not elect him did not invalidate the election if three votes did in fact elect. Nor did the other proceedings of the council respecting deferring action and voting to reconsider the election invalidate the election if relator was elected by the first formal ballot. The proceeding to reconsider was not regular even if the council had power to reconsider. The motion deferring action did not disturb the vote taken or change the choice of the three aldermen who voted for the relator, and the motion to reconsider was not passed upon until after the relator had filed his oath of office.

Moreover, after the election of relator, acceptance of the [433] office, and qualification by him, the council had no power to reconsider and elect another. *State v. Starr*, 78 Conn. 636, 63 Atl. 512; *Reg. v. Donoghue*, 15 U. C. Q. B. 454; *Marbury v. Madison*, 1 Cranch 137, 2 U. S. (L. ed.) 60; *State v. Miller*, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732; 2 Dillon, Mun. Corp. (5th ed.) § 529 and cases cited in note.

In 2 Dillon, Mun. Corp. (5th ed.) sec. 529, it is said: "The weight of authority is also to the effect that, when a completed vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person."

It is true that in case of mistake or fraud in the taking of a ballot another ballot may be taken and the irregular or fraudulent one rejected. *State v. Starr*, supra. But no such case is here.

It is further insisted by counsel for appellant that the election or appointment of relator was not complete, because the city clerk never issued or filed a certificate to the effect that the relator had qualified as provided by sec. 925—29a of the general city

charter, and that the members of the common council never considered that relator was elected, and the mayor never declared him elected. The rule adopted for the election of city attorney provided that the election be by ballot and the second ballot be formal. The result of the formal ballot declared and recorded was that the relator received three votes. This result could not be changed by declaration of the mayor. Neither could the failure of the city clerk to issue and file a certificate of election deprive the relator of the office. The duty of the city clerk to issue and file the certificate was ministerial and is no part of the appointing power. The appointment is made when the last act required of the person vested with the power has been performed. *Marbury v. Madison*, 1 Cranch 137, 2 U. S. (L. ed.) 60.

[434] It is further argued by counsel for appellant that the vote of three aldermen was not sufficient to elect. There is no provision in the written law requiring a majority of the council to elect, hence the common-law rule applies. Under the charter two thirds of the aldermen, being four, constitutes a quorum for the transaction of business. The election or appointment of a city attorney was "transaction of business," and a majority of a quorum, in the absence of any statute to the contrary, was sufficient to elect. *Atty.-Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576; *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405; *Wheeler v. Com.* 98 Ky. 59, 32 S. W. 259. A majority of the votes cast, where all the aldermen were present, was sufficient to elect, even though some did not vote or voted a blank ballot. 2 *Dillon, Mun. Corp.* (5th ed.) §§ 528, 529; *State v. Miller*, 62 Ohio St. 436, 444, 57 N. E. 227, 78 Am. St. Rep. 732; *State v. Parker*, 32 N. J. L. 341; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *Cooley, Const. Lim.* (6th ed.) p. 771; *Everett v. Smith*, 22 Minn. 53; *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312, 14 L.R.A. 403; *Cass County v. Johnston*, 95 U. S. 360, 24 U. S. (L. ed.) 416; 2 *Dillon, Mun. Corp.* (5th ed.) §§ 522, 523, 526, 527.

It will be seen that in the special charter provision is made (sec. 1, ch. II) for appointments of all officers not elected by the electors, while in sec. 7 of ch. III the charter provides that the council may "elect" a city attorney, and in the general charter it is provided that officers not elected by the people shall be "elected or otherwise selected as provided by ordinance. . . ." Perhaps, accurately speaking, under sec. 9, art. XIII, Const., and the provisions of the city charter in the instant case the council appoint and do not elect the city attorney. But whether the term "elect" or "appoint" be used in the charter the power of the council over the subject matter is the same.

It is in reality an appointing power, and under the terms of the charter under consideration is to be exercised by the common council as a collective body, acting [435] in the capacity of the common council of the city of Lake Geneva.

Council for appellant further insists that sub. 3, sec. 4971, Stats., rules this case, and that under the provisions of this statute the power given to elect or appoint confers upon a majority of the council only the right to make the appointment, and the relator not having a majority of the council was not elected. We do not think the statute applies. It provides that words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons unless otherwise expressly declared. In the instant case the authority to appoint or elect a city attorney was not a joint authority given to the aldermen or aldermen and the mayor; it was an authority given to the common council in its collective capacity as common council.

Appellant also urges the doctrine of estoppel against the relator. We find nothing in the record to support this contention.

By THE COURT.—The judgment is affirmed.

#### NOTE.

##### Legality of Action by Majority of Quorum of Municipal Council.

The present note discusses the legality of action by a majority of a quorum of a municipal council. For a review of the cases passing on the legality of action of a majority of a quorum of corporate directors see the note to *Gunmaer v. Cripple Creek Tunnel, etc. Co.* 13 Ann. Cas. 786.

It seems to be well settled that a majority of a quorum of municipal council have the right to take any action which is within the power of the entire council, unless the statute, charter or by-laws governing the council provides otherwise.

*Connecticut*.—*State v. Chapman*, 44 Conn. 595.

*Illinois*.—See *McLean v. East St. Louis*, 222 Ill. 510, 78 N. E. 815.

*Indiana*.—*Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L.R.A. 315.

*Iowa*.—*Thurston v. Huston*, 123 Ia. 157, 98 N. W. 637.

*Kentucky*.—*Covington v. Boyle*, 6 Bush 204; *Morton v. Youngerman*, 89 Ky. 505, 12 S. W. 944, 11 Ky. L. Rep. 886; *Wheeler v. Com.* 98 Ky. 59, 32 S. W. 259; *Collopy v. Cloherty*, 39 S. W. 431.



*Maryland.*—*Murdock v. Strange*, 99 Md. 89, 3 Ann. Cas. 66, 57 Atl. 628. See also *Heiskell v. Baltimore*, 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 308.

*Missouri.*—*State v. Cowgill, etc. Mill Co.* 156 Mo. 620, 57 S. W. 1008; *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 85 S. W. 112.

*Massachusetts.*—See *Kingsbury v. Centre School Dist.* 12 Metc. 99.

*North Carolina.*—*LeRoy v. Elizabeth City.* 166 N. C. 93, 81 S. E. 1072.

*New Hampshire.*—*Atty.-Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576.

*New Jersey.*—*McDermott v. Kenney*, 45 N. J. L. 251; *Cadmus v. Farr*, 47 N. J. L. 208; *Barnert v. Paterson*, 48 N. J. L. 395, 6 Atl. 15; *Hutchinson v. Belmar*, 61 N. J. L. 443, 39 Atl. 643.

*New York.*—*Matter of Brearton*, 44 Misc. 247, 89 N. Y. S. 893.

*Ohio.*—*State v. Green*, 37 Ohio St. 227.

*Pennsylvania.*—*Schwer v. Muhlenberg*, 19 Pa. Super. Ct. 388; *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

*South Carolina.*—*State v. Delicesseline*, 1 McCord Eq. 52.

*Tennessee.*—*Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L.R.A. 308.

*West Virginia.*—*McMillin v. Neely*, 66 W. Va. 496, 66 S. E. 635.

*Wisconsin.*—See the reported case.

Thus in *Thurston v. Huston*, 123 Ia. 157, 98 N. W. 637, it was said: "The only question to be considered in this connection is whether a vote of a majority of the entire council is necessary to its passage. No authority is cited by the appellee in support of this contention. In the absence of any statutory or charter restriction, we think the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any resolution or order properly arising for the action of a city council or other collective body exercising legislative, judicial, or administrative functions. . . . The very fact that the statute makes specific requirement of a majority of all the members for the passage of ordinances, and the adoption of orders and resolutions to enter into contracts or for the appropriation of money, is a clear indication of the legislative intent to leave all matters arising for the action of the council, and not thus enumerated, to be governed by the parliamentary rule generally recognized by the courts, as above indicated." And in *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L.R.A. 315, it was said: "The rule is that if there is a quorum present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number

should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members." So in *Schwer v. Muhlenberg*, 19 Pa. Super. Ct. 388, the court said: "Was, however, a majority of the whole councils necessary to give the act validity? By the Act of April 5, 1867, sec. 14, P. L. 788, it is enacted that a majority of each council shall constitute a quorum to do business. This being so, it follows that a majority of the quorum voting in the affirmative is all that is required, in the absence of express statutory regulations to the contrary, to pass any item of business which the council has power to enact. It cannot be claimed that a majority of the whole body is necessary to perform the ordinary business of the body, and, therefore, as this transaction is of no higher class, even giving due weight to all the statements contained in the answer, and without considering the effect of the nonvoting members present at the meeting, to think the account was legally approved by common council."

In *Collopy v. Cioherty* (Ky.) 39 S. W. 431, it was held that while a majority of the quorum of a municipal council had power to act it was necessary that the entire quorum should be present to vote. The court said: "The charter (1874) provides that a majority of the board of councilmen shall constitute a quorum to transact all ordinary business. A rule had been adopted by the council, which reads as follows: 'A majority of a quorum of members elected and voting shall be necessary to choose any officer elected by the board.' As to the right of council to adopt it, there can be no question. This rule was in force at the time Collopy claims he was elected. There were 14 members of the board of council. Of course, eight would constitute a quorum. The record of the proceedings of the council shows that when it convened at

the meeting during which the voting was done for the election of the 'foreman of street repairs and overseer of the poor' thirteen of the members were present. The record of the council exhibited in this record is silent as to the number present when the voting took place. Only seven members voted at the election, and all voted for Collopy. However, in our opinion, the question to be determined is not as to whether, under the law ordinarily governing the action of boards of council of municipalities, those who may have been present and did not vote should be counted to make a quorum, nor as to whether, under that law, if a majority of the council failed to attend, a majority of those present may act. The question is whether the rule required that a quorum should vote in order that a majority of it should be enabled to elect an officer. If the contention of appellant be correct, then five members could meet and elect such officers as the council were authorized to elect, regardless of whether a quorum was present or participated in the election. We are of the opinion that the meaning of it is that a 'quorum of the members elected' should vote, and that a majority of that quorum could elect when the quorum was 'voting.'"

### MANNING

v.

### ST. PAUL GASLIGHT COMPANY.

Minnesota Supreme Court—March 12, 1915.

129 Minn. 55; 151 N. W. 423.

#### Gas — Liability for Injury Caused by Escape.

Defendant manufactures and distributes illuminating gas. Such gas, when allowed to escape in any considerable quantity, becomes a highly dangerous substance, and the defendant must exercise a commensurate degree of care to prevent the gas from escaping up to the time it is measured and delivered, through its meter, to the consumer.

[See note at end of this case.]

#### Same.

The rule of *res ipsa loquitur* may be applied to a situation which discloses that gas escaped in destructive quantities from a break in the service pipe installed by the gas company upon the consumer's premises, at his cost, where the evidence further shows that there had been no work or change upon such premises which could have affected the

pipe, and no interference therewith. Under this rule defendant was not entitled to a directed verdict.

[See note at end of this case.]

#### Complaint Held Sufficient.

The complaint, without the permitted amendment, held sufficiently broad to admit of proof showing improper installation of the service pipe.

#### Instructions Sustained.

No error is found in refusing to give requested instructions, nor is there prejudicial error in the charge as given.

#### Evidence Held Sufficient.

The verdict finds support under the evidence and the law.

(Syllabus by court.)

Appeal from District Court, Ramsey county: CATLIN, Judge.

Action for death by wrongful act. Mary B. Manning, administratrix, plaintiff, and St. Paul Gaslight Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Butler & Mitchell* for appellant.

*Charles W. Farnham and O'Brien, Young & Stone* for respondent.

[56] *HOLT, J.*—While asleep in his home in St. Paul, Minnesota, on August 22, 1913, plaintiff's intestate, Samuel J. Manning, was asphyxiated by illuminating gas which had escaped through a break in the service pipe through which defendant supplied it to the building. Mr. Manning was alone in the house on the night he met death. Immediately upon his body being discovered, defendant made an investigation and ascertained that the gas found entrance to the house from a large break in the service pipe at a joint, or coupling, located in the ground about five feet away from where it passed through the foundation of the building. The pipe was laid about 27 inches below the surface. The ground was peaty. It, however, had been in no manner disturbed during the time Mr. Manning had been the owner, some four years. Defendant under its franchise installs the service pipe and connects it with a meter in the building to be supplied with gas; however, the owner of the building pays the cost of installation from the lot line to the meter. The complaint set forth: "That on or about August 22, 1913, the defendant wrongfully, unlawfully and negligently had permitted its pipes to become damaged, defective and leaky to such an extent that solely on account of such negligence, a large quantity of the defendant's illuminating gas was permitted to escape and did escape" into the dwelling house of Mr. Manning causing his death. Plaintiff had a verdict, and defendant

appeals from the order denying its motion, in the alternative, for judgment notwithstanding the verdict, or a new trial.

Defendant is not entitled to judgment notwithstanding the verdict. There is no doubt the fatal accident was caused by defendant's gas which escaped from the break in the service pipe. Illuminating gas is a highly dangerous and destructive product when allowed to escape or to get beyond control. Defendant is engaged in the manufacture [57] and distribution thereof, and in so doing is required to exercise a degree of care commensurate with the great danger likely to result from its escape. The gas belongs to defendant until sold and delivered through its meter in the consumer's building, and therefore defendant should be responsible for its care until it is so measured and delivered. We are unable to find any sound basis for making defendant's care and vigilance to prevent the escape of its dangerous product any less between the meter and the lot line, than between the lot line and the retort where manufactured. Whether defendant owns the pipes in which its gas is confined or not is not important, for, the fact remains, such pipes are of its choosing as to kind, quality and method of installation. They are not subject to the care or interference of any one but defendant. Therefore, when it appears that upon the private premises where defendant has installed its product there has been no change or work done which, in any manner, could interfere with the service pipe containing defendant's gas and nevertheless a break has occurred in such pipe from which death or destruction has come, the doctrine of *res ipsa loquitur* applies. This we deem decided in *Gould v. Winona Gas Co.* 100 Minn. 258, 111 N. W. 254, 10 L.R.A.(N.S.) 889. The intimated possible distinction between the gas escaping from the service pipes upon the consumer's land and that from its defective pipes away from the premises upon which the injury is wrought, found in the last part of opinion, relates to a plaintiff's contributory negligence, and not to the burden of proof on the question of a defendant's negligence. The decision goes to the proposition that the manufacturer and distributor of illuminating gas is held in damages for the escape of gas on the principle of negligence, and not of trespass; and that the escape of this agency in highly destructive quantities is *prima facie* evidence of negligence.

The trial court deemed the doctrine of *res ipsa loquitur* inapplicable, and we should ascertain whether defendant is entitled to a new trial because of errors or because of lack of evidence to support the verdict under the charge of the court. The errors assigned depend chiefly on the claim that the complaint was insufficient to admit proof of defects in the installation of the pipe where the break

[58] occurred. The court permitted plaintiff to amend; but we think the amendment added nothing of substance to the charge of negligence originally made. Permitting or suffering the pipe to become leaky does not necessarily convey the meaning that such condition was due alone to want of care subsequent to its installation, it may as well have resulted from faulty construction originally. And in its last analysis the actionable wrong was in negligently permitting the destructive gas to escape. We therefore hold evidence properly received as to the character of the soil wherein and the depth at which the pipe was laid, the absence of the usual blocking under the joint and how the pipe had sagged, and the condition in which the foundation had been left where it passed through.

Construing the complaint as we do, and holding that defendant is not absolved from the duty of care to prevent the escape of its gas, it follows that it was not error to refuse defendant's requested instructions to the effect that there was no justification for finding liability on the ground of defective installation, or for failure to maintain in a safe condition or for not guarding against the action of frost. The court was right in submitting those propositions to the jury.

We think the evidence amply justifies the verdict. The character of the soil around Manning's home was such that it was liable to settle, yet the usual precaution to block the service pipe at the coupling or joint was not taken. That the settling was considerable was shown by the fact that the sag of the pipe at the break was six inches. The soil was also of such character that the action of the frost was likely to heave or unsettle it to a great extent, and yet the pipe was placed at a depth of less than three feet. The evidence also tended to show no attempt in the original installation to plaster or make tight the foundation where the pipe passed through, thus a ready access to the basement was afforded the escaping gas.

The order is affirmed.

#### NOTE.

#### Liability of Gas Company for Injury Caused by Escape of Gas from Pipes.

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- Evidence:
  - Burden of Proof, 280.
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  - Particular Injuries, 281.

*Introductory.*

The present note purports to discuss the recent cases passing on the liability of a gas company for injury caused by the escape of gas from pipes. The earlier cases on this point are collected in the notes to *Dowler v. Citizens' Gas, etc. Co.* Ann. Cas. 1914C 341, and *U. S. Natural Gas Co. v. Hicks*, 135 Am. St. Rep. 407.

*Generally.*

The reported case conforms to the general rule that a gas company, in view of the highly dangerous character of gas and its tendency to escape, must use a degree of care to prevent the escape of gas from its pipes, proportionate to the danger which it is its duty to avoid, and that if it fails to exercise this degree of care and injury results therefrom, the company is liable, provided the person suffering the injury either in person or in property is free from contributory negligence. *Little Rock Gas, etc. Co. v. Coppedge*, 116 Ark. 334, 172 S. W. 885; *Union Inv. Co. v. San Francisco Gas, etc. Co.* 168 Cal. 58, 141 Pac. 807; *Christo v. Macon Gas Co. (Ga.)* 89 S. E. 532; *Murphy v. Ludowici Gas, etc. Co.* 96 Kan. 321, 150 Pac. 581; *Louisville Gas Co. v. Guelat*, 150 Ky. 583, 150 S. W. 656, 42 L.R.A.(N.S.) 703; *Wolff v. Shreveport Gas, etc. Co.* 138 La. 743, 70 So. 789; *Soulier v. Fall River Gas Works Co.* 224 Mass. 53, 112 N. E. 627; *Chew v. Commercial Gas Co.* 87 N. J. L. 679, 94 Atl. 578; *Sharkey v. Portland Gas, etc. Co.* 74 Ore. 327, 144 Pac. 1152, *rehearing denied* 74 Ore. 333, 145 Pac. 660; *Windish v. People's Natural Gas Co.* 248 Pa. St. 236, 93 Atl. 1003; *Smith v. People's Natural Gas Co.* 248 Pa. St. 246, 93 Atl. 1005; *Pouder v. People's Natural Gas Co.* 248 Pa. St. 242, 93 Atl. 1005; *Clemens v. American Natural Gas Co.* 21 Pa. Dist. 315; *Norfolk City Gas Co. v. Webb*, 117 Va. 269, 84 S. E. 645; *George v. Tri-State Gas Co.* 74 W. Va. 177, 81 S. E. 722, 52 L.R.A.(N.S.) 537; *Guillaume v. Wisconsin-Minnesota Light, etc. Co.* 161 Wis. 636, 155 N. W. 143.

Thus in *Windish v. People's Natural Gas Co.* 248 Pa. St. 236, 93 Atl. 1003, it was said: "Natural gas companies are very properly held to a high degree of care in the maintenance of pipes and other instrumentalities required in furnishing gas to consumers, and there is no disposition to relax the requirements of the rule applicable to those whose business it is to furnish such a dangerous agency; but it must not be overlooked that the right to recover damages in such cases depends upon first averring and then proving the negligence charged. It is the duty of the pleader to aver the negligence upon which he relies to sustain a recovery, and when the

case is tried the burden is on plaintiff to prove the negligence so charged." And in *Sharkey v. Portland Gas, etc. Co.* 74 Ore. 327, 144 Pac. 1152, *rehearing denied* 74 Ore. 333, 145 Pac. 660, it was said: "Illuminating gas is a dangerous thing when it eludes control, and it is incumbent upon those who deal in it as an article of merchandise to use care commensurate with its harmful nature. Of course the diligence must be such as an ordinarily prudent person would exercise under like circumstances in managing such an article. In brief, the care must be proportionate to the danger to be reasonably apprehended from the agency under consideration. It is plain that a greater degree of absolute care should be exercised in such circumstances than in conducting a millinery store or carpenter shop. In either case, however, the care must be proportionate to the risk incurred." So in *McWilliams v. Kentucky Heating Co.* 166 Ky. 26, 179 S. W. 24, L.R.A.1916A 1224, the court said: "The contract obligated the appellees to keep their line of pipes in proper condition, and in such a way as not to interfere with ordinary travel on the road. The meaning of this condition, as we construe it, is that the appellees undertook to exercise ordinary care to continually keep and maintain the gas mains in such manner as to have the road, from day to day, in such condition as that it would be reasonably safe, considering the usage and travel which it might be reasonably foreseen or anticipated it would be subjected to from day to day. Ordinary care to maintain a place or thing in safe condition, under a state of facts such as we have, is a variable and not a stationary degree of care. It changes as the conditions under which it is to be exercised change, and keeps pace with these conditions, so that the place or thing, under all conditions that it may reasonably be foreseen or anticipated will arise, will be in a reasonably safe condition." And in the same case the court further said: "But the care demanded of appellees did not end when the main was laid. They were under a duty to exercise ordinary care to keep and maintain the main in such condition as that the road would be in reasonably safe condition, considering the uses and travel to which it might reasonably be anticipated it would be subjected in the future, and to take notice of the future use and travel and exercise such care as might be necessary to maintain the mains in reasonably safe conditions to meet its requirements. The duty imposed upon the appellees to exercise ordinary care in the maintenance of these gas mains imposed upon them the duty of exercising ordinary care at all times, while the mains were in the public road, to guard against injury through any reasonable and proper use of the road, in view

of the condition to which its use under modern methods might be subjected."

#### *Liability as Insurer.*

A gas company is not an insurer of its pipes and is not liable for failure to keep its gas pipes in such condition as to prevent absolutely the escape of gas, where it has used the proper degree of care to that end. *Taylor v. St. Joseph Gas Co.* 185 Mo. App. 537, 172 S. W. 624, wherein the court said: "It is certainly true, as claimed by defendant, that it is not an insurer, and that, though its gas killed the trees, negligence must be shown." And in *Louisville Gas Co. v. Guelat*, 150 Ky. 583, 150 S. W. 656, 42 L.R.A. (N.S.) 703, the court said: "By the instruction of the court, the jury were, in substance, told that it was the duty of the gas company to have and maintain its gas pipes in such condition as to prevent the escape of gas into the plaintiff's house, and that a failure on its part to do this was negligence. The instruction goes too far. In *Triple-State Natural Gas, etc. Co. v. Wellman*, 114 Ky. 79, 70 S. W. 49, 24 Ky. L. Rep. 851, 1 Ann. Cas. 64, we said: 'The authorities lay down the rule, as gas is a useful article, almost indispensable in modern life under many circumstances, the manufacture and sale of it is not an illegal act; and that the company in supplying this necessity to its customers is bound only to exercise such care and skill in its management as the dangerous character of the substance and the attending circumstances demand of a person of ordinary prudence.' The company is not an insurer of its pipes and it is not liable if it fails to keep its gas pipes in such condition as to prevent the escape of gas, where it has used ordinary care to this end. To illustrate in this case, it may be true that the gas company properly put the plug in the pipe and that the pipe was in a safe condition as it left it, and it may be true that after this in some manner the plug was disturbed or the pipe was injured without its knowledge, and when it had no reason to anticipate that there was any danger. The court should have told the jury in effect that it was the duty of the gas company to use ordinary care to have and maintain its gas pipe in such condition as to prevent the escape of gas into the plaintiff's house; and if it failed to use such care and by reason of such failure, the loss occurred, they should find for the plaintiffs."

#### *Duty of Inspection.*

In *Christo v. Macon Gas Co.* (Ga.) 89 S. E. 532, the court adhered to the rule that a gas company not only must see that its pipes and fittings are of such material and workmanship and are laid in the ground with

such skill and care that gas will not escape therefrom when new, but also must maintain such a system of inspection as will with reasonable promptness detect leaks that may occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. In that case it was said: "A company which produces and furnishes gas is bound to use such skill and diligence in its operations as is proportionate to the delicacy, difficulty, and nature of that particular business. *Chisholm v. Atlanta Gas-Light Co.* 57 Ga. 29; 20 Cyc. 1170. Such a company, before turning on, or permitting to be turned on, gas for the benefit of a tenant in an apartment house who has applied for it, must use reasonable precautions to ascertain that the pipes in the building are in such condition that gas will not flow into the apartments of tenants who have not applied for it, to their injury; and it is for the jury to say whether or not the company, before permitting gas to be turned on for the benefit of one tenant of an apartment house, used reasonable precautions to ascertain that no harm would thereby result to other tenants who had not applied for it, by the gas escaping into their rooms. In such a case the company cannot deny its liability for injuries resulting from failure to use reasonable precautions, before turning gas into an apartment building, to see that injury could not result from the escape of gas into the rooms of tenants not applying for it, on the ground that it had no right to enter upon the premises of the parties not applying for gas for the purpose of making an inspection of the pipes therein. *Schmeer v. Gas Light Co.* 147 N. Y. 529, 42 N. E. 202, 30 L.R.A. 653. This is true although the gas pipes used by the gas company were old pipes that had not been installed by the company, and did not in fact belong to it." To the same effect see *Louisville Gas Co. v. Guelat*, 150 Ky. 583, 150 S. W. 656, 42 L.R.A. (N.S.) 703.

#### *Notice of Leak.*

When a gas company has notice of a break or defect in its pipes it must use due care and diligence to prevent the escape of gas either by cutting off the flow or by repairing the break. *Norfolk City Gas Co. v. Webb*, 117 Va. 289, 84 S. E. 645. See also *Smith v. People's Natural Gas Co.* 248 Pa. St. 246, 93 Atl. 1005; *Windish v. People's Natural Gas Co.* 248 Pa. St. 236, 93 Atl. 1003; *Pouder v. People's Natural Gas Co.* 248 Pa. St. 242, 93 Atl. 1005.

But in *George v. Tri-State Gas Co.* 74 W. Va. 177, 81 S. E. 722, 52 L.R.A. (N.S.) 537, it was held that a gas company was not responsible for the escape of gas in a house

that had been set on fire by an explosion from an independent source, and which explosion broke the gas pipes, where it appeared that the occupant of the house had it within his control to turn off the gas, and that the gas company had not been notified of the escape of gas. And this was so held even though the gas company knew of the fire, and had an agent there.

#### *Contributory Negligence.*

The rule that contributory negligence is a defense in an action against a gas company for damages suffered and is a question of fact to be submitted to a jury was applied in *Christo v. Macon Gas Co.* (Ga.) 89 S. E. 532.

However, in *Norfolk City Gas Co. v. Webb*, 117 Va. 269, 84 S. E. 645, wherein it appeared that the plaintiff by igniting a match for the purpose of finding the valve of a water pipe, over a manhole, caused to explode, gas which had negligently been allowed to collect through the gas company's failure to exercise the proper care, it was held that the plaintiff was not chargeable with contributory negligence, even though he knew that there was gas escaping in the vicinity.

#### *Negligence of Third Person.*

The rule that a gas company is not relieved from liability for an injury caused by gas escaping from its pipes although this is due to the concurrent negligence of the company and a third person not in privity with the plaintiff was applied in *Wolff v. Shreveport Gas, etc. Co.* 138 La. 743, 70 So. 789, wherein it was held that a passer-by who was injured by a gas explosion caused partly by the negligence of the gas company and partly by the negligence of the consumer, could recover from both.

In *McWilliams v. Kentucky Heating Co.* 166 Ky. 26, 179 S. W. 24, L.R.A.1916A 1224, wherein it appeared that the plaintiff, a county employee, was injured by reason of the negligent location of a gas main, while driving a steam roller over a macadam road, and wherein it further appeared that the county officials knew of the location of the gas main, it was held that the contributing negligence of the county official would not defeat the plaintiff's right of action. The court said: "But the knowledge of the county officials, or whether they did or did not know of the closeness of the main to the surface of the road, is not a material factor in the disposition of this case. The appellant is not to be dismissed because the county officials were guilty of some want of care, nor are the appellees to be relieved from liability even if it should be assumed that the negligence of the county officials was a contributing cause in producing the accident

that caused the injury. We think it is a well-settled rule in the law of negligence that the negligence of one party does not excuse from liability a third party, also guilty of negligence, if the injury complained of would not have happened except for his negligence. So that, if we should assume that the county authorities were negligent, and that their negligence, concurring with that of the appellees, produced the injury, the right of action created in the appellant against the appellees on account of their negligence is not, in any manner, impaired or diminished by the negligence of the county officials if they were guilty of any."

#### *Evidence.*

##### **BURDEN OF PROOF.**

The well-settled rule, that in an action for injuries caused by escaping gas the burden is on the plaintiff to prove that the gas company failed to exercise the proper degree of care, has been further sustained in some recent cases. *Union Inv. Co. v. San Francisco Gas, etc. Co.* 168 Cal. 58, 141 Pac. 807; *Murphy v. Ludowici Gas, etc. Co.* 96 Kan. 321, 150 Pac. 581; *Woodburn v. Union Light, etc. Co.* 164 Ky. 29, 174 S. W. 730; *Windish v. People's Natural Gas Co.* 248 Pa. St. 236, 93 Atl. 1003; *Smith v. People's Natural Gas Co.* 248 Pa. St. 246, 93 Atl. 1005; *Pouder v. People's Natural Gas Co.* 248 Pa. St. 242, 93 Atl. 1005; *Karabelas v. Canadian Western Natural Gas Co.* 28 West. L. Rep. (Alberta) 669, 16 Dominion L. Rep. 791. But in *Willard v. Valley Gas, etc. Co.* 171 Cal. 9, 151 Pac. 286, wherein it appeared that an explosion occurred in plaintiff's premises while an agent (Mr. Mills) of the gas company was making a repair, the court held that the burden of proving freedom from blame was on the gas company. The court said: "In proving, by the witnesses of both sides, that the origin of the fire was an explosion of gas, plaintiffs placed upon the defendant the burden of proving freedom from blame, because explosions do not ordinarily occur when work such as Mr. Mills was performing is executed in a careful manner."

##### **SUFFICIENCY OF EVIDENCE.**

In the reported case where it appears that gas escaped from a break in a service pipe installed by a gas company on the plaintiff's premises, which pipe was subject to the care and maintenance of the gas company, and where it further appears that there was no change or work done, which in any manner could interfere with the service pipe, the doctrine of *res ipsa loquitur*, it is held, applies. To the same effect see *Grimes v. Minneapolis*, following the reported case. And in

129 Minn. 55.

*Sharkey v. Portland Gas, etc. Co.* 74 Ore. 327, 144 Pac. 1152, *rehearing denied* 74 Ore. 333, 145 Pac. 660, it was held that the escape of gas from a gas main was some evidence of negligence on the part of the gas company on the principle of *res ipsa loquitur*.

However, in *Union Inv. Co. v. San Francisco Gas, etc. Co.* 168 Cal. 58, 141 Pac. 807, it was held that evidence of insecure fastening of gas pipes in a newly erected building which had been burned, did not create a presumption that this was the cause of the fire, and that the gas company was responsible. The court said: "It will thus be seen that there was an utter failure to establish a causal connection between the only facts that may be taken as proved,—namely, the insecure fastening of the pipe and the burning of the building. All the rest of plaintiff's case rested on inference piled upon inference. The building may have been set on fire by an incendiary, or a lighted cigarette dropped by a workman may have ignited debris which smouldered for hours before bursting into flame. These theories are pure conjectures, yet they are no more unsubstantial than the attempted proof that the defendant's negligence was the approximate cause of the fire. The fact that the pipe was insecurely fastened, coupled with the other facts that it was found broken after the fire and that gas was burning in the building during the conflagration, does not establish plaintiff's case."

In *Woodburn v. Union Light, etc. Co.* 164 Ky. 29, 174 S. W. 730, it was held that the mere fact of a gas explosion does not raise a presumption of negligence on the part of the gas company, and it appearing in that case that a leak was not discovered in the gas meter installed by the gas company until two weeks after the accident, the evidence was considered insufficient to go to the jury on the question of the gas company's negligence. But in *Taylor v. St. Joseph Gas Co.* 185 Mo. App. 537, 539, 172 S. W. 624, it was said: "The St. Louis Court of Appeals decided that in an action against a gas company for damages caused by the defendant's negligence permitting the escape of gas a *prima facie* case is made out by showing the break or leak in the main and the consequent escape of the gas, which caused the injury." And in *Chew v. Commercial Gas Co.* 87 N. J. L. 679, 94 Atl. 578, evidence that the defendant gas company had not properly laid its pipes and that the gas began to escape from

them, almost as soon as it was turned under pressure into the pipes, and evidence that during the next spring after the pipes were laid near the roots of the plaintiff's shade trees, the leaves of the trees turned yellow and died, together with expert testimony by a forestry engineer to the fact that the poisoning of the trees was due to illuminating gas, was considered sufficient to go to the jury. In *H. Wales Lines Co. v. Hartford City Gas Light Co.* 89 Conn. 117, 93 Atl. 129, the plaintiff, in an action to recover damages for injuries to a pumping station, showed that the defendant gas company negligently allowed illuminating gas to escape into a public sewer which connected with the pumping station and further showed by an expert that the cause of the accident was the explosion of illuminating gas, the court held that the evidence was sufficient to go to the jury on the question of the gas company's liability.

#### *Particular Injuries.*

Where the evidence is sufficient to show negligence on the part of a gas company resulting in an explosion of gas and causing personal injuries, the gas company will be held liable. Thus in *Murphy v. Ludowici Gas, etc. Co.* 96 Kan. 321, 150 Pac. 581, wherein it appeared that the plaintiff was injured by reason of an explosion caused by the driving of a threshing machine over a defectively laid gas pipe, it was held that the gas company was liable. To substantially the same effect see *McWilliams v. Kentucky Heating Co.* 166 Ky. 26, 179 S. W. 24, L.R.A.1916A 1224. And in *Willard v. Valley Gas, etc. Co.* 171 Cal. 9, 151 Pac. 286, wherein it appeared that certain property was destroyed by reason of a gas explosion attributed to the fault of the gas company, recovery for the damages was allowed.

Where injury is done to trees, grass, shrubbery, or plants from the pipes of a gas company due to the use of defective material in the pipes, or because of the imperfect manner in which they are laid or because of failure to repair breaks whether caused by the fault of the company or another, the injured property owner has a right to recover for the damages sustained. *Chew v. Commercial Gas Co.* 87 N. J. L. 679, 94 Atl. 578. To the same effect see *Grimes v. Minneapolis Gaslight Co.* (Minn.) 158 N. W. 623; *Guillaume v. Wisconsin-Minnesota Light, etc. Co.* 161 Wis. 636, 155 N. W. 143.

**IDAHO POWER AND LIGHT  
COMPANY**

v.

**BLOMQUIST ET AL.**

**BEAVER RIVER POWER COMPANY**

v.

**BLOMQUIST ET AL.**

Idaho Supreme Court—June 27, 1914.

*26 Idaho 222; 141 Pac. 1083.*

**Statutes — Time of Taking Effect —  
Public Utilities Act.**

The act known as the "Public Utilities Act" was passed at the twelfth session of the Idaho legislature, which session was adjourned on the 8th day of March, 1913, and said act was approved by the governor on March 13, 1913, and went into effect sixty days after the adjournment of said session of the legislature, to wit, on the 8th day of May, 1913. Session Laws 1913, p. 247. Said act provided for the organization of a public utilities commission, and defined its powers and duties, and also the rights, remedies, powers, and duties of public utilities, their officers, agents, and employees, and the rights and remedies of patrons of public utilities.

**Same.**

Under the provisions of section 10, art. 4, of the constitution, every bill passed by the legislature becomes a law upon the approval and signing of the same by the governor.

**Constitutional Law — Control of Public Utilities.**

All property devoted to public use is held subject to the power of the state to regulate or control its use in order to secure the general safety, health, and public welfare of the people, and when a corporation is clothed with rights, powers, and franchises to serve the public, it becomes in law subject to governmental regulation and control.

[See 6 R. C. L. tit. *Constitutional Law*, p. 224.]

**Power of Legislature Generally.**

The legislature has plenary power in all matters of legislation, except as limited by the constitution.

**Regulation of Public Utilities.**

There is nothing in the constitution that prohibits the legislature from enacting laws to regulate and control public utility corporations.

**Same.**

The police power of the state is sufficiently broad and comprehensive to enable the legislature to regulate by law public utilities, in order to promote the health, comfort, safety, and welfare of the people, and thus regulate the manner in which public utility corporations shall construct their systems and carry on their business within the state.

**Necessity for Extension of Public Utility — Power of Public Service Commission.**

Under the state's police power, the legislature has authority to authorize said utilities commission to determine whether a duplication of an electrical plant is required in a town or city for the convenience and necessity of the inhabitants.

[See note at end of this case.]

**Power to Fix Rates.**

Under the provisions of said act, the commission has power absolutely to fix the rates, and it is unlawful for the utility to charge more or less than the rates so fixed.

[See 14 Ann. Cas. 614.]

**Restricting Competition between Public Service Companies.**

Formerly competition was supposed to be the proper means of protecting the public and promoting the general welfare in respect to service of public utility corporations, but experience has demonstrated that public convenience and public needs do not require the construction and maintenance of numerous instrumentalities in the same locality, but rather the construction and maintenance only of those necessary to meet the public necessities, when such utilities are properly regulated by law.

**Same.**

Said public utilities act provides that competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand or require it.

**Same.**

Section 18, art. 11, of the state constitution, prohibits combinations for the purpose of fixing prices or regulating production, and requires the legislature to pass appropriate laws to enforce the provisions of that section, and said public utilities act is justified by the provisions of said section, since its ultimate effect will be to prevent unreasonable rates and combinations by public utilities.

**Same.**

Unregulated competition is the tool of unregulated monopoly.

**Same.**

Under the provisions of said act, unregulated competition is not needed to protect the public against unreasonable rates or unsatisfactory service; and there can now be no justification for unregulated competition or a duplication of utility plants under the pretense of preventing monopoly.

**Necessity of Regulation.**

Experience and history clearly show that public utility corporations cannot be safely intrusted to properly serve the public until they are regulated and placed under public control.

**Extension of Public Utility — Power of Public Service Commission.**

The legislature has ample power to give the public utilities commission authority to refuse to give a certificate of convenience and necessity to a public utility, where it seeks to



duplicate a plant or system that is amply sufficient to serve properly the inhabitants of a community.

[See note at end of this case.]

**Public Service Commissions — Delegation of Legislative Powers.**

The legislature may not delegate its purely legislative power to a commission; but, having laid down by law the general rules of action under which a commission may proceed, it may require of that commission the application of such rules to particular situations and conditions, and authorize an investigation of facts by the commission, with a view to making orders in a particular matter within the rules laid down by such law.

**Regulation of Public Utilities.**

Power to regulate public utilities presupposes an intelligent regulation, and necessarily carries with it the power to employ the means necessary and proper for such intelligent regulation.

**Same.**

Under the law, the standard by which rates, service, etc., must be fixed clearly contemplates reasonable rates, service, etc., which is a legislative matter, and cannot be delegated; but the authority to determine what is a reasonable rate is purely administrative, and can be delegated and was delegated to the commission in our public utilities act (Laws 1913, c. 61), and the several acts authorized to be performed by the commission may be reviewed by this court on a writ of certiorari or review, as provided by section 63a of said act, and under the provisions of that section all orders made by the commission may be reviewed by this court, and this court has the authority to determine whether such orders are unlawful.

**Same.**

The contract right given to a public utility corporation by ordinance of a city does not come within the contract clause of the Constitution of the United States, in that it can in no manner be affected by the police power of the state; and when a corporation acquires a franchise for the purpose of carrying on a corporate business within a city, it is accepted subject to the police power.

**Certificate of Necessity — Extension of Electrical Plant.**

It is provided by section 48a of said act that no electrical corporation shall "henceforth" begin the construction of an electrical plant, etc., without having first obtained a certificate of convenience and necessity from the commission; and a public utility corporation cannot slip in between the passage and approval of such act and its going into effect and procure an ordinance that would deprive the state of its right to regulate it in its operations under the police power of the state, especially where such corporation had not begun actual construction work, and was not prosecuting such work in good faith and uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, as provided by section 48b of said act; for under the facts of this case the plaintiffs

had not begun actual construction work on their system on either of said cities.

**Same.**

The last proviso of section 48a provides that power companies may, without such certificate, increase the capacity of existing plants, or develop new generating plants and market the product thereof. That proviso must not be so construed as to nullify the clear object and purpose of said act. If construed to give such corporations the power to establish new plants and lines and enter into new fields for the sale of their products, then the main object and purpose of said act would be nullified and defeated; and if that proviso be construed in that way, it must be held as nugatory, and be disregarded.

**Same.**

It was not the intention of the legislature, under the provisions of section 48b, to permit such corporations to extend their lines into territory already occupied by a similar utility corporation, without first securing a certificate of convenience and necessity from said commission.

**Same.**

Held, that the power of regulation as provided by said act is not required to be specifically conferred by the provisions of the state constitution, and that there is no inhibition in the constitution upon the legislature prohibiting the enactment of such a law.

(Syllabus by court.)

Two original applications for writs of review to determine validity of order of public utilities commission. Idaho Power and Light Company and Beaver River Power Company, plaintiffs, respectively, and J. A. Blomquist et al., defendants in each case. The facts are stated in the opinion. **ORDER AFFIRMED.**

*Hawley, Puckett & Hawley* and *H. R. Waldo* for plaintiffs.

*J. H. Peterson, J. J. Guheen* and *E. G. Davis* for defendants.

*S. H. Hays* for Great Shoshone and Twin Falls Water Power Company.

*Richards & Haga, McKen F. Morrow* and *T. C. Coffin, amici curiae.*

[232] SULLIVAN, J.—On this hearing two separate and distinct applications for writs of review under sec. 63a of the act known as the public utilities act (Laws 1913, p. 247), are involved. One case is entitled the Idaho Power & Light Co. a Corporation v. J. A. Blomquist, A. P. Ramstedt and D. W. Standrod, as the Public Utilities Commission of the State of Idaho (which is known as the Twin Falls case); and the other is entitled, The Beaver River Power Co. a Corporation v. J. A. Blomquist, A. P. Ramstedt and D. W. Standrod, as the Public Utilities Commission of the State of Idaho (known as the Pocatello case).

In the application in each case for a writ of review, the plaintiff complains of the order made by the public utilities commission requiring the plaintiff to refrain from constructing its proposed plants in either the city of Twin Falls or Pocatello, for the purpose of furnishing such cities and inhabitants with electrical energy, on the ground that such company has not obtained a certificate of public convenience and necessity requiring such service, in compliance with secs. 48a, 48b and 48c of said act.

It is provided by sec. 63a that the applicant may apply to this court for a writ of review for the purpose of having the lawfulness of any order of the utilities commission inquired into and determined, and that such review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right [233] of the petitioner under the constitution of the United States or of the state of Idaho, and whether the evidence is sufficient to sustain the findings and conclusions of the commission.

A complaint was filed with the public utilities commission on the 22d day of November, 1913, by the Great Shoshone & Twin Falls Water Power Co., a public utility corporation, which was then supplying the city of Twin Falls with electrical energy, and by J. H. Seaver, a resident and citizen of the said city of Twin Falls; in which complaint was set up by the Idaho Power & Light Co., the plaintiff herein, and its predecessors in interest, had not procured the certificate of necessity and convenience required to be procured by the provisions of said act before any public utility is permitted or authorized to construct power lines into a territory already served by some public utility of like character.

After various proceedings were had in said matter, an answer was filed with the public utilities commission and the decision of the commission was rendered on the 18th of February, 1914, to the effect that it was necessary, under the provisions of said act, for the plaintiff to secure a certificate of convenience and necessity before constructing its lines and works in the city of Twin Falls. A rehearing was applied for and denied and the matter now comes before this court for hearing on a writ of review.

The point in issue in this proceeding is as to the constitutionality of said act, and if constitutional, whether or not the Idaho Power & Light Company, the plaintiff, must obtain a certificate of convenience and necessity before constructing its lines into the said cities. It is admitted that said public utilities act was approved by the governor and

went into effect on the 8th day of May, 1913, if constitutional. The facts are stipulated in these cases, and it appears therefrom that the Great Shoshone & Twin Falls Water Power Company has for more than three years last past been supplying the city of Twin Falls and its inhabitants with electricity for light and power purposes; that on April 29, 1913, the city council of Twin Falls passed ordinance No. 134, granting to the Beaver River Power Company, the predecessor of the [234] plaintiff, the right, authority, privilege and franchise to distribute electricity and electrical current for the purpose of furnishing the same for light, heat, power and all other purposes, to the city of Twin Falls and to the inhabitants thereof, and granting it the right to use the streets and alleys, etc., of said city for said purpose. By section 7 of said ordinance, certain rates were provided. Said ordinance further provides that the franchise and rights granted thereunder are voluntarily transferable only by ordinance duly and regularly passed. Section 12 of said ordinance provides that the Beaver River Company or its successors, or assigns shall file with the city of Twin Falls a good and sufficient bond in the sum of \$2,500, conditioned upon its compliance with the provisions of section 11 of said ordinance, and section 14 provides that said corporation or its assigns shall within sixty days from the passage of said ordinance file an unconditional acceptance thereof in writing with the clerk of said city, and that "any rights and privileges granted shall be null and void unless such acceptance is so filed." On the 28th of June, 1913, nearly two months after said public utilities act went into effect, the Beaver River Company filed an acceptance of said ordinance, and on October 3, 1913, a bond in the sum of \$2,500 was filed with the city clerk.

On the 6th of October, 1913, ordinance No. 141 was passed by the city council of said city, authorizing the Beaver River Power Company to transfer to the Idaho Power & Light Company all of its rights, privileges and franchises granted under the provisions of said ordinance No. 134.

Up to that time nothing whatever had been done by the Beaver River Power Company under ordinance No. 134 toward constructing its plant or lines within the corporate limits of said city. In the month of October, 1913, the plaintiff commenced the construction of a distribution system within the corporate limits of said city. Such construction work was not commenced until after the Beaver River Company had transferred its rights and interests thereunder in October, 1913, to the Idaho Light & Power Company. The proceedings [235] in the

Twin Falls case were begun before said commission, as above stated, in November, 1913.

It appears from the record that the Beaver River Company had commenced the construction of a power plant on the Malad river in Lincoln county, about thirty miles distant from the city of Twin Falls, and that at the time said act went into effect had done nothing toward extending its lines from its said plant to the city of Twin Falls. It thus appears that sometime after the passage of said public utilities act, and only a few days before it went into effect, the Beaver River Company procured from the city of Twin Falls the passage of said ordinance granting it the right to supply electricity to the inhabitants of said city, and, as above stated, said ordinance provided that it was void unless a written acceptance was filed within sixty days after its passage. Said acceptance and bond were not filed until after said act went into effect. Thus at the time the law went into effect, said ordinance was an unaccepted offer to the Beaver River Company, and it was within the power of that company to accept or refuse it for some time after said law went into effect. It certainly was not a franchise contract until said written acceptance was made.

In the Pocatello case the following facts, among others, are stipulated: That the city of Pocatello passed ordinance No. 281 on May 5, 1913, granting said Beaver River Power Company the right to construct its plant and lines within the corporate limits of said city; that prior to the passage of said ordinance the Beaver River Company expended considerable money investigating the electrical market of Pocatello and in securing the passage of said ordinance, and also paid for the publication of said ordinance; that after making certain investigations in regard to the feasibility of establishing a plant in said city and in about the month of August, 1913, a contract was entered into by the Beaver River Company for a 500 horse-power Diesel engine, to cost approximately \$25,000, to be used solely for the purpose of generating electrical energy for said city, and work on the distribution system within the corporate limits of said city was begun in the [236] month of November, 1913, and has been continued diligently and uninterruptedly, and about \$2,500 has been expended in an underground and overhead distribution system; that the power system contemplated to be used in said city calls for the installation of four engines of similar design to the one purchased; that prior to November, 1913, no work of any character under said franchise had been done within the city limits of Pocatello, and that said Diesel engine was constructed outside of the city of Pocatello. It was not the intention of plaintiff to supply the inhabitants

of Pocatello with electrical energy from its Malad plant, but to erect a new plant in said city and use Diesel engines in manufacturing electrical energy.

The proceedings in the Pocatello case were brought before the public utilities commission by the Southern Idaho Water Power Company, a corporation, which company had been supplying the city of Pocatello and its inhabitants with electric power long prior to the passage of said ordinance No. 281.

The proceedings were brought in each case to have the commission determine whether the convenience and necessity of the inhabitants of said cities required the construction and installation of another electrical plant or system, or whether under the provisions of sec. 48a of said public utility act the plaintiff company had the right, without such certificate, to proceed as it did in attempting to furnish said cities with electrical power.

On the facts stipulated, it is claimed by the plaintiff corporation that it is authorized by law to construct and operate its electrical power system without securing any certificate of public convenience and necessity from the public utilities commission, for the following reasons:

(1) Because plaintiffs' right under the franchises granted by said ordinances (which ordinances were passed prior to the date when the public utilities law became effective) became contract rights within the protection of the constitutional provision.

(2) Because the plaintiffs come within the terms of the proviso of sec. 48a of said act, which declares "that power companies may, without such certificate, increase the capacity [237] of existing generating plants or develop new generating plants and market the products thereof."

(3) Because the plaintiffs come within the terms of the proviso of sec. 48b of said act which declares that "this section shall not be construed to . . . impair any vested right in any franchise or permit heretofore granted."

(4) Because plaintiffs come within the proviso in sec. 48b of said act which declares, "That when the commission shall find, after hearing that a public utility has heretofore begun actual construction work and is prosecuting such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise or permit heretofore granted but not heretofore actually exercised, such public utility may proceed to the completion of such work and may, after such completion exercise such right or privilege."

It will be observed that plaintiffs' real contention is based upon the proposition that they had procured franchises from each of

said cities subsequent to the passage by the legislature of said public utilities act and shortly prior to its going into effect, and therefore under said ordinances they had secured vested rights under and by which they were authorized to construct their lines into said cities and furnish the inhabitants electrical power.

In order to determine the questions presented in this case, it will require a review and construction of many of the provisions of said public utilities act and application of some provisions of the constitution thereto.

Said act is a very comprehensive one and was passed at the twelfth session of the legislature and was approved by the governor on the 13th of March, 1913. It contained no emergency clause, and under the provisions of sec. 22, art. 3, of the constitution did not take effect until sixty days after the end of the session at which it was passed, which session adjourned on the 8th day of March, 1913; hence the act did not take effect until the 8th day of May, 1913. By the provisions of sec. 10 of art. 4 of the constitution, every bill passed by the legislature shall before it becomes a law be [238] presented to the governor, and "If he approve, he shall sign it and thereupon it shall become a law." Under that provision of the constitution, said act became a law on the 13th day of March, 1913, but did not go into effect until the 8th day of May.

Many of the states of this Union have passed similar public utility laws, a compilation of which may be found in the publication known as "Commission Regulation of Public Utilities," published by the National Civic Federation (1913), and the provisions in such laws regarding "Certificates of Convenience and Necessity" may be found at page 800 et seq. of that work.

In Arizona a public utility must first obtain a certificate before beginning the construction of its works. (Laws 1912, chap. 90, sec. 50.) The California law is to the same effect. (Laws 1911, chap. 14, sec. 50.) Much of our public utilities law was copied from the California act. In Connecticut no steam railway or interurban road shall be parallel to any other unless it appears that public convenience and necessity require it. Application in that state must be made to the superior court or judge for a certificate. (Laws 1902, sec. 3846.) In Kansas no public utility can transact business until it has obtained a certificate that public convenience would be promoted by the transaction of such utility business. (Laws 1911, chap. 238, sec. 31.) In Maine the directors of a railroad must present to the commission a petition, and if after a hearing it appears that the public convenience requires the construction of the road, a certificate must be granted. (Rev. Stats. 1903, chap. 51, sec. 3.) In Mary-

land the public utilities act provides that no common carrier shall begin construction without a certificate, and no gas or electrical corporation shall begin construction or exercise any right or privilege without first having obtained the permission and approval of the commission. (Laws 1910, chap. 180, secs. 26, 33.) In Michigan it is necessary for a telephone company to apply to the railroad commission for a certificate. (Laws 1911, chap. 138, sec. 7.) In New Hampshire no public utility shall commence business without first having obtained [239] the permission and approval of the commission. (Laws 1911, chap. 164, sec. 13.) In New York no gas or electrical corporation shall begin construction of a plant without the approval of the commission, and no such corporation shall exercise any right or privilege under any franchise granted without having first obtained the consent of the commission. (Laws 1910, chap. 480, sec. 33.) In Ohio no telephone company can exercise any franchise in a place where there is already in operation a telephone company, unless such company first secures from the commission, after public hearing, a certificate that the exercise of such franchise is proper and necessary for the public convenience. (Laws 1911, No. 325, sec. 54.) In South Dakota no railroad hereafter constructed shall parallel another line within eight miles of the same for a greater distance than ten miles in every 100 miles, and permits to build railroads must be obtained from the commission. (Sess. Laws 1907, chap. 217, secs. 1 and 2.) In Wisconsin the law provides that no franchise shall be granted in any municipality where there is in operation a public utility engaged in similar service without first securing from the commission a declaration, after a public hearing, that there is a reasonable necessity therefor. (Laws 1909, sec. 74, p. 759.) In Illinois it is provided that no public utility shall begin the construction of any plant until it shall have obtained from the commission a certificate of necessity. (Laws 1913, House Bill No. 907, sec. 55.) In Missouri the law provides that no common carrier shall begin the construction of any railroad or any extension thereof without having first obtained from the commission a certification that the present or future public convenience and necessity require or will require such construction. The Missouri law contains provisions similar to the Idaho law in regard to franchises theretofore granted but not theretofore actually exercised. (Laws 1913, p. 557, sec. 53.) The Colorado law provides that public utilities shall not henceforth begin construction without first having obtained from the commission a certificate that the future public convenience and necessity require such construction, and it also contains the same provisions as the [240] Idaho law in regard

to franchises not heretofore actually exercised. The laws of Pennsylvania provide that a certificate of public convenience must first be had and obtained before any public utility begins to exercise any right, power, franchise or privilege under any ordinance, municipal contract or otherwise. (Laws 1913, p. 1374, art. III, sec. 2.)

Thus it appears that public utility acts similar to the Idaho act have been passed by many states and are in full operation therein. Massachusetts was the first state to adopt a public utility act. That act was intended as a substitution for the control of public utilities by competition. Pond, in his work on Public Utilities, sec. 610, quotes from Weld v. Board of Gas, etc. Com'rs, 197 Mass. 556, 84 N. E. 101, as follows:

"In the first place, in reference to this department of public service, we have adopted, in this state, legislative regulation and control as our reliance against the evil effects of monopoly, rather than competitive action between two or more corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. . . . The state, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas-pipe and conduits for electric wires through the same streets would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracks, waterpipes and other structures. . . . In reference to some kinds of public service, and under some conditions, it is thought by many that regulation by the state is better than competition."

The courts of last resort of several of the above-named states have already passed upon the public utilities acts of their respective states and held them constitutional and valid. [241] However, the public utilities act is attacked by counsel for the plaintiffs on three grounds: (1) That the legislature had no power to grant to the public utilities commission power to restrict competition; (2) That legislative authority is delegated to said commission in an unconstitutional manner; (3) That said commission is a judicial body established in contravention of sec. 2, art. 5, of the Idaho constitution.

First, has the legislature power to restrict competition of public utilities through the public utilities commission?

The doctrine that private property devoted to public use is subject to public regulation

is too well settled to require the citation of many authorities. We have not only a long line of decisions by the supreme court of the United States, commencing as early, at least, as the decision of *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. ed.) 77, but a long line of state decisions, and the law is well settled that all property is held subject to the power of the state to regulate or control its use in order to secure the general safety, health and the public welfare of the people, and that when a corporation is clothed with the rights, powers and franchises to serve the public, it becomes in law subject to governmental regulation and supervision.

The constitution of the state of Idaho is a limitation upon the legislative power in all matters of legislation, and is not a grant of power. The legislature has plenary power in all matters of legislation except as limited by the constitution. There is nothing in the constitution that prohibits the legislature from enacting laws prohibiting competition between public utility corporations, and the legislature of this state no doubt concluded that a business like that of transmitting electricity through the streets of the city and furnishing light and power to the people must be transacted by a regulated monopoly, and that free competition between as many companies or as many persons as might desire to put up wires in the streets is impracticable and not for the best interests of the people. The police power in regard thereto is sufficiently broad and comprehensive to enable the legislature to regulate public utilities in order to promote the health, comfort, [242] safety and welfare of society. One of the fundamental principles upon which our government is founded is the police power, and the exercise of that power is absolutely essential to its general welfare. Upon that power rests the peace and tranquillity of society and the enjoyment of health and property; and when any corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is accepted subject to the police power. By granting a franchise to a public utility corporation, the state does not abrogate its rights to exercise the police power of the state over it. It therefore follows, under the state's inherent power of police regulation, that it may regulate the manner in which public utility corporations shall construct their lines and carry on their business within the state. (*Jones on Telegraph & Telephone Lines*, sec. 214.)

In the 41st Report of the Georgia Railroad Commission, it is said by that commission as follows:

"We do not believe competition can ever be a consistent and economical regulator of rates and other conditions, in a local public utility field.

"In such a field it means a duplication of investments, organization and operating expenses, which is unnecessary to the service, and burdensome upon the public. It is rarely maintained permanently.

"The commission is strongly convinced that it would be wise if the General Assembly should enact legislation prohibiting the grant by municipal authorities of franchises to local utilities, where there is an established utility rendering safe, adequate and proper service at reasonable rates, already occupying the field, prior to application to and issuance by this commission of a certificate of public convenience and necessity.

"In our opinion, the government which properly assumes to prescribe reasonable rates and compel adequate service by public utilities, should also protect such utilities and the public from unwise and useless competition, and the wasteful investment of capital in the unnecessary duplication of plants."

[243] As touching upon this question see Public Service Regulation, p. 247; Floy on Valuation of Public Utility Property, p. 36.

The regulating of rates and compelling proper service is for the purpose of obtaining rates and service as nearly equitable as possible to both the consumer and the utility corporation, and competition can have no other effect than to destroy the very groundwork of regulation, and therefore competition may be regulated by a commission under laws enacted by the legislature.

By the public utility laws of the several states, attempts have been made on the part of their legislatures to correct existing difficulties between public service corporations and the communities which they serve. The first general steps taken by the legislatures were to provide for rate regulation in order that the consumer might be protected in cases where there was no competition. Competition at that time was looked upon as a regulator and rate regulation was accepted as a protection to the public. Competition between public utility corporations led to rate wars in which each company tried to get the advantage of or destroy the other, and usually resulted in the destruction of one of the competing corporations, or in a division of the territory between them, or in the consolidation of such corporations. Statutes to prevent such consolidation and to prevent the division of the territory have been enacted. Those regulating laws were differently viewed by different classes of people. Those who furnished the money for the construction of the utility system, represented by stockholders, bond holders or mortgagees, was one class; the consumer, another; promoters, another. The latter desired no regulation whatever, since it hampered their ability to sell prospective utilities. On the other hand, the people who furnished the money desired stability for

their investment. It was the desire of the stockholder, bondholder or mortgagee not to have his investment jeopardized and it was the desire of the consumer to receive the services at a reasonable rate or compensation. Rate wars affected such investments and either one company or the other finally had to go out of business, [244] and experience shows that there can never be any *permanent* competition in matters of this kind.

Under these various utility acts, the commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate-cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the commission is given power to fix the rate absolutely and neither of the competing companies can charge more or less than the rate fixed. Under those conditions competition can amount to nothing, and the only reason for having two corporations covering the same field is to secure satisfactory service. But under our utilities act, the commission is the arbitrator in regard to all matters of service. If the utility corporation is not giving satisfactory service, the commission has absolute power to compel it to do so. If its facilities are such that the cost of operation is unnecessarily high, the commission can enforce the installation of proper machinery and facilities and a correspondingly proper charge for the commodity furnished. The commission may force the public utility to keep abreast of the times in the employment of proper machinery and appliances in their plants and in the economic conduct of its business. If wasteful methods are indulged in, the public utility must bear the loss and not the consumer. Thus the reason for competition is entirely taken away. The rate to be determined by the commission in each case is a reasonable rate—a rate fair to both the consumer and the supplier. If there are other methods or machinery that might be used in a plant that would materially reduce the cost of production, the commission may direct the utility to install such machinery or appliances, and in case it refuses to do so, upon proper application, may issue a certificate of convenience and necessity to a utility corporation that will do so.

A power company already occupying a field may be giving service to many localities where it cannot charge sufficient to obtain a profitable return. Another corporation might thereafter construct its plant and lines into the profitable [245] markets of such company and thus compete for the most desirable business. In this way it might take the cream of the business at the very least expense, and cripple the company that was furnishing the commodity to the more extensive field.

There is another question that affects the general public in such cases: An existing utility has already expended, say, a million dollars in the power plant and transmission lines and distribution system in a town. Another utility coming in must also provide a power plant and transmission lines and a distributing system. If there is to be unrestricted competition, then the later distribution system must cover the same area as that of the older one. If it costs the same money, then there is an additional million dollars expended in a town where a one million dollar system would be amply sufficient. There would be two sets of poles and transmission wires in the streets, the construction and keeping in repair of which would necessarily interfere with and obstruct the free use of the streets by the people more than one set of poles and wires; and two sets of electrical wires in a city would necessarily increase the danger to the lives and limbs of the people, and thus interfere with the peace, health and welfare of the community. In such a case, when a commission comes to fix rates, it will be confronted with this situation: It finds the town provided with duplicate plants; each company is entitled to have a rate fixed so as to give a return upon its *bona fide* investment, therefore the rates paid by the people must be upon two million dollars instead of upon one million dollars, and the amount of money collected by the utilities, if they are to be given a fair return on their investments, must be much more on the two investments than it would be upon the one. And the total amount paid by the consumers must be more than it need be if there were only one investment and one system. It is for the benefit of the public that the highest efficiency be obtained from a public utility and that it serve the public at the lowest cost, and such an end cannot be reached if the community is served by duplicate plants. Where a one million dollar plant is amply sufficient, a duplication [246] of such plant is a waste of resources and an extra tax on the people.

If rates are absolutely fixed by the commission with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. Experience shows that while the people, or some of the people, may receive a temporary advantage from cut-throat competition, the general public can receive no substantial advantage therefrom. Then the question is presented from the standpoint of public policy, Shall plants be duplicated in order to give efficiency of service? The law has fully answered this by putting the supervision of the service in the hands of a commission so that there can be no duplication without a necessity for it. The commis-

sion has the power to compel the utility company to give good service for reasonable compensation. What need is there of a competitive plant where the commission has absolute control so far as service and rates to be charged are concerned, and rates must be fixed so as to give the company a reasonable interest on its investment and a sufficient sum to keep up the system and operate it?

The city of Twin Falls has one company already serving it, and if another company is permitted to enter, there will be two sets of poles and lines erected in said city, and it does not seem possible that anyone would contend that where one company is amply able to serve the wants of the people, so far as electrical power is concerned, that the interests of the public would require another system to cover the same ground, when there can be no cut-throat competition under the law.

The only practical difference between systems operated under the utilities act and municipal ownership is that under the former system the money or means is provided by a bond issue or mortgage by a private corporation and the employees are named by the corporation furnishing the money, while under the latter, the money is furnished and the employees named by the municipality. The control of a city council over municipal works is perhaps a little more complete than that of the commission over the utility under the present law. The state having taken away the rights of such corporations [247] to fix their own rates, and having assumed supervisory power over the service in every material particular, it ought to provide some sort of a safeguard for those who furnish the money to construct the system, and the state has attempted to meet this situation by providing that the utility already in the field shall have that field unless public necessity and convenience require an additional utility, and as to whether the public convenience and necessity require an additional utility is an administrative matter left with the commission to ascertain and determine under supervisory power of the court. Any erroneous action on the part of the commission in that regard may be corrected by the court.

The law relating to public service should be based on the public needs, rather than on the desire of any corporation to serve the public. The purpose of such laws should be to promote the common welfare and equally to protect the parties who furnish the money for the erection of the plant and those who use its product.

The general impression has been that competition was supposed to be a legitimate and proper means of protecting the interests of

the public and promoting the general welfare of the people in respect to service by public utility corporations; but history and experience has clearly demonstrated that public convenience and the necessities of the community do not require the construction and maintenance of several plants or systems of the same character to supply a city or the same locality, but that public convenience and necessity require only the maintenance of a sufficient number of such instrumentalities to meet the public demands. If more than one instrumentality is to be sustained when one is amply sufficient, the actual cost to the public served is not only necessarily greater than it would be under one system, but also less convenient. If public convenience and necessity do not demand a duplication of power systems, why should the public be burdened with the expense of maintaining such duplicate systems, and the annoyance of perpetual solicitation to make or break contracts for service, and the inconvenience to the people of the occupation of the streets and alleys of a [248] town or city by such corporations in constructing and keeping in repair the two systems?

The public utilities act merely declares the will of the people as expressed through the legislature, to the effect that competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand it, and in any case the commission is thereby given power to fix the rates to be charged, which cannot be varied by such corporations. The legislature has concluded by the passage of said act that it is not for the best interests of the people or the public welfare to permit public utility corporations to compete with each other where public convenience and necessity do not require such competition.

Sec. 18 of art. 11 of the constitution prohibits combinations for the purpose of fixing prices or regulating production, and requires the legislature to pass appropriate laws to enforce the section. The public utilities act is justified by that provision of the constitution, for it is largely concerned with preventing unreasonable rates and combinations by public utilities. Those provisions were intended to prevent monopoly and cut-throat competition which can only result in monopoly. Past history shows that unregulated competition is a tool of unregulated monopoly, as the word "monopoly" is usually understood.

The power of the legislature, so long as it observes the restrictions imposed by the state and federal constitutions, to regulate the relative rights and equities of all persons and corporations within its jurisdiction, in order to conserve, not merely the health,

safety and morals of the people of the state, but also the general welfare, undoubtedly exists, whether it is called police power or merely governmental or legislative power. (*Lake Shore, etc. R. Co. v. State*, 173 U. S. 285, 19 S. Ct. 465, 43 U. S. (L. ed.) 702.)

Said act substitutes reasonable rates to be determined by the commission for those that would otherwise be fixed by competition, in the one case, or the rule of charging what the traffic will bear, in the absence of competition. Under this law it must therefore be conceded that competition with its [249] disastrous effects is no longer needed to protect the public against unreasonable rates, hence there is no longer any justification whatever for competition or the duplication of utility plants under the pretense of preventing monopoly.

In vol. 1 of Wilcox on Municipal Franchises, sec. 41, p. 29, the author discusses the establishment of monopolies by franchises and says:

"In spite of the practically uniform experience of cities, the authorities still cling to competition, as if it were a fetish, for the regulation of public service utilities. Year after year and decade after decade, the same old story is repeated, of franchises granted to new street railway companies gas companies, electric companies, telephone companies, which in a few years, by the inevitable logic of events, either absorb their predecessors or are absorbed by them."

The author quotes the following from the report of the National Civic Federation Commission on Public Ownership and Operation, found in part 1, vol. 1, p. 26, of *Municipal and Private Operation of Public Utilities*, as follows: "Public utilities, whether in public or in private hands, are best conducted under a system of legalized and regulated monopoly." The author then says: "The reasons for this statement are not far to seek. The available space in the streets for the use of permanent fixtures is strictly limited. Furthermore, the construction and maintenance of any particular outfit of fixtures entails upon the public great inconvenience and loss through the tearing up of the streets, the obstruction of traffic, and the resulting dangers and inconveniences. . . . From the standpoint of the companies supplying public services, the advantages of monopoly are obvious. Street railway tracks, gas and water pipes, electrical conduits, poles and wires, all require the investment of very large amounts of capital in providing the facilities for the distribution of the commodity or service. If one of these distributing systems is duplicated in the same streets or in the same territory, there is involved a duplication of investment which, with competitive rates, is ruinous to the enterprise.



After capital has once been invested in unnecessary fixtures, the pressure of competing rates [250] leads the owners of the different fixtures to combine in order to maintain prices and avoid insolvency."

In referring to said report of the Civic Federation Commission, the author states that the conclusion reached by that commission is in line with reason and experience, and says: "In each center of population every public utility should be controlled and operated as a monopoly." The author there has in mind regulated monopoly—not monopoly that may charge all a business will bear. He then refers to the past oppression of monopolies and says: "It is the experience or the fear of such oppression as the outgrowth of private monopoly, that keeps alive the dream of competition in franchise grants." And in section 42 the author says: "It is evident, however, that no monopoly of a necessary and universal service can be safely intrusted to private operation unless it is kept under strict public control."

As touching on this question see *In re Petition of Schuylkill L. H. & Power Co.* a decision rendered by the Public Service Commission of Pennsylvania (not yet reported but published in pamphlet form).

A volume entitled "Commission Regulation of Public Utilities," by the National Civic Federation, N. Y., contains a compilation and analysis of the laws of forty-three states and of the federal government for the regulation by central commissions of railroads and other utilities. It is stated in the preface to that work, page 6, that the material contained in said volume represents forty-four different jurisdictions, to wit, the federal act to regulate commerce with its amendments and supplements, and the laws of forty-three states, which in 1912 had central commissions for the regulation of public utilities. The states of Delaware, Idaho, Utah, West Virginia and Wyoming are not represented in said volume because they had at that time no public utilities law providing for a commission. That volume contains much valuable information.

Bruce Wyman, Esq., was counsel for said commission and is author of the two volume work of Wyman on Public Service Corporations. The author states in his preface to vol. 1 of said work, at page 5, as follows:

[251] "Free competition, the very basis of the modern social organization, superseded almost completely the medieval restrictions, but it has just come to be recognized that the process of free competition fails in some cases to secure the public good, and it has been at last admitted that some control is necessary over such lines of industry as are affected with a public interest."

In section 36 the author says: "In all of the businesses to be discussed in these chap-

ters, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail."

Some will no doubt become incensed by the action of the public utilities commission when it refuses to permit a utility corporation to duplicate an amply sufficient plant to supply the needs of the community, because they think they may receive service at a little less rate; but they overlook the fact that under said public utilities act the commission may fix rates and neither company can furnish light and power at a less rate. The public utilities commission has ample authority to fix just and equitable rates, both to the people and to the corporation; that is made a part of its duty, and the consumer cannot insist on a less rate than would realize to the corporation a fair return on its legitimate investment and sufficient to pay for the up-keep of the plant or system, and the legitimate expense necessarily connected with the operation of such system.

The cry "monopoly" by promoters and agitators will not be given much weight by thinking people when they come to study the question of public utilities carefully and to thoroughly consider from various view points the welfare and financial interests of those who furnish the money for the construction of utility plants and those who are in need of and demand the products or services of such plants for their comfort and prosperity. Those who furnish the money should be given a reasonable interest thereon; the corporation should be allowed sufficient to keep the plant in good repair so as to [252] give the patrons good service; the people who do the work should be paid a reasonable wage; the consumer should receive the product or service at a reasonable compensation or rate. The interests of these four classes are entitled to fair and just consideration. It is conceded at the present time by the leading thinkers of the country upon this subject that the best method of arriving at a reasonable rate to be charged for such services can be better established by a public utility commission than by competition, especially that competition which must culminate in unregulated monopoly. If monopoly is to be regulated, it ought to be regulated in a way that equal justice may be done to all. The consensus of opinion at the present time clearly is that that object or purpose can be best achieved by public utilities laws similar to the one under consideration.

The public mind has been so long impregnated with the idea that competition is the only relief against oppressive monopoly, it is difficult for the people to understand, without some thought and study, that such op-

within a state, it is accepted subject to the police power. By giving the franchise [we may say, permitting it to be exercised] the state did not abrogate its power over the public highways; nor in any way curtail its power to be exercised for the general welfare of the people."

It is well settled by the decisions that the making of contracts between individuals or between individuals and corporations or municipalities and corporations, as in the case at bar, can never be held to abrogate or prevent the exercise by the state of its police power in any manner that it may consider just and proper. If it were conceded that such contracts could be entered into, every substantial power granted to the commission by the legislature in the public utilities act could easily have been nullified and set at naught by the simple act of making contracts prior to the time the act [258] became effective, as was, in fact, done in this case, the act having been approved by the governor on March 13th and gone into effect on May 8th, and the franchise contracts referred to passed on the 29th of April and the 5th of May, respectively, just prior to the time the act went into effect. Any future exercise by the state of its police power cannot thus be thwarted and prevented by the mere procuring by a utility corporation of the passage of an ordinance by a city or town granting it certain rights. Such contracts must be held not to be protected by any provision of the state or federal constitution against the proper exercise by the state of its police power. Said act became a law when approved by the governor, but did not go into effect until May 8th, there being sixty days between the adjournment of the session when said act was passed and its going into effect. And it was not intended that a public utility corporation should thwart the purpose of said act simply by procuring the passage of an ordinance granting it certain rights that could not be granted after the law went into effect.

It is provided in sec. 48a that no electrical corporation, etc., shall "henceforth" begin the construction of an electrical plant, etc. It was not intended that a public utility corporation should slip in between the passage and approval of said act and its going into effect and procure rights that would deprive the state of the right to regulate it in its operations and in making it amenable to the police regulation of the state, especially where it had not begun "actual construction work and is prosecuting such work in good faith and uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking," as provided by sec. 48b of said act. Under the facts of this case it clearly appears that the plaintiff had not begun actual construction work on its systems within either of said cities.

It is next contended by counsel for plaintiff that the provisions of sec. 18, art. 11, of the constitution, prohibit the legislature from passing a law that would create a monopoly; that the provisions of said section prohibit combinations to regulate either production or prices of commodities used by [259] the people; also that the provisions of said section by implication recognize freedom of competition. Counsel then propounds the following question: "Can the legislature delegate its power, if power it has, to restrict the business of carrying on and generating electricity?"

In reply we would say that the legislature has not delegated its legislative power to restrict the carrying on of any business. The public utilities act was passed by the legislature and the administration of it was placed in the hands of said commission and the courts. The legislature could not go into the facts of each individual case and determine whether the various public utility corporations should be permitted to carry on business within the state, but committed that administrative power to said commission and declared the public policy of the state to be that it was not for the best interests and welfare of the people to have a duplication of public utility plants in the same community where one was amply sufficient to serve the necessities and convenience of the people, unless authorized by said commission. The policy of said act is not to permit a duplication of plants where it is not for the welfare, convenience and necessity of the people, and under said act the body first to determine that question is the public utilities commission. It is clearly apparent that the questions required to be determined under said law may be best determined by a commission in the first instance. If such questions were first to be determined by the courts, the courts of the state would have to be increased in order to perform the additional duties which now devolve upon the commission. The legislature no doubt in the enactment of said law considered said matter and concluded that it would be better to establish the commission to hear and determine such cases first than to impose that duty on the courts.

While said sec. 18 of the constitution prohibits combinations to regulate either production or prices of articles of commerce, etc., it does not either directly or indirectly prohibit the legislature from enacting a law whereby rates to be charged by public utility corporations for their services and product may be made or established.

[260] The legislature has determined by the adoption of said act that as a matter of public policy it is for the best interest and welfare of the people of the state to direct the operation of utility corporations by a commission and thus prevent what may be

denominated cut-throat competition, which invariably results in private monopoly. We find nothing in the constitution prohibiting the legislature from doing so.

This matter involves the police powers of the state, and it is declared in sec. 8, art. 9, of the constitution that the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state. Now, the state, through the legislature, has concluded that where a city or community is amply served by one utility corporation, it may not be for the best interests of such city or community to permit a duplication of the plant that is serving it, and that question is left to said commission. The monopoly that counsel contend is so created is clearly not such a monopoly as is referred to in said sec. 18 of the constitution. Said act provides for such a regulation and control of utility corporations as would prevent, on the one hand, the evils of unrestricted rights of competition, and, on the other hand, the abuse of unregulated monopoly. (*People v. Willcox*, 207 N. Y. 86, 100 N. E. 705, 45 L.R.A. (N.S.) 629.) Unrestricted competition, as experience has shown, generally results in the very worst kind of monopoly.

Monopoly may be created by combination, by dividing the territory to be supplied, or by driving out the weaker corporation by the stronger, and thereafter taxing the business all it will stand. That is the kind of monopoly and combination that the framers of the constitution had in mind. They did not have in mind a public utility corporation governed and controlled by law, as the legislature has sought to govern and regulate such corporations by the provisions of the act in question. In other words, they had in mind unrestricted monopoly and not a monopoly that is governed and controlled by law and not permitted to charge more than just [261] and fair rates for serving the people. So far as public utilities are concerned, in order to secure for the people the largest degree of satisfactory service, efficiency and economy, the state must regulate them, and if such regulation results in a regulated monopoly, it will be far better for the people than competition which results in a duplication of plants, combinations, bankruptcies or receiverships. No honest man or community would ask for such services as the public utilities give without being willing to pay a fair and just compensation therefor.

At the present time it must be conceded that the legislatures of nearly all of the states of the Union have concluded that the best method for regulating public utility corporations is by a commission under laws

similar to the act in question. There is nothing in the contention of counsel for plaintiffs to the effect that under said law said commission is permitted to establish such a monopoly or such a combination as was intended to be prohibited by any of the provisions of our state constitution.

It is contended that the last proviso to sec. 48a authorizes public utility corporations, without a certificate of public convenience and necessity from the commission, to increase the capacity of existing generating plants or to develop new generating plants and market the products thereof. Said proviso is as follows: "Provided: That power companies may, without such certificate, increase the capacity of existing generating plants or develop new generating plants and market the products thereof."

It is conceded that said proviso was attached to said section by one or both of the attorneys for the utility corporations involved in this case, or was suggested by them, and in all probability was not carefully considered by the legislature, or, at least, the legislature did not give it the interpretation or meaning now contended for by counsel for the plaintiff. If that proviso is given the meaning contended for by counsel, it would nullify the main intention and purpose of said 80-section public utilities act. If under that proviso existing utility corporations in the state may increase [262] the capacity of or develop new generating plants and construct lines for marketing the products thereof into any of the cities or towns of the state without the certificate of public convenience and necessity, it gives the existing corporations an absolute monopoly of furnishing electricity or electrical power to every city or town or community in the state without procuring a certificate, and thus sets at naught one of the main objects and purposes of said act. Provisos must not be so construed as to nullify the clear object and purpose of the act.

It is stated in 2 Lewis' Sutherland, Statutory Construction, sec. 347, that "General words may be cut down when a certain application of them would antagonize a settled policy of the state."

In *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128, the court held that when the first clause of a section conforms to the obvious policy and intention of the legislature, it is not rendered inoperative by a later inconsistent clause which does not conform to this policy and intent. In such cases the later clause is nugatory and must be disregarded.

The decisions hold that laws must be interpreted according to what on the whole must have been the intention of the law-makers, and if the principal object of the

act cannot be accomplished and stand under the restrictions of the proviso, the proviso must be held void for repugnancy. It is held in vol. 2, sec. 352, Lewis' Sutherland, Statutory Construction, that if a proviso is repugnant to the body of the act, it should be rejected. (See *Penick v. High Shoals Mfg. Co.* 113 Ga. 592, 38 S. E. 973.) If said last proviso to said section is construed to mean that such corporations may increase the capacity of their existing plants or build new ones and market the products thereof over existing lines or those which may be constructed in accordance with the clear legislative intent as expressed in said act, then the act and proviso can be construed together and both be permitted to stand. If the proviso can be construed as being not repugnant to the main object and purpose of the act, it ought to be so construed.

[263] Under that proviso no certificate is required to increase the capacity of an existing plant, or even perhaps to build a new plant and market the product thereof, over any lines already constructed by the utility corporation in accordance with the law, or to supply an increasing demand in a city or town or place already occupied and supplied by such utility, and it may extend its instrumentalities for conducting such power to the place of intended use. That clause of said section, to wit, "and market the products thereof," does not grant permission to build new lines into the territory occupied by other utility corporations, since the clear intention of the legislature was to prohibit the duplication of such plants unless a certificate of convenience and necessity was first obtained, and as before stated, the plaintiff corporation had not commenced "construction" operation in either of said cities prior to the time said act went into effect. They had simply procured the passage of ordinances granting them the right. The first proviso of said sec. 48a is that said section shall not be construed to require any such corporation to secure such certificate for an extension within any city, county or town within which it shall have theretofore lawfully commenced operation, or for an extension into territory either within or without a city, county or town, contiguous to its street railroad, or line, plant or system, *and not theretofore served by a public utility of like character*, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. From those and other provisions, the clear intention of the legislature was not to permit such corporation to extend its lines into territory already occupied by a similar utility corporation without first procuring a certificate of convenience and necessity from said commission.

Counsel for plaintiffs lay considerable stress upon the decision of the supreme

court of California in the case of *Pacific Telephone, etc. Co. v. Eshleman*, 166 Cal. 640, Ann. Cas. 1915C 822, 137 Pac. 1119, 50 L.R.A. (N.S.) 652, wherein it was held that the public utilities act of California would have been held void and unconstitutional but for that provision of the constitution [264] embodied in art. 12, sec. 22, wherein it is declared that no provision of the constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind, or different from those conferred therein, not inconsistent with those conferred upon the commission by the constitution. That case involved an order of the railroad commission requiring a telephone company, having both long distance and local lines, to permit a physical connection to be made between its long distance lines and the local lines of another company competing with it locally.

A decision or order by the district court of the United States for the district of Oregon, in the case of *Pacific Telephone, etc. Co. v. Wright-Dickinson Hotel Co.* 214 Fed. 666, was filed May 4, 1914, in which substantially the same question was raised as that in the California case. Said decision has not been published in the Federal Reporter, but has been printed in circular form by the Home Telephone & Telegraph Company of Portland, Oregon, a copy of which decision is before me. After a statement of the case and a reference to the provisions of the public utilities act of Oregon, the court, speaking through District Judge Wolverton, said:

"In other words, the power to regulate within the purpose and spirit of the act includes the power to require physical connection; otherwise regulation would prove largely ineffectual in practical application. We are not impressed with the suggestion that this power of regulation must specifically conferred by constitutional authority. . . . The opposite view is entertained in an exhaustive and ably considered case from California—*Pacific Telephone, etc. Co. v. Eshleman*, 166 Cal. 640, Ann. Cas. 1915C 822, 137 Pac. 1119, 50 L.R.A. (N.S.) 652—but we are unable to give assent thereto."

We are in accord with the views of the U. S. district court for the district of Oregon, and hold that the power of regulation provided for by the public utilities act of this state is not repugnant to the provisions of the constitution of the state of Idaho or the constitution of the United States, and [265] that it is not necessary that the power of regulation as provided by said act must be specifically conferred by constitutional authority.

We therefore conclude that the legislature had the power to authorize said commission to restrict competition between public utili-

ties; that said act is not repugnant to the provisions of the commerce clause of the constitution of the United States, or repugnant to the provisions of the constitution of this state; that the plaintiffs have no legal right to construct their lines into either of said cities without first obtaining a certificate of convenience and necessity; that no vested rights of the plaintiffs have been in any manner interfered with by the orders complained of, and that the orders made in the above-entitled cases by the commission are not unreasonable or unlawful, and must be affirmed, and it is so ordered. Costs awarded in favor of the defendants.

Walters, District Judge, concurs.

AILSHIE, C. J. (*dissenting*).—It seems to me that the construction placed on the statute by the opinion of my associate thwarts and sets at naught the intention of the legislature and renders meaningless the plain language of the statute.

Two things are made perfectly plain by secs. 48a and 48b of the act. First, that a power company that was engaged in business in the state when the act went into effect should not be required to secure permission from the commission to continue in business or to "increase the capacity" of an existing plant "and market the products thereof;" and, second, that the commission could not prevent a company going ahead and completing its plant and works and serving customers where it had secured a permit or franchise from the proper authorities prior to the utilities act going into effect and had commenced actual construction and prosecuted the same with reasonable diligence thereafter.

It is worthy of note that the statute, sec. 48a, closes with the following proviso: "*Provided that power companies may, without such certificate, increase the capacity of existing generating plants or develop new generating plants and market [266] the products thereof.*" And there is immediately added the following proviso in section 48b, "*Provided, that when the commission shall find, after hearing that a public utility has heretofore begun actual construction work and is prosecuting such work in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise or permit heretofore granted but not heretofore actually exercised, such public utility may proceed to the completion of such work, and may, after such completion, exercise such right or privilege.*"

The foregoing scarcely admits of construction; the layman can understand that as well as the lawyer. The majority opinion, however, seems to hold these provisos to the statute as "nugatory" and that they should be "disregarded."

The commission itself originally took the same view of the statute I have above expressed, in a case designated as "Ashton & St. Anthony Case. No. F-5." There the company secured a franchise from Ashton on March 18, 1913, and from Marysville, April 7, 1913, which was only a short time before the utilities act went into effect. The company did some trivial work on its power site a couple of miles outside of the city prior to the going into effect of the utilities act. The commission held that, "Under this clause of the statute and under the facts so found, it would seem that the Ashton & St. Anthony Power Company, Limited, may proceed to the completion of its work and may after such completion exercise the rights and privileges granted to it by these franchises. It would appear from the statute and from such findings that no certificate of public convenience and necessity is required from the commission in order that the applicant company may proceed to the completion of its works, and after such completion may exercise the rights and privileges granted by the franchises aforesaid." The commission appears to have receded from the view there expressed in the present case.

Let us now see what the facts are in the case under consideration. In 1908 the predecessor of the plaintiff secured from the state engineer a permit for the diversion of 1,000 [267] second-feet of water from the Malad river in what is now Gooding county. That work has been prosecuted diligently ever since and diversion works have been constructed and power plants erected so that about 7,500 horse-power has been developed and utilized, and approximately 20,000 horse-power can be developed under this permit and diversion; that in the construction of diversion works and power and generating plants, \$600,000 has been expended, and the total expenditure made by the company in constructing diverting works, power and generating plants and transmission and distribution lines aggregates about \$1,500,000. It is claimed that more than one million of this investment had been made when the utilities act was passed. Prior to the time the utilities commission was created by act of the legislature, plaintiff's predecessor, the Beaver River Light & Power Company, had constructed a transmission line from the power plant on the Malad river by way of Glens Ferry and Mountainhome to Boise, a distance of something like 86 miles, and was then furnishing light and power in Boise City and towns along the course of the transmission line. The stipulation shows that even all these points did not consume all the electricity that plaintiff was then prepared to generate, and it had not yet developed more than about one-third of its water-power possibilities under its permit from the state

and the diversion made thereunder. In the meanwhile, many other towns were much closer to its power and generating plant than Boise and other towns already supplied, Twin Falls being only thirty miles away. It is also stipulated that the plan of development and purpose of plaintiff and its predecessor is and has been to develop the entire available power of the Malad river as rapidly as possible and as fast as the terms of their water permit would require, and to seek a market for the product of the plants.

The utilities act went into effect on May 8, 1913, and prior to that date the plaintiff's predecessor, the Beaver River Power Company, secured a franchise from the city of Twin Falls to construct transmission lines through the city and to deliver light and power to the city and its inhabitants, but [268] had not commenced any actual construction work within the city limits.

It is admitted, however, that it was already equipped with a sufficient plant to supply all the electricity that would be needed or could be used at this place. In the meanwhile, the Great Shoshone and Twin Falls Water Power Company was supplying electricity to Twin Falls and neighboring towns.

Now, the question arises: *Did the legislature, when writing and enacting into law the above-quoted sections of the statute, intend to permit the utilities commission to exclude either one of these companies, or any company already in the field, from continuing to operate and seek a market for its products?* To my mind, it is clear that the legislature intended to allow them to continue to operate and seek every available market for the products of their plants to the extent of the full capacity of their power and generating possibilities and to confer on the commission plenary power to regulate the service and fix rates. *The chief thing the legislature had in mind was to confer the power to regulate public service corporations and fix rates to be charged consumers. They had no idea of discriminating between public service companies already in the field with their money invested and plants in operation; neither did they intend to make a pet monopoly out of one and wreck another that already had hundreds of thousands in cash invested in the state. I cannot conceive that lawmakers attempting to legislate for the people of the state could have meant any such thing, and it seems to me that they made it very plain by the above-quoted provisions that they did not intend such a thing.*

It is said that because the plaintiff company had not commenced work within the corporate limits of Twin Falls, it had not done any work under its franchise. That is like saying that the man who shoves his hand through the window and takes your

coat off the hook didn't steal the coat from your dwelling-house because the motive and will power were outside the house.

We don't generally have great water-power sites in the city. We rather have to go out and build power and generating [269] plants where the streams flow and then convey the current long distances over transmission lines to places of consumption, and we find the bulk of consumers in the town and cities. The diversion of the water and construction of plants at the power site is as much a part of the work of supplying a city and its inhabitants with light and power as is the building of distributing lines. Again, it would seem to me that a plant large enough to generate current for transmission 86 miles to supply a city of twenty-five or thirty thousand people is certainly within the same "field" of operation comprising a city of nine or ten thousand that is only thirty miles distant.

Again, it would be the height of folly to say they can enlarge or increase existing plants and generate more electricity and still they cannot build more transmission or distributing lines but must carry the additional load and distribute it over existing lines or not at all. The mere statement of such a proposition refutes the claim. New and additional consumers must be served over other and different lines.

The fact that the plaintiff, Idaho Light & Power Company, had not filed an acceptance of the terms of the ordinance granting it a franchise prior to the time the utilities act took effect is without shadow of merit. That the franchise was granted on the company's application was itself an acceptance and would bind it to the terms of the ordinance granting the same so long as the ordinance provided the exact terms proposed by the company soliciting the franchise. *It is well settled that doing work under the terms of a franchise is an acceptance of its terms and conditions.* (Allegheny v. People's Natural Gas, etc. Co. 172 Pa. St. 632, 33 Atl. 704, 705; City R. Co. v. Citizens' St. R. Co. 166 U. S. 557, 17 S. Ct. 653, 41 U. S. (L. ed.) 1114, 1118; Lincoln, etc. Bank v. Richardson, 1 Greenl. (Me.) 79, 10 Am. Dec. 34; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Atlanta v. Gate City Gas Light Co. 71 Ga. 106, 117; State v. Dawson, 22 Ind 272, 274.)

[270] If the utilities act is valid and constitutional, then there can be no question about *the right of the commission to regulate the service of the plaintiff and all other like concerns and to fix the rates it may charge, but it has no right to exclude it from the field and grant its competitor an exclusive monopoly of the business.*

Entertaining, as I do, the opinion of this case just expressed, it would be useless for

me to enter into any discussion as to the constitutional questions presented, and I accordingly refrain from any consideration of that phase of the case, or the expression of any opinion thereon.

It has been iterated and reiterated by counsel for the state and counsel for the utilities commission, and also by counsel for both corporations here represented, that the public utilities act of this state does away with competition in Idaho so far as all public service corporations are concerned, and that it provides for the creation of monopolies in all public utilities regulated by a commission. The opinion by Mr. Justice Sullivan adopts the same view and asserts that this statute provides for regulated monopolies. I cannot concur in all the views advanced on this phase of the question, but I think it well that the construction to be placed on this law is made plain so the people may know and understand the scope and purpose of the law as viewed by the court and the utilities commission.

What I have said with reference to the Twin Falls case is equally applicable to the Pocatello case. There it was proposed to generate electricity by means of a Diesel Internal Combustion oil engine, and a franchise was procured from the city prior to the utilities act going into effect, and plans and specifications were made and the company paid for publication of the ordinance and did some preliminary work in the way of investigations and survey of the field. Thereafter, and prior to commencement of proceedings before the commission, the company ordered and had constructed a 500 horse-power engine, which it installed in the city of Pocatello, and all together incurred an expense of about \$50,000, and still in the face of this state of facts, the utilities commission [271] contend that they have the power to exclude this company from supplying light or power to the people of Pocatello. I repeat that the commission has the undoubted power to fix the rates to be charged by this company and to regulate the service by it, but the legislature never dreamed of vesting the commission with the power to exclude the company from serving the people of Pocatello under these conditions and to confer a monopoly on the company already there.

The order of the commission is clearly erroneous and ought to be vacated and set aside.

#### NOTE.

#### Validity of Statute Conferring on Public Service Commission Power to Determine Necessity for Construction or Extension of Public Utility.

The reported case, which holds to be valid a statute requiring a certificate of necessity

from the public service commission as prerequisite to the construction or extension of a public utility, appears to be the only case passing directly on that point. As is pointed out in that case, the statutes of most of the states wherein a public service commission has been created contain a similar provision, which has not been questioned in the decisions sustaining those acts. In *Eastern Telephone, etc. Co. v. Board of Public Utility Com'rs*, 85 N. J. L. 511, 89 Atl. 924, the court sustained an order of a public service commission refusing to approve a telephone franchise on the ground that the community was already adequately served by a telephone company. The court said: "No one would contend that if, when the act authorizing the granting of these franchises was adopted, it contained a provision that no such franchise should be valid until approved by a board, or by any other state agency selected for that purpose, such limitation would not have been good, and if so the legislature may by a subsequent act limit the effect of such power. Section 24 also provides that the 'approval is to be given when the board determines that such privilege or franchise is necessary for the public convenience and properly conserves the public interests.' By the terms of this act the board is not required, nor authorized, to approve until it determines that the privilege for which approval is sought, is necessary and proper for the public convenience, and in this case the board have found that such condition does not exist. It is argued that it would be absurd to interpret this act as conferring a power upon the board to prevent the municipality from making any designation whatsoever. With this we do not agree. The right to use the public streets and highways by these private corporations is deprived from the legislature, and they have the power to say that while a municipality may grant a franchise, it shall not be valid until approved by the board. We can see nothing absurd or unreasonable in this, for the legislature could have refused it if application was required to be made to it, and it has a right to appoint agents to determine for it whether proposed constructions are necessary and proper for the convenience of the public and the conservation of its interests, especially when they add an additional burden to public easements." In *Mt. Konocti Light, etc. Co. v. Thelen*, 170 Cal. 468, 150 Pac. 359, the exercise of a power similar to that sustained in the reported case was upheld without question as to the validity of the statute. In *People v. Railroad Com'rs*, 160 N. Y. 202, 54 N. E. 697, involving a statute requiring a certificate of public necessity from the railroad commissioners for an extension requiring the exercise of the power of eminent domain, the court said:

"Now, the section before us prohibits a railroad corporation from exercising any of the powers conferred by law upon such a corporation until the board of railroad commissioners shall certify that certain specific conditions have been complied with, and also that 'public convenience and a necessity' require the construction of such railroad as proposed in said articles of association. The granting of such a certificate cannot be treated as an idle ceremony, required by the legislature as a mere matter of form, for the board of railroad commissioners, in order to certify, must first determine what the fact is, and it must decide that the public convenience and a necessity require the construction of the proposed railroad before it can certify that such is the fact. To enable it to pass upon that question of fact it must be in possession of the necessary evidence upon which to base a decision, and in order that the people may have an opportunity to be heard and be permitted to produce evidence in opposition to the railroad's claim of a necessity, the statute requires the publication of the articles of association for three weeks in each county in which the road is proposed to be located, and further requires that the certificate shall be applied for within six months after the completion of such publication. Upon such hearing the commissioners have the right to administer oaths to witnesses, to authorize their examination and cross-examination by counsel, and while not bound by the technical rules governing the admission of evidence in actions and proceedings pending before the courts, the commissioners are authorized to, and do receive oral testimony, written and printed documents, and affidavits which in their opinion tend to throw light upon the question which in the end they are to pass upon, namely, whether 'public convenience and a necessity' require the construction of the proposed railroad. This determination is one of great importance from a public point of view, and so the statute requires that it shall be passed upon at the very threshold of the corporation's existence, for thus is prevented, if the railroad ought not to be built, a waste of the money contributed by the stockholders in proceedings which may come to naught should some owner of land through which the railroad is intended to pass succeed in establishing, in condemnation proceedings, that there is no necessity for the building of the railroad." See also *In re Public Service Commission*, 217 N. Y. 61, 111 N. E. 658, wherein the action of the commissioners on an application for such a certificate was said to be final. In *Gratiot, etc. Tel. Co. v. Brownsville Farmers' Telephone Co.* 34 Ohio Cir. Ct. Rep. 237 (*affirmed* without opinion 106 N. E. 1059), a telephone company sued to

enjoin another company from constructing a competing line without a certificate of necessity from the public service commission. The court held that the defendant company was not within the terms of the act requiring such a certificate, but said obiter: "It might further be said that, before it could be held that the defendant should procure a certificate of public necessity from the public service commission, the adequacy or inadequacy of the service rendered in the locality where the plaintiff's property is located would first have to be determined; and while it might not be essential to its right to the relief sought in this action to show that it was rendering adequate service in the same territory, or in the same locality, where the defendant company expected to locate its lines, yet it would not be necessary to make such showing in this proceeding, but the question of the adequacy or inadequacy of its service would have to be raised and passed upon by the public service commission."

#### MEDLIN

v.

#### COUNTY BOARD OF EDUCATION ET AL.

North Carolina Supreme Court—November  
18, 1914.

167 N. Car. 239; 83 S. E. 483.

#### Witnesses — Testimony as to Repute — Scope of Cross-examination.

In mandamus to compel a school committee to admit relators' children to the white school, from which they had been excluded, as being of mixed blood, a witness who testified that the mother of the children was generally reputed to be of mixed blood may be cross-examined as to whether the report had been started through envy and jealousy; such evidence tending to discredit the witness' testimony as to the general reputation.

#### Evidence — As to Race to Which Person Belongs.

A witness, who has not testified to general reputation as to the parentage of a person, whose race is in question, cannot testify as to who was said to be such person's parent.

[See note at end of this case.]

#### Same.

In a suit by a father to compel the admission of his children, who were excluded from the white school as mixed bloods, evidence of declarations by the father that he had married a negress is admissible only to impeach his testimony that the children were white;



he not being such a party in interest that his declarations would be substantive evidence as admissions against interest.

[See note at end of this case.]

**Instructions — As to Weight of Evidence — Necessity of Specific Objection.**

In view of court rule 27 (164 N. C. 548, 81 S. E. xi), providing that it shall not be ground for exception that the court failed to charge the jury as to the effect to be given testimony admitted in corroboration or contradiction, unless such charges are specially requested, the giving of a charge which informed the jury that testimony was to be considered solely in impeachment of a witness, even if error, is harmless.

Appeal from Superior Court, Wake county:  
ALLEN, Judge.

Action for mandamus. J. R. Medlin, plaintiff, and County Board of Education of Wake County et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Percy J. Olive and H. E. Norris for appellants.

W. B. Snow and Armistead Jones & Son for appellee.

[239] CLARK, C. J.—This is an action against the county board of education of Wake and the school committee of District No. 2 (white) of House's Creek Township. The plaintiff alleges that his children belong to the white race and are entitled to attend said school, but have been wrongfully and unlawfully debarred by defendants from attending the same on the false allegation that they are of mixed blood, and asks a mandamus to compel the defendants to admit his children to the said school for [240] whites. The defendants answer, admitting that plaintiff's children have been debarred, and aver that they are of mixed blood and therefore not entitled to attend.

It is admitted in the answer that the plaintiff, who is the father of the children, is of the white race. It is also admitted that Nan Powers was the mother of Mrs. J. R. Medlin and the grandmother of plaintiff's children. It was contended by plaintiff that John Powers and Lucy Powers, who are admitted to be of the white race, were the parents of Nan Powers, but this was denied by the defendants.

Revisal, 4086, forbids the admission of children to the white schools if there is any admixture of colored blood. Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832. The jury found that the children of the plaintiff were of unmixed white blood and entitled to attend the white school.

Exceptions 1 and 2 not being brought forward in defendants' brief, are abandoned. Rule 34.

Elma Maynard testified, on cross-examination in respect to Annie Powers, that the general reputation was that she was of mixed blood. The witness was then asked "If that general reputation has not sprung up through envy and jealousy of two or three men in that neighborhood in the last few years?" To which she replied: "I have heard so. I went to school with some of Mr. Medlin's children. It is generally reputed that two or three men started the rumor that Medlin's children were mixed blooded." This was a matter in the discretion of the court. It showed by the witness's testimony that there was no general reputation as to Nan Powers being of mixed blood; that what the witness meant was that there was a widely spread report which was not believed, because it was of general repute that it was a trumped-up charge.

Exceptions 4, 5, 7, 8, 18, 20, 23, and 26 seem to present substantially the same question, which is exemplified by the question, "who was said to be her mother?" Here it is not the general reputation that is asked for, but merely hearsay. To make such questions competent, the witness should have been asked, first, if she knew the general reputation. This defect applies to all these questions. The defendant did not offer to show general reputation in the family.

Exceptions 9 and 10 are those most strenuously contested. Thad Ivey, who was a witness for the defendants, testified that plaintiff Medlin had said to him: "I married a nigger;" and Hardie Bagwell, also witness for defendants, testified that Medlin said in his presence that he "knew his wife was one-fourth nigger."

J. R. Medlin denied having made such statements, and testified that his wife was the daughter of Annie Powers, who was white, and that he had never known that she was reported to be of mixed blood; that Annie Powers was the daughter of John Powers and Lucy Powers, who are admitted on this trial to be of the white race.

[241] There was much conflicting evidence, but the jury found that the evidence showed that the children were of purely white blood.

Exceptions 9 and 10 are because the judge stated that the evidence of Bagwell and Ivey as to Medlin's statement was "impeaching evidence. The parties involved here are the children. It is only what we call impeaching evidence. It only affects Mr. Medlin's testimony as a witness, but it is not what we call substantive evidence as to the real color of the children. He denies having said that, and it is only a question affecting his testimony, that does not go to the jury in respect to the color of the

children." Had this evidence of contradictory statements been as to any other witness than Medlin, unquestionably such contradictory statements would have been impeaching and not substantive evidence. As the judge stated, it could not affect the color of the children. It was not evidence as to their color, but hearsay impeaching the truth of his statement on the trial. Evidence of contradictory statements are not substantive evidence, but merely impeaching testimony, unless it is an admission by a party in interest. The contradictory statement is hearsay, and therefore incompetent except to impeach the credibility of the testimony of the witness, except when the statement is a declaration against interest. Here, while Medlin was the nominal plaintiff, he was not possessed of such interest as would have made his admission against the interest of the children receivable as such. 1 Greenleaf Ev. sec. 176. If he had signed a statement that the children were not white, it would not have been competent in an action brought directly by them, unless he had gone on the stand and testified to the contrary, and then it would have been competent only to impeach his credibility. The judge ruled correctly. Besides, if it had been otherwise the jury could not have been prejudicially affected by the distinction, which they could not be expected to comprehend, between impeaching evidence by reason of a contradictory statement which lessens the weight of witness's testimony and calling such contradictory statement substantive evidence. The distinction between the two is not easily appreciated by a jury. Formerly new trials were given by reason of the distinction. But the Court, appreciating the fact that new trials should not be given on such slight distinction, in Rule 27, 164 N. C. 548, prescribed: "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury especially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission that its purpose shall be restricted."

[242] The tendency of the courts and of the times is that new trials shall not be granted unless it can be seen that the error, if one is committed, materially contributed to the result of the trial. This is hardly possible, when the error alleged is that evidence was substantive and not impeaching only, when the contradictory statement is made by a nominal plaintiff who is suing in

behalf of the beneficial plaintiffs, whose rights he could not prejudice by any admission out of court, though such statement by him might well be calculated, if believed by the jury, to disparage the weight of his testimony at the trial.

The other exceptions do not require discussion. They were evidently taken out of abundant caution in a hotly contested case. The question at issue is almost entirely one of fact. It is one in which a jury would be naturally deeply interested and in which the jurors have the great advantage over any other mode of trial in that, knowing the witnesses, they can weigh the credit to be given to their testimony.

The burden was upon the plaintiff to make out his case by the preponderance of the testimony, and when a jury of twelve white men have determined the issue, as they have done in this case, in a matter of this kind, there can be little doubt of the correctness of their conclusion.

No error.

WALKER, J. (*dissenting*).—It is always with regret that I have to differ with my brethren of the majority, and I never do so unless I am convinced otherwise by reasons which my own logic does not enable me to overcome, and never express that difference in the form of a separate opinion unless the case is of the greatest importance or the principles involved are of the gravest moment in the administration of justice. I so regard this case, and the doctrines of law which govern it. The Legislature had positively and unmistakably forbidden that a child having any negro blood in its veins should be admitted to a public school for white children, adequate and equal facilities being provided by law for the education of both races in separate schools (Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832), and this being so, and such having been ordained as the public policy of the State by the highest lawmaking body, for reasons which are obvious, it is our bounden duty to see that the law is not violated, either directly or indirectly. It follows that where the right of any child to be admitted to a school for white children is brought into controversy, the right being disputed upon the ground that he has inherited negro blood in however small a degree or quantity, the question should be tried and decided strictly according to established rules of law. My fixed opinion that this case has not been so tried is my reason, and an all-sufficient one, for this dissent. Whatever may be said of the others, this exception of the defendant is certainly well taken. The action was [243] brought by J. R. Medlin against the defendants. He is the only plaintiff, and brings the suit in

his own name, alleging his individual and personal interest therein as the natural guardian of his children. They are not parties. He is attempting solely to enforce his alleged paternal right to have his children admitted to the school. He is, therefore, not only a party in interest, but the only party in interest on the side of the plaintiff.

The defendants introduced as a witness Thad Ivey, who testified that plaintiff J. R. Medlin said to him, in a conversation had while he was riding with witness in his buggy, he being a mail carrier: "Well, Ivey, what are we going to do about the school matter?" And I asked what was the matter with the school business, and he said: "They won't let us send to school;" and he said to me, 'I married a negro,' and it so shocked me there was very little else said, if anything at all. I drove on and he went his way." The court ruled, without even any objection by plaintiff to the testimony, so far as the record shows, that it could be used only as evidence tending to impeach Mr. Medlin as a witness, and not as substantive proof of the children's color, and he would not allow it to be considered by the jury to prove that fact. The defendant offered the evidence generally, both as impeaching and as substantive evidence. His Honor fell into this error doubtless because, from his remark while ruling upon the question, he evidently thought the children were the plaintiffs, and their father was not the plaintiff; but he was mistaken in this assumption.

It is hardly necessary to cite authority for the position that a declaration against the interest of a party is always competent as both impeaching and substantive evidence, and is evidence of the strongest and weightiest kind. A man is not apt to swear to his own hurt. Plaintiff, at the time of his remark to the witness Ivey, had a controversy with the school board, it seems, and spoke advisedly and with knowledge that his statement might affect his interests. That such declarations are competent would seem to be beyond any doubt. *McDonald v. Carson*, 95 N. C. 377; *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008, where the declarant had said he was of negro blood; and even in proceedings to caveat a will, where there are strictly no parties, such declarations by any of those who have been brought in have been held admissible by this Court. *Enloe v. Sherrill*, 28 N. C. 212, where, at p. 215, Judge Nash says: "And when the declarations of any party to the issue are admitted as evidence, it is because of the rule that the declarations of any one against his interest is legal testimony as against him. It has therefore been ruled in this State that in an issue of *devisavit vel non*, when the parties are regularly constituted, their declarations are

evidence against them," citing *McCraime v. Clarke*, 6 N. C. 317. In *McDonald v. Carson*, supra, Chief Justice Smith dismisses a similar point with scant consideration, in view [244] of the well settled rule of evidence. He says, briefly: "The last imputed oversight is in regard to a conversation had between the plaintiff and the defendant Wadsworth, of which it is enough to say that any and all declarations, pertinent to the subject-matter and bearing upon the issue, coming from the defendants, or any of them, are competent, at least against the persons making them, and may be against all, when their interests are joint and they are engaged in a common enterprise. This objection has not been pressed in the argument, and we dismiss it without further comment."

Nan Powers was the grandmother of the children, the mother of Medlin's wife. Elma Maynard had testified that the general reputation was that Nan Powers was of mixed blood, meaning that there was an admixture of negro blood, and on redirect examination was allowed to state, over defendant's objection, that she had heard that the reputation to which she had referred had "sprung up from envy and jealousy of two or three men in the neighborhood." This was clearly incompetent, as what she had last heard came from an entirely different source, and it was not the subject of proof by reputation. If she had said, that at the same times she heard of the reputation as to Nan Powers being of mixed blood, she also heard, as a qualifying part thereof, that it was based on envy and jealousy, the case would have been different; but she did not say so.

His Honor also disparaged the defendant's testimony, of course unconsciously, when he said that he thought "the law ought to be very carefully administered as to the mixed blood of a person born sixty-eight years ago," for that remark greatly impaired its force, and there was no real reason why the law should be more carefully administered in such a case than in any other. It was giving the court's view upon the weight of such testimony, and although not in so many words, the clear implication was that it was not entitled to much credit. The evidence in this case to show the presence of negro blood in the veins of these people was very strong, and almost convincing; but such an observation coming from the court might, and no doubt did, turn the scales against the defendants, and was within the prohibition of Revisal, sec. 535. *State v. Dick*, 60 N. C. 440, 86 Am. Dec. 439; *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855; *Park v. Exum*, 156 N. C. 228, 72 S. E. 309; *State v. Cook*, 162 N. C. 588, 7 S. E. 759; *Ray v. Patterson*, 165 N. C. 512, 81 S. E. 773, and *Speed v. Perry*, 167 N. C. 122, 83 S. E. 176.

Reputation and tradition are the methods of proof by which pedigree and kindred matters are established. They are considered by the law as reliable and trustworthy, and therefore have long been admitted as evidence. This kind of testimony is not weakened, but rather strengthened by age and the long continuance of the reputation. Any tradition which can survive the lapse of sixty-eight years is not to be discredited [245] on account of that fact, but our confidence in its truthfulness should be increased thereby, as it improves by age, and the long period of its existence and the continuity of the tradition but show its persistence. The length of time, therefore, was not the proper subject of unfavorable comment. No rule of law, that I am aware of, warranted the criticism.

The learned and impartial judge who presided at this trial was inadvertent to the effect of this remark at the time, as he would be the last one to sway a jury, in the least, by any personal expression of opinion upon the weight of the evidence. He is too just and exemplary for that, and that the comment was unguardedly made, I have not the least doubt. But we must look at its effect, and the motive is not to be considered. *Starr v. Southern Cotton Oil Co.* 165 N. C. 587, 81 S. E. 776; *State v. Dick*, *supra*; *Withers v. Lane*, *supra*.

The exclusion of the evidence of Thomas Finch was error, as it was not necessary to prove, as a fact, that Nan Powers had any grandparents. In the course of nature, she must have been the grandchild of some one, and the court takes judicial notice of all such matters.

There are other assignments of error, but I need not consider them, as those I have mentioned are sufficient to overturn the verdict and judgment. Some of the defendant's most important evidence was either improperly excluded or the probative force to which it was naturally and legally entitled was greatly weakened; and, thus embarrassed, there was left to the defendant little chance to succeed. We are not infallible, and these slips will sometimes accidentally occur, where we strive to do our best; but the harm is not neutralized by the noble purpose to do the right, however earnest it may be, and for this reason the law steps in and corrects the error, and it is but just that it should do so. It takes no chances on the probable harmlessness of the mistake, but acts upon the theory that such a handicap must needs be prejudicial.

The public schools of our State should be administered in strict accordance with the mandate of the law requiring separate schools for the two races. It is no injustice to either, but, in my judgment, a great help, and a necessary provision for both. If this verdict

has gone wrong, the harm may be incalculable, and especially so if it has resulted from an erroneous application of the law. It is better, even if it be a true deliverance, that it should come after a trial which is clear of any departure from long established principles. My conviction, after much reflection upon and study of the questions raised, has led me irresistibly to the conclusion which I have stated, and my desire to see this important law, so necessary to the peace and happiness of both races, correctly and strictly enforced, compels me to this dissent.

The record shows, as I have stated, that J. R. Medlin is suing in his own behalf and not as next friend or in behalf of his children. He [246] alleges, and it is the only theory upon which he bases his claim to relief, that his own personal right has been violated, and he is, in no sense, a nominal plaintiff, either in fact or in law. His children are not parties to this record, and if they were and could assert any individual right therein, they would have to appear by their next friend. I cannot agree to the doctrine that because a jury has decided a case one way, it must be the correct one. That depends very much upon whether the law has been properly administered, and the defendant is entitled under the Constitution, and as of right, to a legal trial, and a verdict in accordance therewith. Nor do I agree that the testimony as to the declaration of Medlin "that his wife was a negro" is not competent substantively on other grounds than that he is the real plaintiff in this suit. It would be dangerous practice to found our decisions upon the possible correctness of a verdict. We do not decide the facts, but what is the law of the case. We stated in *Starr v. Southern Cotton Oil Co.* *supra*, that the court should be careful to see that neither party is placed at any undue advantage before the jury by anything occurring during the trial, whether it proceeds from counsel, the court, or otherwise, and further said: "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause by extraneous considerations, which militate against a fair hearing. . . . While frequently in the exercise of the authority conferred upon this Court we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical," citing *Hensley v. McDowell Furniture Co.* 164 N. C. 148, which is to the same general effect. I am of opinion that there should be a new trial.

Hoke, J., concurs in this dissenting opinion.

**NOTE.**

On an issue as to the race to which a person belongs, evidence of general reputation is held in the reported case to be admissible. It is also held that a statement out of court by a parent, suing to enforce the right of his children to attend a school for whites, that he married a negro, is not admissible as original evidence but only by way of impeachment. The evidence admissible to show the race to which a person belongs is discussed in the note to *Cole v. District Board*, etc. Ann. Cas. 1914A 459.

**MOREHOUSE**

**v.**

**SHEPARD ET AL.**

Michigan Supreme Court—December 19, 1914.

183 Mich. 472; 150 N. W. 112.

**Agency — Sale of Land by Person Not Broker — Measure of Compensation.**

Where one not engaged in the real estate business is employed to procure a purchaser of real estate without any agreement as to the commission to be paid, a recovery for procuring a purchaser must be limited to the fair value of the services, but in determining that fact the amount customarily charged by real estate agents in the neighborhood can be considered, but it cannot be made a governing factor.

[See note at end of this case.]

**Harmless Error — Instruction Cured by Verdict.**

Where one not engaged in the real estate business sued for the usual commissions for procuring a purchaser of real estate pursuant to a contract not fixing the compensation, defendant did not offer any evidence of the reasonable value of the services, and the jury rendered a verdict for \$200 less than the customary commission, the error in an instruction authorizing a recovery of the usual commission is not reversible.

Error to Circuit Court, Van Buren county: *Des VOIGNES*, Judge.

Action for services. Frank D. Morehouse, plaintiff, and Horace T. Shepard et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. **AFFIRMED.**

*Thomas J. Cavanaugh* for plaintiffs in error.

*David Anderson* for defendant in error.  
Ann. Cas. 1916E.—20.

[473] *OSTRANDER*, J.—Plaintiff, a farmer, claims that the defendants, also farmers, and neighbors of plaintiff, desired to sell their farm, and said to him, each of them, in substance, "If you can sell it, I will pay you for it," "I will pay you, and pay you well, for selling the farm;" that he undertook to sell it. He claims, further, that he found and produced a person who bought the farm and paid for it the sum of \$9,000, and that he should be paid as a commission 5 per cent on this sum. He declared upon the common counts in assumpsit, and gave as particulars of his demand the following:

"To commission on sale of real estate,  
\$9,000 at 5 per cent. . . . . \$450.00

"Said commission to be at the usual rate at Paw Paw, Mich., and said 5 per cent being said rate as claimed by plaintiff."

Defendants denied making any contract with plaintiff, and denied that plaintiff sold or found a purchaser for the farm on their account, and asserted that plaintiff's interest and conduct with respect to the sale arose out of the fact that he wished his brother-in-law, the purchaser, to locate near him. Included in this was a claim that plaintiff, in talking with the intending purchaser, depreciated the value of the farm, calling attention to its *run-down* condition as affecting the price which should be paid for it. Issue having been joined and the cause tried, a verdict was returned in plaintiff's favor for \$250, and judgment was entered accordingly.

[474] The issues were simple, were plainly for a jury, and, while a considerable number of exceptions were taken and made the foundation for an assignment of errors, we think they are without merit, and, with a single exception, that they require no discussion. Plaintiff introduced testimony tending to prove the defendants' offer and his efforts pursuant thereto, known to defendants, to find a purchaser for the farm. That the farm was sold for \$9,000 to a person produced by plaintiff is not disputed. As to the value of his services, plaintiff showed, over objection and exception, the usual commission charged and received by real estate agents and brokers in Paw Paw, and the court instructed the jury that if they reached the question of damages, they should, in determining the amount of them, "be governed by the usual compensation to be paid in Paw Paw for services of this kind—Paw Paw and vicinity." Error is assigned upon this instruction. In this connection and a subject of assigned error, the court said:

"It is no objection to plaintiff's right to recover that he has not regularly been in the business of real estate agent. Any person, no matter what his business, has the right to accept employment as agent for another in the sale of real estate. If defendants in fact

employed Mr. Morehouse as their agent in the matter claimed by him, they would be as much bound to pay him as if they had made the same contract with a person whose only business was to act as a real estate agent."

Concerning this, appellants say in their brief, in part:

"If the plaintiff was at the time engaged in the real estate business, there would be no doubt but the defendants would be obliged to take notice of a custom existing among real estate brokers, but that is not the question with which we are dealing. The plaintiff was not engaged in the real estate business. Then the contract, as related by the plaintiff himself, would, it [475] seems, negative any intent on the part of the defendant to pay a commission, or any intent on the part of the plaintiff to ask a commission such as persons engaged in the real estate business would expect.

"The parties were farmers, neighbors as it were, and, admitting the making of the contract in the language of the plaintiff, can it be said as a matter of law that the defendant meant more, or that the plaintiff expected more, than to be paid well for the time expended in producing a customer?

"We believe the proper way to measure plaintiff's compensation would have been for him to show the amount of time spent in endeavoring to and in procuring a customer, and then to show the value of those services."

Plaintiff did show, rather generally, what he had done, in his effort to prove that he was the efficient cause of making the sale.

We are of opinion that counsel for appellants is right in his contention to this extent: That upon the measure of damages the question was, What was the fair value of the services rendered by the plaintiff? In determining the fair value of the services, it was not error to consider what real estate men in the neighborhood customarily charged, but it was error to make the customary charge of real estate men the governing factor. It is not unusual for a neighbor to perform for a neighbor, for hire, special services out of the line and scope of his usual employment. A woman will sometimes, with skill, nurse her neighbor who is sick, or her neighbor's child, with the mutual understanding that she shall be well paid for what she does. In such a case, the usual wages of a trained nurse ought not to be the measure of her pay, for various obvious reasons, one of which is that the parties did not contract with reference to any such standard of wages.

Can it be said that the error was not prejudicial? Presumptively it was prejudicial. The verdict indicates [476] that the jury considered that reasonable pay for plaintiff's services was a sum less than 5 per cent of the selling price of the farm. In the face

of the court's instruction, they returned a verdict for \$200 less than the instruction called for. Defendants introduced no testimony upon the subject. They say in the brief that because the court, in ruling that testimony of the usual commission was competent, said:

"I am afraid that any other measure of damages than that suggested by counsel for the plaintiff would lead us into a field of exploration that would never end. Either he is right upon that proposition or he has no standing in court"—defendants were thereby precluded from offering any testimony as to the value of the services of the plaintiff, except the testimony of witnesses concerning the prevailing custom among real estate brokers. It is probable that the court would have excluded any testimony offered by defendants upon the subject of the reasonable value of plaintiff's services. But counsel should have offered, if in good faith he could have done so, to prove that they were worth some sum less than plaintiff claimed. If he had, and has, no testimony tending to prove, the contract being established, that the services were reasonably worth less than \$250, there ought to be no new trial.

The judgment is affirmed.

McAlvay, C. J., and Brooke, Kuhn, Stone, Bird, Moore, and Steere, JJ., concurred.

Rehearing denied April 28, 1915.

#### NOTE.

#### **Amount of Compensation of Person Other than Real Estate Broker for Effecting Sale of Land Where Contract Fails to Fix Compensation.**

As a general rule, where one who is not a real estate broker performs the services usually rendered by such a broker, his compensation is to be determined according to a just and fair value of his services. *Elting v. Sturtevant*, 41 Conn. 176; *Ruckman v. Bergholz*, 38 N. J. L. 531; *Erben v. Lorillard*, 2 Keyes (N. Y.) 567; *Baikie v. Latourelle*, 24 Quebec K. B. 171. And see the reported case.

The reason for the rule is well stated by *Ostrander, J.*, in the reported case as follows: "We are of opinion that counsel for appellants is right in his contention to this extent: That upon the measure of damages the question was, What was the fair value of the services rendered by the plaintiff? In determining the fair value of the services, it was not error to consider what real estate men in the neighborhood customarily charged, but it was error to make the customary charge of real estate men the governing factor. It is not unusual for a neighbor to perform for a neighbor, for hire, special services

out of the line and scope of his usual employment. A woman will sometimes, with skill, nurse her neighbor who is sick, or her neighbor's child, with the mutual understanding that she shall be well paid for what she does. In such a case, the usual wages of a trained nurse ought not to be the measure of her pay, for various obvious reasons, one of which is that the parties did not contract with reference to any such standard of wages."

But evidence of the customary charges of brokers is admissible to prove what is a fair and reasonable charge in the particular instance. *Elting v. Sturtevant*, 41 Conn. 176; *Ruckman v. Bergholz*, 38 N. J. L. 531. In *Ruckman v. Bergholz*, supra, the court said: "The charge instructed them that they were not, if they found that Bergholz had been employed, but at no fixed rate of compensation, and had rendered the service, to assume that he was, of course, entitled to the rate of compensation usually accorded to professional land brokers or real estate agents, but that they were to consider and determine the value of his services in the premises from the work done, and in fixing the amount, the amount usually paid to professional land brokers for such services might be taken into consideration." The status of such evidence was described in *Elting v. Sturtevant*, supra, where in it was said: "1. Was the testimony of Mr. Hooker admissible? The point to be proved was the value of the plaintiff's services in purchasing a mill for the defendant. The testimony of Mr. Hooker, who was a real estate broker, proved what his charges would have been for the same services. It was not offered as fixing the rule of damages, but as tending to prove the point in issue, and for that purpose we think it was properly received. The price ordinarily charged for such services by persons engaged in that business might well be considered by the court in determining what the plaintiff's services were reasonably worth."

If the services of the plaintiff, however, do not accord with those of a broker, evidence of the charges of a professional broker should not be admitted. Thus, where the services rendered only bring the parties together, and do not affect the negotiations of the parties, the plaintiff may recover for his actual services. *Lyon v. Valentine*, 33 Barb. (N. Y.) 271. And if the parties, acting independently of the plaintiff, alter the contract, the latter's commission is based on the actual consideration of the sale. *Baikie v. Latourrelle*, 24 Quebec K. B. 171; *Robertson v. Carstens*, 18 Manitoba 227.

In Louisiana a different rule prevails. The amount usually paid to a broker is the amount of compensation. *Stewart v. Soubral*, 119 La. 211, 43 So. 1009.

## BROWN

v.

## STATE.

Mississippi Supreme Court—June 23, 1913.

105 Miss. 367; 62 So. 353.

### Deadly Weapon — What Constitutes — Razor.

A razor is not a "deadly weapon," within Code 1906, § 1103, making any person guilty of a misdemeanor who carries concealed any bowie knife, dirk knife, butcher knife, pistol, brass or metallic knuckles, slungshot, sword, or deadly weapon of like kind or description.

[See note at end of this case.]

### Same.

A "razor" is defined as a sharp instrument or tool used for shaving purposes.

[See note at end of this case.]

Appeal from Circuit Court, Adams county:  
BROWN, Judge.

Criminal action. Junius Brown convicted of unlawfully carrying deadly weapon and appeals. The facts are stated in the opinion. REVERSED.

Chas. F. Engle and B. W. Crawford for appellant.

Frank Johnston for appellee.

[372] REED, J.—Junius Brown, a boy about thirteen years old, was charged with unlawfully carrying concealed "a certain deadly weapon, to wit, a razor." Upon the trial of the case in the circuit court on appeal from the justice of the peace court, where the charge was made, a demurrer to the affidavit was filed, on the ground that "a razor is not such a deadly weapon as is contemplated by section 1103, Code of 1906." This demurrer was overruled. For the same reason, the appellant moved the court to exclude the evidence and give peremptory instruction for the defendant; after the testimony was all introduced. From conviction, appellant appeals, and assigns as error the action of the trial court in refusing to sustain the demurrer and to grant the peremptory instruction.

Section 1103 of the Code of 1906 provides that "any person who carries concealed, in whole or in part, any bowie knife, dirk knife, butcher knife, pistol, brass or metallic knuckles, slungshot, sword or other deadly weapon of like kind or description, shall be guilty of a misdemeanor."

Is a razor a deadly weapon, in the meaning of the statute? It will be noted that the

statute names certain weapons, and then includes "other deadly weapons of like kind or description."

A razor is defined in the Century Dictionary to be "a sharp-edged instrument used for shaving the face." In 23 Am. & Eng. Enc. of Law (2d ed.) 891, this definition is given: "A razor is a sharp instrument or tool used for shaving purposes." We take the following definition from 33 Cyc. 1537: "A razor is a sharp instrument or implement pertaining to the toilet or shop, having a well-known and specific use, to which it is ordinarily applied." In *State v. Nelson*, 38 La. Ann. 942, 58 Am. Rep. 202, it is said: "A razor is an instrument or implement appertaining to the toilet or shop. It has a well-known and specific use, to which it is ordinarily applied. [373] It is not known or usually sold in the market as a weapon."

It was settled in *State v. Nelson*, supra, that a razor is not a "dangerous" weapon within the statute in Louisiana, which declares that "whoever shall carry any weapon or weapons concealed in or about his person, such as bowie knives, pistols, dirks or any other dangerous weapons, shall, on conviction," etc. It will be noted that the Louisiana statute is similar to that in this state. We think it is broader in its inclusions. The statute in this state, after naming certain weapons, says "other deadly weapons of like kind or description." In Louisiana the statute says "or any other dangerous weapons." Referring to the razor as such a weapon, Watkins, J., delivering the opinion of the court, said: "It may be quite as easily and conveniently carried in the pocket as a pen-knife, and when thus carried is effectually concealed from public open view. Under such circumstances the concealment of one would be just as pernicious as the other." Defining the difference between a razor as a dangerous weapon when used in a combat or assault, and instruments which are made to be used in fights, and which are ordinarily called arms or weapons, Judge Watkins said: "The lawmaker, in our view, . . . only denounced as a crime the carrying concealed dangerous weapons *eo nomine*, and not such articles or instruments as might be used in an assault."

It was decided in the case of *State v. Ianucci*, 4 Penn. (Del.) 193, 55 Atl. 336, that a razor is a deadly weapon within the meaning and conception of the statute of Delaware on the subject. We find, however, that the Delaware statute is quite different from that in this state. It provides that, "if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, . . . shall upon conviction," etc. It will be seen that no weapons are specifically named in this statute, and

that there is no limitation [374] whatever as to the kind of instruments which are included as deadly weapons.

In deciding the case of *State v. Larkin*, 24 Mo. App. 410, the court indicates that, if a razor is carried as a weapon of offense, it might be termed a deadly weapon concealed. On the other hand, the court clearly states that it is not to be ordinarily denominated such weapon. In delivering the opinion of the court, Rombauer, J., said: "A razor is an article of common domestic use, and while no one could be held guilty of the offense of carrying a dangerous and deadly weapon concealed about his person, simply because he so carried a razor, yet, if surrounding circumstances would tend to show that he carried it as a weapon of offense, he might become liable to the charge, because a razor, when thus used, is notoriously a weapon dangerous to life."

The only testimony in the present case showing why appellant had the razor concealed on his person when the officer found it is his own statement, as follows: "My aunt give me that razor to have sharpened. She uses it to cut her corns with. I had it in my pocket." Though a razor is an article of ordinary domestic use, still it is well known that it can be used with deadly effect. This can also be said of an ordinary pocket knife, or other articles or instruments which are not classed as weapons. In some sections of the land it may be the habit or custom of a certain class of persons to carry a razor concealed for the purpose of using it in combat. The time may come when it will be so generally used as an instrument in combat as to cause the legislature to include it in the names of deadly weapons, which shall not be carried concealed. But we cannot decide that it is so included now.

We are construing the statute. The purpose thereof is to prevent the carrying concealed weapons; that is, instruments used in fights, or arms. Certain of the instruments well known to be weapons are named, and then it includes "other deadly weapons of like kind or description." [375] We do not believe that we can list the razor in the class of instruments defined to be weapons of like kind and description to those designated in the statute.

Reversed, and defendant discharged.

#### NOTE.

##### What Constitutes "Deadly Weapon."

The earlier cases discussing the nature of a deadly weapon are collected in the note to *Hudson v. State*, Ann. Cas. 1912A 1324. This



note presents the recent cases on the same subject.

A deadly weapon has been defined recently as "one likely to produce death or great bodily harm by the use made of it," the court saying that "a weapon capable of producing death is not necessarily a weapon likely to produce death." *Clemons v. State*, 8 Okla. Crim. 452, 128 Pac. 739.

It is the peculiar and exclusive province of the jury to say whether an ordinary pocket knife is a "deadly weapon," or merely a "sharp and dangerous" one; for a pocket knife is not necessarily a deadly weapon. *Clemons v. State*, 8 Okla. Crim. 452, 128 Pac. 739, wherein the court said: "In many cases the court may declare as a matter of law that the particular weapon was or was not a deadly weapon, but where the weapon used may be a deadly weapon or not, according to the manner in which it was used or the part of the body struck, the question must be submitted to the jury." In *Territory v. Gomez*, 14 Ariz. 139, 125 Pac. 702, 42 L.R.A.(N.S.) 975, it was held that whether a pistol was loaded so as to make the accused guilty of an "assault with a deadly weapon" was a question of fact for the jury.

In *Schwarz v. Poehlmann*, 178 Ill. App. 235, it was held that a rubber hose, plugged at both ends with pieces of wood and about 21 inches in length and 1½ inches thick was per se a deadly weapon of like character to a slung shot and within the scope of a statute providing that "whoever shall have in his possession . . . any slung shot or metallic knuckles, or other deadly weapon of like character, or any person in whose possession such weapons shall be found, shall be guilty of a misdemeanor."

It was held in *Papella v. State* (Del.) 96 Atl. 198, that a revolver, containing cartridges, even though so defective that it could not be fired, was within the scope of the statute. See also *State v. Quail* (Del.) 92 Atl. 859, wherein it was said that a revolver, unloaded, and one in such a defective condition that it could not be fired, were within the purview of the statute of Delaware (ch. 548, vol. 16 [Rev. Code 1852, amended to 1893, p. 987] Del. Laws, c. 252): That "if any person shall carry concealed a deadly weapon," etc. But in *Territory v. Gomez*, 14 Ariz. 139, 125 Pac. 702, 42 L.R.A.(N.S.) 975, it was held that an unloaded pistol is a deadly weapon only if used within striking distance.

A pocket knife is not necessarily a deadly weapon, though it may be a sharp and dangerous one. *Clemons v. State*, 8 Okla. Crim. 452, 128 Pac. 739. It is not to be inferred that all knives are deadly weapons; and in *McGill v. State*, 60 Tex. Crim. 614, 132 S. W. 941, it was held to be error on the part of the trial

judge not to instruct, defining a deadly weapon.

In the reported case it is held that a razor does not come within the meaning of a statute providing that "any person who carries concealed, in whole or in part, any bowie knife, dirk, butcher knife, pistol, brass or metallic knuckles, slung shot, sword or other deadly weapon of like kind or description, shall be guilty of a misdemeanor." In *People v. Cricuoli*, 157 App. Div. 201, 141 N. Y. S. 855, it was said that an ordinary razor, with a nicked or serrated edge, was not a deadly weapon within the meaning of a statute forbidding the carrying of concealed weapons with intent to use them unlawfully against the person of another, and specifying only "a dagger, dirk or dangerous knife;" and that it was not prohibited when not shown to have been prepared for a "dangerous" weapon for such a use. But the court said in *People v. Cricuoli*, 164 App. Div. 119, 149 N. Y. S. 819, in a second review of the case, that it could be found on the people's evidence that the nicked or serrated razor was a dangerous knife under the statute.

## STATE

### v.

## SOLOMON.

Wisconsin Supreme Court—May 21, 1914.

158 Wis. 146; 147 N. W. 640; 148 N. W. 1095.

### Criminal Law — Right to Preliminary Examination.

The right to a preliminary examination is entirely statutory; the proceeding being unknown at common law.

[See note at end of this case.]

### Same.

St. 1911, § 4781 et seq. giving to persons, charged with offenses not triable before a justice of the peace, the right to a preliminary examination, do not give such right to one charged with an offense, the exclusive jurisdiction to try which was given to the district court by Laws 1899, c. 218, § 5, and the exclusive jurisdiction to hold a preliminary examination for which was given to the same court by Laws 1905, c. 63, since the statutory scheme for preliminary examinations contemplates that they be held in a separate court from the one which has jurisdiction to try the case.

[See note at end of this case.]

### False Pretenses — Sufficiency of Complaint.

A complaint for obtaining money by false pretenses, which alleged that the defendant falsely represented that a certain ring was of solid gold, and that the complaining witness, relying on such pretense, was induced thereby to deliver to the defendant a certain sum of money, is not objectionable as failing to show what was the deception practiced or as failing to show the connection between the pretenses alleged and the obtaining of the money.

[See generally 25 Am. St. Rep. 384.]

### Criminal Law — Right to Preliminary Examination.

Notwithstanding Laws 1905, c. 63, amending Laws of 1899, c. 218, so as to give the district court concurrent jurisdiction with the municipal court of offenses arising within the county of Milwaukee the punishment of which does not exceed one year's imprisonment of a fine of \$500, or both, no preliminary examination is required for minor offenses, where the examining magistrate has jurisdiction to try defendant for the offense charged.

[See note at end of this case.]

Reported from Municipal Court, Milwaukee county: BACKUS, Judge.

Criminal action. Albert Solomon convicted in district court of obtaining money by false pretenses. On appeal to municipal court of Milwaukee county, that court reported four questions to Supreme Court. QUESTIONS ANSWERED.

[147] On October 31, 1912, on a warrant issued by the district court of Milwaukee county on a complaint charging him with obtaining in Milwaukee county \$4.50 from one Andrew Jurgensen by means of false pretenses, the defendant was arrested and was brought before the district court of said county for trial. Sec. 4423, Stats. 1911, provides a punishment for such offense of "imprisonment in the state prison or county jail not more than one year, or by a fine not exceeding two hundred dollars." Sec. 5 of ch. 218 of the Laws of 1899 provides that the district court of Milwaukee county shall "have exclusive jurisdiction to hear, try and determine all charges for offenses arising within said county of Milwaukee, the punishment whereof does not exceed one year's imprisonment in the state prison or county jail or a fine of five hundred dollars, or both such fine and imprisonment." And, as amended by ch. 63, Laws of 1905, it also provides that "said court shall also have authority and jurisdiction to issue warrants for the apprehension of persons charged with the commission of offenses in said county of Milwaukee and not triable before a justice of the peace of said county; and exclusive jurisdiction to examine said alleged offenders and commit or hold them to bail, the same as a

justice of the peace might otherwise do." Before trial in the district court defendant demanded a preliminary hearing, which was denied. He then objected to the jurisdiction of the court to try him on the ground that he had not had a preliminary [148] examination, and the objection was overruled, whereupon he filed a plea in abatement setting forth that he had not had a preliminary examination; that he was entitled to one, had not waived it, and was not a fugitive from justice. The district attorney demurred to the plea and the demurrer was sustained. Defendant was then tried, found guilty, and sentenced to pay a fine of \$25 and costs. He appealed to the municipal court of Milwaukee county. That court sustained the demurrer to the plea in abatement. Defendant demurred to the complaint and the demurrer was overruled, whereupon, with the permission of the court, he entered a plea of *nolo contendere*, and moved in arrest of judgment. Upon the request and motion of the defendant the court, under the provisions of sec. 4721, stayed all further proceedings, and reported the following questions to this court:

1. Is the defendant entitled to a preliminary examination before being placed on trial for the offense, if any, set forth in the complaint?
2. Does the complaint filed in this case state an offense under the laws of the state of Wisconsin?
3. Ought the court to grant a motion in arrest of judgment duly made?
4. Can the court lawfully, upon the complaint and record here certified, proceed to sentence the defendant?

Attorney General, Edward Yockey and Henry S. Sloan for plaintiff.

Michael Levin and Lenicheck, Robinson, Fairchild & Boesel for defendant.

VINJE, J.—The determination of what is a correct answer to question 1 is involved in some difficulty and doubt. The [149] right to a preliminary examination is one given by statute. The proceeding was unknown to the common law. *State v. Huegin*, 110 Wis. 189, 239, 85 N. W. 1046, 62 L.R.A. 700; 1 Bishop, New Crim. Proc. (2d ed.) sec. 239a. The statutory scheme or statutory declarations, therefore, must govern. Under the provisions of secs. 4781 et seq., the defendant, before the establishment of the district court of Milwaukee county, would unquestionably have been entitled to a preliminary examination, since the offense was one not triable before a justice of the peace. Ch. 218, Laws of 1899, created the district court, giving it a jurisdiction somewhat more enlarged than that of a justice's court. It has exclusive jurisdiction to try and sentence all offenders

against the ordinances of the city of Milwaukee, and to hear, try, and determine all charges for offenses arising within said county of Milwaukee the punishment whereof does not exceed one year's imprisonment in the state prison or county jail or a fine of \$500, or both such fine and imprisonment, as well as to hear, try, and determine all charges for misdemeanors arising within said county otherwise triable before a justice of the peace. By ch. 83, Laws of 1905, it was given exclusive jurisdiction to examine offenders charged with the commission of offenses in Milwaukee county not triable before a justice of the peace therein and commit or hold them to bail, the same as a justice of the peace might otherwise do.

We thus see that the district court had exclusive jurisdiction to hold the preliminary examination for the offense charged against the defendant, and also exclusive jurisdiction to try him for the offense. The question arises, Does the statute contemplate that there shall be a preliminary examination by a magistrate or court that also has jurisdiction to try the offense? A literal construction of sec. 4782, Stats. 1911, would lead to an affirmative answer. But when we consider the statutory scheme, which has not provided for a preliminary examination for offenses triable before justices [150] of the peace because the persons charged therewith could have a speedy and summary trial by a court always ready to hear the case itself, and that the chief object of a preliminary examination is to prevent innocent persons from being incarcerated for a considerable length of time awaiting trial, it is not so apparent that it was the legislative intent to provide for a preliminary examination under the circumstances here presented. It is hardly probable that it was contemplated that a person charged with an offense exclusively triable by the district court should first be given a preliminary examination by the court, and then if it was found that the offense had been committed and that there was probable cause to believe the prisoner guilty he should be bound over to the same court for trial. Such procedure does not fit into the statutory scheme at all. The statute contemplates that the examining magistrate is some one else than the court trying the offense. Sec. 4801 provides that the examination must be returned to the court before which the prisoner is bound to appear, and the same idea of difference in identity between the examining magistrate and court vested with jurisdiction to try the offense permeates the whole scheme of preliminary examinations. The chief reason for a preliminary examination disappears when the examining magistrate and the court having jurisdiction to try the offense are identical. The defendant can be given a

speedy trial, for the district court is always in session. Hence no appreciable length of time need elapse awaiting trial. If upon the hearing the evidence should fail to show the guilt of the defendant, the court would at once discharge him. So it must be held that when the legislature gave the district court jurisdiction in excess of that of justices of the peace and also exclusive jurisdiction to bind over offenders, it was not contemplated that the court should bind over to itself prisoners charged with offenses that it had exclusive jurisdiction to hear. Under somewhat similar statutes the supreme court of Michigan held that a justice of the [151] peace had no jurisdiction to hold a preliminary examination for an offense which was triable before him. *Byrnes v. People*, 37 Mich. 515. The first question reported is answered in the negative.

Does the complaint state an offense under sec. 4423, Stats. 1911, which provides that "any person who shall designedly by any false pretenses or by any privy or false token and with intent to defraud, obtain from any other person any money, goods, wares, merchandise, or other property, . . . shall be punished," etc.? The complaint, in addition to the requisite formal allegations, charges that the defendant Albert Solomon "did unlawfully and designedly, falsely pretend to one Andrew Jurgensen that a certain ladies' wedding ring was solid gold and of the reasonable value of four dollars and fifty cents, and the said Andrew Jurgensen then and there believing said false pretenses so made as aforesaid by the said Albert Solomon, to be true, and relying thereon, being misled therein and deceived thereby, was induced, by reason of the false pretenses so made as aforesaid, to deliver, and did then and there deliver to the said Albert Solomon four dollars and fifty cents of the value of four dollars and fifty cents of the money, goods, chattels and property of the said Andrew Jurgensen, and the said Albert Solomon did there and then obtain the said money, goods, chattels and property of the said Andrew Jurgensen, by means of false pretenses aforesaid, and with intent to defraud."

It then appropriately charges the falsity of the pretenses used and defendant's knowledge of such falsity. The defendant claims the complaint is defective because "it fails to show what, if any, deception was practiced—fails to show that such deception was the efficient operative cause of the injury sustained; because it fails to show the connection between the pretenses alleged and the obtaining of the money. The complaint does not inform us that any bargain of any kind was consummated between the complainant and the defendant, [152] nor does it show us why or for what the money, if any, was

delivered to the defendant." We have set out somewhat in full the material parts of the complaint as the best possible answer to the objection urged against it by the defendant. No comment thereon is deemed necessary. The second question reported is answered in the affirmative.

From what has been said it follows that the third question reported should be answered in the negative and the fourth in the affirmative. They are each so answered.

BY THE COURT.—The first question reported is answered in the negative; the second in the affirmative; the third in the negative; and the fourth in the affirmative.

BARNES, J. (*concurring*).—I agree in affirmance, but not in the ground of decision. I think the decision amends sec. 4782, Stats. In my opinion the work of amending statutes should be left to the legislature. I reach the same conclusion in a different way. Sec. 3072*m*, Stats. forbids this court to reverse any judgment for any error in "procedure" unless it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse the judgment. This section was adopted long after sec. 4782. The court which would hold the preliminary examination and the one which conducted the trial is the same. The court must necessarily have held on the motions made on the trial that an offense was committed and that there was probable cause to believe the defendant guilty. The defendant fails to show wherein he was prejudiced by failure to give him a preliminary examination, or how the result would have been different had such an examination been granted. I therefore think the error in procedure should not result in reversal, because its prejudicial character is not apparent.

#### ON MOTION FOR REHEARING.

(October 6, 1914.)

[153] *PER CURIAM*.—Through inadvertence that part of ch. 63 of the Laws of 1905 amending ch. 218, Laws of 1899, so as to give the district court concurrent jurisdiction with the municipal court of "all charges for offenses arising within said county of Milwaukee, the punishment whereof does not exceed one year's imprisonment in the state prison or county jail, or a fine not exceeding five hundred dollars, or by both such fine and imprisonment," was overlooked. The amendment, however, does not affect the decision rendered, which was to the effect that for minor offenses no preliminary examination is required where the examining magistrate has jurisdiction to try the defendant for the offense charged.

#### NOTE.

#### Right of Accused Person to Preliminary Examination.

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#### I. Scope of Note.

This note discusses the right of an accused person to a preliminary examination before being put on trial for an alleged offense. Waiver of a preliminary examination by an accused person, and the regularity and sufficiency of preliminary examination proceedings are not treated, nor is the right of an arrested person to a preliminary examination, before being imprisoned to await trial, considered. Cases discussing the right to hold an accused person for another charge after his waiver of a preliminary examination on the original charge, are collected in the note to *State v. Pigg*, 18 Ann. Cas. 521, and the right of a grand jury to find an indictment before or pending a preliminary examination of the accused person is discussed in the note to *Knight v. District Court*, Ann. Cas. 1912D 143.

#### II. In General.

At common law an accused person has no right to a preliminary examination before being put on trial for an alleged offense. The right to such an examination exists by virtue of some constitutional or statutory provision in the jurisdiction wherein the accused is put on trial. *Holt v. People*, 23 Colo. 1, 45 Pac. 374; *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; *State v. Hart*, 30 N. D. 368, 152 N. W. 672. See the reported case. See also *Bridgeman v. Kelyng* (Eng.) 19; *Holt v. People*, 23 Colo. 1, 45 Pac. 374.

It has been held that the "due process of law" clause of the 14th Amendment to the Federal Constitution does not require a preliminary examination of the accused. *Lem Woon v. Oregon*, 229 U. S. 586, 33 S. Ct. 783, 57 U. S. (L. ed.) 1340.

In *Canada* in the provinces of Alberta and Saskatchewan, under a statute (Criminal

Code § 873a, 6 & S Edw. VII, ch. 8), which provides that "charges may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the judge of the court or the Attorney-General or by order of the court," it has been held that a preliminary examination before a magistrate was not necessary. In re Criminal Code, 43 Can. Sup. Ct. 434, 16 Can. Crim. Cas. 459.

An accused person has no right to a preliminary examination where the examining court has jurisdiction to try the offense with which he is charged. See the reported case. Thus it has been held that where a justice of the peace had exclusive jurisdiction of an offense, subject to the power of removal, an accused person was not entitled to a preliminary examination before being put on trial. *People v. Cuatt*, 70 Misc. 453, 126 N. Y. S. 114. See also *Byrnes v. People*, 37 Mich. 515.

Under Canadian statutes allowing the accused, at his election, to be tried in a summary manner by a stipendiary magistrate, it was held in the case of *Rex v. McLeod*, 39 Novia Scotia 108 that the accused had no right to a preliminary examination; but in *Rex v. Williams*, 11 British Columbia 351, 10 Can. Crim. Cas. 330, it was held that a conviction by a stipendiary magistrate without a preliminary inquiry was bad.

### III. Prosecution by Information.

#### 1. MAJORITY VIEW.

##### a. General Rule.

In the majority of jurisdictions where prosecution by information is permissible there are statutes prohibiting the filing of an information until after the accused person has been accorded a preliminary examination.

*California*.—*Kallock v. Superior Court*, 56 Cal. 229; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119. See also *People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *In re Mills Sing*, 13 Cal. App. 736, 110 Pac. 693.

*Idaho*.—*State v. Braithwaite*, 3 Idaho 119, 27 Pac. 731.

*Kansas*.—*State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471; *State v. Montgomery*, 8 Kan. 351; *State v. Gleason*, 32 Kan. 243, 4 Pac. 363; *State v. Fields*, 70 Kan. 391, 78 Pac. 833. See also *State v. Watson*, 30 Kan. 281, 1 Pac. 770.

*Michigan*.—*Washburn v. People*, 10 Mich. 372; *Turner v. People*, 33 Mich. 363; *Byrnes v. People*, 37 Mich. 515; *Sneed v. People*, 38 Mich. 248; *O'Hara v. People*, 41 Mich. 623, 3 N. W. 161; *People v. Sessions*, 58 Mich. 594, 26 N. W. 291; *People v. Brock*, 64 Mich. 691,

31 N. W. 585; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *People v. Wright*, 89 Mich. 70, 50 N. W. 792. See also *People v. Chapman*, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

*Nebraska*.—*White v. State*, 28 Neb. 341, 44 N. W. 443; *Coffield v. State*, 44 Neb. 417, 62 N. W. 875; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158 (*reversed* on other points, 68 Neb. 181, 104 N. W. 154). See also *Van Syoc v. State*, 69 Neb. 520, 96 N. W. 266.

*Ohio*.—*Gates v. State*, 3 Ohio St. 293.

*Oklahoma*.—*Fields v. State*, 5 Okla. Crim. 520, 115 Pac. 608.

*Utah*.—*State v. Jensen*, 34 Utah 166, 96 Pac. 1085; *State v. Hoben*, 36 Utah 186, 102 Pac. 1000; *State v. Gustaldi*, 41 Utah 63, 123 Pac. 897; *State v. Pay*, 45 Utah 411, 146 Pac. 300.

*Wisconsin*.—*Martin v. State*, 79 Wis. 165, 48 N. W. 119; *State v. Sorenson*, 84 Wis. 27, 53 N. W. 1124.

Thus in *State v. Hoben*, 36 Utah 186, 102 Pac. 1000, the court said: "Before one can be properly charged by information of the commission of a crime, the Constitution guarantees to him a preliminary examination before a committing magistrate." And in *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154, the court said: "It has frequently been held in this and in other jurisdictions that where prosecutions by information are allowed in the absence of a waiver by a defendant accused of crime of his right to a preliminary examination, he cannot be put upon trial for the crime charged over his objections until such preliminary hearing has been accorded him and he held to await a trial in the district court." See also *Sneed v. People*, 38 Mich. 248, wherein the court said: "Under our system an information cannot be filed against the accused and he compelled to go to trial thereon until after he has had an examination or waived the same. This gives him full opportunity, if he desires to avail himself of it, to ascertain fully the facts to be brought forth against him, and that in a much clearer and better manner than he could have ascertained them under the grand jury system."

In *Missouri*, under an act approved March 17, 1913 (Laws 1913, p. 225), the state cannot file an information charging a person with any felony until the accused has been accorded a preliminary examination, unless he has waived his right. *State v. Flannery*, 263 Mo. 579, 173 S. W. 1053. Under the prior *Missouri* Act of 1909 (Laws 1909, p. 460) an accused person against whom an information was filed had no right to a preliminary examination except when he was charged with a capital crime. *State v. Schenk*, 238 Mo.

429, 142 S. W. 263; *State v. Pierce*, 243 Mo. 524, 147 S. W. 970; *State v. Anderson*, 252 Mo. 83, 158 S. W. 817. The Missouri Act of 1909, *supra*, repealed the Act of 1907 (Laws 1907, p. 243), which required a preliminary examination in felony cases. *State v. Schenk*, 238 Mo. 429, 142 S. W. 263. Under the Missouri Act of 1905 (Laws 1905, p. 132), an accused person, against whom an information was filed, had no right to a preliminary examination, except when he was charged with a capital crime. *State v. Schenk*, 238 Mo. 429, 142 S. W. 263. See also *State v. Moran*, 216 Mo. 550, 115 S. W. 1126; *State v. Payne*, 223 Mo. 112, 122 S. W. 1062.

#### b. Where Information Is Set Aside.

In jurisdictions wherein an accused person has a right to a preliminary examination before being put to trial on an information, it has been held that where the accused has been accorded a preliminary examination before the filing of an original information, he has no right to a second preliminary examination before being put on trial on an amended information filed after the original information has been set aside. *Ex p. Nicholas*, 91 Cal. 640, 28 Pac. 47; *People v. Kilvington* (Cal.) 36 Pac. 13; *State v. Geer*, 48 Kan. 752, 30 Pac. 236. Compare *Ex p. Baker*, 88 Cal. 84, 25 Pac. 966. In *People v. Kilvington*, *supra*, the court said: "We have no doubt of the correctness of the following propositions: (1) If A. has been properly examined before a magistrate, but no order holding him to appear before a proper court has in fact been made, an information filed against him before the commitment is entered and depositions are sent up is void. (2) In such a case, upon the filing of the order of commitment and depositions, the district attorney may, within the time provided by law, file a proper information; and the fact that the former information has been set aside by the court will not, in such a case, render a second examination and commitment necessary."

But it has been held that where the original information was quashed and set aside on the ground that the defendant could not be prosecuted for the specific offense therein alleged, because of the bar of the statute of limitations, the court could not legally authorize the district attorney to file a new information and place the defendant on trial for an offense separate and distinct from the one charged in the first information, and for which he had never been committed and held to answer by a committing magistrate. *State v. Jensen*, 34 Utah 166, 96 Pac. 1085.

#### c. After Inquisition by Coroner.

It was said obiter in the case of *In re Sly*, 9 Idaho 779, 76 Pac. 766, that under the

Idaho law an inquisition of a coroner is not a sufficient basis for an information by the public prosecutor.

#### d. Where Accused Is Fugitive from Justice

Statutes prohibiting the filing of an information until after the accused person has been accorded a preliminary examination, usually contain a proviso that a preliminary examination of the accused is not necessary, if the accused is a fugitive from justice at the time the information is filed. *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *People v. Kuhn*, 67 Mich. 463, 35 N. W. 88. See also *State v. Braithwaite*, 3 Idaho 119, 27 Pac. 731; *Washburn v. People*, 10 Mich. 372; *Coffield v. State*, 44 Neb. 417, 62 N. W. 875; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403. In *Washburn v. People*, *supra*, the court said: "The statute (Laws of 1859, p. 393, § 8) provides that 'no information shall be filed against any person, for any offense, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination; provided, however, that informations may be filed without such examination against fugitives from justice.'" And in *State v. Woods*, *supra*, the court said: "It is contended that the trial court erred in requiring the defendant to plead to the information filed against him, because he had had no preliminary examination. This question is not properly here for our consideration, because no plea in abatement was filed. . . . It appears, however, from the record that at the time the information was filed the defendant was a fugitive from justice: therefore no preliminary examination was necessary. (Crim. Proc. § 69.)"

In *State v. Jeffries*, 210 Mo. 302, 14 Ann. Cas. 524, 109 S. W. 614, it was held that a person against whom an information has been filed cannot complain that a codefendant who is a fugitive from justice has not been accorded a preliminary examination.

#### 2. MINORITY VIEW.

In a few jurisdictions wherein prosecution by information is permissible there are no statutes giving to an accused person the right to a preliminary examination before being put on trial by information and in those jurisdictions such an examination is not necessary. *Ocampo v. U. S.* 234 U. S. 91, 34 S. Ct. 712, 58 U. S. (L. ed.) 1231 (sec. 2 of Act No. 612 of the Philadelphia Commission of February 3, 1903 construed); *Ratcliff v. People*, 22 Colo. 75, 43 Pac. 553; *Holt v. People*, 23 Colo. 1, 45 Pac. 374; *State v. Bunker*, 14 La. Ann. 465; *State v. Anderson*, 30 La. Ann. 558; *State v. Recorder*, 42

La. Ann. 1091, 8 So. 279, 10 L.R.A. 137; State v. Werner, 128 La. 1, 54 So. 402; State v. Mates, 133 La. 714, 63 So. 294; State v. Belding, 43 Ore. 95, 71 Pac. 330; State v. Williams, 13 Wash. 335, 43 Pac. 15; State v. McGilvery, 20 Wash. 240, 55 Pac. 115. See also Ex p. Way, 48 Tex. Civ. App. 584, 89 S. W. 1075. In *Holt v. People*, 23 Colo. 1, 45 Pac. 374, the court said: "We have been unable to find any case holding a preliminary examination a necessary prerequisite to the filing of the information, except in those states in which, by constitution or statute, the right to file an information is limited to cases where there has been such an examination. On the other hand, in the states wherein no such limitation exists, it is uniformly held that a preliminary examination is not essential." And see *State v. Mates*, 133 La. 714, 63 So. 294, wherein the court said: "The return of the judge is, in substance, that the relator was arrested under an information, and made no request for the fixing of appearance bond, but demanded a preliminary examination, which was refused. The respondent judge gives the following reasons for his action: 'That if every person charged with crime by indictment or information has the right to demand a preliminary trial, this court will have no time for its ordinary business. The court has now convened and applicant can secure an early trial.' Section 1010 of the Revised Statutes of 1870, in case of an arrest under a warrant issued on the oath of one or more credible witnesses provides for an examination before a competent judge or magistrate, as the case may be, and for the commitment of the accused, or his release on bail, if it should appear from the testimony of the witnesses that some crime or misdemeanor has been committed by the accused. We know of no statute that provides for such an examination after an indictment or information has been filed."

### 3. RULE IN MONTANA.

In Montana it has been held that an accused person has no right to a preliminary examination where an information is filed against him by leave of court; but in the absence of leave of court, one accused of crime cannot be put on trial by information without first being accorded a preliminary examination. *State v. Brett*, 16 Mont. 360, 40 Pac. 873; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1028; *State v. Shafer*, 26 Mont. 11, 26 Pac. 463; *State v. District Court*, 26 Mont. 275, 67 Pac. 943; *State v. Vinn*, 50 Mont. 27, 144 Pac. 773. See also *State v. Martin*, 29 Mont. 273, 74 Pac. 725. In *State v. Brett*, supra, the court said: "It appears by the record that the information upon which the defendant was convicted of the crime of

forgery was filed by leave of court. Nevertheless, it is argued, a prosecution by information, where there has been no preliminary examination, is illegal, and a violation of constitutional rights. Const. art. III, § 8, expressly provides that 'all criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment, without such examination or commitment, or without leave of court.' It is evident that one of the objects of the constitution was to do away, to a great extent, with the machinery and expense of a grand jury, by substituting therefor prosecution by information. It is not necessary, in order to vest power in the county attorney, to file an information that there shall be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case like the one at bar, where there may not have been any charge or information before a committing magistrate. One of two methods of procedure is indispensable where an information is filed,—either there must have been an examination and commitment, or there must have been leave of court procured. But both steps are not required. A plain interpretation of the words of the constitution by which every clause of the section quoted shall be effective leads to this conclusion. We think, too, that the rights of a defendant are guarded, no matter what procedure is followed."

### 4. RULE IN NORTH DAKOTA.

In *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97, the court stated the rule in North Dakota as follows: "No constitutional provision is found in this state requiring a preliminary examination before filing an information in criminal proceedings, but § 9791, Rev. Codes 1905, provides as follows: 'During each term of the district court held in and for any county or judicial subdivision in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county or judicial subdivision, or other person appointed by the court as provided by law to prosecute a criminal action, shall file an information, or informations, as the circumstances may require, respectively, against all persons accused of having committed a crime or public offense within such county or judicial subdivision, or triable therein. (1) When such person or persons have had a preliminary examination before a magistrate for such crime or public offense, and, from the evidence taken thereat, the magistrate has ordered that said person or persons be held to answer to the offense charged or some other crime or public offense disclosed by the evidence. (2) When the

crime or public offense is committed during the continuance of the term of the district court in and for the county or judicial subdivision in which the offense is committed or triable.' The remainder of the section is not applicable to the case at bar. Prior to 1895, a preliminary examination was necessary in all cases. Hence former decisions of this court, based upon the right of a party to a preliminary examination before the filing of an information in the district court, are not in point."

Under the foregoing North Dakota statute it has been held that an accused was entitled to a preliminary examination before being called on to answer an information charging an offense committed while the district court was not in session. *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97. But it has been held that where an offense was committed during a term of the district court, the accused was not entitled to a preliminary examination before being called on to answer an information. *State v. Riley*, 26 N. D. 236, 144 N. W. 107.

By North Dakota Laws of 1909 (chap. 80 § 35), it is provided that "no preliminary examination shall be necessary before trial in criminal actions in the county court." The foregoing statute was declared to be constitutional in *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460, wherein the court said: "It was not error to deny appellant's motion for a preliminary examination. The statute governing the practice in county courts expressly provides that 'no preliminary examination shall be necessary before trial in criminal actions in the county court.' (Laws 1909, chap. 80, § 35.) That such statute is constitutional we entertain no doubt. The constitution of this state confers no right to a preliminary examination. If such right exists, it is by virtue of some statute. Such was the express holding of this court in *State v. Rozum*, 8 N. D. 548, 80 N. W. 477. See also 1 Bishop, New Crim. Proc. § 239a. Nor does a statute such as chapter 80, Laws 1909, contravene the 'due-process-of-law' clause in our Constitution, or in the Federal Constitution. *Hurtado v. California*, 110 U. S. 534, 28 U. S. (L. ed.) 238, 4 S. Ct. 111, 292; *Hallinger v. Davis*, 146 U. S. 314, 36 U. S. (L. ed.) 986, 13 S. Ct. 105; *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3. The opinion in the latter case, to our minds, fully answers the very ingenious argument of appellant's counsel upon this branch of the case. Such argument would, no doubt, have much to commend it if addressed to the legislature, instead of to the courts. As argued by counsel the statute dispensing with preliminary examinations in the county court may, for reasons stated, be very harsh and drastic in many instances; but the remedy for this rests with the legislature, not the courts."

Prior to the enactment of the foregoing statutes it was held in *State v. Hasledahl*, 3 N. D. 36, 53 N. W. 430, that where an accused has been given a preliminary examination prior to the filing of an information, a second examination need not be ordered prior to the filing of a second information for the same offense curing defects in that first filed.

##### 5. RULE IN WYOMING.

By section 7 of chapter 59 of the Wyoming Session Laws, 1890-91, it was provided as follows: "No information shall be filed against any person for any felony until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, and shall have been held for trial by such court or officer, unless such person shall have waived his right to such examination; Provided, however, that informations may be filed without such examination against fugitives from justice, and in misdemeanor cases not punishable by a justice of the peace, or whenever the county and prosecuting attorney is satisfied that a crime or offense has been committed in this county." The foregoing act was held to be constitutional, and under its terms it was held that an information could be filed by the prosecuting attorney without a previous preliminary examination. *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3. The act quoted supra, was amended by section 7 of chapter 123 of the Laws of 1895, so as to provide as follows: "Whenever an offense shall be charged against any person, at any time within thirty days immediately preceding the first day of a regular term of court of the county wherein such offense is charged to have been committed, or within thirty days immediately following the first day of such regular term of court, provided such term shall continue in session for such period, then and in either of such cases, information may be filed without such examination; but in cases last named, the accused shall have the right to a trial at such term of court; Provided, that if the defendant shall not be tried at such term of the district court for the reason that the case is continued upon the application of the prosecution, the defendant shall be entitled to an immediate examination before a committing magistrate." It has been held that the thirty days mentioned in the foregoing amendment are to be computed from the date of the preferring of the charge, and not from the date of the commission of the alleged offense. *Ackerman v. State*, 7 Wyo. 504, 54 Pac. 228, wherein the court said: "This charge was preferred on October 23, and the meeting of court was November 8, following an interval of less than thirty days. It is evident that the thirty days mentioned in



the amendment are to be computed from the date of the preferring of the charge, and not from the date of the commissions of the alleged offense. The act of 1890-91 provided that informations might be filed without such examination whenever the county and prosecuting attorney should be satisfied that a crime or offense had been committed in his county. The amendment above quoted is a modification of the authority delegated to the prosecuting attorney, it being the opinion of the legislature, no doubt, that the power conferred upon him by the original act was greater than could safely be intrusted to an individual in matters involving the personal liberty of the citizen. And the reason for the limitation of thirty days evidently is that a person charged with a crime shall not be held indefinitely with no opportunity for a hearing before an officer competent to discharge him in case there shall not appear to be probable cause for holding him to answer for the offense. The charge having been preferred in this case within thirty days immediately preceding the regular term of court, no preliminary examination was necessary."

#### IV. Prosecution by Indictment.

The right of a grand jury to return an indictment before or pending a preliminary examination is fully discussed in the note to *Knight v. District Court*, Ann. Cas. 1912D 143.

### ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

v.

MITCHELL.

Arkansas Supreme Court—November 23, 1914.

115 Ark. 339; 171 S. W. 895.

#### Railroads—Operation of Hand Car—Liability.

Kirby's Dig. § 6607, providing that all persons running trains in the state shall keep a constant lookout for persons and property on the track and that railroad companies shall be liable for any damage done to any person or property by reason of failure to keep such lookout, and imposing on such companies the burden of showing that the duty was performed, is limited to the operation of trains as such, and does not apply to the operation on the track of a hand car belonging to the railroad company.

[See note at end of this case.]

Same.

Where employees of a railroad company operate a hand car along the track and over crossings, they are bound to exercise reasonable care in so doing, whether commanded to do so by statute or not.

[See note at end of this case.]

Same.

In an action for injuries to plaintiff at a railroad crossing by being struck by a railroad hand car it is proper to charge that the operatives of the car were required to keep a lookout for persons crossing the track, and if their failure to use reasonable care in stopping the car constituted negligence plaintiff could recover unless he himself was negligent in failing to stop, look, and listen to see if a car or train was coming, under the rule that a railroad track is a warning of danger and that a person approaching it in the exercise of ordinary care must stop, look, and listen.

[See note at end of this case.]

Same.

In an action for injuries to plaintiff by being struck by a railroad hand car at a crossing at night, the car following a train and approaching without lights, whether plaintiff was negligent in failing to observe the car before going on the track is for the jury.

[See note at end of this case.]

#### Accord and Satisfaction — Claim for Injuries — Failure to Perform in Full.

Plaintiff having been injured in a railroad crossing accident, defendant's claim agent offered him a draft for \$50 in settlement, agreeing also to pay plaintiff's attorney. Plaintiff testified that he took the draft because the agent told him he would never get anything else, but had no intention to cash it and did not do so. The railroad company made no attempt to settle with plaintiff's attorney and sought to excuse itself by stating that, suit having been begun on the same day the settlement was effected, it concluded that no settlement with him could be made. Held, that such facts were insufficient to establish an accord and satisfaction.

[See generally Ann. Cas. 1914C 152.]

#### Instructions — Time for Requesting.

Under Kirby's Dig. § 6196, subd. 5, providing that when the evidence is concluded either party may request instructions, which shall be given or refused by the court, etc., the trial judge has discretion to require that the instructions be settled before argument, and to that end may require that requests to charge be submitted before the opening argument.

Same.

Where, in an action for injuries at a railroad crossing, a controversy arises during the argument over a statement made therein that defendant's offer to compromise was an admission of liability, defendant is then entitled to request and have the court give an instruction that such was not the effect thereof.

**Evidence — Railroad Records — Weight.**

In an action for injuries at a railroad crossing, a request to charge that if the jury found that the original record of the movement of the railroad's trains had been proven they must accept it as they would any other written evidence made at the time of the transaction, and unless they had reason to believe that the record had been changed or tampered with they should find it to give the correct movement of the trains, is properly refused, since such record did not import verity and was entitled to no greater weight than other similar records.

Appeal from Circuit Court, Prairie county: LANKFORD, Judge.

Action for damages. P. M. Mitchell, plaintiff, and St. Louis Southwestern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[341] Appellee sued to recover damages to compensate an injury sustained by him and at the trial testified that on the 3d day of January, 1914, while proceeding with due care to drive his team across the appellant's road on a public highway the employees of appellant in charge of a motor car negligently ran into appellee's wagon in which he was riding, threw him out of it and seriously injured him.

Appellant admitted that its handcar struck the appellee's wagon, but alleged that the collision was occasioned by reason of the failure of appellee to stop, look or listen before undertaking to cross the track; and alleged, and offered proof tending to show, that its employees were proceeding with due care, and further that had appellee stopped and looked or listened he could and would have seen the approaching car in time to have avoided the collision, whereas its employees operating the handcar were unaware of appellee's proximity to the track and his consequent danger until the car was too near the wagon to avoid the collision.

Appellee undertook to excuse his failure to stop, look and listen by testifying that a freight train passed immediately in front of the handcar, and that the train made so much noise that he could not hear the car, and that he did not know that the handcar was following immediately behind the train and, moreover, that the collision occurred just about dark; and there were no lights of any kind on the handcar.

The proof showed that some time after the injury complained of was inflicted, an agreement was entered into whereby appellee agreed to accept the sum of \$50 [342] in satisfaction of all damages which he had sustained, and a draft for that amount was drawn in favor of and delivered to appellee.

This draft was never cashed, nor presented for payment, although the proof showed that it would have been cashed had it been presented. A written release was signed, but the proof does not show that appellee's attorneys were parties to or were advised of it and on the very day of its execution this suit was brought. It is admitted that, in addition to the consideration of \$50 evidenced by the draft, the railway company agreed to pay appellee's lawyer, and it was stated by the claim agent at the time that as no suit had been brought the fee would probably not exceed \$25, but the agreement was that the railway company should pay the fee, whatever it might be. There was no proof that any representative of the railway company ever conferred with appellee's attorney in regard to the fee, and no understanding was ever had in that behalf. The appellant tendered the \$50 recited in the release, and undertook to excuse its failure to pay the attorney's fee by saying that it knew it was useless to undertake to settle with the attorney after the institution of the suit.

Among other instructions the court gave the following:

"2. It is the duty of the servants of the railroad company operating a car to keep a lookout for people crossing the tracks, and if they fail to do that or if they fail to use reasonable care in stopping the train or car, they would be guilty of negligence and the plaintiff should recover, unless you find that he was guilty of contributory negligence and neglected to watch out for approaching cars. It is the duty of any one crossing the tracks to stop, look and listen to see if car or train is coming."

The court refused to give the following instructions at the request of the appellant:

"2. The jury is instructed that if they find from the evidence that the plaintiff and the defendant entered [343] into an agreement to settle and compromise this cause and that such agreement was reduced to writing and that the defendant performed and was ready and willing to carry its agreement to completion by paying the draft and such other agreement as it would in reference to the settlement, then your verdict must be for the defendant."

"3. The jury are instructed that an offer to settle this suit by the defendant is not an admission of its liabilities and in ascertaining the fact as to whether the defendant is liable to the plaintiff for damages you can not take into consideration any action or statement made by the claim agent in reference to a settlement or a compromise of the case in fixing the original liability of the defendant."

"4. You are instructed that the railway company, on account of the nature of its

business, keeps a record of the movement of all of its trains, and if you find that the original record of the movement of its trains had been adduced in evidence, you must accept it as you would any other written evidence made at the time of the transaction and unless you have reason to believe the record of the trains had been changed or tampered with, you must find it to give the correct movements of the trains."

Other facts will be stated in the opinion.

Appellee recovered a substantial judgment, and this appeal has been duly prosecuted.

*S. H. West and J. C. Hawthorne* for appellant.

*J. G. and C. B. Thweatt* for appellee.

[345] SMITH, J. (*after stating the facts*).

—(1-2) Instruction numbered 2, given by the court, was evidently framed under the impression that section 6607 of Kirby's Digest applied to handcars. But such is not the case. That section makes it the duty of all persons running trains in this State to keep a constant lookout for persons and property upon the track of any railroad, and further provides that the railroad company shall be liable for any damage done to any person or property by reason of the failure to keep this lookout, and imposes upon the railroad company the burden of showing that this duty has been performed. But this burden is imposed only upon persons running trains. The history of the section quoted is well known. It is Act No. 125 of the Acts of 1891, found on page 213 of the acts of that [346] year, and has a preamble referring to the decision of this court in the case of *Memphis R. Co. v. Kerr*, 52 Ark. 162, 12 S. W. 329, 20 Am. St. Rep. 159, 5 L.R.A. 429. That case held that the extent of a railroad's duty to the owner of stock which had strayed upon its track was to use reasonable and ordinary care to avoid injuring it after discovering its presence on the track, and that it was not negligence for the railroad company to fail to keep this lookout for stock. This act was intended to impose a duty which the court had decided did not previously exist; but this duty was imposed only on persons running trains; and a handcar, even though propelled by some mechanism or machinery, and not by hand, is not a train. This section, 6607, was amended by Act No. 284, of the Acts of 1911, page 275, by the addition of a proviso to the effect that the right to recover damages should not be defeated by the contributory negligence of the person injured where, if such lookout had been kept, the employees in charge of the train could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such

peril; and imposed upon the railroad company the burden to show that its duty to keep this lookout had been performed. But, as thus amended, the section applies only to persons operating trains. The duty of persons running a handcar, to keep a lookout, is, therefore, not a statutory one; but the duty to exercise reasonable care is a duty that does exist, whether commanded by statute or not. However, while the instruction given is not correct, as an abstract proposition of law under all circumstances, it was a correct declaration of the law as applied to the facts of this case. This court has held in numerous cases that one crossing a railroad track must look or listen, and that the failure so to do is contributory negligence, unless some circumstance in proof excuses the failure to perform this duty. The reason for the rule is that the track is a warning of danger and every one must know that trains run at all hours and are likely to pass at any time. And for the same reason we would hold, even in the absence [347] of a statute imposing the duty upon persons running trains to keep a lookout, that the duty to keep a lookout exists, and that this duty is not limited to persons running trains, but rests upon all persons operating any agency which may be dangerous to persons at railroad crossings. All persons must know that railway crossings are liable to be used at any time. This knowledge is imputed as a matter of law and, having this knowledge, this lookout must be kept at crossings, independently of any statutory requirement. In the *Kerr* case, supra, it was said that there was an obligation due to persons from railroad companies to preserve a strict lookout while running their trains. The injury here sued for occurred at a crossing, and the instruction was, therefore, correct as applied to the facts of this case.

(3) The issue of contributory negligence was properly submitted to the jury, as the proof on the part of appellee was that the injury occurred about dark, when he could not see distinctly, and the car carried no lights, and the noise of its approach was drowned by the roar of the freight train which passed just ahead of the car.

(4-5) Appellant's instruction numbered 2 was properly refused. The instruction, as we understand it, told the jury that, if an agreement to settle had been made and reduced to writing, and had been performed in part by appellant, and a tender of performance of other parts had been made, and that appellant was ready to perform all other parts thereof, that a verdict should be returned for defendant. This being upon the theory that there was an accord and satisfaction. Appellee testified that he took the check because the claim agent told him he would never get anything else, but that he

had no intention to cash it, and did not do so. And it is undisputed that the railway company did not settle with appellee's attorney, and has not attempted to do so, except that it expressed its willingness so to do in its answer. This is not an accord and satisfaction.

In 1. Corpus Juris § 20, page 363, it is said: "Mere readiness to perform is insufficient, and while there are [348] a few decisions which seemingly hold an accord, with tender of performance and refusal to accept, is equivalent to satisfaction, and may be so pleaded in bar of the action on the original claim, the great weight of authority is directly to the contrary. The majority of decisions are to the effect that tender of performance is in no case equivalent to performance and, therefore, not a satisfaction of the original obligation. Nothing short of actual performance, meaning thereby performance accepted, will suffice. But this rule, as is elsewhere shown, would not apply in a case where a new agreement or promise, instead of the performance thereof, is accepted in satisfaction."

And sections 21 and 22, page 364, of the same authority read as follows:

"Sec. 21. Accord and part performance do not constitute satisfaction. It is merely executory so long as by its terms something remains to be done in the future. If performed in part only, the original right of action remains and the party to be charged is allowed what he has paid in diminution of the amount claimed."

(6) "Sec. 22. Performance of part and readiness to perform the balance, or performance in part and tender of performance of the balance, are likewise insufficient to constitute a satisfaction." This statement of the law is subject to the qualification that one may take such action, or accept such benefits, as to place it out of his power to abandon the contract of compromise, in which event his remedy is to sue on the agreement of compromise for damages for the part that remained unperformed. *Whipple v. Baker*, 85 Ark. 439, 108 S. W. 830. But that exception does not apply here.

See also *North State Fire Ins. Co. v. Dillard*, 88 Ark. 476, 115 S. W. 154; *Grimmett v. Ousley*, 78 Ark. 304, 94 S. W. 694.

The instruction was properly refused.

Instruction No. 3, asked by appellant, is conceded to be a correct declaration of the law; but it is urged that it was not asked in apt time.

[349] (7) Section 6196 of Kirby's Digest provides the order of trial after the jury has been sworn. Subdivisions 1, 2, 3 and 4 thereof cover the progress of the trial to the conclusion of the evidence. The fifth subdivision of this section provides:

"5. When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given by the court, which instructions shall be reduced to writing if either party require it."

The sixth subdivision relates to the argument before the jury.

We think the trial judge has the discretion to require that the instructions be settled before the argument begins and, as a means to this end, may require any special request for instructions to be made before the opening of the argument. Of course, this discretion is not an absolute one, for questions might be raised in the argument which would necessitate additional instructions by the court.

At the conclusion of the court's instructions, appellant requested the court to give the instructions which it asked, except its instruction numbered 3, which last was not asked until after the opening argument had been made for appellee. The court refused to give these instructions, but granted permission to appellant to reduce them to writing. In the meantime, a controversy arose over a statement said to have been made in the opening argument in appellee's behalf, to the effect that the offer of compromise on the part of appellant was an admission of its liability. This argument is not reported in the transcript, but the record does show that this controversy arose, and the instruction was asked as soon as it arose and was, therefore, asked in apt time.

(8) Under the circumstances we think appellant was entitled to have the jury specifically told that they should not consider the offer of compromise as an admission of liability. The case was a close one on the facts and, in the absence of specific directions to ignore the evidence in regard to the settlement, in determining [350] the question of liability, that evidence may have turned the scale in appellee's favor.

(9) We think no error was committed in refusing appellant's fourth instruction. There is nothing about these train records to import verity. Under some circumstances their recital might furnish evidence of a very satisfactory character but the court cannot say as a matter of law that these records were correctly kept, and that no agent has been mistaken in his report of the movement of any train, nor that the records have been properly kept so that all opportunity for mistakes, or possible collusion, have been eliminated. Such evidence should be weighed by the jury like other evidence and given such weight as it appears entitled to have.

For the error in refusing appellant's third instruction, the judgment will be reversed and the cause remanded.

## NOTE.

**Liability of Railroad Company for Injuries Caused by Operation of Hand Car.**

General Rule, 321.

Application of Rule:

In General, 321.

Collision at Crossing, 322.

Frightening Horse, 324.

*General Rule.*

It has been held that a hand car is a "car" within various statutes imposing on railroad companies a liability for negligence. See the note to *Boyd v. Missouri Pac. R. Co.* Ann. Cas. 1914D 37. It has however never been held that statutes requiring the keeping of a lookout, the giving of crossing signals or the like apply to a hand car. See the reported case. The duty of a railroad company in the operation of a hand car is therefore ordinarily that imposed by the common law, to use reasonable and ordinary care under all circumstances to avoid injury to persons or property. See the cases cited *infra* in the subdivision "*Application of Rule.*" In *Lake Erie, etc. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, that duty was defined as follows: "Appellant, in the operation of its hand car, was bound to exercise a degree of care and caution commensurate with the surroundings, and the ordinary business incident to its operation. It is the settled law everywhere that where railroads intersect and cross public highways, such railroads have the right of way. . . . In the lawful operation of a hand car by a railway company, in the transaction of its legitimate business, it is required to exercise only such care and caution as may be required to protect the traveling public. In the operation of a railroad, a hand car is a necessary and useful device, for it is used by its servants in repairing the track, going from place to place, and for the purpose of determining whether or not such track is in a safe condition upon which to transport passengers and freight. . . . In operating its hand car on the occasion complained of, appellant's servants, upon approaching the highway crossing, were not required to give any signal, or alarm, nor were they required to slacken their speed, or stop to see if any one was approaching the crossing."

Applying a familiar limitation on the maxim *respondere superior* it has been held that a railroad company is not liable for the negligent acts of its employees while they are using a hand car for a purpose of their own disconnected with their employment. *Harrell* Ann. Cas. 1916E.—21.

*v. Cleveland, etc. R. Co.* 27 Ind. App. 29, 60 N. E. 717; *Branch v. International, etc. R. Co.* 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844. But it was held in *Salisbury v. Erie R. Co.* 66 N. J. L. 233, 50 Atl. 117, 88 Am. St. Rep. 480, 55 L.R.A. 578, that a railroad company which placed a hand car in the hands of its foreman was liable for the failure of the foreman to see that it was operated with reasonable care in preventing injury to a person lawfully crossing its tracks. It therein appeared that the foreman had loaned his hand car to an Italian to take away some old railroad ties after the day's work was done, and he struck the plaintiff at a crossing while returning the car, thus causing the injury complained of. So in *Branch v. International, etc. R. Co.* (Tex.) 48 S. W. 891, it was held that though it appeared that the hand car was being used by employees on their personal errand it was error for the trial court to direct a verdict for the defendant where there was evidence that the company was negligent in intrusting the care of the car to its foreman. The court said: "The duty that a railway owes to the public requires it to exercise reasonable diligence in the employment of capable and trustworthy servants, and of only continuing in its employment servants of that character. If the accident which resulted in injury to plaintiff can be traceable to the negligence of the railway company in retaining Maloney in its employment, and intrusting him with the possession and use of the hand car, at a time when it was known to the railway company, or could have been known by the exercise of reasonable diligence, that Maloney was untrustworthy in the performance of his duty to the public, as a servant of the railway company, in the use of the hand car which had been intrusted to his possession, then we see no reason why the company should not be held responsible for his conduct." See also the same case on a second appeal, *International, etc. R. Co. v. Branch*, 29 Tex. Civ. App. 144, 68 S. W. 338.

*Application of Rule.*

## IN GENERAL.

It was held in *Murray v. Southern R. Co.* 140 Ky. 453, 131 S. W. 183, that a railroad company was not liable for injuries sustained by a deaf trespasser as a result of being run in by a push car operated by defendant's employees who shouted the approach of the car and gave sufficient warning signals to warn two women to leave the track who were following closely behind the injured person whose deafness was known to the employees but who was not recognized from the rear. The court said: "It has often been held that persons in charge of cars on a railroad

track have a right to presume that a trespasser seen on the track will get out of the way, and that they are not required to stop the car unless they have reason to believe that he is unconscious of his danger. The evidence here fails to show that the men on the push car which was moving only from four to six miles an hour, had any reason to anticipate danger to Murray until his actions showed that he had not heard the signals which caused the two women walking behind him to leave the track; and it was then too late for the men on the push car to avoid injury to him." In *Louisville, etc. R. Co. v. Osborne*, 149 Ky. 648, 149 S. W. 954, where the evidence showed that the plaintiff had been struck and injured by a motor car operated, as the jury found, at a negligent rate of speed on defendant's tracks within the corporate limits of a town of some two hundred inhabitants, the judgment in plaintiff's favor was sustained, and as to the care required in operating the car under those circumstances, the court said: "... as the place of the accident was in an incorporated town and where the presence of persons on the track was to be expected, it was the duty of appellant's servant, in charge of the car, to operate it at a moderate rate of speed, maintain a proper lookout and take such other precautions as circumstances and the exercise of ordinary care might have required for the security of life."

In *Minor v. Escanaba Lumber Co.* 167 Mich. 431, 132 N. W. 1035, wherein it appeared that the plaintiff who was the wife of a contractor cutting lumber for the defendant company was injured in a collision between a hand car on which she was riding and one of defendant's lumber trains, no signal of the approach of the train being given, and it further appearing that the night was dark, that the car was being used on a trip of private convenience, and that the plaintiff's husband had been previously permitted to use the car to bring in supplies from the defendant's store, it was held that the evidence not supporting the theory that the plaintiff was invited to use the car and track, at least, as in the manner on the night in question, since there was a different duty owing to a mere licensee than would be required of the defendant in behalf of persons invited to use its tracks, a charge to the jury imposing on the defendant the duty towards an invited person was improper.

As to the duty of an operator of a hand car toward persons on a trestle, in *Wright v. Southern R. Co.* 132 N. C. 327, 43 S. E. 845, wherein the evidence showed that the plaintiff having notice of the approach of a hand car which was operated under the direction of one of the defendant's section masters failed to leave the track and was struck

thereby, the court said: "We think the true rule is and ought to be, in a case like the one before us, that the section master, the operator of the hand car, might assume that the pedestrian would step off like other persons in possession of their faculties had done, and that he would owe no duty to a person on the trestle until he had discovered by the behavior and conduct of such person that he could not, or did not, intend to leave the track; and that behavior or conduct to manifest itself positively, and not to be inferred from simply remaining on the track. After discovering as above described that the plaintiff did not intend to leave the track or could not, then it would be the duty of the section master to use every available means to prevent injury. This is what the section master testified he did, and there was no evidence to the contrary."

In *King v. Nacogdoches, etc. R. Co. (Tex.)* 146 S. W. 300, it appeared that the plaintiff's wife was injured while driving along a road running parallel with the defendant's railroad when plaintiff's team became frightened by a motor car negligently driven on defendant's track by one W. G. Edgar who was not an employee of the defendant but was shop fireman for a certain lumber company which owned the motor car jointly with the defendant railroad and who had taken the car without the consent of either the lumber company's manager or defendant's superintendent who were the only persons authorized to use it. It was held that the plaintiff had failed to show any actionable negligence on the part of the defendant.

#### COLLISION AT CROSSING.

In *Mott v. Detroit, etc. R. Co.* 120 Mich. 127, 79 N. W. 3, it was held in an action brought for injuries received as a result of a collision with a hand car on defendant's road on a smoky and foggy night, it being defendant's custom not to run hand cars at night, that the plaintiff was required to exercise only the same degree of care as was required of him in looking out for trains, and the court not being prepared to say that the speed of the car testified to by defendant's witnesses was not negligence, it was a proper question for the jury, and their verdict for the plaintiff would not be disturbed. In *Ball v. Adnondick R. Co.* 52 Hun 610 mem. 4 N. Y. S. 769, the court held that the questions of defendant's negligence and plaintiff's contributory negligence were proper ones for the jury, and their finding would not be disturbed where the facts appeared to be that a hand car running at a moderate rate of speed on defendant's road collided with the carriage in which the plaintiff was riding, thus causing the injury complained

of, where at the particular crossing the view of the railroad tracks was somewhat obscured by trees and fences and the plaintiff testified that she looked and listened before going on the track.

It appeared in *Hill v. Atlantic Coast Line Co.* 166 N. C. 592, 82 S. E. 864, that the plaintiff who was deaf had been struck while crossing defendant's track at night by a motor car containing no light. As to the defendant's liability for the omission the court said: "It was the duty of the defendant to have a light at night on its car, so that it could be seen by those using the crossing of its tracks and the public street, if by having a light plaintiff would have seen the car and avoided injury. There was no light on the car. As it had no bell or whistle with which to warn those on the crossing, or about to come upon it, of the danger, it stands to reason that the only other feasible signal, that is, a light, should have been supplied. The plaintiff could not hear, but he could see, and no doubt would have seen if there had been a light. He was deprived of one sense, but the other, that of sight, was left to him unimpaired, and he had the right to the full use of it for his protection, and moreover was required by the law to resort to it in the absence of the other. But the use of it for his safety was practically destroyed by defendant's plain omission of duty."

In *Douglass v. Southern Ry.* 82 S. C. 71, 62 S. E. 15, *rehearing denied* 82 S. C. 85, 63 S. E. 5, it appeared that the injury for which the action was brought was sustained by the overturning of the plaintiff's buggy while he was engaged in whipping his horse in the endeavor to avoid a collision with a hand car on defendant's road which was approaching at a rapid rate of speed. It was held that the trial court had neither erred, nor placed a greater burden on the defendant in establishing the affirmative defense of contributory negligence than that imposed by law, in charging as follows: "You will first decide whether the defendant company, its servants and agents, were negligent in the manner in which it was running that lever car in approaching that highway crossing. If it was—if the defendant company, its agents and servants, were negligent, and the negligence was the proximate cause of the plaintiff's injury, then the defendant would be liable unless the defendant has satisfied you by the greater weight of all the evidence in the case that the plaintiff contributed by his own negligence as a proximate cause to his own injury." And "if he was injured through the negligence of the defendant company, its servants or agents, then he is entitled to recover unless the defendant company has satisfied you by the greater weight

of all the evidence in the case that the plaintiff himself was negligent in that regard, or in connection with that crossing, in entering upon the crossing; and if he was negligent, and if his negligence contributed as a proximate cause to his own injury, why, he cannot recover, even though the defendant company was negligent." In *Irby v. Southern Ry.* 92 S. C. 490, 75 S. E. 793, an exception was taken to the court's refusal to charge as follows: "There is no rule of law which relieves a person from looking out for trains and lever cars when he goes upon or to cross railroad tracks. I charge you that a railroad company is not bound to slacken speed of a lever car upon seeing one on or near its track unless the circumstances indicate that such person does not or cannot see or hear such lever car." The appellate court would not sustain the exception on the ground that it stated a sound proposition of law applicable to the issues involved in the case, but held that it must be overruled since it would have been a charge on the facts.

Judgment in the plaintiff's favor was sustained in *Pittsburg, etc. R. Co. v. Sponier*, 85 Ind. 165, wherein recovery was had for injuries sustained by reason of the collision after dark of the two-horse wagon in which the plaintiffs were riding with a hand car which had been placed on a bridge by the defendant's servants in such a manner that passage was obstructed, the bridge being part of the public crossing over defendant's right of way.

In *Burtch v. Canadian Pac. Ry.* 13 Ont. L. Rep. 632, 6 Can. Ry. Cas. 461, it appeared that a child of ten years, while coasting down a hill and across defendant's tracks at a public crossing, was struck by a hand car and injured. The plaintiff was absolved from contributory negligence by the jury and a verdict given for the plaintiff on the ground that the defendant was guilty of negligence in failing to give some warning of the approach of the hand car. Relative to this the court said: "The hand car was lawfully upon defendants' railway. The plaintiff was lawfully upon John street. The plaintiff was run down by the hand car and the jury say the plaintiff was not to blame, but the defendants were to blame, and that the blame or negligence was in approaching such a crossing as this was in a hand car as driven, without giving such warning as would enable a person on the highway and near to the track, exercising ordinary care, to avoid the danger of being run down. What warning should be given must depend upon the facts and circumstances in each case, and if from any cause it would be difficult for a person at or near the crossing—he not being to blame for, or creating the difficulty—to see or hear an approaching hand car, there

would be necessity for care on the part of the persons in charge of the car."

The duty is placed on a person approaching a crossing to look and listen for an approaching hand car. *Suiter v. New York*, etc. R. Co. 44 Hun 627, 7 N. Y. St. Rep. 687. Therein the court sustained the following charge made by the trial court: "Now, the plaintiff, as she approached this crossing, was bound, and it was her duty to use her eyes and ears, and to look and to listen to see if she could discover whether there was an approaching train or not, or whether there was any car passing at that time. If she could not do that—if she did not look and listen, and her omission to do so contributed to this injury, then she could not recover in this action." Also in *Lake Shore*, etc. R. Co. v. *Franz*, 127 Pa. St. 297, 18 Atl. 22, 46 L.R.A. 389, the court said: "The duty to stop, look and listen is absolute and unyielding," and "the fact that the gates were raised is no excuse for the failure of a plaintiff to stop, look and listen, yet on the other hand it is some evidence of negligence on the part of the defendant." It appeared therein that the plaintiff was struck by a second hand car closely following one that had just passed a crossing at which gates were maintained. The morning of the accident the gates were not operated and the view of the tracks in either direction was hidden by box-cars. It was held that the question whether the defendant was guilty of contributory negligence was a proper one for the jury to determine since it was not clear that the plaintiff should not have stopped a second time or that the place where he did stop was the best.

#### FRIGHTENING HORSE.

There is under ordinary circumstances nothing about the operation of a hand car to terrify a horse, and accordingly no particular precautions need be taken by the persons in charge of a hand car on approaching a crossing to avoid such a result. Thus in *Chicago*, etc. R. Co. v. *Vremeister*, 112 Ill. App. 346, it was held that the railroad company was not liable where a horse attached to a wagon and being driven across the railroad's tracks at a public crossing took fright at an approaching hand car, overturned the wagon and injured the driver. It was contended that the railroad company was guilty of negligence in that the hand car was driven at a high rate of speed without any warning of its approach being given and in that the gates were up, thereby giving notice that the crossing was clear. The court said: "There is no proof that horses habitually shy at hand cars; and no reason existed why appellant's servants should give or have been required to give appellee any notice or warning of the approach of the car, especially when it

was in plain sight and he must have seen it if he was looking as he claims to have been. There was nothing in the existing situation to suggest any occasion or necessity for putting appellee on his guard. To hold that appellant was negligent would mean that every person driving a vehicle or carrying an object or doing anything whatever at which a horse might possibly take fright would have to give notice of his coming. Such is not the law. On the contrary, railway companies running their trains in a lawful and usual manner without negligence or wanton disregard of the rights of others are not responsible to travelers for damages which may happen to them as a consequence of their horse taking fright." It was similarly held in *Louisville*, etc. R. Co. v. *Howerton*, 115 Ky. 89, 72 S. W. 760, 24 Ky. L. Rep. 1905, 103 Am. S. Rep. 295, that no recovery could be had where the injuries were caused by a horse which became frightened by an approaching hand car, just as he was about to cross the track after having passed through a deep cut. Therein the court said: "The mere fact that the horse became frightened at the hand car, ran off, and injured the appellee, does not entitle her to maintain this action. She could only maintain it upon the ground that defendant's servants or employees were guilty of negligence resulting in the injury. Hand cars are necessary in the conduct of the business of railroads. They must be used for the purpose of carrying tools and the section forces from point to point in repairing and looking after the track. It is impossible to run them in a noiseless manner. The fact that they are run, and that a horse became frightened by reason of their approach, or the noise which they make, which results in injury to the driver, does not give a cause of action. When trains are run in the ordinary way, and whistles and bells are sounded as the necessities of the business require, and a horse becomes frightened by reason thereof, and damages result therefrom, no action can be maintained therefor." In *McCerrin v. Alabama*, etc. R. Co. 72 Miss. 1013, 18 So. 420, the court said: "The law has no standard for the rate of speed of a hand car, and has no rule as to noises produced by its operation, or made by those operating it; and as to the sudden appearance of car and crew (which, probably, was the real cause of the unfortunate fright of plaintiff's horse), surely no blame can be imputed for that, which, it may be justly supposed, would have terrified the horse if the speed had been less and the noise of car and men less. True, the averment is that these things were all well calculated to frighten very gentle horses, but if the defendant, by its servants, did nothing unusual, and nothing which 'common prudence would com-



demn as being calculated to frighten teams passing that way,' it is not liable. There are many things in the unquestionably lawful operation of a railroad well calculated to frighten very gentle horses, and yet one who suffers from the fright of his horse cannot successfully complain of the loss sustained, unless it appears that the railroad company, by its servants, was guilty of wrong in the matter complained of. The declaration here seems to us to fall short of stating a cause of action by failing to aver that what is complained of was unusual, and such as common prudence would condemn as being calculated to frighten horses. . . . The defendant had the right to operate its car in the usual and customary way, and at a safe rate of speed, but had no right to convert it needlessly into a terror-inspiring thing, and for such departure from propriety, would, undoubtedly, be liable in damages for any injury caused by this negligence to one free from fault; but rapidity of movement, noises and sudden appearances are common incidents of the operation of railroads, and one complaining of hurt from these causes must show clearly a departure by the defendant from custom and propriety to warrant recovery." In *Lake Erie, etc. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, it was held that no recovery could be had where it appeared that the horse had become frightened by a passing hand car on which were bright and glistening tools, the view of the track in the direction from which the hand car approached being obscured by an orchard until a point 80 to 100 feet from the crossing was reached.

But in *Marshall v. Lehigh Val. R. Co.* 240 Pa. St. 272, 87 Atl. 575, it appeared that the plaintiff's horse had been frightened at a crossing by escaping steam from a locomotive of an independent contractor. The driver turned the horse about, drove back some distance and alighted to fix the harness. A hand car then approached on defendant's tracks at a rapid and reckless rate of speed, the horse again taking fright and causing the injuries complained of. The court held that the case was for the jury, and they having found the hand car to be the proximate cause, a verdict in plaintiff's favor was sustained. In *Houston, etc. R. Co. v. Beard*, 42 Tex. Civ. App. 427, 93 S. W. 532, it appeared that the plaintiff, a farmer, cultivated land on either side of defendant's railroad, and while returning to his field one afternoon riding one horse and leading another in passing over defendant's tracks at his private crossing, his horses became frightened by the noise made by defendant's workmen in placing a hand car back on the track and in allowing tools to fall therefrom. He was thrown from his horse and received the injuries complained

of. A verdict in plaintiff's favor, based on the ground that defendant's employees were negligent was sustained. In *Sherman, etc. R. Co. v. Bridges*, 16 Tex. Civ. App. 64, 40 S. W. 657, a verdict for the plaintiff was sustained on proof that the injury was caused by a horse becoming frightened at a hand car which was being moved slowly off a private crossing.

If railroad employees temporarily take a hand car from the track and leave it beside the highway and a horse takes fright at the sight of it the company is ordinarily liable for any damage resulting therefrom. Thus in *Ohio, etc. R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64, it appeared that the plaintiff was thrown from her horse which had become frightened at a hand car placed temporarily on one side of a highway near to the point where the same crossed the defendant's railroad. The court said: "The broad claim that a railroad company may use a highway for general railroad purposes cannot be sustained. Neither authority nor principle sanctions or supports it. Railroad companies have one right that, properly exercised, is superior to that of the public, the right of passage for its trains. All other rights are subordinate to the paramount public right. They have, no doubt, a right to repair their tracks at crossings, but this right, subordinate in its nature, must be exercised with due regard to the public safety and convenience, and care, skill, and diligence must be used to prevent injury to travellers . . . but a permanent or temporary occupancy of a highway by the cars of a railroad company is, prima facie, unlawful. It is therefore incumbent upon a railroad company which places a car upon a highway, to explain or excuse the act. The act of the appellant in placing the hand car on the highway was, in this instance, unlawful, and calls for an explanation from the authors of the wrong. We find no satisfactory explanation, nor any reasonable excuse, in the facts exhibited by the answers to special interrogatories. Finding neither explanation nor excuse in the special facts, we must adjudge that none exists, for so the general verdict affirms." It was similarly held in *Southern Indiana R. Co. v. Norman*, 165 Ind. 126, 74 N. E. 896, that the defendant railroad company was liable where it placed a hand car in the public highway within two feet of the wagon track, and by means thereof caused a team of gentle and well-broken mules attached to a cultivator on which appellee was riding, and which team of mules he was driving on a highway, to become frightened and run away, thereby throwing appellee from the cultivator and injuring him. So in *Baltimore, etc. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 119

Am. St. Rep. 503, 7 L.R.A. (N.S.) 597, wherein the complaint alleged that the defendant "carelessly and negligently left within the traveled way of a farm crossing, and as an obstruction to the free use of the same, a hand car, having upon it tools, tin dinner buckets, and clothing, and, as a result of the negligence charged, one of the animals composing the team which appellee was driving along said way and across said track, became frightened at the hand car and ran away, throwing appellee out of his wagon and injuring him," it was held that a demurrer thereto was properly overruled. See to the same effect *Louisville, etc. R. Co. v. Vanzant*, 158 Ala. 527, 48 So. 389. In *Myers v. Richmond, etc. R. Co.* 87 N. C. 345, it appeared that the plaintiff was injured by his horse taking fright and running away when the wheel of the wagon to which he was hitched struck a hand car which had been left in a public highway crossing. It was held to be error for the trial court to consider the case solely from the point of view of defendant's right to use the highway and not extend the inquiry to the question of defendant's negligence in putting into the highway an object of that character. The court said: "The responsibility of the defendant in this action depends upon the question, whether the use which it was making of the highway at the time of the plaintiff's mishap, was a reasonable one or not, and this in turn depends upon the character of the object, the urgency of the occasion, the manner in which the road was frequented, and the hazard to travellers attending an obstruction at the particular locality." In *Texas, etc. R. Co. v. McManus*, 15 Tex. App. 122, 38 S. W. 241, the court charged in effect that "it would be negligence on the part of the employees of the railway company to leave a hand car with tools, buckets and some clothing on it near a crossing of a public road, and if the plaintiff's horse became frightened at it and he was thereby injured, that the railway company would be liable." It was held to be error not to give the following requested special charge: "The jury is instructed that before defendant would be liable for damages resulting from the fright and runaway of plaintiff's horse, at scare from hand car, the plaintiff should show that said hand car was such a thing as was ordinarily calculated to frighten a horse, and that under the circumstances in proof, it was negligence on the part of defendant's agents to leave the said hand car at the place it was left. If the proof shows that there was nothing unusual in the appearance of the hand car, and not ordinarily calculated to frighten

ordinarily gentle horses, then the defendant company would not be liable, although you may find that in fact the horse did get frightened at the said handcar.'" It appeared in *Locke v. International, etc. R. Co.* 25 Tex. Civ. App. 145, 60 S. W. 314, that a crossing over which the plaintiff desired to pass with his wagon and team of mules was obstructed by a hand car on the handles of which were hung some coats and shirts, and in going over defendant's track aside from the route of the regular planked crossing in order to pass around the hand car, his mules became frightened at the car and threw him out. It was held that the question of defendant's negligence and plaintiff's contributory negligence were questions of fact for the jury and the court erred in peremptorily directing a verdict for the defendant. In *Texas, etc. R. Co. v. Wright*, 31 Tex. Civ. App. 249, 71 S. W. 760, the evidence showed that the railroad company's employees had left a hand car covered with tarpaulin in the edge of the public road where it crossed the railroad's right of way, that the plaintiff's wife was approaching the car when the gentle, docile horse she was driving became frightened by the flapping of the tarpaulin and backed the buggy in the ditch, and that she then led the horse past the hand car and had resumed her seat in the wagon when the horse, gazing back, again took fright at the flapping of the tarpaulin. Verdict having been rendered against the company, it was held that the evidence introduced by the plaintiff standing by itself not presenting the issue of contributory negligence, the court properly charged that the burden of proof was on the defendant to prove by a preponderance of the evidence that the plaintiff's wife was chargeable with contributory negligence. In *Vars v. Grand Trunk R. Co.* 23 U. C. C. P. 143, it appeared that defendant's employees on approaching a station and finding the track occupied by a train removed their hand car from the tracks and placed it in such a position that it encroached on a highway crossing at that point. It further appeared that shortly thereafter the plaintiff drove past in his carriage and his horse became frightened by the car and ran away. It was held that "it was a matter entirely for the jury to say whether the vehicle in question was one calculated to cause the injury, and whether the place in which it was left, was, or was not, a fit and proper place for it, so as to render the defendants guilty of negligence in so placing it," and that the jury having found for the plaintiff the verdict would be sustained.

EX PARTE McDONOUGH.

California Supreme Court—May 24, 1915.

170 Cal. 230; 149 Pac. 566.

**Attorneys — Privileged Communications — Disclosure of Name of Client.**

An attorney who had been employed by certain clients to represent them in matters connected with the investigation of election frauds, and who appeared to defend three other individuals who were indicted for such frauds and put up a cash bail for one of the indicted men, cannot be compelled to state to the grand jury the names of the clients who employed him to represent the three indicted men, and who furnished the cash for the bail, under Code Civ. Proc. § 282, subd. 5, requiring an attorney to maintain inviolate the secrets of his client, and section 1881, providing that an attorney cannot without the consent of his clients, be examined as to any communication made by the client, "communication" in that section not being restricted to mere words but including acts as well.

[See note at end of this case.]

**Illegal Transaction Not Privileged.**

A communication to an attorney concerning an intention on the part of the client to do some illegal act in the future is not privileged.

[See Ann. Cas. 1913A 13; 66 Am. St. Rep. 337.]

Original application for writ of habeas corpus. George McDonough, petitioner. The facts are stated in the opinion. PETITIONER DISCHARGED.

A. L. Frick and Burton Jackson Wyman for petitioner.

W. H. L. Hynes and Walter J. Burpee for respondent.

[231] ANGELLOTTI, C. J.—Petitioner, an attorney at law, was retained by one Woolley and one Gorman to represent them as their attorney in connection with any and all investigations that were being made or that might be made as to their participation in certain alleged election frauds and violations of the election laws in Alameda County, claimed to have been committed in connection with the general primary election of August 25, 1914, and he has ever since been acting as their attorney in pursuance of such employment. Subsequent to such employment one Higgins, one Gale, and one Wiles were indicted by the grand jury of that county, charged with participation in said crimes alleged to have been committed in connection with such election. Petitioner appeared as the attorney of each of such men, and has

ever since acted for them having admittedly been employed to represent them. He deposited ten thousand dollars cash bail for the release of Higgins. Subsequently the grand jury of Alameda County, in the further investigation of said frauds and crimes, procured the attendance of petitioner as a witness, and while he has finally answered many questions put to him, he has steadily refused to answer such questions as these, viz.:

Q. Who employed you to represent Higgins et al.?

Q. Did Jack Woolley or Grant Gorman employ you to represent Higgins et al.?

Q. Did Jack Woolley or Grant Gorman furnish the \$10,000 which you deposited as bail for Higgins?

Q. Who furnished the \$10,000 deposited as bail for Higgins?

For his refusal to answer these questions after being ordered to do so by the superior court, petitioner has been adjudged guilty of contempt of court and ordered confined in the county jail of Alameda County until he does answer them.

[232] Admittedly the purpose of the questions is to obtain evidence against Woolley and Gorman, by which they can be implicated as principals in the commission of the crimes for which Higgins et al. have been indicted, and to implicate them in the commission of the election frauds.

The court below found that all the allegations of petitioner's affidavits filed in the contempt proceedings are true. These affidavits averred substantially, among other things, the following: Each and every communication, either verbal, written, or by signs, which he had received from either Woolley or Gorman in any way, relating to or concerning or about the said frauds, or the charges on which Higgins et al. were indicted, or with reference to the defense or bail of either said Higgins or said Wiles or said Gale, were received by him as the attorney for said Woolley and as the attorney for said Gorman, and not otherwise. That the ten thousand dollars deposited as bail for Higgins was delivered to him by a client of his, which client had previously employed him to represent him, said client, in all investigations which were being or might be made of said client's conduct in connection with said alleged election frauds and in connection with Higgins et al., and to represent him in all matters and things growing out of the alleged election frauds in which it was or might be claimed that said client was implicated, and in any proceedings whereby it might be sought to ascertain whether the said client was connected with the commission of these crimes or not. That clients employed him to represent Higgins et al. and that these clients had previously employed him to represent

them in connection with all charges which might be brought against them in connection with said frauds, and in reference to any claim that might be made that these clients had in any way been connected with these frauds, and that it was in connection with such employment by said clients to act as their attorney, and not otherwise, that these clients employed him to represent Higgins et al. That neither the unnamed clients nor Woolley nor Gorman consented to his testifying.

The question presented is whether the employment of petitioner by his clients to defend Higgins et al. and the furnishing by his clients of the sum of ten thousand dollars to bail out Higgins were matters concerning which he cannot testify without the consent of such clients. Section 1881 of the [233] Code of Civil Procedure provides: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . . 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

However desirable it may be to obtain proofs sufficient to insure the conviction of all persons who commit crimes of the character of those under investigation, and it will readily be conceded that it is most desirable, such proofs may not be obtained from those who are forbidden by our law to give them. In regard to the obligations of an attorney to his client in this respect, our statutes are very explicit, making it his duty "to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client" (Code Civ. Proc. sec. 282, subd. 5), and, in the section above quoted, prohibiting his examination as a witness, as therein stated. As said in *People v. Atkinson*, 40 Cal. 284: "On principles of public policy, communications from a client to his attorney touching the subject-matter under investigation are privileged, and will not be allowed to be disclosed by the attorney, even though he be willing to do so."

It is obvious, of course, that the sole purpose of the questions was to obtain from petitioner proof of admissions by a client to him, tending in some degree to show complicity on his part in the alleged crimes for which Higgins et al. had been indicted, made while he was acting as the attorney of such client in the very matter of said alleged crimes. Under the circumstances shown here, the questions could have no other purpose and the answers no other effect. It will at once be conceded that if this client had said to such attorney that he had aided and abet-

ted Higgins et al. in the commission of the acts for which they had been indicted, under such circumstances of course as to preclude the idea that his statement was not confidential, the attorney could not be examined as a witness regarding such statement, in view of our law, without the consent of the client. To our minds there is absolutely no distinction in principle between such a case and that presented by the questions which it is here sought to compel petitioner to answer. The only difference [234] is in the weight of the testimony as going to show such complicity on the part of the client, in the one case being a direct admission of such complicity, and in the other being an admission of interest from which, in the light of other circumstances, such complicity might reasonably be inferred.

It has been said that the word "Communication" as used in such provisions as our section 1881 of the Code of Civil Procedure, is not to be restricted to mere words uttered by the client, that looking back at the reason of the privilege it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge, and that acts, as well as words, may fall within the privilege. (See *Wigmore on Evidence*, sec. 2306; *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *Holden v. State*, 44 Tex. Crim. 382, 71 S. W. 600.) These statements, we are satisfied, are in accord with the reason of the rule, and we cannot doubt their correctness. The questions here called for "communications" from petitioner's client or clients to him. In view of the facts found by the lower court, it cannot here be doubted either that whatever information was conveyed to petitioner thereby, came to him from his clients in the ordinary course of his professional employment as such clients' attorney, or that there was nothing in the nature of the transaction or in matters extraneous thereto to rebut the presumption that the communications were confidential. (See *Hager v. Shindler*, 29 Cal. 67.) And there was nothing in the facts to warrant a conclusion that the evidence proposed to be thus adduced bore at all upon any intention or arrangement on the part of the client to perform some illegal act in the future, or the then actual doing of any such illegal act, as to which, it may be conceded, the rule would not apply, however injurious to the client the evidence might be. (See *U. S. v. Lee*, 107 Fed. 702.) There was nothing illegal or contrary to public policy in what it was proposed to show petitioner's clients had done in the way of employing petitioner to defend Higgins et al., or in furnishing the money to be used for the purpose of obtaining the release of Higgins on bail. As before suggested, it was simply being attempted to show by petitioner's testimony

that the clients had made to him admissions from which, in the light of other circumstances, their guilt in the matter as to which petitioner was defending them, might be inferred.

[235] We are unable to perceive any sufficient ground upon which it may be held that petitioner may be compelled, without his client's consent, to answer any of these questions. Counsel for the people rely, as to the questions directed to the identity of the persons who employed petitioner to defend Higgins et al., upon what has frequently been said to the effect that an attorney is not privileged from disclosing by whom he was employed. Ordinarily this is doubtless true. As is said by Wigmore in his work on evidence (sec. 2313), the identity of the attorney's client, or the name of the real party in interest, will seldom be a matter that can be held, under the law, to have been communicated in confidence. The mere fact of retaining an attorney to act as such is not ordinarily a matter occurring in the course of the confidential relation of attorney and client, but is something that precedes the establishment of that relation. (Eickman v. Troll, 29 Minn. 124, 12 N. W. 347.) Frequently, too, the fact of employment of an attorney by a certain person for a specific purpose is an element of the cause of action being asserted against such person in the matter under investigation. This is illustrated in the case of *White v. State*, 86 Ala. 69, 5 So. 674, and *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187, cited by counsel for the people. In the first of these cases, White was charged with making a false claim against a railroad company for lost baggage, and evidence of an attorney, employed to present the claim and who presented it, as to his employment, was held admissible. The other case was an action for damages by a wife against her husband's parents for alienation of her husband's affection, and the testimony of an attorney that he was employed by the parents to bring an action for divorce on the part of the husband against the wife was held to be proper. As Mr. Wigmore says, much ought to depend on the circumstances of each case. The matter was discussed in *Matter of Shawmut Min. Co.* 94 App. Div. 156, 87 N. Y. S. 1059, and it was substantially said that many cases holding that an attorney may be compelled to testify to his representation of some person as an attorney are based and decided upon the principle that the employment and communications were made for the purpose of enabling the attorney to perform acts which involved the rights of third parties, *who acted upon the faith of his attorneyship*, and that under such circumstances it [236] was entirely proper that the fact of attorneyship should be established. Of course, we have nothing of this kind here.

The case of *U. S. v. Lee*, 107 Fed. 702, perhaps comes nearer to sustaining the claim of the attorneys for the people than any other case cited, but even that case is distinguishable in a material way. The grand jury was investigating the matter of the disappearance of Lee, who had become a fugitive from justice while under indictment and awaiting trial, and his attorney, who had appeared for him on the indictment, was compelled to testify as to the name of the person who had employed him to defend Lee, it appearing that some one other than Lee himself had employed him. As suggested, the grand jury was investigating the matter of his disappearance, and not the question of his guilt of the charge against him—was endeavoring to ascertain who, if anybody, was guilty of complicity in the flight of Lee, an illegal act occurring after the commission of the crime charged against Lee. Even as to this the district judge said that a question asked the attorney relative to the interest which his client had in the defense of Lee might involve a confidential communication from his client to himself and might therefore be improper. He further said: "If the client did have an interest and stated it to his counsel, the latter is not called upon to reveal it." But the judge thought that counsel could not state that he gained the information called for from a client and then leave that client mysterious, unknown and undefined, and that the court had a right to know that the client was actual flesh and blood, and "to demand identification *for the purpose at least of testing the statement which has been made by the attorney who places before him the shield of this privilege.*" Of course, in view of the facts found by the trial court here, no such reason exists in this case. It is clear enough that none of the various reasons advanced in the authorities for the disclosure of the name of the client who employed the attorney is applicable here, in view of the circumstances of this case. We cannot escape the conclusion that, in view of the findings of the lower court, to require the petitioner to answer any of the questions as to the name of the client who employed him to defend Higgins et al. would be to require him to divulge a confidential communication made to him by a client in the course of his employment—a communication [237] tending to show, and, under the circumstances of this case, material only for the purpose of showing an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney had been employed to defend him.

What we have said is also true as to the questions relative to the furnishing of the money deposited as bail for Higgins.

The petitioner is discharged from custody.

Sloes, J., Lorigan, J., Melvin, J., Henshaw, J., and Shaw, J., concurred.

LAWLOR, J. (*dissenting*).—I dissent.

In my opinion the judgment of contempt should be upheld. There is in the commitment, and made a part thereof, a full record of the proceedings before the grand jury and the superior court, which includes the two affidavits each of A. K. P. Harmon, foreman of the grand jury, and the petitioner. This record merits a critical examination. I will consider the questions relating to employment and bail separately.

On the question of employment I will examine first whether the superior court found that before petitioner was employed to represent Higgins, Gale, and Wiles he had already been retained on behalf of the party or parties who so employed him, and in this connection the inquiry is apart from the question of the identity of such party or parties.

It was, of course, necessary for petitioner to show such order in the respective employments as a foundation for the claims of privilege, and he sought to show it in an indirect and, as I think, ineffective way.

In respect to Higgins and Gale it is alleged that he was employed *prior* to October 19th, and Wiles *prior* to November 16th, but there is a striking absence of any averment covering the exact date of his employment on behalf of the three men.

In regard to the date that he was retained by those who employed him to represent Higgins et al., it is plainly averred that Woolley and Gorman engaged him separately as their individual attorney on October 17th. There is, however, no allegation in terms that before petitioner was employed to act for Higgins et al. he had been retained by Woolley and [238] Gorman on their own account. But such prior employment is attempted to be established by several indirect averments. For instance, it is alleged that anything "which *may* have been said" to petitioner by either Woolley or Gorman about the cases against Higgins, Gale, and Wiles, or representing them, was communicated while the relation of attorney and client existed between Woolley and Gorman and petitioner, and not otherwise.

It is elsewhere averred that petitioner had been employed by "clients" of his, without stating their names or how many such clients there were. Then follows the direct allegation (which is absent from the averments wherein Woolley and Gorman are mentioned by name) that before the "clients" employed him on behalf of Higgins, Gale, and Wiles they employed him to represent them. And in succeeding paragraphs it is averred in consequence that Woolley and Gorman were and are "clients" of petitioner.

It was apparently intended to further supplement the suggestion of prior employment by Woolley and Gorman for themselves per-

sonally by the averments that ever since October 19th and November 16th, respectively, petitioner has represented the three men.

No liability of disclosure touching the question as to *who* employed him on behalf of Higgins et al. would have been incurred by stating *when* he was so employed.

Such jugglery with facts should not be tolerated, and especially as the direct averment on the point of time would not, as has been shown, have impaired the asserted claims of privilege so far as the identity of either Woolley or Gorman or the unnamed "clients" is concerned.

As to the legal effect of all the averments on this point it is proper to state that before pronouncing the judgment of contempt the superior court made the following general findings:

"The court finds that each and every averment in the affidavits filed with this court by A. K. P. Harmon and the said George McDonough, and made a part of this commitment, and each and every recital in the orders made thereon by this court, and made a part of this commitment, is and are true. . . ."

It is the established law of this state that on *habeas corpus* the findings of fact of the superior court are binding on this [239] court. (Ex p. Clark, 110 Cal. 405, 42 Pac. 905; Ex p. Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; Ex p. Sternes, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275, and Ex p. Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.)

The court made no findings of any specific fact otherwise than as above expressed or implied, and in the involved state of the evidentiary record it cannot even be conjectured what conclusion, if any, was reached on the question whether the relation of attorney and client existed between Woolley and Gorman and petitioner before he was employed to represent Higgins et al., and this question was vital to the claims of privilege, for, I repeat, if the relation had not been previously formed there could be no privilege.

It must be shown that the relation of attorney and client actually existed before any communication can have the sanctity of privilege. (40 Cyc. 2363-b; Churchill v. Corker, 25 Ga. 479; Jennings v. Sturdevant, 140 Ind. 641, 40 N. E. 61; State v. Smith, 138 N. C. 700, 50 S. E. 859; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; George v. Silva, 68 Cal. 272, 9 Pac. 257.) In State v. Smith, the prisoner had made communications prior to the employment to one whom he claimed to be his attorney in fact. But the court overruled the objection and held that even if it had been shown that the recipient of the communication was an attorney at law at the time, "the prisoner could not deprive the

state of such important evidence by 'retaining' the witness." The fact of employment is preliminary in its nature and is not involved by the rule of privilege.

It is clear that the petitioner had primary knowledge of the precise date of his employment on behalf of the three men, and his failure to allege the fact, and relying on ambiguous and indirect averments instead, may have led the court, under a familiar rule of evidence (Code Civ. Proc. sec. 2061, subds. 6 and 7), to find that there had been no such prior employment, for, in strictness, prior to October 19th or November 16th may be prior to October 17th. And, as already pointed out, fixing the exact date of the employment did not involve the main question as to *who* employed him. The allegation that "anything which *may have been said*" of course is not the equivalent of a statement that [240] anything was said. In this behalf I think the reference in the majority opinion to the subject that any communication petitioner "had received" is too strongly expressed. Nor has any attempt been made, except by suggestion, to establish identity between Woolley and Gorman and the unnamed "clients," notwithstanding the direct averment that Woolley and Gorman were "clients" of petitioner. Indeed, the court may have decided that there was no such identity. Nor, again, does the averment that ever since the indicated dates petitioner has represented Higgins et al. preclude the idea that he may have represented them prior to October 17th. Evidence of such equivocal import should have been ignored for every purpose, and in my opinion it cannot be availed of to annul the judgment of the superior court. It seems to me there is an evidentiary gap between the set of averments which refer to Woolley and Gorman by name and the allegations touching the unnamed "clients," and as neither is sufficient, in itself, by reason of vagueness, to cover the point of time, it cannot be held here that the superior court found the fact in favor of petitioner.

Tested by the averments of priority of employment, the crime of perjury could not be supported, if, as a matter of fact, petitioner was employed to represent Higgins et al. before October 17th.

Finally, if petitioner intended by circumlocutory averments to have the superior court assume or find that Woolley and Gorman were the "clients" referred to, then his assertions of privilege should not be further considered.

In my view, the superior court did not intend by its findings to hold that the petitioner met the burden of showing that the relation of attorney and client had previously existed between himself and those who employed him at the time he was retained to

represent Higgins, Gale, and Wiles. But even if it must be held here that under the findings of the superior court the employment on behalf of Higgins et al. was after instead of before October 17th, the fact of the employment itself should have been divulged by the petitioner.

Following the findings, the superior court concludes "that none of the averments contained in any of the affidavits, or answer, filed by George McDonough, and made a part hereof, state facts sufficient to justify the refusal of the said [241] George McDonough to answer the questions hereinafter referred to, and no reason appears why the said George McDonough should not be compelled to answer such questions before the grand jury of Alameda County, and why he should not be punished for refusing to do so in contempt of an order of this court issued on the eighth day of December, A. D. 1914, and made a part thereof."

The grand jury was organized on November 2d. Prior to October 19th the preceding grand jury had returned indictments against Free S. Beach and James Higgins for the crimes of forgery and violating section 113 of the Penal Code; Edward C. Wiles for perjury, false registration, fraudulent voting and falsification of a public record, and Charles L. Gale for forgery and violating the provisions of sections 46 and 113 of the Penal Code. What remained to investigate called for the faithful and diligent efforts of the grand jury and the district attorney. The initiatory affidavit of the foreman, referring to the first appearance of the petitioner before the grand jury, enumerates the foregoing indictments and avers "that said matters and said criminal action and actions grew out of and were based upon certain fraudulent registration, voting, falsification of records and impersonation of voters that had been committed in the said county of Alameda on the 25th day of August, A. D. 1914, at the general primary election held pursuant to the provisions of the direct primary law; that said crimes and frauds against the elective franchise shows a general concerted plan, scheme and conspiracy . . . ; that . . . said grand jury was investigating the above matters with a view of determining what person or persons planned and directed the execution of said frauds and crimes and who were in league and in conspiracy with the above-named defendants in the execution and perpetration of said election frauds and the above-mentioned crimes."

The investigation, the petitioner was apprised by the district attorney, covered the range of offenses prescribed by chapter IV, part I of the Penal Code, which is devoted to crimes against the elective franchise, and embraces sections 40 to 64½, the latter making

applicable to primary elections the provisions of the preceding twenty-four sections. In addition, as already appears, indictments had been found against Higgins and Gale for violations of section 113 of [242] the Penal Code, which relates to the stealing, destroying, mutilation, altering, falsifying and the like of records in the custody of a public officer.

It is averred by the petitioner on his information and belief that the inquiry concerning his employment on behalf of the three men was immaterial and irrelevant, and that the purpose of the district attorney in asking the questions was to implicate Woolley and Gorman and the so-called "clients."

Whether the court found in favor of these averments does not appear by any specific finding. But it is proper to consider in this connection, as well as with regard to the legal conclusions of the superior court, that a grand jury is an appendage of the superior court and its members officers thereof (In re Gannon, 89 Cal. 541, 11 Pac. 240; Heard v. Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; that they are "persons specially invested with powers of a judicial nature" (Code Civ. Proc. tit. III, part I); and that "the grand jury must inquire into all public offenses committed or triable within the county and present them to the court by indictment." (Pen. Code, sec. 915.)

While the subject-matter of investigation by a grand jury must fall within the original jurisdiction of the superior court as to the grade of offenses, and the inquiry be clearly defined when the authority of the superior court is invoked by it to compel a witness to answer, yet, because of the inquisitorial nature of the powers of the grand jury, it is not requisite that the court shall be fully advised of the exact evidentiary import of the proposed evidence, nor that it shall be informed of every angle and turn of, or keep pace with the investigation, or who may be involved thereby. It must affirmatively appear, however, that the inquiry is within the general scope of the investigation and that the subject-matter thereof is not in excess of the cognizance of the grand jury.

A full investigation of the matters referred to in the affidavits of the foreman of the grand jury was of transcending importance to the public and to the administration of justice, for crimes of the character mentioned tend to sap the foundations of free government and subvert the will of the people in the exercise of their electoral rights. It is readily conceivable that the inquiry had many ramifications, a close [243] knowledge of which would properly be confined to the grand jury and to the district attorney, and I cannot assent, therefore, to the statement in the prevailing opinion: ". . . It is ob-

vious, of course, that the sole purpose of the questions was to obtain from petitioner proof of admissions by a client to him, tending in some degree to show complicity on his part in the alleged crimes for which Higgins et al. had been indicted, made while he was acting as the attorney of such client in the very matter of said alleged crimes. . . ." This excerpt assumes the existence of facts about which, as I have shown, there is serious doubt. But even if by "client" is meant Woolley or Gorman, or both, or the unnamed "clients," the fact of petitioner's employment on behalf of Higgins et al. should have been divulged, whether the questions had the import alleged by petitioner or tended to the effect described in the majority opinion.

The test as to whether a communication is privileged is not the effect the disclosure may have either on the client or the attorney, but whether the communication comes within the rule of privilege, and this question must inevitably be determined by the facts and circumstances of each particular case.

The reasons calling for the identification of the client are set forth in Wigmore on Evidence, section 2313, and I cannot conceive of a criminal case where the privilege is urged that the fundamental fact of employment may not be inquired into. The questions of employment and the privilege claimed are in their essence interdependent, and each must be determined according to the accepted rules governing them.

The general doctrine of privileged communications is expressed in the following cases:

" . . . There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact of which he is asked to testify was acquired in professional confidence, yet wherever the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity." (Jones on Evidence, sec. 748-a; In re Ruos, 159 Fed. 252; [244] People's Bank of Buffalo v. Brown, 112 Fed. 652, 50 C. C. A. 411; and Hughes v. Boone, 102 N. C. 160, 9 S. E. 286.)

" . . . It was incumbent on the party who objected to the examination . . . to show that the communication was privileged. . . ." (Carroll v. Sprague, 59 Cal. 659.)

"The burden is on the party seeking to suppress the evidence to show that it is within the terms of the statute." (Sharon v. Sharon, 79 Cal. 677, 22 Pac. 26, 131.)

"Authorities establish the rule that the attorney may be compelled to disclose the character in which the client employed him.



... It is further to be observed that as this rule has a tendency to prevent the full disclosure of the truth, it ought to be strictly construed." (*Satterlee v. Bliss*, 36 Cal. 508.)

"Whether or not the circumstances are such as to make the rule of privilege applicable in a particular case is a question for the court." (23 Am. & Eng. Enc. of Law (2d ed.) 71, citing cases.)

And "... as the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it." (*Id.* citing *Satterlee v. Bliss*, 36 Cal. 508, and other authorities.)

The general principle of privileged communications is laid down in *Wigmore on Evidence*, section 2285 (4):

"The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." And see section 2332.

In *U. S. v. Lee*, 107 Fed. 704, referred to in the majority opinion, it is said:

"But it is thought that a counsel may not state that he gained the information called for from a client, and then leave that client mysterious, unknown, and undefined. The court has a right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege."

The question arose there, as here, in an investigation before a grand jury, and in the light of the evidentiary record in the case at bar the language is peculiarly pertinent, since [246] the range of the questions touching the employment of petitioner on behalf of *Higgins et al.*, was limited to the identity of the party or parties who so employed him, and did not call for a disclosure of any communication received after such employment was entered into.

I apprehend there is no division of opinion on the general subject of privileged communications. When the relation of attorney and client has been created, and the object of the employment is not in furtherance of any criminal or fraudulent purpose (*Jones on Evidence*, sec. 748; *Wigmore on Evidence*, sec. 2298) any communication made by one to the other "during, in the course of, and for the purposes of such employment" (*Jones on Evidence*, sec. 748-a) is privileged, and "it is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser." (*Id.*)

It is the privilege of the client and not of the attorney, and the communications shall not be disclosed by the latter without the express consent of the former.

In determining in any case the pivotal question whether the relation of attorney and client had been created before the communication passed, the inquiry should be as broad as the necessities of the particular case in order to get at the truth of the matter. And if the prior existence of the relation is not established, the communication lacks in privilege.

I shall assume again for the purposes of what is to follow that the superior court found that the relation of attorney and client existed at the time the petitioner was employed on behalf of *Higgins et al.* by "clients"—*Woolley* and *Gorman* or others—whose secrets he is guarding by his refusal to testify, and now consider whether, as matter of law, upon the record of the proceedings from the superior court, the communications referring to the employment to represent the three men come within the rule of privilege.

My conclusion is that they do not, and this rests on two considerations: 1. That the fact of employment in criminal litigation is never privileged; and 2. That even if the privilege may attach to the fact of employment in criminal proceedings in some instances, yet under the peculiar circumstances shown by the record from the superior court not only the fact of employment but also the "characterizing circumstances" should be fully developed.

[246] The question whether the fact of employment may always be inquired into in civil litigation whenever the claims of privilege are urged upon considerations affecting the rights of third parties, or otherwise, is not involved here. But I perceive no reason for any difference in the rule. It may be suggested, however, that the rights of the public are not so immediately concerned in civil as in criminal litigation, and hence in relation to crimes against the state there would, in my opinion, always be stronger reason for having the identity of the interested parties known.

I have pursued the subject at length in order to ascertain, if possible, the reasoning the superior court followed in the premises, for it found without qualification in favor of all the averments of fact and held nevertheless that petitioner had placed himself in contempt of its authority and it is our duty not to pronounce the judgment void except in the face of the strictest necessity.

In my examination of the law I found no case on the subject of contempt of court whose facts bear resemblance to those of the proceeding at bar, and it is because of the unusual state of the facts that I finally conclude the superior court made a finding on the entire evidentiary record—although it does not so specifically appear therein—to the effect that because of the peculiar circum-

stances surrounding the employment of petitioner on behalf of Higgins et al. the communications on the subject should not receive the sanction of privilege. I do not think the court could have reached any other conclusion.

According to the claims of the petitioner, before being retained for the three men he had been employed by certain "clients"—Woolley and Gorman or others—to represent them individually in any matter that might arise out of the election crimes and frauds. From certain averments in the affidavit of petitioner it was doubtless inferred by the court that the employment to represent the "clients" came as a result of prevalent rumors and articles that appeared in the public press tending to connect them with the crimes claimed to have been committed by Higgins et al. The employment for the three men followed. The purpose of that particular employment primarily, of course, was to defend the original "clients."

[247] I have given particular attention to the record of the said proceedings, with a view of determining the conclusion the court must have reached in reference to the character of the services the petitioner was to perform for the three men. It readily occurs that under all the circumstances presented there might well be an adversity of interest between the two sets of clients, and, of course, if that were so, the law would not support the petitioner in attempting to represent both.

The court could not have done justice to the state, as well as to the petitioner, if it failed to keep in mind the common experience in the administration of criminal justice, that in relation to crimes involving conspiracy and confederation those who plan them remain in the background, while reckless tools are sent forth to do the actual work under promises of reward, protection, and defense. If exposure follows, the men who actually committed the criminal act are alone brought to the bar of justice. Then an attorney, chosen by the heads of the enterprise, appears to defend them. Deference is generally paid to appearances by having one attorney for each individual. If conviction follows, the leaders in the background are naturally anxious about the outcome. Will the district attorney be able to obtain confessions from the men already in the toils of the law, and, in that way, develop all the facts of the crime and reach out for the prime conspirators? In such circumstances the advantage of hiring an attorney to guide the criminals already in the clutches of the law can hardly be exaggerated. What would be the conception of duty on the part of an attorney who would, in such a situation, accept employment to represent the two sets of malefac-

tors? This is not an unusual experience by any means, as every one familiar with criminal litigation is aware.

If the superior court applied the foregoing illustration to the strange facts and circumstances of this case, and then in judging petitioner's conduct reached the conclusion that Woolley and Gorman were original conspirators in the scheme to debauch the election, and Higgins et al. were merely tools to do the actual work, would it be expected, under any rule of law, that the communications in relation to the employment of petitioner on behalf of Higgins et al. should be held privileged? The inherent circumstances plainly suggest that there was two such classes of participants in the enterprise—[248] one in the conception and the other in the commission of the election crimes and frauds.

How are the interests of justice to be safeguarded if an attorney is permitted to form such divergent alliances? To illustrate: If, in the progress of the investigation or prosecution, it seemed to be for the mutual benefit of the state and the involved men that, upon considerations of mitigation or immunity, the latter make to the authorities disclosures covering the criminal enterprise to violate the election laws on a wholesale scale, would the petitioner be in a position to give disinterested advice to his clients in the open in the face of his personal employment for the "clients" in the dark?

If such practices are to be tolerated, then assuredly an attorney under the cover of his professional *status* could, with assurance of security, be guilty of conduct which would be reprehended by the law if committed by another.

An attorney is required to take the constitutional oath of office to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability (Code Civ. Proc. sec. 278), and his duties are prescribed by law (Code Civ. Proc. sec. 282), among which are: . . .

"4. To employ, for the purpose of maintaining the cases confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

"5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client."

On the record here it is proper to inquire whose confidence would the petitioner maintain and whose secrets would be preserved?

It is idle to think that Woolley and Gorman or the "clients" employed petitioner on behalf of Higgins et al. simply for the purpose of securing an adequate defense for them, for the whole record is at war with any such suggestion. The superior court

129 Minn. 104.

must have concluded that the real purpose was nearer to the individual anxieties of the original clients. If these reflections are warranted, then the petitioner was involved in a conflict of duty, in which, considering the circumstances of the employment, the interests of the three men would probably be subordinated to those of the others; and if this be so, the petitioner has doubtless been more concerned in the proceedings about the nature of his engagement [249] to represent Higgins et al. than he was over the prospect of the disclosure of the fact of the employment itself. If petitioner were retained by Woolley and Gorman or the unnamed clients to protect them at all hazards, then, in my opinion, he was not free to accept employment to represent the three men, and this points to the necessity of showing "the characterizing circumstances" in such a case. The dual employment is disturbing, no matter from what angle it may be viewed, and in such circumstances the law should frown upon the relation, for to sanction it is to leave the law weaker and to place a premium on unethical conduct, or something more serious. It is not to be held that the law is susceptible of such stultification.

No client, in the suggested situation of the petitioner's original "clients," is entitled to the services of an attorney for the collateral purpose indicated here, and an attorney should not be permitted to be so employed, and if he would guard his professional honor and standing, and value his own liberty, he would not be willing to be.

Upon the remaining question whether the petitioner should have been compelled to state the source from which he obtained the bail money, I am not free from doubt. The petitioner, we have seen, stated unequivocally that he had been employed separately by Woolley and Gorman on October 17th, and that before the "clients" engaged him for Higgins et al. they retained him for themselves. It was stipulated between petitioner and the district attorney that the bail money was deposited on October 19th.

If the court found that the "clients" were identical with Woolley and Gorman, and that petitioner was employed to represent Higgins prior to October 19th, then under the rule governing the findings of the superior court on *habeas corpus* it would be proper to conclude here that the bail was deposited for Higgins during the existence of the relation of attorney and client between him and the petitioner, and upon this theory the point as to how the employment was brought about would lose some of its importance when considered in connection with the question of bail. This view proceeds on the assumption that in regard to the bail, communications passed between petitioner and Higgins as well

as the petitioner and the "clients" who furnished the bail. The depositing of bail by an attorney on behalf of his client in the [250] due course of employment would ordinarily be deemed a communication between attorney and client within the meaning of privilege, but there may be some question in this case whether the superior court found it was a communication for the "purposes of such employment."

However, as already stated, on the question of bail I entertain some doubt, which I shall resolve on the side of the petitioner. (People v. Atkinson, 40 Cal. 284.)

Applying the rule of decision on *habeas corpus* (In re Shortridge, 5 Cal. App. 371, 90 Pac. 478), to the record and the law on the question of employment, I am of opinion that the writ should be dismissed and the petitioner remanded.

#### NOTE.

The reported case while recognizing the general rule that an attorney may be compelled to disclose the identity of his clients, holds that an attorney's privilege forbids his stating by whom he was employed to defend a person charged with crime. The scope of an attorney's privilege is discussed, with a specific reference to the disclosure of the identity of his client, in the note to Collins v. Hoffman, Ann. Cas. 1913A 1.

#### W. J. ARMSTRONG COMPANY

v.

#### NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Minnesota Supreme Court—March 19, 1915.

129 Minn. 104; 151 N. W. 917.

#### Process — Service on Foreign Corporation — Agent of Associated Corporations.

Summons was served on a foreign railroad corporation by leaving a copy with a soliciting freight agent employed by defendant and other corporations operating connecting lines and associated under the name of New York Central Fast Freight Lines. Under that name defendant and its connecting lines solicit freight systematically throughout the state of Minnesota for transportation out of the state. They transport freight solicited under a single through tariff. They maintain offices in the state for the purpose of such solicitation. This cause of action arose out

of a shipment of freight from a point in Minnesota to New York City which was solicited in this manner. The statutes of the state authorize service of a summons on a foreign corporation by service upon an agent in the state for the solicitation of freight traffic over its lines outside the state. It is held that the soliciting agent of the associated corporations was the agent of each of them.

#### **Foreign Corporations — Requisites of Jurisdiction.**

Three conditions are necessary to give a court jurisdiction in personam over a foreign corporation: First, it must appear that the corporation was carrying on business in the state; second, that the business was transacted by some agent of the corporation in the state; third, the existence of some local law making such corporation amenable to suit.

#### **Agents for Service of Process — Designation by Statute.**

Where a state by statute designates an agent of a particular character as an agent upon whom process may be served, the corporation by sending such an agent into the state assents to the statute and clothes the agent with authority to receive service in its behalf.

[See note at end of this case.]

#### **Same.**

Without invoking this principle, the state may designate the agent upon whom service of summons may be made, but the agent must be one sustaining such relation to the corporation that such service constitutes due process of law.

[See note at end of this case.]

#### **Same.**

A foreign corporation keeping and maintaining agents in this state for procuring business for its benefit and profit may be required to answer in this state to a citizen thereof for a breach of contract or duty arising out of business so procured, and an agent engaged in procuring such business may be declared the representative of the corporation for the purpose of bringing it into court.

[See note at end of this case.]

Appeal from District Court, Waseca county: **CHILDBRESS**, Judge.

Action for damages. **W. J. Armstrong Company**, plaintiff, and **New York Central and Hudson River Railroad Company**, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*William Furst* for appellant.  
*Moonan & Moonan* for respondent.

[106] **HALLAM, J.**—The complaint alleges that plaintiff is engaged in business at Waseca, Minnesota; that defendant is a common carrier, with lines of railroad without the

state of Minnesota; that plaintiff consigned over defendant's road to **Henry Behrmann & Co.**, New York City, certain goods, of which plaintiff was the owner; that defendant did not safely carry the goods, but negligently caused their damage. The summons was served upon **H. R. Ballard**. Defendant moved to set aside the service of the summons. The motion was denied and plaintiff appealed.

In what state the defendant is incorporated the record does not show, but the briefs concede that it is not a Minnesota corporation. Nothing appears as to the extent or location of its lines of road, except that it is one of the "large lines" and that it carries freight between New York and Buffalo. Ballard is commercial agent, or soliciting freight agent, of the New York Central Fast Freight Lines. Under that name defendant and its connecting lines solicit freight business and they receive and transport such freight outside the state under a single through tariff. Ballard solicits freight for transportation over these roads, both east and west bound. He does not collect freight charges, but receives a copy of the billing containing a description of the shipments, the originating point, the name of the shipper, and consignee, and the freight charges, and on receipt of the same sends out cards to the customers. These associated roads evidently cover the state of Minnesota with systematic solicitation of business. They have an office in Minneapolis, another in St. Paul, and another "agency" in Duluth. Between these the state is parceled out. Ballard is in charge of the St. Paul office. He [107] covers most of the state of Minnesota outside of the cities mentioned, and also North Dakota and a large part of South Dakota the amount of freight so solicited is described as "a large amount of freight." It is alleged that freight out of which this cause of action arose was solicited in this manner. The expense of this work of solicitation is borne by joint contribution of all the roads concerned.

Chapter 218, p. 274, Laws 1913, provides as follows:

"Any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

The statute without doubt covers this case. In explicit terms it authorizes service of summons upon the agent who was in fact served. The fact that Ballard is the agent of several other railroad companies as well as defendant, does not alter the case. He is the agent of each of the associated roads. *Archer-Daniels Linseed Co. v. Blue Ridge Despatch*, 113 Minn. 367, 129 N. W. 765; *St. Louis S. W. R. Co. v. Alexander*, 227 U.

S. 218, 228, Ann. Cas. 1915B 77, 33 S. Ct. 245, 57 U. S. (L. ed.) 486.

It is urged that a statute subjecting the defendant to the jurisdiction of the court by service upon such an agent is unconstitutional. This is the question in the case.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle was that a corporation must dwell in the place of its creation, that it could not migrate to another sovereignty, and that no officer or agent of the corporation could carry his functions with him into another state. The great increase in the number of corporations and in the extent of their business, and the inconvenience and manifest injustice of such a rule led the legislatures of the several states to provide for service of process on officers and agents of foreign corporations doing business therein. *St. Clair v. Cox*, 106 U. S. 350, 354, 1 S. Ct. 354, 27 U. S. (L. ed.) 222. There is a limit beyond which the state cannot go in subjecting foreign corporations to the jurisdiction of its courts. It is an elementary principle of jurisprudence that a court of justice [108] cannot acquire jurisdiction to render a personal judgment except by actual service of notice within the jurisdiction, upon the defendant, or upon some one authorized to accept service in his behalf, or by his waiver of want of due service. The state may designate the agent upon whom service may be made, but, in doing so, it must not encroach upon this principle. *St. Clair v. Cox*, 106 U. S. 350, 356, 1 S. Ct. 354, 27 U. S. (L. ed.) 222; *Goldey v. Morning News*, 156 U. S. 518, 15 S. Ct. 559, 39 U. S. (L. ed.) 571.

Formerly the Federal courts could take cognizance of an assumption of jurisdiction by a state court only when the judgment of the state court was called into question in another jurisdiction, and the "full faith and credit" clause of the Federal Constitution was invoked to sustain it. "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 U. S. (L. ed.) 565. The Constitution of this state contains a provision similar to that contained in the Fourteenth Amendment (Const. of Min. art. 1, § 7), so that these fundamental principles are now common to both the Federal and the state Constitutions. Since they are part of the former, the Supreme Court of the United

States is the final arbiter in cases where the application of these principles comes into question, and such cases are accordingly controlled by the decisions of that court. *State v. Weyerhaeuser*, 72 Minn. 519, 75 N. W. 718.

It is well settled by the decisions of the Federal Supreme Court that three conditions are necessary to give a court jurisdiction in *personam* over a foreign corporation: "First, it must appear that the corporation was carrying on its business in the state where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state; third, the existence of some local law making such corporation amenable to suit." *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 618, 19 S. Ct. 308, [109] 314, 43 U. S. (L. ed.) 569, 574, quoting *U. S. v. American Bell Telephone Co.* 29 Fed. 17.

This decision might be placed on narrow ground. It is well recognized where a state by statute designates an agent of a particular character as an agent upon whom process may be served, the corporation by sending such an agent into the state assents to the statute, and clothes the agent with authority to receive service in its behalf. *Baltimore, etc. R. Co. v. Harris*, 12 Wall. 65, 81, 20 U. S. (L. ed.) 354, 358; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 U. S. (L. ed.) 451; *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 U. S. (L. ed.) 292; *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 254, 29 S. Ct. 445, 53 U. S. (L. ed.) 782, 786; and the same result follows where the corporation continues its agent in the state after enactment of such a law. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 S. Ct. 308, 43 U. S. (L. ed.) 569. If it can be said under the principles laid down in *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 U. S. (L. ed.) 678, 27 L.R.A. (N.S.) 493, 18 Ann. Cas. 1103, and *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 S. Ct. 57, 59 U. S. (L. ed.) 193, that no such consent can be implied where the corporation sends its agent into the state under its constitutional right to engage in interstate commerce, it may be answered that in this case it does not appear that the agent Ballard was engaged exclusively in interstate commerce. His own testimony is: "I solicit coming from New York or any way; it don't make any difference where it is coming or going."

But we think it may be placed on broader ground. Just what is the limitation upon the power of the state in designating an agent, the cases have not made definitely clear. It has been said the provision "must be reasonable, and the service provided for

should be only upon such agents as may be properly deemed representatives of the foreign corporation" (*St. Clair v. Cox*, 106 U. S. 350, 356, 1 S. Ct. 354, 360, 27 U. S. (L. ed.) 222, 225); that the character of the agency must be "such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service," and such that "the law . . . ought to draw such an inference and to imply such authority" (*Connecticut Mut. L. Ins. Co. v. Spratley*, [110] 172 U. S. 602, 617, 19 S. Ct. 308, 314, 43 U. S. (L. ed.) 569, 574); that the agent must be "an agent sustaining such a relation to it that notice to the agent might well be deemed notice to the principal, without a violation of the principles of natural justice." Seymour D. Thompson, in 19 Cyc. 1328. In one case it was aptly said: "The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service." *Denver, etc. R. Co. v. Roller*, 100 Fed. 738, 741, 41 C. C. A. 22, 25, 49 L.R.A. 77.

The requirement that the corporation must be doing business in the state, is but an incident to the requirement that it must have a proper agent there. In no sense can any person be said to be the agent of the corporation in a state other than the state of its creation, unless it is transacting there the business of the corporation. The president of the corporation, while casually in another state, is not the representative of the corporation there. *Goldney v. Morning News*, 156 U. S. 518, 15 S. Ct. 559, 39 U. S. (L. ed.) 517. As to the nature of the business to be transacted, "in a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws" of the state in which the service is made. *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 227, Ann. Cas. 1915B 77, 33 S. Ct. 245, 57 U. S. (L. ed.) 480, 489. The fact that the business done is interstate in its character, does not in any manner affect the case. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 583, 34 S. Ct. 944, 58 U. S. (L. ed.) 1479, 1483.

After all it is a question whether the requirement that the corporation shall be submitted to the jurisdiction of a state court upon service of process on the agent designated by the statute, constitutes due process of law. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 S. Ct. 308, 43 U. S. (L. ed.) 569; *Old Wayne Mut. L. Assoc. v. McDonough*, 204 U. S. 8, 27 S. Ct. 236, 51 U. S. (L. ed.) 345; *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 255, 29 S. Ct. 445, 53 U. S. (L. ed.) 782, 787;

*Mikolas v. Hiram Walker*, [111] 73 Minn. 305, 76 N. W. 36; *Wold v. J. B. Colt Co.* 102 Minn. 386, 114 N. W. 243.

If this could be viewed as a new question in this case, it would seem quite clear that the representative character of this agent ought to be considered sufficient, and that the business done by this defendant in this state should be held such as to "warrant the inference that the corporation has subjected itself to the jurisdiction and laws" of this state. It is reasonable that a foreign corporation, keeping and maintaining agents in this state for procuring business for its benefit and profit should answer in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured, and that agents engaged in procuring such business should be deemed the representatives of the corporation for the purpose of bringing it into court as well. See *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 613, 19 S. Ct. 308, 43 U. S. (L. ed.) 569, 572. And we believe the authorities are in harmony with this view.

In *Denver, etc. R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L.R.A. 77, above cited, summons was served in California on W. J. Shotwell, agent of defendant, at San Francisco. Plaintiff in error neither owned nor operated any road in California. The cause of action accrued in Colorado. Shotwell was engaged in soliciting passengers and freight and inducing shippers of freight to route it over the line of plaintiff in error. He issued bills of lading for goods shipped from San Francisco. It was held that the statute of California authorized service on such an agent, and that such service gave jurisdiction. The only point of difference we observe between that case and this lies in the fact that Shotwell issued bills of lading, while Ballard in this case did not. It seems to us this difference is not vital. See also *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 U. S. (L. ed.) 292.

Defendant relies upon the case of *Green v. Chicago, etc. R. Co.* 205 U. S. 530, 27 S. Ct. 595, 51 U. S. (L. ed.) 916. It must be conceded that the facts in that case were much like those in the case at bar. The court held that doing business which was "nothing more than solicitation" does not constitute "doing business" so as to bring [112] the defendant within the Federal district so that process of the United States courts of that district can be served upon it. In a later case it was said the decision in the *Green* case was "an extreme case" (*International Harvester Co. v. Kentucky*, 234 U. S. 579, 586, 34 S. Ct. 944, 946, 58 U. S. (L. ed.) 1479, 1482), but it has never been overruled. However, in the *Green* case the *Roller* case is cited, and it is distinguished, but in no sense discredited

or overruled. Speaking of the Roller case the court said (205 U. S. 533, 27 S. Ct. 596, 51 U. S. (L. ed.) 916): "The action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts." The same observation applies to this case, and, whatever may be said of the similarity between the agency in this case and that in the Green case, we feel warranted in accepting the distinction made in the Green case and in following the Roller case, the authority of which is not questioned. The distinction is also recognized in other cases that "the act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts." *Ex p. Schollenberger*, 96 U. S. 369, 378, 24 U. S. (L. ed.) 863, 855.

What we have said as to the Green case is quite applicable to *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.* 105 Minn. 198, 117 N. W. 391. That case turned on the meaning of the statute then in force. In terms it distinguished the case then before the court from a case like this one where the statute explicitly provides for service on "an agent in [the] state for the solicitation of freight and passenger traffic . . . over its lines outside of [the] state." *Archer-Daniels Linseed Co. v. Blue Ridge Despatch*, 113 Minn. 367, 129 N. W. 765, while tending to sustain the contention of plaintiff, is not a decisive authority either way.

We find no decision anywhere holding that where a state statute expressly designates an agent with the powers possessed by Ballard in this case as a proper agent on whom to serve process, that service of process on such an agent is not due process of law.

The service made in this case gave the court jurisdiction over the defendant.

Order affirmed.

#### NOTE.

##### **Validity of Statute Designating Particular Kind of Agent of Foreign Corporation on Whom Process May Be Served.**

This note considers cases dealing with the validity of a statute designating a particular kind of agent of a foreign corporation on whom process may be served. It is not intended to include cases involving a statute which provides for service on a state officer, or makes some designation as a method of enforcing a provision requiring the foreign corporation to appoint an agent for the service of process. For a discussion of the validity of a statute requiring a foreign corporation to appoint a resident agent for the service of process, see the note to

*State v. St. Mary's Franco-American Petroleum Co.* 6 Ann. Cas. 38. And for a discussion of the question who is an "agent" within the meaning of a statute providing for the service of process on an agent of a foreign corporation, see the notes to *Saxony Mills v. Wagner*, 19 Ann. Cas. 199, and *McSwain v. Adams Grain, etc. Co.* Ann. Cas. 1914D 981.

The holding of the reported case, to the effect that the legislature may authorize service of process on an agent for the solicitation of freight and passenger traffic, is in accord with the decision rendered in *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245, 29 S. Ct. 445, 53 U. S. (L. ed.) 782, wherein the court said: "It was competent for the state, keeping within lawful bounds, to designate the agent upon whom process might be served. It chose to enact a statute providing that an agent competent by authority of the company to settle and adjust losses should be competent to represent the company for the service of process. When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service, and to be vested with authority in respect to such service so far as to make it known to the foreign corporation thus coming within the state and subjecting itself to its laws. *Lafayette Ins. Co. v. French*, 18 How. 404, 408 [15 U. S. (L. ed.) 451]. It is not necessary that express authority to receive service of process be shown. The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. This was held in effect in *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602 [19 S. Ct. 308, 43 U. S. (L. ed.) 569]. We think the state did not exceed its power and did no injustice to the corporation by requiring that when it clothed an agent with authority to adjust or settle the loss, such agent should be competent to receive notice, for the company, of an action concerning the same."

Likewise, it has been held that service is valid when executed under a statute providing that, in a civil action against a foreign corporation doing business in the state, the summons may be served on the secretary of the corporation. *Smith v. Empire State-Idaho Min. etc. Co.* 127 Fed. 462. In that case the court said: "After mature deliberation and consideration of the authorities, I feel constrained to deny the motion to dismiss, for the reason that by maintaining its principal office in Spokane the defendant has voluntarily placed itself in a situation to be sued in the courts of the state of Washing-

ton, and must be deemed to have consented to be bound by the law which authorizes service of process in actions against it to be made upon its secretary. The secretary is a proper officer to receive notice for the corporation, and notice to him of the pendency of an action is sufficient to insure a fair opportunity for the corporation to appear and defend, and such a notice is sufficient to meet the constitutional requirement of due process of law."

In *Carroll v. New York, etc. R. Co.* 65 N. J. L. 124, 46 Atl. 708, wherein a statute providing for service on "agents, clerks, and engineers" was held not to authorize, in a suit against a railroad company, service on the engineer of a steamboat owned by the company, the court said: "In its designation of the classes of persons on whom process against foreign corporations may be served, our statute must be construed in the light of the constitutional principle that only by due process of law can courts acquire jurisdiction over parties." In the same case the court applied the principle of due process as follows: "To legalize service of process upon a foreign corporation, the circumstances must show that the person on whom service is made has such connection either with the corporation or with the business out of which the alleged cause of action arose, that he should be considered the representative of the corporation for the purpose of service. If he has no connection with that business, and no general representative character in the corporation, there is no basis for a claim that the corporation has through him been brought into court by due process of law."

## STATE

v.

## BRUNETTE.

North Dakota Supreme Court—October 10, 1914.

28 N. Dak. 539; 150 N. W. 271.

### **Bastardy — Nature of Proceeding as Civil or Criminal.**

A bastardy proceeding which is brought under the provisions of chapter 5, Rev. Codes 1905, although quasi criminal in its nature, is governed, in so far as its trial is concerned, by the law regulating civil actions.

[See 11 Ann. Cas. 316.]

### **Evidence — Reputation of Defendant.**

In a bastardy proceeding which is brought under the provisions of chapter 5, Rev. Codes

1905, evidence as to the reputation of the defendant for chastity is not admissible.

### **Proof of Promise of Marriage.**

It is not error in a bastardy proceeding to permit the complaining witness to testify that the defendant, before the acts of intercourse complained of, led her to believe that they were to be married, as such evidence tends to show the relationship of the parties and is corroborative in its nature.

### **Relation of Complainant with Others — Necessity of Specific Questions.**

It is not error to refuse to permit the complaining witness to testify as to presents given her by other men, when the questions asked are general and are not confined to the times in issue.

### **Argument of Counsel — Rebuke by Court Justified.**

Where counsel for defendant in his closing argument makes a statement: "This is M., I could say more. I couldn't say less. He is an absolutely unreliable man and an absolutely unreliable police magistrate"—and there is no evidence in the record which tends in any way to question the general reliability of the witness, nor any which casts discredit upon his career as a police magistrate, it is not error for the court to say: "I think you will have to be a little careful, Mr. H., in the use of your words. You have a certain latitude, but beyond that, please don't go. . . . Getting so close to the line, it was dangerous."

### **Bastardy — Cross-examination of Complainant.**

It is not error in a bastardy proceeding to refuse to allow the complainant to testify on cross-examination as to whether she had, outside of the period of gestation, asked the defendant to go with her to a house of prostitution.

### **Necessity of Corroboration of Complainant.**

It is not necessary to a conviction under chapter 5 of the Criminal Code of North Dakota (Rev. Codes 1905) that the testimony of the complainant should be corroborated by other evidence.

### **Instructions — Necessity of Specific Objection.**

Where counsel wishes to take advantage of alleged errors in the court's charge, he should point out the portion of the charge which is subject to criticism, and wherein the defects, if any, consist.

### **Bastardy — Judgment — Mode of Ascertaining Facts.**

Section 9655, Rev. Codes 1905, which provides that in a bastardy proceeding and in cases of a verdict of guilty, the court "shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child until such time as the child is likely to be able to support itself. . . . The court may at any time upon the motion of either party upon ten days' notice to the other party, vacate or modify such judgment as justice



may require" presupposes that the court shall reasonably acquaint himself with the necessities of the case. It nowhere, however, provides for the method of how the information shall be obtained. The taking of testimony, therefore, upon such questions and before the rendition of judgment is not necessary, where the station in life, age, and occupations of all of the parties interested have been fully exposed upon the trial, and especially where the defendant takes no exception to the methods pursued by the trial court until after the rendition of the judgment.

**Witnesses — Examination of Expert — Use of Scientific Books.**

Before the contents of medical books may be introduced in evidence and read to the jury for the purpose of refuting the testimony of a medical expert, it is necessary that the attention of the witness shall be first called to such books, and that he shall have based his opinion upon the same, and it would be a mere evasion of the rule to allow counsel, in the cross-examination of a witness who has not either based his opinion upon the specific book nor upon the authorities generally nor whose opinion in the nature of things must necessarily be based upon authorities, to read to such witness portions of a medical work, and to ask him if he concurs in or differs from the opinions therein expressed. Such a proceeding would be nothing more nor less than impeaching the witness by a text-book on which he has in no way relied, and where no foundation for his impeachment has been laid, and by an authority who is not present in court and cannot be cross-examined.

[See note at end of this case.]

**Same.**

Where, however, a medical witness has in his examination in chief based his opinion upon the medical authorities generally, rather than upon the result of his own personal experience, it is permissible in cross-examination to read to him portions of medical works and to ask if he concurs therewith or differs therefrom, and to thus test his knowledge and reading and accuracy, even though he has not, in his direct or cross-examination, referred to any specific work. Where this is done, however, the proper practice is for the court to caution the jury that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Cass county.

Prosecution for bastardy. State, plaintiff, and Francis Brunette, defendant. Judgment for plaintiff. Defendant appeals. **REVERSED.**

[541] This is an appeal from a judgment of the district court of Cass county, and from an order denying a motion for a new trial, and which judgment determined that the de-

fendant was the father of a bastard child, and ordered him to pay for its support the sum of \$120 a year, quarterly, until the 10th day of August, 1917, and \$150 a year thereafter until the 10th day of August, 1928, and to provide a bond in the sum of \$2,250, or on default to be committed to the county jail.

*M. A. Hildreth* for appellant.

*A. W. Fowler* for respondent.

[543] *BRUCE, J. (after stating the facts).* —Counsel for appellant has made seventy-eight assignments of error in this case, and states in his brief that these various assignments "will convince every unprejudiced mind that the defendant did not have a fair and impartial trial, and that the rulings of the court were highly prejudicial." We cannot see any merit in any of these assignments, and yet we do not plead guilty to prejudice in this matter, nor can we find anywhere in the record any indication of prejudice on the part of the learned trial judge.

The first assignment of error claims that it was prejudicial error for the trial court to refuse to permit the defendant to introduce testimony [544] showing that his reputation as to chastity and virtue prior to being arrested was good. In the case of *State v. Brandner*, 21 N. D. 310, 130 N. W. 941, the court has held that a bastardy proceeding which is brought under chapter 5 of the Code of Criminal Procedure is quasi-criminal in its nature, but that the legislature has provided in §9653, Rev. Codes 1905, and had the constitutional right to provide, that the trial should be governed by the law regulating civil actions. Such being the case, we seem to have no option but to hold that in such cases the civil rule as to the admissibility of character evidence prevails; and that according to such rule, and except in the case of libel and slander, such evidence is inadmissible, seems to be overwhelmingly, if not universally conceded. *Jones*, Ev. § 148; *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382; *Walker v. State*, 6 Blackf. (Ind.) 1; *Houser v. State*, 93 Ind. 228; *Low v. Mitchell*, 18 Me. 372; 5 Cyc. 662; *Sidelinger v. Bucklin*, 64 Me. 371; 3 Am. & Eng. Enc. Law (2d ed.) 884.

The cases cited by counsel for respondent, indeed, are all strictly criminal cases, involving offenses such as murder, larceny, and assault and battery; and though, in addition thereto we have been able to find the cases of *Hawkins v. State*, 21 N. J. L. 630, *Dally v. Woodbridge Tp.* 21 N. J. L. 491, and *Webb v. Hill*, 115 N. Y. S. 267, which seems to hold to a contrary doctrine (and these are all which we can find), all of them treat the action as criminal, or at least quasi-criminal,

and in none of them is to be found a reference to a statute such as ours, which provides that "the trial of such proceedings . . . shall be governed by the law regulating civil actions." Rev. Codes 1905, § 9653. The case at bar, indeed, seems to come squarely within the rule that in a civil action (and though quasi-criminal in its nature this action, as far as procedure is concerned, must be treated as a civil one), and except in the cases of slander and libel, the character of the defendant is not in issue, and that evidence in relation thereto is therefore inadmissible. Jones, Ev. § 148.

We find no reversible error in the rulings of the trial court on the cross-examination of the plaintiff's witness, Dr. Chagnon. It is argued that the doctor had testified on direct examination that the normal period of gestation is 270 days; that the medical authorities and physicians laid down as a minimum and maximum, 270, 260, and 265 days, or a few days over. He then testified, over the objection of the [545] defendant, that it was a fact that some of the physicians and text-books laid down a minimum as low as 249 or 285 days. He then testified that a child could be born at seven months, or eight months, and live, and that in his opinion, from the character of the child with respect to the quality of its nails and hair, it was a normal child.

On the cross-examination the following took place.

Defendant's counsel: Q. Let's see if you will agree with what I am going to read to you (reads). "The duration of pregnancy has an important bearing upon the questions of legitimacy and paternity. The signs of pregnancy, time of quickening, etc., have already been considered in another connection."

Plaintiff's counsel: Just a minute. If the court please, we object to this as not proper cross-examination. It doesn't seem to me counsel should read this. . . .

The court: Let's see the book, and I can see just what is coming. . . .

Plaintiff's counsel: Our objection is that it is not proper to use a medical book of this character on cross-examination.

The Court: Objection sustained.

Defendant's counsel: I would like to make a little offer of proof.

The Court: Well, all you want to do is to read from a book. You can ask him any question you have a mind to, bearing upon that subject, but the only extent of this rule is that you can't read from the book. . . .

Defendant's counsel: I can't use the book?

The Court: That is the point; you can't use the book. You can ask any question as to the subject matter in controversy, but you can't read from the book.

Defendant's counsel: Then I understand, your Honor, it isn't permissible to examine an

expert witness as to whether or not he agrees with certain language that is laid down in a treatise; is that the extent of your Honor's ruling?

The Court: You can ask that, but you can't read from the book.

Defendant's counsel: The defendant now offers to prove by questions to be put to this witness, based on the testimony of the other authors, that there isn't a case on record of a full-grown child where the period [546] of gestation was less than 265 days, and that in the case at bar the child was a full-grown child, and that the rule at common law and in the civil codes of the country fixes the period of gestation at 280 days, or, as some books say, 28 weeks, not less; and from that to 40 weeks; and I offer to read from a standard work on medical jurisprudence, and there form part of a hypothetical question to be put to the witness that the percentage as fixed by Athel's Table shows that the general rule is not less than 266 days, and that the maximum rule is 280 days, and that a child born at a period of 249 days would not and could not, according to medical jurisprudence, be a normal child, but would be an abnormal child; and I also in this connection maintain that in the direct examination of the witness by the state's counsel I am entitled under the rules of legitimate cross-examination to examine this witness thoroughly on that subject in the line that I have suggested to the court.

Plaintiff's counsel: Objected to upon the ground that it is not proper cross-examination, and irrelevant and immaterial, and that the rules of law do not permit the use of text-books in the manner sought to be used by counsel in his offer, and that the effect of the offer is to impeach the witness by the use of a text-book, and it comes squarely within the rule as laid down by all the authorities.

The Court: The court in ruling upon this question makes the following statement: At the time this objection was first interposed, counsel for the defendant, as will appear from the record, had in his hands a book entitled "Medical Jurisprudence, Student's Series, by M. D. Ewell," and had said book open at page 190, and was reading from ¶ 2 on said page, and, as stated by counsel, expected to read the balance of that paragraph, including what Dr. Tiddig said. The court believes that this method of procedure is contrary to the rule as laid down by Jones and other authorities, and especially as found in Jones on Evidence, 2d ed. p. 732, wherein the author states: "It would be a mere evasion of the general rule under discussion if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed; hence this is not allowed." The

same being supported by *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Bloomington v. Shrock*, 110 Ill. 219, [547] 51 Am. Rep. 678; *State v. Winter*, 72 Ia. 627, 34 N. W. 475, as appears by the note on said page 732. For the purpose of not being misunderstood, the court further states that he understands the rule will permit counsel for the defendant to ask the witness some of the questions which have been couched in his recent offer, with reference to the period of gestation,—as to the knowledge of the witness with reference thereto,—as based upon his study of the several works. That if he desires to offer any book in evidence the attention of the witness must be called directly to the statement of each author, and that the witness must have contradicted the author before the authority could be produced, and the same read to the jury. Now I think that it is also included within the rule.

Plaintiff's counsel: But I think the court has it wrong.

The Court: I don't so understand it.

Plaintiff's counsel: The rule is here stated, starting at the bottom of page 731 (reads). "But with reference to offering books in evidence the rule is that when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony!"

The Court: That is what I intended to say.

Defendant's counsel: Counsel for the defendant desires to have the record show that he has no intention of offering this book in evidence; that his intention is to read from this book and from other like authorities, standard works on this subject, certain hypothetical question to be put to this witness as applied to the case at bar, for the purpose of showing the jury that the child that is in controversy here was a full-grown normal child, and that under all the sound rules must have been begotten at a period of not less than 265 days and not to exceed 285 days, and that from the appearance of the child the witness is unable to state whether it was a 280-day child or 265-day child.

The Court: Well, I think that the record is complete enough. You don't misunderstand me, do you Mr. Hildreth?

Mr. Hildreth: No sir, I don't. I understand. I offer to examine this witness along the line above stated.

Plaintiff's counsel: This offer is objected to on the ground that the use of the text-books in the manner contemplated, namely, using them in framing hypothetical questions, is a mere evasion of the rule as [548] stated in Mr. Jones, and the effect is to use the text-book in impeachment of the witness on cross-examination, and that if any hy-

pothetical questions are proper on cross-examination, or are to be framed and put to the witness, the counsel should not use, in the presence of the jury, the text-book in framing the questions, for the reason that it will necessarily and unquestionably have the direct effect upon the jury of leading them to believe that the text-book which the counsel is using and from which he frames his hypothetical questions are in direct conflict. Might just as well offer in evidence the text-book.

The Court: Objection sustained.

Counsel for defendant claims that he was unduly restrained in his cross-examination. We do not so hold, however, and have merely cited the proceedings at length because of the strenuousness of counsel's contention, and his constant imputation of prejudice on the part of the trial court. If counsel for defendant desired to refute the testimony of the witness by the use of the books in question, he should have first asked the witness if he based his opinion on any medical works, and, if so, on what; and then, and not till then, was he entitled to offer the book, or any book, in evidence for the purpose of impeaching this testimony. The rule is too well established to need amplification here. See *Jones*, Ev. § 578; *Abbott*, Civil Trial Brief, 329. And it is equally well established that it would be a mere evasion of the general rule if counsel were allowed on cross-examination to read to the witness portions of medical works, and to ask him if he concurred in or differed from the opinions there expressed. *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 678; *State v. Winter*, 72 Ia. 627, 34 N. W. 475. Such procedure, indeed, would be nothing more or less than impeaching the witness by a text-book on which he had in no way relied, and would be the same as offering in evidence the text book read from. *Jones*, Ev. 2d ed. § 579.

But counsel for defendant further complains that in spite of this ruling the court permitted the plaintiff to introduce a certain work of Professor Edgar, upon the cross-examination of defendant's witness, Dr. Vidal. The ruling of the learned trial judge, however, was entirely correct, and it merely serves to illustrate the point under consideration, [549] and to make clear the distinction which is made by the authorities, and which was emphasized by the trial court; for in this instance the attention of the witness had been directly called to the book in question, and the matter came fully within the rule laid down by the authorities. A perusal of the record will, we believe, make this clear to all.

It is "Cross-Examination by counsel for plaintiff.

Q. Doctor, this question of the average period of gestation is a question concerning which there is a great deal of dispute in the medical profession, is there not? I mean by that great deal of difference of opinion?

A. There is a few days. Matter of a few days in—between the best authorities; matter of two or three days one way or another. That is, some of the authorities lay down a lower average of gestation than others. That is true. I think I am familiar with a great number of authorities upon what the authorities hold upon this subject. I am familiar with what Professor Edgar holds. He is professor of Obstetrics in Cornell University. He is a leading authority on the subject in this country, and a very good authority.

Q. Do you recall what he lays down as the average period?

Defendant's counsel: Objected to as incompetent, irrelevant, and immaterial; improper cross-examination, and I assume that it is practically what I attempted to ask.

By the Court: Now, it just illustrates the objection. It is a perfect illustration of my rule. The objection is overruled. You may answer the question.

Exception by defendant.

A. I believe 274 days. I am not positive; but that would be my opinion. I am not positive that it wasn't 272, but that would be my impression.

Q. Well, to refresh your recollection, doctor, I will call your attention to the following language found at page 144 of Professor Edgar's work on the practice of obstetrics, 3d edition—1911 edition—which language reads as follows:

Defendant's counsel: Just a moment. I object to the counsel's using the book to cross-examine this witness. I haven't been permitted [550] to use any books, and I object to the testimony as being incompetent, irrelevant, and immaterial, and improper cross-examination. I haven't referred to this book in no way, and when I sought to ask him about this book, as I understood the Court to rule, I could not refer to it.

By the Court: Again the court holds with the rule laid down by Jones and others. This is cross-examination, and under the rule in cross-examination this is permissible. You may answer the question.

Plaintiff's counsel: I haven't quite finished. I didn't want to read until the court rules. (Continued reading): "We learn from experience that the average apparent duration of pregnancy is ten lunar or nine calendar months, or 40 weeks or 280 days from the beginning of the last menstrual period, or 272 days from the date of conception." Now, from that language, doctor, would you say that the average period of

gestation from the date of conception, laid down by Professor Edgar, was 274 days or 272 days?

A. 272.

Counsel for defendant: Objected to—wait a minute, doctor. Objected to as incompetent, irrelevant, and immaterial; improper cross-examination.

The Court: Overruled. You may answer.

Exception by defendant.

A. 272. It reads from the book; it must be right. My impression was 274. I have a good many authorities; I haven't taken pains to look them up for a long time. Yes, the authorities differ. Some of them place it as low as 268 days; some 268 days; some 269 days; some 272 days. I testified that in my opinion the average number of days of gestation was 278. That is figuring from the first day of the last menstrual period. Assuming that a woman's menstrual period was November 16, 1911, you would figure this 278 days from that day. Now if the intercourse took place November 25th, or nine days later, then if I was going to figure the period of gestation from the date of intercourse, I would subtract 9 days from 278. That would make it 269 days from the period of intercourse to the date the child was born. But the 278 days I gave as a general rule dates from the first day of the menstrual period preceding, and if I was going to figure from the date of intercourse I would, of course, deduct the days between.

Q. And in the supposed case it would make it 269 days as the actual [551] period of gestation from the time of intercourse to the date of birth. Now, doctor, in arriving at this matter of average period of gestation, it is arrived at, is it not, by taking a number of cases and averaging them up?

A. Yes sir. That is all it amounts to. Supposing Professor Edgar in fixing his rule would take 1,000 cases of pregnancy of childbirth, there would be a number of cases that would be a great many days less than the average. Some of them, say, 250 days; some of them 252 days; some of them 254 days; some of them 258 days, and as you got up to the average the number of cases would increase at a given date. Some of them would run 274, 276, and so on, and he would take and add them all together, and divide it by the number of cases, and get the average.

We think there was no error in permitting the complaining witness to testify that the defendant had, before the acts of intercourse, complained of, led her to believe that they were to be married. This evidence tended to show the relationship of the parties, and was corroborative in its nature, just as much so in fact as evidence that the parties had been seen together at or about the times of the alleged intercourses.

There is no merit in the objection that defendant's counsel was not allowed to cross-examine the complainant in regard to her relations with the man Anderson. Even if the privilege was improperly denied in the first instance, the error, if any, was entirely cured by the granting of the privilege, and the full use thereof, later on in the trial, and when the plaintiff was recalled. Nor was there any merit in the contention that defendant was not allowed to question plaintiff as to presents alleged to have been given to her. The questions were very general, and hardly confined to the times in issue. There, too, must be some reasonable limit to cross-examination; and receiving presents is hardly in itself evidence of illicit relationship.

There is certainly no merit in appellant's contention that the trial court erred in his remarks to counsel during his argument to the jury, or that he thereby "emphasized his prejudice that he had manifested during the case." During counsel's argument he said to the jury: "This is H. F. Miller. I could say more. I couldn't say less. He is [552] an absolutely unreliable man, and an absolutely unreliable police magistrate." To this counsel for the state objects, saying: "Object to that statement. No evidence in the record to substantiate any such statement." The court thereupon said: "I think you will have to be a little careful, Mr. Hildreth, in the use of your words. You have a certain latitude, but beyond that, please don't go." Counsel for defendant then responded: "I didn't think I was going beyond the line," and the court continued: "Getting so close to it, it was dangerous." We really do not see what less the court could have said under the circumstances. In fact, we believe that he would have been justified in saying a great deal more. The remarks of counsel for the defendant were, indeed, entirely improper. There was, it is true, some question as to whether the witness Miller's version of what took place in the justice's court was the correct one, but there was absolutely no evidence in the record at all that he was "*an absolutely unreliable man, and an absolutely unreliable police magistrate.*" Witnesses have at least some rights which counsel are bound to respect, and our legal system will soon break down if one subpoenaed in a lawsuit, and with no opportunity for a hearing or a defense, is subjected to the danger of not merely having his testimony in the particular lawsuit criticized and refuted, but of having his personal integrity and professional or business career assailed. The remarks of counsel, indeed, were not even "close to the line." They went far beyond it, and if the really restrained comment of the presiding judge was evidence of prejudice on his part, we might just as well do away with orderly court trials alto-

gether, and return once more to the primitive but speedy and character-saving procedure of trial by battle. It is time, indeed, for all of us to cease imputing prejudice, and to realize that an honest difference of opinion can exist without prejudice and without ulterior motive.

It was not error to refuse to allow the complainant to testify on cross-examination as to whether she had asked the defendant to go over to Moorhead with her. The question in the first place was not proper cross-examination, as it did not touch upon any subject which was treated upon in the direct examination; in the second place, the time alleged was outside of the period of gestation, and the evidence could only have been asked for the purpose of injuring the plaintiff's [553] general reputation for chastity by proof of a specific act of unchastity, which cannot be done, for the simple reason that the very nature of the proceeding is at least to some extent an admission of unchastity, and such evidence would be merely diverting attention from the principal question to be tried. *Jones, Ev. § 153; Rawles v. State, 56 Ind. 433; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823.* On the other hand, it was not improper to allow the witness to testify as to the giving of a ring by defendant to her, and the conversation relating thereto. Foundation for this evidence was not only laid in the cross-examination by defendant's counsel himself, but it was competent to show the general relationship of the parties.

We do not agree with counsel for appellant that the evidence is not sufficient to sustain the verdict. The plaintiff positively swore to sexual intercourse with the defendant on November 27th, 1911; that she had a menstrual period on November 16th, and did not have it on December 16th, nor until after the child was born, on August 10, 1912. There, too, is corroborating evidence in the record, which, though not very strong or very conclusive, has yet some weight. We have no right to interfere with the verdict of the jury. *State v. Peoples, 9 N. D. 146, 82 N. W. 749.* It seems generally to be held, indeed, that in the absence of a statute it is not necessary to a conviction that the testimony of the complainant should be corroborated by other evidence. 2 Enc. Ev. 355.

Counsel next makes a general statement to the effect that the court's charge is erroneous. He, however, points out no particular portion of the charge which is subject to criticism. Nor does he give us any idea wherein its defects consist. This is nothing more or less than an abandonment of the objection. The same is true of the objection that the court erred in refusing to give the instructions asked for, and the assignment of error that "the court erred in denying the

requests marked 1, 2, and 3" of the defendant, in the instructions to the jury. All that counsel says in his brief upon this proposition is that "these requests and instructions, when taken together, clearly indicate that the rights of the defendant were not safeguarded by instructions which the court should have given to the jury in a case of this character." It would certainly seem that this court should have something more [554] definite to pass upon, and that counsel for the respondent should have some specific allegations with which he could join issue.

Nor is there any merit in appellant's contention that no evidence was taken as to the earning capacity of the parties to the suit, nor of the "assistance" that the mother might be able to furnish in the maintenance and education of the child, and that therefore the judgment is invalid which orders the defendant to pay the sum of \$120 a year until the 10th day of August, 1917, and \$150 from that date to the 10th day of August, 1928. The statute (§ 9655, Rev. Codes 1905) expressly provides that the court, in cases of a verdict of guilty, "shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child, until such time as the child is likely to be able to support itself. . . . The court may at any time, upon the motion of either party, upon ten days' notice to the other party, vacate or modify such judgment, as justice may require." This statute, of course, presupposes that the court shall reasonably acquaint himself with the necessities of the case, but it nowhere provides for the method nor how the information shall be obtained. Here the station in life, age, and occupations of all of the parties interested had been fully exposed upon the trial, and there was clearly no necessity for taking any further testimony. The sums ordered to be paid were certainly not excessive. So, too, not only did defendant's counsel, who appears to have been present at the time, take no exception to the methods pursued by the trial court, or make or ask permission to make any proof upon the subject, but the statute expressly provides "that the court may at any time, upon the motion of either party, upon ten days' notice to the other, vacate or modify such judgment, as justice may require."

The judgment of the District Court is affirmed.

On Rehearing.

(December 23, 1914.)

BRUCE, J.—We are now satisfied that our original opinion must be modified and the judgment be reversed, and that the learned trial court erred in its rulings as to the cross-

examination of Dr. Chagnon, and failed to distinguish between the use of medical books for the purpose of cross-examination merely, and to test the knowledge and reading and [555] accuracy of the witness who is upon the stand, and the use of such books in the examination in chief or in rebuttal, or by reading them, directly or indirectly, to the jury upon cross-examination, and not for the purpose of testing the learning, reading, or accuracy of the witness, but in order to get their contents and the opinions of their authors before the jury.

Although there is some conflict in the authorities and much obscurity of thought therein to be found, the distinction seems to be very clear. It is that, where the expert has testified from his own experience, and from his personal experience alone, and has not based his opinions upon any specific authorities or upon the authorities generally, the scientific treatise may not be read, either directly or indirectly, to the jury or to the witness in the presence of the jury, so that in any way their authority may be obtruded upon them. Hypothetical questions may, of course, in all instances, be framed from the books, but the books themselves should not be paraded before the jury. *Brown v. Springfield Traction Co.* 141 Mo. App. 382, 125 S. W. 236.

Where, however, the witness has not testified as to the results of his experience alone, but of his reading also, or where the subject under consideration is of such a nature that his opinion must necessarily be based upon his readings and the data and conclusions of the scientific authorities, rather than upon his individual experience, the witness may be cross-examined as to the authorities generally, and may be asked if he agrees with extracts which are read to him therefrom. This method of examination is allowed in these cases, not for the purpose of rebuttal, but to test the learning of the witness and the reliability and the nature of his data, and is permissible, even though no specific book has been referred to by him. It is allowed under the liberal rule which governs cross-examination, and not for the purpose of refuting the testimony of the witness by reading such authors into the evidence, which can only be done where the witness admits either in his examination in chief or in cross-examination that he has based his opinion upon such specific authors. See *Macdonald v. Metropolitan St. R. Co.* 219 Mo. 468, 118 S. W. 78, 16 Ann. Cas. 811. Where this is done, however, the proper practice is for the court to caution the jury that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case. *Ibid.*

[556] A distinction must be made between the cross-examination of a witness for the

purpose of showing his lack of reading and training, and an attempt to overcome his evidence by reading medical works to the jury. The distinction is pointed out in the case of *State v. Moeller*, 20 N. D. 114, 126 N. W. 568, in which we said: "The fifth and sixth assignments of error relate to the sustaining of the state's objection to the following questions, asked one of the experts: 'Q. Don't you know that the text-books dealing with obstetrics and gynecology lay it down as a fact of not uncommon occurrence for a woman in a pregnant condition to inflict injuries upon the walls of the uterus, and cause similar conditions to those which were presented by the uterus described in this case?' and 'Q. Does not Hearst say in his text-book that injuries to the internal walls of the uterus resulting in septicemia may be inflicted, and in fact not uncommonly are inflicted, by the pregnant woman herself?' These questions were propounded to Dr. Larson, who conducted the autopsy. He was a most intelligent witness, but his experience was limited, and his testimony was *based very largely upon knowledge gained from reading rather than from experience*. Had these questions been submitted for the purpose of eliciting information as to the contents of text-books primarily, the ruling of the court might be, and doubtless would have been, correct; but it is now claimed that they were submitted solely for the purpose of testing the accuracy of the witness's knowledge and the correctness of his conclusions as an expert, that necessarily his opinions were based upon reading medical works, and that their bearing was upon the weight which should be given his testimony. If this was the reason assigned in the trial court, the ruling was error."

When we apply these principles to the case at bar we become satisfied that the learned trial court erred in regard to the examination of Dr. Chagnon. It is clear from the record that Dr. Chagnon based his opinion largely upon his reading and upon the authorities, although he referred to no specific book. Counsel for defendant, then, should have been allowed to read to him from and to question him upon the medical authorities. "We cannot conceive," says the supreme court of Nebraska in the case of *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113, "that it would be possible, by any rule of evidence, to base the testimony in chief of the witness upon his experience in obstetrics. For [557] instance, the normal period of gestation, the probability of conception in the first act of intercourse, the length of the period of gestation in case of the first as compared with subsequent children, the number of days that ill health caused by uterine disorders would shorten the period of gestation, if at all, and many other

prominent elements in the case presented by the defense, would naturally and inevitably require the witness to go outside of the domain of experience as an obstetrician, and it seems to us that he very properly and truthfully answered that his testimony was based upon *medical authorities*. For the purpose, therefore, of testing his recollection as well as his knowledge, it was proper to interrogate him as to the teachings of those authorities, and, in case his testimony was incorrect, to confront him with them in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because 'the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities.' As we have shown, the testimony entered the domain of science, and the ground upon which the objection is founded appeals most strongly to the mind of the writer as cogent reasons why the cross-examination was proper."

It is, indeed, upon this fact, or absence of fact, of the witness having based his opinion in chief upon what he had learned from the books, that the cases may be distinguished. In the case of *State v. Blackburn* the court said: "He (the witness) had not alluded to any authorities on his direct examination, as the witness had in *Cronk v. Wabash R. Co.* 123 Ia. 349, 98 N. W. 885; *nor had he based his opinion on what he had learned from the books*, as in *State v. Donovan*, 128 Ia. 44, 102 N. W. 791, and for this reason asked, as in *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113, what the several authorities taught. . . . In *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516, the expert had said that he had read text-books in order to be able to state why he had diagnosed the case as delirium tremens, and paragraphs were read to him, and inquiry was made as to whether he agreed with the authors. *This was approved on the ground that he had assumed to be familiar with the authors, and in no better way could his knowledge on the subject be tested*. . . . In the case at bar the physician *had based his opinion solely on his own experience and observation*, and therefore it [558] was error to cross-examine him on the state of the medical authorities, in order thereby to get their supposed teachings before the jury. . . . Moreover, the inquiry was not one depending so much on skill in the profession as upon observation in its practice."

In the case of *State v. Winter*, 72 Ia. 627, 34 N. W. 475, the question was asked upon the examination in chief, and not upon cross-examination. "He [the witness]" the court said, "was then asked the following question: 'Have you read the article by Dr. Casselman,

in the American Journal of Insanity, in which the author says, Mania,—instantaneous, temporary, fleeting,—a disease which breaks out suddenly like the sudden loss of sense by some physical disease; the subject is urged in a moment to automatic action, which would not have been foreseen? If you say you have read the above quotation, state whether the same agrees and accords with your knowledge and experience on the subject.' On the objection of the district attorney the court excluded the question. It is not claimed that the question was asked with the view of laying the foundation for the introduction in evidence of the article referred to, but the object was to elicit the opinion of the witness. It will be observed, however, that the answer of the witness (which we assume would have been in the affirmative) would have been but a reiteration, in another form, of the opinion he had already expressed. He had already testified to the existence of the very form of mania referred to in the article. The fact or theory sought to be established was material and important, but as the witness had already clearly expressed his opinion as to its truth, the court did not abuse its discretion in refusing to allow the question, which, as we have said, sought only to elicit a reiteration of that opinion. The same witness was asked the following question, which the district court ruled was incompetent: 'State whether delusion or transitory mania is a condition recognized by medical authorities.' *It would be admissible, perhaps, on the cross-examination of a medical expert, to inquire of him as to the teachings of the authorities in his profession. The object of such examination, however, would be to test the accuracy of the expert's knowledge. But the question in this case was asked not with this view, but for the purpose of proving that the theory in question is taught by the authorities. But the works themselves were admissible in evidence, and they are the only competent evidence of what they teach.*

[559] In the case of Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516, the court on page 519 said: "On the other point made, no medical books were read to the jury as evidence or for any other purpose, and it will not be necessary to discuss the admissibility of such evidence. But on cross-examination of the attending physician, who made a diagnosis of the disease of which the assured died, and pronounced it delirium tremens, paragraphs from standard authors that treat of that disease were read to the witness, and he was asked whether he agreed with the authors, and that is complained of as error hurtful to the cause of defendant. The testimony of this witness was of the utmost importance, and certainly plaintiff was entitled to reasonable latitude in the cross-examina-

tion. The witness had given the symptoms of the disease with which the assured was affected, and pronounced it delirium tremens, and as a matter of right, plaintiff might test the knowledge possessed by the witness, of that disease, by any fair means that promised to elicit the truth. It will be conceded, it might be done by asking proper and pertinent questions, and what possible difference could make whether the questions were read out of a medical book or framed by counsel for that purpose. Ordinarily, the limits of cross-examination of a witness are within the sound discretion of the court, and usually the greatest latitude is allowable that can be consistently given, for the discovery of the truth. *The witness in this case stated that he had read text-books that he might be able to state why he 'diagnosed the case as delirium tremens.'* Assuming to be familiar with standard works that treat of delirium tremens, it was not unfair to the witness to call his attention to the definitions given in the books, of that particular disease, and asking him whether he concurred in the definitions. How could the knowledge of the witness, of such subjects, be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness. The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination. That the cross-examination was in the presence and hearing of the jury could not, of course, be avoided, as the witness was examined in [560] open court. No material error appearing in the record, the judgment must be affirmed."

In the case of Macdonald v. Metropolitan St. R. Co. 219 Mo. 468, 118 S. W. 78, 16 Ann. Cas. 811, the court said: "In framing questions on the cross-examination of experts, counsel held in hand medical books, and formulated questions from their language. The books were not read to the jury, but the jury could see that the examiner read from them. This method of cross-examination was objected to. The court, over objections, permitted plaintiff's counsel to adopt the scientific terminology of the author, and put the propositions to witnesses obviously asserted by him, but repeatedly cautioned the jury that what was read from the book was not evidence, and the jury should pay no attention to it; that the only thing they could consider was the evidence that fell from the lips of the witness along the line of verifying the propositions put by the examiner. Samples of these cautionary instructions are as follows (The court): 'The jury will not give any more



weight to anything Mr. Karnes reads from the books than they would to any other questions Mr. Karnes asks, unless the witness answers questions in the affirmative, thereby making it evidence in the case. . . . It is the answers of this witness, gentlemen of the jury, that is evidence in this case, and not the questions.' Error is assigned on this phase of the trial, but the point is without soundness. It has been said that it is within the discretion of the court to permit medical books to be read to the jury (*State v. Soper*, 148 Mo. 1, c. 235, 236, 49 S. W. 1007), but undoubtedly the better and generally accepted doctrine is that the contents of such books are not admissible as independent evidence. [17 Cyc. 421; *Union Pac. R. Co. v. Yates*, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 1, c. 587 et seq.] Judge Thayer in the last case puts the grounds of exclusion on, first, such evidence is not delivered under oath; second, there is no chance of cross-examining the author; third, medicine is not an exact science, doctors disagree, medical theories are subject to frequent modification and change. But while not independent evidence, and the question is a vexed one, yet there is a legitimate use of such books, at least on cross-examination, where the testimony has taken wide range and where skilled witnesses testifying as experts base their testimony on their knowledge derived from books as well as experience, as in this [561] case. Here, defendant's counsel had notified some of his witnesses that he was appealing to, and asking his doctors to draw from, their medical knowledge running back, say, two thousand years, and which could only be preserved, if at all, in book form, from the days when Socrates ordered a cock sacrificed to Esculapius, the god of medicine, and Hippocrates and Galen practised physic in Greece and Italy. Under such circumstances, we see no reason why counsel could not frame a proposition in medical science in the exact language of the author, and ask the witness whether he agreed to it, so long as this was done under the due guard of the cautionary instructions given by the court. Such is the doctrine of a learned and exhaustive note on § 440, *Greenleaf on Evidence*, 15th ed. p. 579, where it is said: 'Moreover, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation, and question him in regard to them.' Mr. Justice Scott, in *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 1, c. 519, gives that proposition the indorsement of his strong pen, though stating that the rule is liable to abuse, and great care should be taken to prevent such abuse. He there says: 'Assuming to be familiar with standard works that treat of

delirium tremens, it was not unfair to the witness to call his attention to the definitions given in the books, of that particular disease, and asking him whether he concurred in the definitions. How could the knowledge of the witnesses of such subjects be more fully tested? That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness.' To the same effect is *Hess v. Lowrey*, 122 Ind. 1. c. 233 et seq. 7 L.R.A. 92, 17 Am. St. Rep. 355, 23 N. E. 156. In *State v. Wood*, 53 N. H. 1. c. 494, 495, Sargent, Ch. J., speaking to the point, said: 'As to Dr. Ferguson's cross-examination, we see no reason for any objection to it. He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observation, but from what he had derived merely from reading and studying medical authorities. Then he was cross-examined as to that general reading, not by putting in the books, but by inquiries whether, in his general reading, he had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading.' *Collier v. Simpson*, 5 C. & P. 73, 24 E. C. L. 219, goes further than the present case. [562] There Tindal, Ch. J., in speaking of a medical expert, says: 'I think you may ask the witness whether in the course of his reading he has found this laid down.' And that was upon direct examination. The Chief Justice further says, 'I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Hallford (the witness who was the president of the College of Physicians) his judgment and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge.' We rule the point against defendant."

In the North Dakota case of *Kersten v. Great Northern R. Co.* 28 N. D. 3, 147 N. W. 787, and where an examination of the record discloses the fact that the doctor had expressly stated that he had based his opinion upon the medical writers, the court said: "The fourth complaint of appellant relates to the cross-examination of defendant's witness, Dr. Sihler. The doctor had given his opinion as to the effect upon the brain of a blow delivered directly above the injury. Upon cross-examination he was asked whether or not certain medical text-books and authorities sustained a doctrine contrary to that held by the witness. It appears that the text-book to which reference was made was offered to the witness, and that the author at that time was a teacher of surgery in Johns Hopkins University. Thus the cross-examination was evidently in good faith to test the accuracy of the conclusion given by the expert who was upon the stand. Great

latitude should be allowed in the cross-examination of experts to test their credibility and knowledge. *Dilleber v. Home L. Ins. Co.* 87 N. Y. 79; *McFadden v. Santa Ana, etc.* St. R. Co. 87 Cal. 464, 11 L.R.A. 252, 25 Pac. 681; *Jones, Ev.* 2d ed. § 389; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760. We think the cross-examination proper." See also *State v. Moeller*, 20 N. D. 114, 126 N. W. 568; *Macdonald v. Metropolitan St. R. Co.* 219 Mo. 468, 118 S. W. 78, and note thereto in 16 Ann. Cas. 810, 818.

In the case of *Hess v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156, we find the following: "Complaint is also made that the court erred in admitting in evidence extracts from certain books or treatises on surgery. It does not appear that extracts from the books were read in evidence, or admitted in evidence as such. In the cross-examination of a medical expert, the witness was asked [563] whether certain statements were not made by certain writers on surgery, the statement referred to being read from a book held by counsel, as part of the question. It is recognized as a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation. *Ripon v. Bittel*, 30 Wis. 614; *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *State v. Wood*, 53 N. H. 484; *Rogers, Expert Testimony*, §§ 181, 182. The opinion of a witness may be tested by a cross-examining counsel by reading from medical books. 2 *Best, Ev.* pp. 882-884. Medical books may be read to the jury, not for the purpose of proving the substantial facts therein stated, but to discredit the testimony of experts who refer to books as authority for or in support of their opinions. *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862."

In *Fisher v. Southern Pac. R. Co.* 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104, we find the following: "On cross-examination of *Woolsey*, a witness called as an expert by defendant, plaintiff's counsel was allowed, against the objection of defendant, to read statements from medical works, and to ask the witness if he agreed with the authors. This is assigned as error. Plaintiff's counsel defends the ruling here, on two grounds: (1) That the witness, on his direct examination, testified to certain medical opinions and supported his statements by the assertion that they conformed to the authority of medical works; and he claims that the rule is that if the witness, either in direct or cross-examination, relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he

relies, to show that his understanding of them is incorrect, or to contradict him; and (2) that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions. A careful examination of the evidence has convinced me that the rulings complained of cannot be defended upon either of these grounds, though the legal proposition be admitted. As to the first, it is plain that some of the extracts read have no reference to any opinions of the witness which he sought to sustain by a reference to medical writers, either generally or specifically, except in response to a direct question by plaintiff referring to such writers. As to the second ground, it is not so plain. The value of an effective [564] cross-examination as a means of showing the incompetency of a witness or his lack of integrity and the true value of his testimony can hardly be overrated; and this is true in a special sense as to expert testimony, where the party may choose from the body of a profession those whose opinions are most favorable. It is quite natural, and certainly common, for one called as an expert to enhance his authority by his power of self-assertion, and there is reason to fear that these opinions are not always as impartial and indifferent as a judicial utterance should be. While it is to be regretted if in the proper exercise of the right of cross-examination it shall appear that certain medical writers of repute differ from the witness, and so a party will get the benefit of unsworn testimony, *still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive a party in such a case of the best touchstone known to legal science, by which to estimate the value of testimony.* And if, on general principles, such questions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow. All the works on medical jurisprudence which I have examined seem to sustain this position, and some cases, although they are not uniform. *Brodhead v. Wiltse*, 35 Ia. 429; *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Ripon v. Bittel*, 30 Wis. 614; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *State v. Wood*, 53 N. H. 484. But since consequences are likely to follow which admittedly should be avoided if possible, *such examination should be strictly limited to this one purpose, for which only it can be permitted. I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose.* No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the

claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect. *They were evidently intended as evidence for the plaintiff, to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony.* As it seems to me a new trial must be granted for this error, it becomes unnecessary to review the other assignments."

[565] In Greenleaf on Evidence, 16th ed. vol. 1, p. 269, § 162K, we find the following: "It has been thought by some courts that an expert witness may be discredited by reading an opposite opinion from a professional treatise, or by being asked whether opposing views have not been laid down by writers, or whether he agrees with certain opposing opinions then read; . . . and it is generally held that it cannot be done, except that where a witness has referred to a treatise, *or to writers generally*, as agreeing with him, the treatise may be shown not to agree with him, just as any other assertion of a witness may be disproved."

In the case of State v. Wood, 53 N. H. 484, the witness (Dr. Ferguson) had several books upon the table during his direct examination, and was apparently about to read from them when he was prevented by the objection of the state. "Upon cross-examination, counsel for the state proposed several questions similar in form to the following: Have you found, in the course of your reading or study, this sentiment in regard to oil of savin (then reading from a sheet of writing paper in his hand): 'Death in an hour after taking it?' Have you also found this: 'A woman took one hundred drops of oil of savin every morning for twenty days and went full time?' or this: . . . 'Almost fatal consequences in producing abortion?' or this: 'Its properties to produce abortion have been denied by late authors, of weight and reputation?' or this: 'Has no action as an abortive except like other irritants?' The respondent objected that, if he could not be permitted to put in the books themselves, such questions were inadmissible; but the state were allowed to put the questions, subject to exception, and the witness answered several of them in the affirmative. Subsequently, upon redirect examination, the respondent asked several questions similar in form to the above, as to the existence in the books of statements tending to confirm the testimony of the witness on his direct examination."

The court on page 494 of its opinion said: "As to Dr. Ferguson's cross-examination, we see no reason for any objection to it. *He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observa-*

*tion, but from what he had derived merely from reading and studying medical authorities.* Then he was cross-examined as to that general reading, [566] not by putting in the books, but by inquiries whether, in his general reading, he had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading. Collier v. Simpson, 5 C. & P. 73, 24 E. C. L. 219, goes further than the present case. There Tindal, Ch. J., in speaking of a medical expert, says: 'I think you may ask the witness whether in the course of his reading he has found this laid down.' And that was upon direct examination. The chief justice further says: 'I do not think that the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford [the witness who was the president of the College of Physicians] his judgment and the grounds of it, which may be in some degree founded on books, as a part of his general knowledge;' and see 1 Wharton Crim. Law, 6th ed. § 50. It is settled, in Taylor v. Grand Trunk R. Co. 48 N. H. 304, 2 Am. Rep. 229, that a physician may give his opinion as an expert upon a subject concerning which he has had no practical experience, and where his knowledge is derived from study alone. This case, we think, fully sanctions the direct examination of this witness upon a subject where his knowledge was *derived from books alone*; and the cross-examination was *simply the testing of the correctness of his opinion by the same standard upon which the opinion was founded,—the authority of the medical books which he had read.* We think this ruling was right."

In speaking of this opinion, and in a case in which the general rule was announced that "an expert medical witness cannot be discredited by reading an opposite opinion from a text-book in the presence of the jury, and asking him whether it is correct, where he has in no way referred to the book to sustain his opinion or otherwise relied on it," the supreme court of North Carolina, in the case of Butler v. South Carolina, etc. R. Co. 130 N. C. 15, 40 S. E. 770, said: "The last one [the opinion in question] relates to a cross-examination upon matters which the witness testified he had learned from certain medical authorities, *not from experience or actual observation.* The books were put in evidence, —were excluded—and the court held that upon the cross-examination counsel could be allowed to ask if the witness had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading."

In the case of Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862, the [567] court said: "The rule is acknowledged in this state that medical books are not admissible as a sub-

stantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it, and among others the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement by referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of. *Ripon v. Bittel*, 30 Wis. 614; 2 Whart. Ev. § 666."

In the case of *Byers v. Nashville, etc. R. Co.* 94 Tenn. 345, 29 S. W. 129, the court said: "But we are of opinion that the objections to the use of the book as first made were not well taken. The admission of such evidence is a matter largely in the discretion of the court, as well as the mode of conducting the examination. The witness Fravel was testifying not only as to the facts connected with the running of his train when the killing occurred, but also as an expert engineer, acquainted with and competent to testify as to the running of trains generally. *When a witness is testifying as an expert, it is competent to test his knowledge and accuracy upon cross-examination by reading to him, or having him read, extracts from standard authorities upon the subject-matter involved, and then asking him whether he agreed or disagreed with the authorities, and comparing his opinion with those of the writer.* *Hess v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156; *Fisher v. Southern Pac. R. Co.* 89 Cal. 399, 26 Pac. 894, 9 Am. Neg. Cas. 104; *Richmond, etc. R. Co. v. Allison*, 86 Ga. 145, 11 L.R.A. 43, 12 S. E. [568] 352; 1 Greenl. Ev. 15th ed. § 440, note. *We think it therefore admissible for the attorney to use the book in shaping his questions, and it was not error for him to require the witness to examine and read portions of the book with a view of testing his knowledge by proper questions; and this, so far as the record shows, is all that was attempted to be done in the first examination when the objection was made. But reading the book to the jury as evidence*

*of the facts therein stated, and as a general rebuttal of the testimony of the expert, stands on a different basis.* It does not appear that this was done during the examination and cross-examination of the defendant's witnesses, but after they were through. Then the book was introduced again by the plaintiffs' counsel, and several pages read to the jury, and no objection was at this time made. In the absence of such objection made when the book was thus offered and read for this purpose and in this way, there is no reversible error. See 1 Greenl. Ev. 15th ed. § 440, note e, in which the following propositions are laid down, and cases cited in support: 'The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, and allowing such books to be read from to contradict an expert generally. *However, it is a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subject under investigation, and question him in regard thereto.* Scientific books may be used by the attorney in framing his questions for the witness. He may read the question from such a book to the witness, either on direct or cross-examination. *Tompkins v. West*, 56 Conn. 485, 16 Atl. 237. And if an expert has quoted a book, it may be read to him to show that he has misquoted it. *Underhill*, Ev. § 189; *Ripon v. Bittel*, 30 Wis. 614."

In the case of *Clukey v. Seattle Electric Co.* 27 Wash. 70, 67 Pac. 379, the court said: "The sixth assignment embraced an objection to the manner in which the attorney for respondent conducted the cross-examination of the medical experts appointed by the court. The counsel asked the expert if such authorities did not lay down certain rules,—reading the language of the rule from the author's work,—and it is contended that it is an infraction of the rule of evidence against the admission of medical authorities. But we do not think the rule of law was announced to meet the practice of the kind complained of. [569] These questions were propounded upon cross-examination for the purpose of testing the knowledge of the expert. It would have been competent for the attorney to have stated supposititious cases to the experts. He could properly have stated the rule from memory, asking the expert if such an author did not lay down such a rule. It seems there could be no tenable objection to his reading the rule to the expert. *In fact, it is a more exact method, and less liable to make a wrong impression on the mind of the juror, than to cross-examine from memory.*"

In the case of *Brown v. Springfield Trac-tion Co.* 141 Mo. App. 382, 125 S. W. 236, the court said: "From the *MacDonald case*,

as well as from authorities of other states, we glean the correct rule to be that an attorney may use a medical book to aid him in framing questions to be asked of a physician testifying as an expert, but it is not permissible to read from such books to the jury, and the court did not err in refusing permission to defendant's counsel to read from such books to the jury in this case."

Again in the case of Louisville, etc. R. Co. v. Howell, 147 Ind. 266, 45 N. E. 584, we find the following: "Some contentions made by appellant seem to be based upon a misapprehension of the facts disclosed in the record. Objection, for example, is made to the exclusion of certain evidence sought to be elicited from Dr. Murphy, one of appellant's witnesses. In the course of his re-examination this witness was asked by appellant's counsel what was said in a certain named medical authority as to the difference between necrosis and caries of the bone, with a view to determine which of these diseases was indicated by the discharges from appellee's wound; and counsel cited authority to show that on cross-examination, such questions are proper. There is no doubt that, in order to test an expert's knowledge, it is proper, on cross-examination, to read *statements from writers of repute*, who have treated of the subject concerning which the expert has testified, and ask him questions touching the views advanced by such text-writers. Hess v. Lowrey, 122 Ind. 225, 7 L.R.A. 92, 17 Am. St. Rep. 355, 23 N. E. 156. The trouble with appellant's contention is that the question here asked was not on cross-examination, and the evidence thus sought was but of a self-serving character."

Again, in the case of Sale v. Eichberg, 105 Tenn. 333, 52 L.R.A. [570] 894, 898, 59 S. W. 1020, we find: "The third assignment is that the court erred in excluding, on cross-examination of Dr. Raymond, one of plaintiff's witnesses, the *reading of extracts from the standard work of Dr. Hamilton as to diagnosis and treatment of fractures like that of Eichberg*. . . . Counsel stated he did not propose to introduce the book itself as evidence, but simply wished to test the witness as an expert, and the accuracy of his opinion and statements. It was held by this court in Byers v. Nashville, etc. R. Co. 94 Tenn. 350, 29 S. W. 128, viz., 'when a witness is testifying as an expert it is competent to test his knowledge and accuracy, on cross-examination, by reading to him or having him read extracts from standard authorities upon the subject-matter involved, and then asking him whether he agrees or disagrees with the authorities, and then by comparing his opinion with those of the writer.' See also, Stoudenmeier v. Williamson, 29 Ala. 558. It is true the witness, after having been examined at great length in chief, finally, on cross-exami-

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nation, said he did not claim to be an expert. The witness was a practicing physician, and had expressed his opinion quite freely in respect to good practice and proper treatment in such cases. The defendant was entitled, on cross-examination, to test the witness's knowledge in the manner indicated, and the court was in error in excluding the question propounded."

There can, indeed, be no doubt that the modern tendency, and certainly the tendency of this court is towards the freedom of cross-examination and quite a wide latitude therein. See Kersten v. Great Northern R. Co. 28 N. D. 3, 147 N. W. 787; State v. Moeller, 20 N. D. 114, 126 N. W. 568; State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 269, 141 N. W. 740. A distinction, however, must be made between legitimate cross-examination and an underhanded attempt to read the authorities to the jury. We think there was no such underhanded attempt in the case at bar, and that, though in the colloquy which afterwards ensued between court and counsel, and in a portion of the subsequent offer, counsel intimated that such could be done, it is clear to us that the primary purpose of the reading in the first instance was cross-examination, and cross-examination alone. If this was the case, and the ruling which prevented the reading in the first instance was incorrect, the rights of the defendant should not be jeopardized merely because, in addition to the reason which was first advanced [571] therefor, others were subsequently asserted which were unsound. There can, we may add, be no distinction made between asking a physician if an author does not make some particular statement, and then asking the witness what he thinks of the statement, which we inferentially at least held could be done in the case of State v. Moeller, supra, and the reading of the statement to the witness directly from the book in the first instance, and asking his opinion thereon. Williams v. Nally, 20 Ky. L. Rep. 244, 45 S. W. 874; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516.

The case at bar, then, comes within the permission, and not within the condemnation, of the decision. It is true that in his subsequent offer counsel asserted the right to use the books as evidence in themselves, but this was only in a part of his offer, and he closed by saying: "And I also in this connection maintain that I am entitled, under the rules of legitimate cross-examination, to examine this witness thoroughly on that subject in the line that I have suggested to the court." It is to be remembered, indeed, that he was interrupted as he was reading a statement from the work after the preparatory question, "Let's see if you will agree with what I am going to read to you," and though he seems in no way to have unnecessarily paraded the

book, the court in answer to the question, "Then I understand, your Honor, it isn't permissible to examine an expert witness as to whether or not he agrees with certain language that is laid down in a treatise," answered, "You can ask that, but you can't read from the book." Counsel for defendant then said: "Counsel for defendant desires to have the record show that he has no intention of offering the book in evidence; that his intention is to read from other like authorities, standard works on this subject, certain hypothetical questions to be put to this witness as applied to the case at bar, for the purpose of showing the jury that the child that is in controversy here was a full-grown normal child, and that under all the sound rules must have been begotten at a period of not less than 265 days and not to exceed 285 days, and that from the appearance of the child the witness is unable to state whether it was a 280-day child or a 265-day child."

The door, indeed, seems to have been opened wide for cross-examination when on the direct examination of plaintiff's witness, Dr. Chagnon, the witness was allowed to testify that "*the medical authorities* [572] and *physicians* laid down as a maximum and minimum 270, 260, and 265 days, or a few days over;" and still further when he was allowed to correct himself, and in answer to a leading question, and over the objection of defendant's counsel, to state that "it was a fact that some of the physicians and text-books laid down in minimum as low as 249 to 255 days."

When we come to the testimony of Dr. Vidal, and for the reasons heretofore mentioned, we think the learned trial court committed no error. There was really no material difference in the two cases. Dr. Vidal had, it is true, on direct examination, referred to no particular authority, nor did he even on cross-examination agree with the authority read. He had, however, as in the case of Dr. Chagnon, based his opinion on the authorities generally, and it was merely proposed to examine him in regard thereto, and to read to him from them for that purpose. We now approve of the examination, not for the reason given in our original opinion, and of which we now entertain some doubt, but because the doctor had expressly stated that his opinion was based upon his readings and upon the authorities, and it was therefore perfectly permissible to show upon cross-examination that his memory of what those authorities held was inaccurate, and to generally test the accuracy and extent of his reading and research.

It is true, there are some authorities which hold to a contrary rule to that which we have herein expressed. They are, however, few in number. Among them is the case of

Mitchell v. Leech, 69 S. C. 413, 66 L.R.A. 723, 104 Am. St. Rep. 811, 48 S. E. 290. In this case the court said: "The eleventh exception will next be considered. The record shows that the question arose in the following manner: 'Doctor, is Lydson a standard medical work on genito-urinary and venereal and sexual diseases?' (Mr. Hart: I object. Medical books are not evidence, except in cases of insanity. Medical books are not evidence in cases of this character.) Q. I will ask him if that is good authority? (Mr. Hart: I object to that.) Mr. Brice: This is an expert witness, and the witness had stated that the authorities, medical authorities—that is what the witness means—state that a man can have an injury so slight as not to be noticed at the time, and yet serious results follow. I am not introducing the authority. I am simply asking him whether this is an authority. The Court: The object of the question is to [573] introduce the book? Mr. Brice: I am simply going to ask him if this is an authority, and read him a piece, and ask him if that is good authority or not? The Court: That introduces the book. You wish to contradict or qualify the opinion of the doctor on the stand. Otherwise it would be irrelevant. Testimony excluded. (Exception taken.)' The presiding judge simply ruled that you could not contradict or qualify the opinion of the doctor on the stand by showing what some author had said. In this there was no error."

The case of Butler v. South Carolina, etc. R. Co. 130 N. C. 15, 40 S. E. 770, seems also to more or less bear out the point contended by the plaintiff. In it, however, there is no proof that the doctor in his direct examination based his opinion upon the authorities generally. The same is true of the case of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678.

In the case of Chicago City R. Co. v. Douglas, 104 Ill. App. 41, the books were sought to be read on the examination in chief, and the case therefore is not in point. In the case of Hall v. Murdock, 114 Mich. 233, 72 N. W. 150, the books were actually read to the jury.

We, too, are not unmindful of the § 570 (595) of Jones on Evidence, on which the trial court based his conclusions, and which states that "it is generally conceded, however, that where experts are examined as to questions of science they may give their opinions and the ground and reason therefor, although they state that such opinions are in some degree founded upon treatises on the subject. But it has been held inadmissible for such a witness to read to the jury from books, although he concurs in the views expressed, or even to state the contents of such books, though he may refer to them to refresh his

memory. . . . And when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony. But unless the book is referred to on cross-examination, it cannot be used for this purpose. It would be a mere evasion of the general rule under discussion, if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed; hence this is not allowed."

This section, no doubt, states the correct rule in regard to the examination in chief and rebuttal, and in regard to the actual reading of [574] books to the jury in all cases. It also states the correct rule in regard to cross-examination where the specific book has neither been referred to nor has the witness based his opinion upon the *authorities generally*, but, instead, upon his own personal experience, and where his knowledge of and understanding of the authorities, as well as the extent of his general reading, is not a fit subject of inquiry. It does not, however, express either the general or the correct rule in cases where these latter facts exist. The statement is too general. Only four cases, indeed, are cited by Mr. Jones in support of the proposition as made, and none of them bear out the contention of counsel for respondent, nor are applicable to facts such as are to be found in the one at bar. The cases cited are: *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 678; *State v. Winter*, 72 Ia. 627, 34 N. W. 475.

The first case, namely, that of *Marshall v. Brown*, *supra*, is more or less in point, but a reading of it will, we believe, disclose a quite apparent desire to read the book to the jury, rather than to test the knowledge of the witness. In the case of *People v. Millard*, 53 Mich. 63, 18 N. W. 562, the point was not merely not a decisive one in the case, but the readings which were under discussion appear to have been had on the *direct examination* of the witness, and their purpose to have been to bolster up his testimony, rather than to test his learning. The language of the opinion is itself a strong argument for the liberal examination of experts and the testing of their knowledge and information. The court, indeed, expressly states that *if the witness is not well read he is not entitled to any credence as an expert*, and yet the case is cited as authority for the proposition that the extent and thoroughness of that reading may not be probed into. The court in its opinion, in fact, merely says: "Another source of error quite as mischievous, and which the court evidently desired to prevent, but did

not always do so, was the introduction of what is no more than hearsay evidence, in the shape of references to writers and books in such a way as to invoke their authority. As we have had occasion on more than one record to explain heretofore, expert evidence is only admissible on the theory that the jury cannot be supposed to comprehend the significance of facts shown by other testimony which needs [575] scientific or peculiar explanation by those who do comprehend it. But this does not permit hearsay testimony of the written or spoken opinions of other persons, whom the jury have no means of examining as to their learning, their honesty, or their sources of special knowledge. Every medical and scientific writer bases much of his conclusions upon what he believes to be true in the reported facts and opinions of other men of science. Those facts may be correctly stated, or they may be assumed on small or no foundation. Those opinions may be taken carelessly at second hand, or they may have been thoroughly weighed before adoption. No one can tell whether a medical book or opinion is reliable or not, until he has applied himself, with some fitting preparation, to its study and criticism. The book may be good in part and bad in part, and neither court nor jury can presumptively ascertain its quality. No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific question involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so, it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, *cannot be fortified* before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect. If the opinion of an author could be received at all, it should be from his own words,—not in single passages, but in combination; and this, as has been heretofore held, cannot be done. It is excluded chiefly as both unknown as to value

and as hearsay, and an attempt to swear to his doctrine orally would be hearsay still further removed, besides involving the other difficulty of needing interpretation and responsibility. A large [576] part of this scientific evidence consists of repeated references for support and confirmation to the statements of authors, and, as might be expected, the different witnesses have not always read through the same glasses. To settle their differences the only resort must have been to the very books, which no one claims were admissible. These references were not merely made on cross-examination to test the knowledge and veracity of the witnesses, but *came in as frequently on direct examination*. In *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862, a witness who had asserted that a certain book laid down a certain proposition was allowed to be contradicted by showing it did not. But it is questionable whether the original assertion was properly drawn out, *although when made it was proper to let it be contradicted*. It was distinctly held in *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55, that attempts to evade the excluding rule by examining or cross-examining in such a way as to get an opportunity to *get books before the jury* could not be permitted."

In the case of *Bloomington v. Shrock*, the opinion expressly approves of the case of *Connecticut Mut. L. Ins. Co. v. Ellis*, to which we have before referred, as an authority in support of the conclusions which we have herein arrived at, and differentiates the case under consideration by the *Illinois* case, from the case at bar, by the express statement that "in the present case, it has been seen, the course pursued was entirely different. The witness based no opinion which he gave, upon the *authority of books*, and they were only brought in to impair his evidence on cross-examination." In the case of *State v. Winter*, 72 Ia. 627, 34 N. W. 475, the question was asked and the book sought to be read on the *direct examination* of the witness, and the authority therefore is in no way applicable here, nor in any way supports the proposition contended for by Mr. Jones.

Indeed, while further treating on the subject of the cross-examination of experts, Mr. Jones himself cites with approval the case of *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113, to which we have before referred, and announces a general rule which appears to be clearly in harmony with that opinion and with the present holding of this court. In § 389 (391) of his *Commentaries on Evidence*, he says: "Not the least important part of the cross-examination is that which subjects [577] the qualification on which the expert has been permitted to testify to a searching inquiry. He has placed himself in the position of one capable, by reason of his superior

or peculiar knowledge, of announcing conclusions, which are of weight according to the thoroughness of the knowledge which prompted and is behind them. Therefore it is that the jury is entitled to know more fully the nature of his qualification, the sources of his knowledge, from which he assumes to speak with special authority, and the grounds and reasons upon which his conclusions and opinions are based. For example, a medical witness had stated that his testimony was based upon medical authorities, and he was then asked to state what the medical authorities at the time of the trial held upon the subject. The question was proper. Reese, J., said: 'If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper, for the purpose of ascertaining his means of knowledge by a reference to the teachings of text-books of his profession, and the scientific works from which he had drawn the theories and principles to which he had testified. . . . For the purpose, therefore, of testifying as to his recollection, as well as to his knowledge, it was proper to interrogate him as to the teachings of those authorities; and, in case his testimony was incorrect, to confront him with them, in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because "the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities." As we have shown, the testimony entered the domain of science, and the grounds upon which the objection is founded appeal most strongly to the mind of the writer as cogent reasons why the cross-examination was proper.'"

For the reasons herein stated, we are now of the opinion that the judgment of the District Court should be reversed, and that a new trial should be had. It is so ordered.

#### NOTE.

#### Use of Scientific Books in Connection with Examination of Expert Witness.

##### *Direct Examination.*

The rule laid down in the note to *Macdonald v. Metropolitan St. R. Co.* 219 Mo. 468, 16 Ann. Cas. 810, that it is improper for a party calling an expert to read from medical books, and to ask his expert if he agrees with the statement of the author, finds support in the recent case of *Matter of Hock*, 74 Misc. 15, 129 N. Y. S. 196.

In *Denver City Tramway Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258, it was held to be improper for an expert to read from a



medical book and state what the author was discussing. The court said: "Medical works, by the great weight of authority, are not admissible, in such instances as this, as independent proof of the opinions therein expressed. This has not been passed upon in this state, but the authorities against the admission of medical books, in such instances, are numerous, and while the reasons given are not altogether satisfactory, nor wholly unanswerable and conclusive, yet they have survived the lapse of time, and neither the encroachments thereupon nor the criticisms thereof have lessened their value."

So it has been held that a medical expert may not quote from a medical book because this would be equivalent to reading from it. *Missouri, etc. R. Co. v. Graves*, 57 Tex. Civ. App. 395, 122 S. W. 458, wherein it was said: "The court also erred, we think, in permitting the witness, Dr. W. C. Graves, after stating that a compound comminuted fracture not receiving proper attention for a period of fifteen hours would be a great deal more likely, if not practically certain, to become infected, and, by reason of the weakened condition of the patient, render him more easily a prey to septic germs, and that these germs multiply rapidly in a proper soil like blood and serum, and to further state: 'So that from a single germ, according to Koch, in twenty-four hours more than eight million would develop; they divide themselves by fission once every hour.' This testimony was subject to the objection urged, that it was hearsay. The statement of the witness does not purport to be an expression of his own opinion or knowledge of the subject upon which he is speaking, but that of the person Koch. The question is practically the same as would have been raised had appellee read the statement made by the witness from some medical treatise or standard work on medical jurisprudence, and that the reading of such an excerpt would not have been admissible seems to be well established." But in *Edling v. Kansas City Baseball, etc. Co.* 181 Mo. App. 327, 168 S. W. 908, it was held to be permissible for counsel to read from a book for the purpose of framing questions to an expert on the stand.

It has been held that an expert witness may in testifying refer to medical authorities and state in substance their views, on direct examination. *Fidelity, etc. Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L.R.A.(N.S.) 493, wherein it was said: "It is insisted that the court erred in permitting medical experts, introduced by plaintiff, to testify concerning statements found in books written by certain medical authorities and the rule is invoked that books of that character are not admissible as affirmative or original evidence. The books were not introduced in evidence, but

the experts who testified merely referred, in giving their opinions, to the medical authorities and stated in substance, the result thereof. This was competent."

#### *Cross-examination.*

The rule that when an expert bases his opinion on the authority of a designated scientific book, counsel on cross-examination may read an excerpt from the book for the purpose of contradiction has been supported by dictum in the recent case of *Denver City Tramway Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258; *Weyh v. Chicago City R. Co.* 148 Ill. App. 165.

The view that though an expert does not base his opinion on a particular authority, counsel may be permitted on cross-examination to read or introduce excerpts from a scientific authority for the purpose of testing the knowledge of the witness, has been further fortified by the reported case and other recent decisions. *Victor American Fuel Co. v. Tomljanovich*, 232 Fed. 662; *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473; *Stout v. Bowers*, 97 Kan. 33, 154 Pac. 259; *Travelers' Ins. Co. v. Davies*, 152 Ky. 600, 153 S. W. 956; *Eckels, etc. Mfg. Co. v. Cornell Economizer Co.* 119 Md. 107, 86 Atl. 38; *Matter of Hock*, 74 Misc. 15, 129 N. Y. S. 196; *Kersten v. Great Northern R. Co.* 28 N. D. 3, 147 N. W. 787; *Lynch v. Rosemary Mfg. Co.* 167 N. C. 98, 102, 83 S. E. 6; *Gulf, etc. R. Co. v. Dooley (Tex.)* 131 S. W. 831. Thus in *Victor American Fuel Co. v. Tomljanovich*, supra, it was said: "With reference to reading from medical text books on cross-examination, it is true that the courts have held, especially the Massachusetts Supreme Judicial Court, that counsel cannot, in their own case, and as a direct part thereof, thus read; but with reference to the cross-examination of medical witnesses, very great latitude is necessarily allowed for indubitable reasons. All that was read in this case was as a part of the cross-examination of a medical witness, and, as said by the court, for the purpose of testing the knowledge of the witness." So in *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473, it was said: "While it is the general rule that books upon scientific subjects are not admissible in evidence, except after an expert witness has referred to a particular work to sustain his opinion, in which case only such work may be admitted to contradict him in that opinion, it is also a well-established rule that, when a witness is testifying as an expert it is competent to test his knowledge and accuracy upon cross-examination by reading to him or having him read extracts from standard authorities upon the subject of his examination and by asking him whether he agrees or disagrees with them. This is in

no sense the introduction of the contents of the books in evidence." Similarly in *Stout v. Bowers*, 97 Kan. 33, 154 Pac. 259, the court said: "There is a complaint that appellee was permitted to read medical books to the jury in the course of the trial. It has been held that medical books are not admissible in evidence to establish the declarations or opinions which they contain. *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. However, experts are permitted to give opinions based in part on the information obtained from medical works prepared by experts of acknowledged ability and which are recognized as authorities. So witnesses are permitted to state what they have found laid down in such works and upon which they found their opinion. In this case the medical works were not introduced as affirmative evidence, but were only used in the cross-examination of the witnesses to test their knowledge and credibility. One of the recognized methods of testing the knowledge of an expert witness who founds his opinions on standard medical authorities is to read from those authorities upon the subject in question and interrogate him as to whether his opinions coincide with those expressed in the books, and whether there is not a conflict between the opinions he then gives and the views expressed by the authorities upon which he relies for information."

On the other hand several recent cases hold that it is improper on cross examination, when an expert has not based his opinion on a particular authority, for counsel to read from a scientific treatise and ask the witness his views. *Griffith v. Los Angeles* Pac. Co. 14 Cal. App. 145, 111 Pac. 107; *Denver City Tramway Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258; *Ullrich v. Chicago City R. Co.* 265 Ill. 338, Ann. Cas. 1916A 793, 106 N. E. 828; *Weyh v. Chicago City R. Co.* 148 Ill. App. 165; *Neiner v. Chicago City R. Co.* 181 Ill. App. 449; *Allen v. Boston Elevated R. Co.* 212 Mass. 191, 98 N. E. 618; *In re DuBois*, 64 Mich. 8, 128 N. M. 1092, 17 Detroit Leg. N. 1017; *State v. MacRorie*, 86 N. J. L. 401, 92 Atl. 578; *State v. Moeller*, 20 N. D. 114, 126 N. W. 568. Thus in the case of *In re DuBois*, supra, it was said: "It is conceded by counsel for appellants that scientific books cannot be introduced in evidence, but contended that it is competent on cross-examination to base questions upon the contents of them or upon extracts from them, so long as the testimony is rigidly confined to the one purpose of testing the competency of the expert, or the value of his opinions. Assuming the rule to be as stated, we are not convinced that counsel was denied the benefit of it. We do not know what counsel proposed to read, or did read. The point is not ruled in appellant's favor by *Pinney v. Cahill*, 48 Mich. 584, 12

N. W. 862, because the witness had not referred to medical work as supporting his opinion, or professed any acquaintance with the work beyond its general reputation. We find no reason for refusing to apply the rule of *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55."

It is improper to ask a witness as to the opinion of other experts contained in books. *Tilgham v. Seaboard Air Line Ry.* (N. C.) 89 S. E. 71, wherein it was said: "The opinion of an expert witness cannot be contradicted by showing on cross-examination what some author has said. . . . It will be observed that several of these authorities (*Lynch v. Mfg. Co.* [167 N. C. 98]; *Allen v. Railroad Co.* [212 Mass. 191]; *Chicago City Railway Co. v. Douglas* [104 Ill. App. 41]; *State v. Blackburn* [136 Ia. 747]) meet the position taken by the plaintiff that, although the book may not be introduced in evidence, it is competent on cross-examination to ask for the opinions of experts as contained in books for the purpose of testing the witness. The law does not permit that to be done by indirection which cannot be done directly, and the fallacy in the position is in assuming that the unsworn declaration contained in a book is a test of the correctness of the opinion of a witness under oath."

In *Douglas v. Berlin Dye Works, etc. Co.* 169 Cal. 28, 145 Pac. 535, wherein a medical expert testified that he based his opinion partly on his own experience, a question asked on cross-examination as to what authorities he relied on to support his opinion was declared to be improper, because the witness had not testified that he relied on any authorities.

In *Barfield v. South Highlands Infirmary*, 191 Ala. 553, Ann. Cas. 1916C 1097, 68 So. 30, it was held to be proper to ask an expert witness on cross-examination whether his opinion coincided with that of a certain medical author. The court said: "Some courts hold differently, but this court has long entertained the opinion that relevant extracts from medical treatises, recognized and approved by the medical profession as standard, may be read to the jury in evidence."

In *Donnelly v. Chicago City R. Co.* 163 Ill. App. 7, it was held that an expert might be cross-examined as to the basis of his opinion and as to whether the authorities did not lay down a different doctrine. The court cited *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816.

In *Dean v. Wabash R. Co.* 229 Mo. 425, 129 S. W. 953, it was held to be proper on cross-examination of an expert for counsel to use a textbook to aid him in framing his questions. To the same effect see *Brown v. Springfield Traction Co.* 141 Mo. App. 382, 125 S. W. 236.

## JENNINGS.

v.

IDAHO RAILWAY, LIGHT AND  
POWER COMPANY ET AL.

Idaho Supreme Court—January 20, 1915.

26 Idaho 703; 146 Pac. 101.

**Attachment — Foreign Corporation as  
Nonresident.**

Under section 2792, Rev. Codes, which provides "that foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations," such corporation is not a citizen or resident of this state, within the meaning of the foreign attachment laws, and is not exempt from attachment as a nonresident.

[See note at end of this case.]

**Same.**

A corporation organized under the laws of a foreign jurisdiction, although engaged in business in this state and having complied with the Constitution and all the laws of this state affecting foreign corporations is a nonresident and subject to attachment as such.

[See note at end of this case.]

**Appeal — Questions Reviewed — Effect  
of Agreement of Counsel.**

Where counsel for respective parties agree that, should the conclusion of the court be adverse to the contention of appellant upon one question, the remaining objections assigned become immaterial, and when it appears from the record that a consideration of said questions is not necessary to a final determination of the cause under consideration, the same will not be decided by the court.

Appeal from District Court, Ada county:  
McCarthy, Judge.

Action on promissory note. E. H. Jennings, plaintiff, and Idaho Railway, Light and Power Company et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

*Cavanah, Blake & MacLane* for appellants.

*Richards & Haga* and *McKeen F. Morrow* for respondent.

[705] BUDGE, J.—On the 6th of November, 1911, the Idaho Railway, Light & Power Company, a corporation organized under the laws of the state of Maine, made, executed and delivered its promissory note to one E.

H. Jennings for \$180,000, payable two years after date, bearing interest at the rate of six per cent per annum from July 6, 1912. In order to secure [706] the payment of the above obligation, the Idaho Railway, Light & Power Company deposited with the said Jennings as collateral security 1,200 shares of the preferred stock and 2,884 shares of the common stock of the Boise Railroad Company, Ltd. After the loan had been negotiated and the stock of the Boise Railroad Company pledged, as aforesaid, the Idaho Railway, Light & Power Company, being then the owner of all of the stock of the Boise Railroad Company, elected its employees or officers as directors and officers of the Boise Railroad Company, and immediately thereafter caused said officers to convey by proper conveyance all of the property, assets, franchises and privileges of the Boise Railroad Company to the Idaho Railway, Light & Power Company. This being done, the necessity for the existence of the Boise Railroad Company as a corporation ceased, and thereafter the annual license tax of said company was not paid to the state by either the Boise Railroad Company or the Idaho Railway, Light & Power Company, and on the 1st of December, 1913, the charter of the said Boise Railroad Company was forfeited to the state.

At the date of the commencement of this action in the trial court, the capital stock of the Boise Railroad Company, which had theretofore been pledged as collateral security for the payment of the respondent's note, was the stock of a corporation which had forfeited its charter and conveyed all of its physical properties, rights, assets and franchises to the appellant corporation herein. The Idaho Railway, Light & Power Company, by its officers, executed a mortgage or deed of trust to the Guaranty Trust Company of New York, securing an issue of bonds aggregating thirty millions of dollars, which said mortgage or deed of trust covered all the property then owned by the Idaho Railway, Light & Power Company, or which it might thereafter acquire, and under which bonds of said company of the par value of about \$9,095,000 had been actually issued. The property transferred to the Idaho Railway, Light & Power Company, which had previously constituted the security as represented by the stock pledged to Jennings, was now claimed by the Idaho Railway, [707] Light & Power Company as owner, and by the Guaranty Trust Company of New York as trustee under the thirty million dollar mortgage above referred to.

On December 23, 1913, a receiver for the Idaho Railway, Light & Power Company was duly appointed by an order of the United States court for the district of Idaho, southern division.

The answer of the appellant admits the indebtedness of \$180,000 to the respondent, and also admits the appointment of a receiver by an order of the United States district court, and the insolvency of the appellant corporation.

This is a brief statement of what appears to be the facts in this case:

At the time of the issuance of summons in this action, the respondent, upon affidavit and sufficient bond, secured a writ of attachment and caused to be attached all of the properties, assets and franchises of the Idaho Railway, Light & Power Company. On May 28, 1914, appellant by its counsel moved in the trial court to discharge the attachment theretofore issued, for the following reasons, to wit:

1. That the affidavit of attachment shows upon its face that the debt upon which action is brought was secured by pledge of stock of the Boise Railroad Company, and fails to show that such security has become valueless.

2. That the defendant Idaho Railway, Light & Power Company is not a nonresident of the state of Idaho within the meaning of the attachment law, but is a foreign corporation that has complied with the constitution and all the laws of Idaho respecting foreign corporations, and as such, by the terms of such statutes is entitled to all the rights and privileges, and subject to the laws applicable to domestic corporations.

3. That the undertaking for attachment is insufficient.

It was conceded upon the argument of this cause that the appellant corporation had fully complied with the constitution and laws of this state respecting foreign corporations. That being true, the appellant insists that it is exempt from attachment [708] under the laws of this state authorizing the attachment of the property of nonresidents.

Sec. 4302, Rev. Codes, as amended by Sess. Laws 1913, page 160, provides, that

"The plaintiff at the time of the issuing of summons, or at any time afterward may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this chapter provided, in the following cases: . . .

"2. In an action upon a judgment, or upon contract, express or implied, or for the collection of any penalty provided by any statute of this state, against a defendant not residing in this state."

Sec. 2792, Rev. Codes, provides, among other things:

"That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic

corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations."

The pertinent question for our consideration, therefore, is; Do the provisions of our statute exempt foreign corporations from attachment within the meaning of sec. 4302 and subd. 2, *supra*, for the reason that said nonresident corporation has fully complied with the constitution and all of the laws of the state affecting foreign corporations? In other words, when foreign corporations comply with the constitution and laws of our state, do they occupy the same position with reference to our attachment laws that domestic corporations do, or is their property liable to attachment irrespective of their compliance with the constitution and laws affecting nonresidents?

Should this court reach the conclusion that a foreign corporation is not exempt from attachment by reason of having complied with the constitution and laws of this state affecting foreign corporations, it would be unnecessary to discuss or determine any other question involved in this case.

It is conceded that the appellant is a foreign corporation organized and existing under the laws of the state of Maine, [709] and unless when it applied to the state of Idaho for admission to do business within this state and by a full compliance with the constitution and laws of this state affecting foreign corporations it thereby became a resident corporation within the meaning of the attachment law, and thereby became exempt from attachment within the meaning of the statutes above cited, it could at this time be considered in no other light than a nonresident.

In the case of *Boyer v. Northern Pac. R. Co.* 8 Idaho 74, 66 Pac. 826, 70 L.R.A. 691, the court says:

"Both upon principle and authority, private corporations are residents of the state in which they are created. They have, and can have, but one domicile—that the state of their birth, and which is fixed by the charter of incorporation. They may migrate into other countries and jurisdictions for the purpose of business, and may be permitted to carry on business in other states; yet, so far as jurisdiction of courts is concerned, they are treated both by our federal courts and by our state courts as residents of the state in which created, and nonresidents of other states. The appellant in this case is a foreign corporation. . . . Foreign corporations are and remain, to all intents and purposes, so far as jurisdiction of actions is concerned, nonresidents of the state."

In the case of *New York L. Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899, the supreme court of Colorado says:

"The authorities, both court and text-writers, announce as settled doctrine that a corporation organized under the laws of one state is a resident of the state under whose laws it was created; that it cannot be a resident of any other state; and, though such a corporation be permitted by another state, upon compliance with its laws, to carry on its business there, such permission and compliance does not make it a resident of such other state. . . . To hold otherwise would be to ingraft upon the statute an exception which is wholly foreign to its plain terms, and would be only an amendment thereof."

In *Cook on Corporations*, 7th ed. sec. 1, it is said: "The domicile, residence, and citizenship of a corporation are in the state where it is created."

[710] To grant to a foreign corporation the right to hold property, to do business, maintain actions, enjoy the benefits of eminent domain, does not make it a domestic corporation, and notwithstanding the right to the enjoyment of all of these privileges, and such others as the legislature may from time to time provide, the residence or citizenship of a foreign corporation would not be changed and it would still, under the great weight of authority, be subject to attachment as a foreign corporation. (*Barbour v. Paige Hotel Co.* 2 App. Cas. (D. C.) 174; *Cowardin v. Universal L. Ins. Co.* 32 Grat. (Va.) 445; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray (Mass.) 488; *Augusta Bank v. Earle*, 13 Pet. 519, 10 U. S. (L. ed.) 274; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 12 S. Ct. 935, 36 U. S. (L. ed.) 768.)

The supreme court of California in *Waechter v. Atchison*, etc. R. Co. 10 Cal. App. 70, 101 Pac. 41, had under consideration the question of venue in a suit brought against a foreign corporation, involving the same principle that we are called upon to consider. The court held that "Its primary purpose was apparently to place foreign railway and transportation companies upon an equal standing in this state with domestic corporations, in respect to building railways and exercising the right of eminent domain, and the rights and privileges incident thereto. To construe it as taking such companies out of the operation of the provisions of the general section relating to the place of trial of actions would be to create a specially privileged class of nonresident corporations who would be favored above, not only nonresident natural persons, but all other foreign corporations that might be doing business in the state. This would not only result in creating a special class of corporate defendants in civil actions, but would also arbitrarily discriminate in favor of corporations against natural persons who were nonresidents."

The authorities are uniform that the domicile, residence and citizenship of a corporation are in the state where it is created, and that where the corporation is not domesticated, that is, reincorporated in other states where it does business, it can have but one domicile, one residence and one citizenship, [711] and that is in the state issuing its charter and maintaining supervision and control over the corporation. (5 *Thompson on Foreign Corp.* 2d ed. sec. 6629.)

In *Drake on Attachments*, 7th ed. sec. 80, the proposition is stated as follows:

"The foreign character of a corporation is not to be determined by the place where its business is transacted, or where the corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered an inhabitant of the state in which it was incorporated." These general principles respecting residency or inhabitancy of corporations cannot be denied or questioned. (*Cowardin v. Universal L. Ins. Co.* 32 Grat. (Va.) 445.)

It must be conceded that it is beyond the power of the state to forfeit or extend the corporate existence of a foreign corporation. It can exercise no power or control over the corporation as such. A foreign corporation by compliance with the constitution and laws may do business within the state at its pleasure, and when dissatisfied can withdraw at will.

The provisions of our attachment law provide for no such exemption as contended for by appellant, and even though the legislature should attempt to make some such provision looking to the exemption of foreign corporations from attachment by a compliance with the constitution and laws, such legislation might be seriously questioned upon the ground and for the reason that it would be class legislation, or an attempt on the part of the legislature to confer special privileges upon a particular class of persons which could not be enjoyed by all alike. We do not think that the legislature ever intended that a foreign corporation, by complying with the constitution and laws of this state permitting it to do business should be regarded as a resident of this state within the meaning of our attachment laws, and that its property should be exempt from attachment. (*Voss v. Evans Marble Co.* 101 Ill. App. 373.)

In view of the conclusion reached by this court upon the second ground of objection urged to the validity of the attachment of the property of appellant, it becomes immaterial whether or not the stock pledged by the Idaho Railway, Light [712] & Power Company to respondent is or became valueless by the fault of respondent or the conduct of appellants.

The third objection urged, namely, that the undertaking for attachment was insufficient, was not discussed by counsel for appellants, either during the oral argument or in the brief filed on appellants' behalf.

The order of the district court refusing to dissolve the attachment is hereby affirmed. Costs awarded to respondent.

Sullivan, C. J., and Morgan, J., concur.

#### NOTE.

#### Right to Issue Attachment against Foreign Corporation on Ground of Non-residence.

##### Generally.

As a general rule a foreign corporation is deemed to be a nonresident within a statute authorizing attachment on the ground of non-residence.

*United States*.—Vance v. Pullman Co. 160 Fed. 707 (Construing West Virginia Statute).

*California*.—Title Ins. etc. Co. v. California Development Co. 171 Cal. 173, 152 Pac. 542.

*Delaicare*.—Albright v. United Clay Production Co. 5 Penn. 198, 62 Ala. 726. *Compare* Vogle v. New Granada Canal, etc. Nav. Co. 1 Houst. 294.

*Georgia*.—South Carolina R. Co. v. McDonald, 5 Ga. 531; Wilson v. Dansforth, 47 Ga. 676; Pyrolusite Manganese Co. v. Ward, 73 Ga. 491; Parramore v. Alexander, 132 Ga. 642, 64 S. E. 660.

*Illinois*.—Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; Wabash R. Co. v. Dougan, 41 Ill. App. 543; Iroquois Furnace Co. v. Wilkin Mfg. Co. 77 Ill. App. 59, affirmed 181 Ill. 582, 54 N. E. 987.

*Idaho*.—See the reported case.

*Kansas*.—See Sipult v. Wilson Land, etc. Co. 94 Kan. 224, 146 Pac. 329.

*Louisiana*.—Martin v. Branch Bank, 14 La. 415.

*Maryland*.—Mason v. Union Mills Paper Mfg. Co. 81 Md. 446, 32 Atl. 311, 48 Am. St. Rep. 524, 29 L.R.A. 273; Linville v. Hadden, 88 Md. 594, 41 Atl. 1097, 43 L.R.A. 222; Hodgson v. Southern Bldg. etc. Assoc. 91 Md. 439, 46 Atl. 971. See also Southern Bldg. etc. Assoc. v. Price, 88 Md. 155, 41 Atl. 53, 42 L.R.A. 206.

*Massachusetts*.—Blackstone Mfg. Co. v. Blackstone, 13 Gray 488. (See infra this subdivision as to subsequent statute.)

*New York*.—Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L.R.A. 854. See also Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Wolff v. American Union F. Ins. Co. 92 Misc. 438, 156 N. Y. S. 104. *Compare* McQueen v. Middletown Mfg. Co. 16 Johns. 5.

*North Carolina*.—Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 715, 119 N. C. 506, 26 S. E. 162, 36 L.R.A. 402.

*Ohio*.—Edwards Mfg. Co. v. Ashland Sheet Mill Co. 31 Ohio Cir. Ct. Rep. 414; Rosenham Co. v. Cohen, 32 Ohio Cir. Ct. Rep. 637. *Compare* Stickney v. Missouri State Bank, 1 Ohio Dec. (Reprint) 80, 1 West. L. J. 563.

*Pennsylvania*.—Bushel v. Commonwealth Ins. Co. 15 Serg. & R. 173. (See infra, this subdivision as to subsequent statute.)

*Tennessee*.—Hadley v. Freedman's Sav. etc. Co. 2 Tenn. Ch. 122; Union Bank v. U. S. Bank, 4 Humph. 369; Stonga Coke, etc. Co. v. Southern Steel Co. 123 Tenn. 428, 131 S. W. 988, 31 L.R.A. (N.S.) 278.

*Vermont*.—Somerville Lumber Co. v. Mackres, 86 Vt. 466, 85 Atl. 977.

*Virginia*.—U. S. Bank v. Merchants' Bank, 1 Rob. 573. (See infra, this subdivision as to subsequent statute.)

*West Virginia*.—Hall v. Virginia Bank, 14 W. Va. 584; Quesenberry v. People's Bldg. etc. Assoc. 44 W. Va. 512, 30 S. E. 73; Savage v. People's Bldg. etc. Assoc. 45 W. Va. 275, 31 S. E. 991.

In South Carolina R. Co. v. McDonald, 5 Ga. 531, the court said: "It is clear that a corporation may occupy one of the positions to wit: the position of a nonresident, in which a debtor must be placed before the attachment can issue. It may reside out of the state, and hence, we infer, that the statute applies to it. We have seen that a corporation is an inhabitant, or resident of the state, where, by law, it is located. In that state, therefore, where it is not located, it is a nonresident. If it does not reside in Georgia, it resides out of the state, and falls into that predicament in which the process by the act is authorized to be issued. And this is the only condition upon which it could be at all made liable to the process. The legislature has actually given to creditors all the remedy which it would be possible now to give against a corporation, were it anew to undertake to prescribe remedies. It cannot abscond, nor remove, nor conceal itself, nor stand in defiance of a peace officer, but it may reside out of the state. But it is argued, that because it cannot do these things we are therefore to infer, that the legislature did not contemplate a corporation—it is said, in other words, that it contemplated only such persons as are capable of absconding, removing, concealing, etc., and inasmuch as corporations are incapable of doing these things, they are not embraced in the act. If it was necessary that a debtor should reside out of the state, abscond, remove and conceal himself, and stand in defiance of a peace officer—if it was necessary for him to fulfill all and each of the conditions prescribed, before an attachment could issue, why then, the argument

would be irresistible. The demonstration of this necessity is indispensable to give to it the least force. But so far from this being necessary, it is clear that the process will issue upon the happening of any one of the contingencies named in the act. Nay, more, it is obliged to issue upon a single ground, and if more than one is taken in the complaint on oath, it will be fatal to the suit. The statute declares that the process shall issue upon a complaint on oath, that a debtor resides out of the state, or absconds, or is removing, etc. It is the right of the defendant to traverse the ground taken by the plaintiff, and he must be distinctly and singly notified upon what ground the plaintiff relies." And in *Bushel v. Commonwealth Ins. Co.* 15 Serg. & R. (Pa.) 173, the court in discussing the question whether a foreign corporation was within a statute providing for attachment against nonresidents said: "Are foreign corporations within the spirit of the act? We are so to construe the act as to suppress the mischief and advance the remedy. The mischief which the legislature intended to remedy was, that the effects of persons, artificial or natural, who were absent, were not equally liable with those of persons, artificial or natural, dwelling upon the spot, to make restitution for debts contracted or owing within the province. Foreign corporations and foreign individuals were placed on a better footing before the passage of the act than domestic corporations or citizens of the state; for remedy whereof the act in question was passed, enabling the court to compel an appearance, by attachment of their effects within the state. It may be here proper to remark, that the act has already been construed to extend to persons, who have never been within the state; it has, therefore, the same application to corporations which are stationary, as to natural persons. Foreign corporations, it is true, are necessarily absent from the state, but may have effects within it, and may contract and owe debts to citizens of this state, which they may be unable or unwilling to pay. It is no answer to say, that this is a mere question of remedy; that the corporation may be sued in Massachusetts, as in this case, or in Europe or Canton, as the case may be. But suppose suit should be commenced within a foreign jurisdiction, judgment obtained, and execution issued, and the company should prove insolvent (and daily experience shows us that this is no improbable supposition), what would be the remedy against their effects within this state? Relief must depend entirely on the laws of the foreign government. If there was a power in their courts to compel an assignment, or to sequester their property, in and out of the state, there might be some remedy, however inadequate, to the creditor. I can-

not bring myself to believe that the legislature ever intended that citizens of Pennsylvania, who had the property within their grasp, or a lien upon it, should be deprived of that lien, and depend for the payment of their debts on the laws of a sister state, or of a foreign government, and the more especially am I unwilling to adopt that construction, at this time, when this contract was made, and contracts are daily making by foreign corporations, within the limits of this state, and under the jurisdiction of this court." So in *U. S. Bank v. Merchants Bank*, 1 Rob. (Va.) 605, the court in disposing of a contention that a foreign corporation is not liable to attachment as a nonresident said: "It has been suggested that the law can be applied to those cases only, where the defendant would, if within the jurisdiction of the commonwealth, be liable to be sued; and that this cannot be predicated of a foreign corporation, for it can have no legal existence without the bounds of the sovereignty which created it. The fact might be conceded, and yet the consequence does not necessarily follow. There is nothing in the act restricting it to defendants who could be sued if within the commonwealth. The law extends to all nonresidents. Whilst they continue without the state, they never could be subject to the jurisdiction of the commonwealth; and the law was passed to enable the creditor to reach their effects, because they would not submit themselves to the jurisdiction of the state. And can it make any difference in the operation of the act, whether the jurisdiction of the commonwealth is prevented from attaching by the defendant's remaining out of the state, or because he can never come within it? If the defendant is a nonresident (to whatever cause owing), so as to be without the jurisdiction of the commonwealth, and has effects subject to its jurisdiction, the case is made out to which the law was intended to apply." In *Wilson v. Dansforth*, 47 Ga. 676, it was held that a statute permitting attachments to issue against foreign corporations transacting business within the state did not affect the right to an attachment "when the debtor resides out of this state" under another statute and an attachment could be issued under the latter statute against a foreign corporation not doing business in the state. See also *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491.

In a number of jurisdictions foreign corporations are by statute expressly made subject to attachment. *Fitzgerald, etc. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 U. S. (L. ed.) 608 (construing Nebraska statute); *Société Foncière Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 S. Ct. 823, 34 U. S. (L. ed.) 208 (construing Texas statute); *Iron Age Pub. Co. v. Western*

Union Tel. Co. 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; Ocean Ins. Co. v. Portsmouth Marine R. Co. 3 Metc. (Mass.) 420; Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747; Harley v. Charleston Steam-Packet Co. 2 Miles (Pa.) 249; Mechanics' Nat. Bank v. Miners' Bank, 13 W. N. C. (Pa.) 515; Pierce v. McLaughlin Electric Co. 28 W. N. C. (Pa.) 311; Pain's Pyro-Spectacle Co. v. Lincoln Park, etc. Co. 5 Pa. Dist. 474; Beal v. Toby Valley Supply Co. 13 Pa. Co. Ct. 273; Drenev v. Wopsononock, 23 Pa. Co. Ct. 376; Williamson v. Eastern Bldg. etc. Assoc. 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; George Norris Co. v. Levin, 81 S. C. 36, 61 S. E. 1103; Cook, etc. Min. Co. v. Thompson, 110 Va. 369, 66 S. E. 79. And see 12 R. C. L. 104.

In *Missouri* it is provided by statute that an attachment may be issued where the defendant is a nonresident or where the defendant is a corporation whose chief office or place of business is out of the state. Under that statute the right of attachment against foreign corporations is limited to those whose chief office or place of business is out of the state. *Farnsworth v. Terre Haute, etc. R. Co.* 29 Mo. 75; *Robb v. Chicago, etc. R. Co.* 47 Mo. 540; *Middough v. St. Joseph, etc. R. Co.* 51 Mo. 520.

***Foreign Corporation Doing Business or Becoming Chartered in State.***

In most of the jurisdictions the fact that a foreign corporation is doing business within the state and has complied with the requirements of the statute imposed on foreign corporations doing business in the state, does not affect its liability to attachment as a nonresident. *Albright v. Union Clay Production Co.* 5 Penn. (Del.) 198, 62 Atl. 726; *Wilson v. Danforth*, 47 Ga. 676, and *Parra-more v. Alexander*, 132 Ga. 642, 64 S. E. 660 (under statute); *South Carolina R. Co. v. Peoples' Sav. Inst.* 64 Ga. 18; *Hodgson v. Southern Bldg. etc. Assoc.* 91 Md. 439, 46 Atl. 971; *Barbour v. Paige Hotel Co.* 2 App. Cas. (D. C.) 174; *Williamson v. Eastern Bldg. etc. Assoc.* 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; *Cowardin v. Universal L. Ins. Co.* 32 Grat. (Va.) 445; *Cook, etc. Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79; *Quesenberry v. People's Bldg. etc. Assoc.* 44 W. Va. 512, 30 S. E. 73; *Savage v. People's Bldg. etc. Assoc.* 45 W. Va. 275, 31 S. E. 991. And see the reported case. See also *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L.R.A. 406, 119 N. C. 506, 26 S. E. 162, 36 L.R.A. 407. And see 2 R. C. L. 820. Thus in *Barbour v. Paige Hotel Co.* supra, it was said: "Upon principle and

authority, we must hold that the defendant, notwithstanding its exclusive engagement in business in the district, its organization for that purpose only, and the continuous presence of its secretary and treasurer therein, is a nonresident and subject to attachment as such." In *South Carolina R. Co. v. Peoples' Sav. Inst.* 64 Ga. 18, it appeared that a foreign railroad company was allowed to extend its road into a city, and was made liable to be sued by persons having claims against it in the proper courts of the counties and cities of the state. The court said: "That did not make it any the less a foreign corporation, and liable to be proceeded against by attachment, as provided by the general laws of the state—the provision that it might be sued in the courts of this state was merely a cumulative remedy for the better protection of our own people but did not alter or repeal the general attachment laws of the state, nor any part thereof."

But where a corporation becomes domesticated or chartered in a state other than that by which it was originally chartered it is not subject to attachment as a nonresident in that state. *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L.R.A. 406, 119 N. C. 506, 26 S. E. 162, 36 L.R.A. 407; *Sprague v. Hartford, etc. R. Co.* 5 R. I. 233; *Stonega Coke, etc. Co. v. Southern Steel Co.* 123 Tenn. 428, 131 S. W. 988, 31 L.R.A. (N.S.) 278. And see 2 R. C. L. 820.

In several jurisdictions the rule obtains that a foreign corporation which has been authorized to do business within a state is not subject to attachment therein as a nonresident. *Burr v. Co-operative Constr. Co.* 162 Ill. App. 512; *Martin v. Mobile, etc. R. Co.* 7 Bush (Ky.) 116; *Phillipsburgh Bank v. Lackawanna R. Co.* 27 N. J. L. 206; *Goldmark v. Magnolia Metal Co.* 65 N. J. L. 341, 47 Atl. 720; *Brand v. Auto Service Co.* 75 N. J. L. 230, 67 Atl. 19; *Puerrung v. Carter-Crume Co.* 16 Ohio Cir. Ct. 629, 9 Ohio Cir. Dec. 411; *Rigalow Fruit Co. v. Armour Car Lines*, 75 Ohio St. 168, 78 N. E. 267, reversing 26 Ohio Cir. Ct. Rep. 496; *Edwards Mfg. Co. v. Ashland Sheet Mill Co.* 31 Ohio Cir. Ct. Rep. 414; *E. A. Rosenham Co. v. Cohen*, 32 Ohio Cir. Ct. Rep. 637. See also *Farnsworth v. Terre Haute, etc. R. Co.* 29 Mo. 75; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Robb v. Chicago, etc. R. Co.* 47 Mo. 540; *Middough v. St. Joseph, etc. R. Co.* 51 Mo. 520. Compare *Voss v. Evans Marble Co.* 101 Ill. App. 373. Thus in *Martin v. Mobile, etc. R. Co.* supra, it appeared that a foreign corporation was permitted by a statute to extend its road through the state and was granted all the privileges, rights, and immunities granted to it by the state of its incorporation. It was held that it was not subject to attachment on the ground of nonresidence.



But even in jurisdictions maintaining the rule last stated a foreign corporation which has failed to comply with the statute prescribing conditions under which a foreign corporation may do business in the state is not exempt from attachment. *Goldmark v. Magnolia Metal Co.* 65 N. J. L. 341, 47 Atl. 720.

In *Bigalow Fruit Co. v. Armour Car Lines*, 74 Ohio St. 168, 78 N. E. 267, applying a statute providing that foreign corporations complying with the requirements as to doing business in the state should not be subject to attachment on the ground that they were foreign corporations or nonresidents, and also providing that the statute was inapplicable to "corporations engaged in Ohio in interstate commerce," it was held that a company engaged in the business of furnishing cars for its own business and also furnishing cars for refrigeration for fruit shipments was embraced in the exception to the statute and was not immune from attachment.

## STATE ET AL.

v.

## KENOSHA HOME TELEPHONE COMPANY.

Wisconsin Supreme Court—October 6, 1914.

158 Wis. 371; 148 N. W. 377.

### Evidence — Parol to Supplement Contract — Place of Payment.

Where a telephone rental contract is silent as to the place of payment of rentals, but provides that it cannot be varied, except in writing, signed by a contract agent or higher officer of the company, evidence of an oral agreement between plaintiff and defendant's service solicitor that rentals should be collected monthly by collectors at plaintiff's office is inadmissible.

[See note at end of this case.]

### Contracts — Interpretation — Presumption as to Place of Payment.

Where a contract to pay money is silent as to the place of payment, the law, in the absence of any legitimate inference to the contrary, implies that payment shall be made at the creditor's residence, office, or place of business, if within the state.

### Telegraphs and Telephones — Rules — Change in Method of Collection.

A telephone company is authorized to change its method of collecting rentals by means of collectors, so as to require payment at its business office, where such change did

not entrench on contract rights or statutory mandates.

### Requiring Payment at Office.

A rule of a telephone company, requiring payment of rentals at its business office, is reasonable and valid.

Appeal from Circuit Court, Kenosha county: QUINLAN, Judge.

Action to recover penalty. State et al., plaintiffs, and Kenosha Home Telephone Company, defendant. Judgment for defendant. Plaintiffs appeal. **AFFIRMED**

[372] Action to recover a penalty under sec. 1791a, Stats. 1913, for failure to furnish plaintiff O'Donnell telephone service. October 27, 1906, O'Donnell entered into a written contract with the defendant wherein the latter agreed to furnish him telephone service at the rate of \$2.50 per month payable in advance. The term of service was to be until the last day of October, 1907, and thereafter until terminated by thirty days' written notice by either party. The contract was silent as to the place of payment, and contained among other provisions the following:

"Upon nonpayment of any sum due, . . . the company may terminate the subscriber's right hereunder immediately, and sever his connection and remove the instrument."

"Its terms cannot be varied or waived by any representation or promise of any canvasser or other person, unless the same be in writing and signed by a contract agent or higher officer of the company."

Previous to the month of October, 1911, the company had sent collectors to O'Donnell as it had to other subscribers, but about September 1, 1911, it adopted a rule applicable to all subscribers that collectors would no longer be sent, but bills would be mailed monthly to each subscriber and payment must be made by the subscriber at the office of the company not later than the 15th of the month. Written notice of such rule was sent to O'Donnell and to the other subscribers on or [373] about the 1st day of September, 1911. A like notice was sent to each subscriber including O'Donnell about October 1st. October 15th and October 21st the company sent further notices to him calling his attention to his unpaid account of \$2.50 for the current month and requesting payment thereof, and again on October 26th it sent him a further notice of his unpaid account stating that unless it was paid at the company's office by 12 o'clock noon of October 30th his telephone connection would be severed and the instrument removed. On October 30th it again twice requested him to pay his account at its office.

O'Donnell refused to pay his account at the office of the company, claiming that he had an oral agreement with the company, entered into on its behalf by the canvasser who secured his contract, that collections should be made at his office. On or about October 28th he called the manager of the company to his office and there tendered him the amount due the company for the month of October. The manager refused to receive it on the ground that he was instructed by his superior officers not to receive payments except at the company's office. About 6 o'clock in the afternoon of October 30th the company disconnected plaintiff's service, since which time it has not been resumed, nor has he made any request accompanied by a tender for a resumption of the service.

The trial court made eleven separate conclusions of law, some of which were to the effect that the written contract could not be varied by parol; that the rule requiring payment at the company's office did not change the terms of the contract between the parties; that it was a reasonable rule; that plaintiff was in default and the company rightfully disconnected his service and had incurred no penalty under sec. 1791a. From a judgment in favor of the defendant the plaintiffs appeal.

*Calvin Stewart and Alfred L. Drury for appellant O'Donnell.*

*Cavanagh, Barnes & Cavanagh and Miller, Mack & Fairchild for respondent.*

[374] VINJE, J.—In view of the effect of the written contract entered into between the parties a number of questions argued in the briefs need not be considered. In addition to the provision in the body of the contract that it could not be varied except in writing signed by a contract agent or higher officer of the company, its first line reads: "This contract cannot be varied except as herein stated." Provisions restricting the authority of agents or employees of a corporation to vary, or add by parol to, the terms of a written contract prepared by it for execution are reasonable and valid. The oral agreement, therefore, entered into between O'Donnell and the canvasser of the company as to the place of payment was void if it varied or added to the terms of the written contract.

Where a contract for the payment of money is silent as to the place of payment, in the absence of any legitimate inferences to the contrary the law implies that payment shall be made at the residence, office, or place of business of the creditor, if within the state. *Bain v. Wilson*, 1 J. J. Marsh. (Ky.) 202; *Galloway v. Standard F. Ins. Co.* 45 W. Va. 237, 31 S. E. 969; *Dockham v. Smith*, 113 Mass. 320, 18 Am. Rep. 495; 30 Cyc. 1185.

The same rule was announced in *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168, but in that case the creditor was absent from the state and it was held not to apply. In *Moore v. Davidson*, 18 Ala. 209, the court held that, where a contract for the payment of money was silent as to the place of payment, parol evidence was inadmissible to show that it was different than that of the place of contract. It is a general rule that in the absence [375] of a valid contract to the contrary the debtor of money must seek the creditor, if the latter be within the state and his residence therein is ascertainable, and there make payment. 22 Am. & Eng. Enc. of Law (2d ed.) 533 and cases cited. It follows that the parol contract relied upon varied the terms of the written contract and was void because expressly forbidden by such written contract.

The right of the company to make reasonable changes in its method of doing business, so long as such changes did not entrench upon contract rights or violate statutory mandates, cannot be questioned. Reasonable rules for the conduct of business may always be made subject to the limitations above stated. The rule here made was reasonable in its nature, one no doubt productive of less confusion and mistakes, and tending to a more economical administration of the affairs of the company, and not unreasonably burdensome upon the subscribers. In *Magruder v. Cumberland Telephone, etc. Co.* 92 Miss. 716, 46 So. 404, 16 L.R.A. (N.S.) 560, it was expressly held that the custom of a telephone company to send collectors may upon sufficient notice be abandoned and the subscribers may be compelled to pay at the company's office. So also a rule requiring subscribers to pay within a reasonable time may be enforced. *Rushville 't'o-op. Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327.

There can be no question in this case but that repeated timely notices of the change were given to O'Donnell.

The tender to the manager at the office of O'Donnell was not such tender as to render the company liable, for it was not obliged to receive payment there at the time it was offered. Under the circumstances of this case it could insist upon a compliance with its reasonable regulation as to place of payment.

By the Court.—Judgment affirmed.

#### NOTE.

#### Admissibility of Parol Evidence to Show Place of Payment under Contract Silent in That Respect.

The prevailing rule is that parol evidence of an agreement relative to the place of payment of money to be paid under a contract

is admissible where the contract is silent in that respect. *Pearson v. Bank of Metropolis*, 1 Pet. 89, 7 U. S. (L. ed.) 65; *Cox v. National Bank*, 100 U. S. 713, 25 U. S. (L. ed.) 741; *Ebert v. Arends*, 190 Ill. 221, 60 N. E. 211; *Blackerby v. Continental Ins. Co.* 83 Ky. 574; *State Bank v. Hurd*, 12 Mass. 172; *McKee v. Boswell*, 33 Mo. 567; *Meyer v. Hibsher*, 47 N. Y. 265; *Wittkowski v. Smith*, 84 N. C. 672, 37 Am. Rep. 633; *Rose v. McCracken*, 20 Tex. Civ. App. 637, 50 S. W. 152. See also, *Myers v. Byington*, 34 Ia. 205; *Farmers, etc. Bank v. Allen*, 18 Md. 475; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285, 17 Cyc. 745. Compare *Specht v. Howard*, 16 Wall. 564, 21 U. S. (L. ed.) 348; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; *Big-ham v. Talbot*, 51 Tex. 450. Thus in *Ebert v. Arends*, supra, it was said: "In cases where the place of payment is thus omitted in the written contract, it may be shown by testimony that a place of payment was agreed upon by parol between the parties." And in *Cox v. National Bank*, 100 U. S. 713, 25 U. S. (L. ed.) 741, it was said: "Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business."

Parol testimony to show such an agreement is admissible, it being settled law that the introduction of such testimony is not inconsistent with the rule that a written instrument cannot be varied by parol evidence." *Pearson v. Bank of Metropolis*, 1 Pet. 89, 92, 7 U. S. (L. ed.) 63, 66. *Blackerby v. Continental Ins. Co.* 83 Ky. 574, the court in holding to be admissible parol evidence of the place of payment of an obligation executed for the payment of the premium on an insurance policy, said: "The written obligation is . . . silent as to any place of payment; its terms presumptively show that the appellant was not to seek the appellee out of the state to pay his premium, and the agreement with the company's local agent as to payment was made with the one who had effected the insurance with him, and fixed the time and amount of the payments. It is true parol testimony is inadmissible to vary or contradict the terms of a written contract; but this rule does not apply where the original contract was verbal and entire, and only a part of it has been reduced to writing; for instance, it may be shown by parol when a written promise without date was made. The parol evidence, in this instance, of what the agent said to or agreed with the insured as to payment, was competent, because no stipulation of the policy was waived or contradicted by it, and the appellant had the right, under all

the circumstances, to believe that the agent had the authority to, and that he had the right to rely upon him to instruct him as to the manner of paying the premiums."

In several jurisdictions the rule obtains that parol evidence as to the place of payment is inadmissible although no place for payment is specified in the contract. *Moore v. Davidson*, 18 Ala. 209; *Stubbs v. Goodall*, 4 Ga. 106; *Patten v. Newell*, 30 Ga. 271; *McLaren v. Marine Bank*, 52 Ga. 131; *Pierce v. Whitney*, 29 Me. 195. And see the reported case. Thus in *Pierce v. Whitney*, supra, it was said: "Parol evidence cannot be received or have the effect to show, that a note not made payable at any particular place was in fact agreed to be payable at a particular place." And in *McLaren v. Marine Bank*, supra, the court said: "That parol evidence is inadmissible to show that a paper, on its face payable generally, was intended by the parties to it to be negotiated or payable at a chartered bank, has been definitely settled by this court in [*Stubbs v. Goodall*] 4 Ga. 106, and [*Patten v. Newell*] 30 Ga. 271; and a contrary ruling would be a heavy blow to the negotiability of such instruments, since no one could ever know what was the truth as to a paper offered for negotiation." In *Moore v. Davidson*, 18 Ala. 209, while parol evidence was held to be admissible to show that a bond was executed in the state, evidence of an agreement that the bond was payable in another state was held to be inadmissible.

For a general discussion of the right to supplement a written contract by proof of a collateral oral agreement, see the notes to *Johnson v. McClure*, 2 Ann. Cas. 144, and *Wehnes v. Roberts*, Ann. Cas. 1914A 452.

For a discussion of the place of payment under a contract not specifying the place, where the parties are residents of different states or countries, see the note to *Weyand v. Park Terrace Co.* Ann. Cas. 1912D 1010.

## CITY OF SPOKANE

v.

## LADIES' BENEVOLENT SOCIETY ET AL.

Washington Supreme Court—January 8,  
1915.

83 Wash. 382; 145 Pac. 443.

### Streets and Highways — Change of Grade — Right to Damages.

The owner of a city lot in front of which the street grade has been fixed by ordinance,

but the street never actually graded, is not entitled to damages for the change of grade, if he has made no improvements in reliance thereon.

[See note at end of this case.]

**Same.**

The owner of a city lot who has improved it in reliance upon a street grade established by ordinance may recover, on the ground of estoppel, damages for a change in the grade, though such change was made before the street was actually brought to grade.

[See note at end of this case.]

Appeal from Superior court, Spokane county: SULLIVAN, Judge.

Eminent domain proceedings. City of Spokane, plaintiff, and Ladies' Benevolent Society et al., defendants. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. MODIFIED.

*H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant and Dale D. Drain* for appellant. *Skuse & Morrill* for respondents.

[382] CHADWICK, J.—The grade of Calispel street, in the city of Spokane, was established by ordinance in the year 1889. The streets were not brought to a physical grade, although some property has been improved with reference to what we [383] will call the paper grade. In 1910, the city, intending to grade the street, passed an ordinance re-establishing the grade of the street. The former paper grade was materially changed. The city then brought an action to condemn and assess the damages, if any, caused by the grading of the street to the grade line established by the later ordinance. Respondents are owners of abutting lots.

This court has held:

"In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication." *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1081. See also *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916, and authorities cited therein; *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089; *Muller v. Great Northern R. Co.* 75 Wash. 631, 135 Pac. 631.

It is not contended by the corporation counsel that the city is not liable for the damaging of property that has been improved by the owner in faith of the first or paper grade. "The question," as stated by counsel for respondents, "is whether a city of the first class can establish and fix the grade of a street by an ordinance duly enacted, and thereafter change such grade, and grade the

street to the re-established grade to the damage of abutting property, and not be liable to the owners of such property for the damage so caused." Or, in other words, is a paper grade unacted upon by the city a grade established, or an initial grading, within the meaning of our own cases so as to prevent a change thereof without meeting the damages to unimproved property under art. 1, § 16 of the constitution, which provides that private property shall not be taken or damaged for a public use until the damages have been ascertained and paid.

It cannot be denied that a grade is in a sense established when it is defined by ordinance, but we cannot make ourselves [384] believe that it is sound doctrine to hold that a city having an original and continuing power to establish grades and to grade streets in conformity therewith, *Abbott, Municipal Corporations*, § 810, should be held to a rule of too strict interpretation.

If no ordinance had been passed in 1889, the city would not have been foreclosed of its right to make an original grade without payment of the resultant damages, notwithstanding the lapse of time or the improvement of the property. *Mattingly v. Plymouth*, 100 Ind. 545. For it is held, and properly so, that the holding and improvement of the property is subject to the legislative will of the city as to the time when a street shall be graded; that this will not be controlled by the courts, and consequently there can be no estoppel because of the lapse of time, either to the burden of the city or to the benefit of the property owner.

The right to recover damages at all against a city for grading or regrading a street rests upon the theory that there is a physical invasion. Until there has been a physical invasion, therefore, it would be more logical to hold that the mere adoption of a paper grade would not exhaust the right of the city to redefine the grade line so as to make a grade that will better serve the whole public, compensating only those who have built upon or improved their property and who are damaged by the change. Compensation being allowed, not upon the theory that the city cannot change the grade of a street—for that it has ample statutory authority to do—but upon the ground of estoppel, or, as Judge Dillon says, upon the "basis of natural justice." *Dillon, Municipal Corporations* (5th ed.) § 1865.

The cases involving the exact question here presented are few. In fact, we have found none which can be called *quatuor pedibus* with it. There are, however, expressions in the books which indicate that the subject has been considered.

It has been quite generally held that the mere establishment by ordinance of a paper grade changing an existing grade [385] or

establishing an original grade in those jurisdictions where damages are allowed therefor will not give a right of action. The right rests inchoate until such time as the city acts upon it. A paper grade gives no right of action. *Clark v. Philadelphia*, 171 Pa. St. 30, 33 Atl. 124, 50 Am. St. Rep. 790. Damages for the grading or change of grade are not given until the actual operation on the ground. *Plan 166*, 143 Pa. St. 414, 22 Atl. 669.

In New Jersey, awards for damages flowing to those who had built upon their land, because of changes or alterations in street grades, are made under certain statutes similar in form and purpose to *Rem. & Bal. Code*, § 7874 (P. C. 77, § 1165). It is said in *State v. Sayre*, 41 N. J. L. 158:

"As the claim of the land owners can stand on these statutes alone, it is plain that those who had no 'house or other building' erected on their land at the time of the alteration of grade, have no legal right to compensation, and the awards made to them must be set aside, unless some of the reasons alleged for the non-interference of this court be sufficient."

A consideration of these and other cases impelled Mr. Abbott to say: "The mere establishment of a grade on paper prior to the one which was consummated by physical construction cannot be considered." 2 *Abbott, Municipal Corporations*, p. 1917, note 584.

The case, or rather the observations of the judge who wrote the case, which most nearly touches this case, is *Manning v. Shreveport*, 119 La. 1044, 44 So. 882, 13 L.R.A. (N.S.) 452:

"The adoption of a (paper) grade may be said to fix the liability of the property affected by it to future damage, but the weight of authority is to the effect that such damage is not recoverable until actually inflicted, and hence that it is the owner at the time who may recover it. A municipality may not be able to grade all of its streets at one time, but it has the undoubted right to declare in advance what the [386] grade shall be, and though, quoad property then existing and affected or to be affected, the liability to damage is thereby imposed, and the right to recover it may be said to attach to the property, to be exercised when the damage shall be actually inflicted, *it cannot be said that any such liability is imposed, or that any such right attaches, with respect to property which is then nonexistent*. In other words, by the adoption of a grade, to be thereafter established, the municipality fixes the status of an existent lot as property which must sooner or later be affected by the actual establishment of the grade so adopted, and the right to recover for such damages as it may sustain, though inchoate at the moment,

Ann. Cas. 1916E.—24.

becomes perfect when the damage is actually inflicted, and may be exercised by the then owner of the lot. But, if the lot be not improved when the grade to be actually established in the future is adopted, no liability for damage to improvements is imposed, and no right of recovery with respect thereto, whether inchoate or otherwise, is created. Under such circumstances, if the then non-existent improvements are subsequently, and at the option of the owner, placed upon the lot, they come into existence subject to conditions already established and of which the owner of the lot has notice, and he must govern himself accordingly."

The supreme court of Utah has held that an abutting lot owner can recover consequential damages for an original grade of the street, but it is worthy of notice that the writer of the opinion in the case of *Kimball v. Salt Lake City*, 32 Utah 253, 90 Pac. 395, 125 Am. St. Rep. 859, 10 L.R.A. (N.S.) 483, where many cases were considered, found the rule in some jurisdictions to be,

"It is likewise true that in some states the law is still to the effect that consequential damages are recoverable only where one established grade is changed to another, and that until the grade is actually established and acted upon, the municipality is not liable for consequential damages."

The finding seems apropos, inasmuch as we hold that consequential damages are recoverable where a grade once made is changed. It is our opinion, as it was the opinion of the writer, gathered not so much from apt words and expressions [387] as from the logic of the cases, that a grade is not actually established when considered in connection with statutes or constitutions allowing damages for a "taking or damaging" until it is "acted upon." The logic of our former decisions is that there can be no taking or damaging of abutting property subject to an initial grade, and where the owner of an unimproved lot is in the same position he would have been in had the city never passed the ordinance of 1889, he is in no position to assert or claim damages for the actual grading of the street.

Coming now to the cases relied on by respondent: *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048; *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 699; *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, 137 Pac. 819; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304. The *Sargent* case does not touch our question. The court had under consideration a statute—*Rem. & Bal. Code*, § 7874 (P. C. 77, § 1165)—protecting owners who had built with reference to a grade established by actual improvement of a street to a grade, or by reference to a grade formally adopted by ordinance. It is no broader in its holding than the statute it construes. The cases cited

in the Sargent case all go to the one proposition, that a grade established, either by ordinance or user and acted upon by the property owner, is such an establishment as will compel a city to meet the resultant damages.

In *Stewart v. Clinton*, 79 Mo. 603, the street had been graded.

The case of *Mattingly v. Plymouth*, 100 Ind. 545, goes primarily to the degree of proof required to show the establishment of a grade. In so far as it bears on this case, it is consistent with our reasoning:

"As the initial point in the appellant's case, it was necessary to show the existence of a duly established grade by the city authorities at the time the improvements were made; that the improvements were made with reference to a grade so established, and that the city was proceeding to change [388] the grade so established, to the appellant's damage, without the assessment and tender of the damages so occasioned. This was neither averred in the complaint nor shown in the evidence, and so both are fatally defective."

The case of *Nebraska City v. Lampkin*, 6 Neb. 27, also goes to the degree of proof required to show an established grade and seems to hold, inferentially at least, that a grade is not established until it is defined and "worked." In the *Rettire* case, the grade had been established and the street improved under an ordinance passed in 1903. The only question before the court was whether the city was bound to follow the elevation of the curb when later fixing a grade for sidewalks. In the *Jones* case the fact, as found by the court, was that there was a paper grade; that it was the only grade and that the plaintiff *Jones* had made his improvements in defiance of it. It is the antithesis of the case of the claimants in this case, who have made improvements with reference to the paper grade, and is, therefore, an authority sustaining their right to recover damages as for a change of grade.

In the *Thorberg* case, the city council by resolution had "adopted" the natural level of the land as a grade and had improved the street at the expense of the abutting property. That case is sustained by reference to the doctrine of estoppel, the elements of which are entirely wanting in this case.

The case of *Goodrich v. Milwaukee*, 24 Wis. 422, is also relied on. In that case the street had been paved at the expense of the lot owners and it was held that the city was estopped to regrade without meeting the consequent damages.

Finally, it is insisted that this court has settled the present controversy in *Hart v. Seattle*, 42 Wash. 113, 84 Pac. 640, where it is said:

"It is first contended that it was error to grant any restraining order in the premises.

It is said that the city [389] denies that it is changing the grade, and it is also argued that, inasmuch as the lots are unimproved, the threatened change can result in but slight damage, for which reason the court should not have interfered. With regard to the fact as to the threatened change of grade, we think the court was justified, under the pleadings and affidavits submitted, in reaching the conclusion that such change was threatened by the city's officers. We also think the showing as to resultant damage justified interference by injunction. One of the affidavits placed the damages as high as \$5,000, and the attendant facts stated are such as, we think, bring the case within the rule established by this court, that where a proposed change of the grade of a street will seriously damage an abutting owner's property, the change may be enjoined, unless the damage has been ascertained and paid."

Counsel say "plaintiff's (*Hart's*) property was unimproved." That case holds that unimproved property may be damaged by a change of grade. The question of damages for an initial grade was not involved. In fact, reference to the briefs and record will show that the city had not only established but had physically graded the street in front of the property and was about to make, as was alleged, a most material change. The defence of the city was that the grade was too steep for asphalt pavement and that "it was necessary to take up and relay the pavement in front of lots 13 and 14," being the lots owned by plaintiff.

Our conclusion is that one who buys a city lot abutting a street dedicated but not graded takes it subject to the continuing right of the city to establish an initial street grade which will be conformable to the convenient use of the public; and, if his property be unimproved at the time a physical grade is made, his injury, if any, falls within the operation of the rule *damnum absque injuria*. If, on the other hand, the city has adopted a paper grade, and, pending a physical grade, a lot owner has improved his property with reference to such paper grade, he may recover damages as for a change of grade, his right being referable to the doctrine of estoppel.

[390] It is but fair to say that the novelty of the questions occurring at the trial impelled the trial judge to express a doubt as to the true rule. He accordingly admitted all testimony offered, and overruled motions for a judgment and for a new trial, upon the theory that, if this court held with the city, it could "simply disregard the jury's verdict as to all the lots not improved," whereas, as he said, if he ruled otherwise and this court did not sustain his judgment the case would have to be remanded for another trial.

Remanded, with instructions to enter a judgment consistent with this opinion.

Crow, C. J., Gose, Morris, and Parker, JJ., concur.

#### NOTE.

The reported case holds that if a street grade is legally established, and the grade is changed before the street is brought to the established grade, the municipality is not ordinarily liable to abutting owners for the change, but that an exception to that rule exists in favor of an owner who has before the change of grade improved his property with reference to the established grade. The holding proceeds on the principle that an abutting owner is entitled to rely on the legal establishment of a grade, irrespective of what has been done with respect to the actual grading of the street. The converse of that doctrine, that an abutting owner is not entitled to damages if, after a grade has been legally established but before the street is brought thereto, he improves his property with reference to the street level as it then exists, is discussed in the note to *Gray v. Salt Lake City*, Ann. Cas. 1916D 1135.

#### STATE

v.

#### LONGINO ET AL.

Mississippi Supreme Court—March 22, 1915.

109 Miss. 125; 67 So. 902.

#### Criminal Law — Applicability of Statute—Effect of Decision Subsequently Overruled.

Code 1906, § 1169, provides that it shall be a criminal offense for the president, cashier, teller, etc., conducting the business of receiving on deposit money, etc., to receive any deposit while knowing the institution is insolvent. The statute was judicially declared not to apply to certain acts, but subsequently the ruling of the court was reversed and such acts held a criminal offense under the statute. Between the two decisions defendants committed such acts. Held, that a holding by the court whether a criminal statute is, or is not, applicable to a particular state of facts is within the spirit of the constitutional prohibition against the passage of ex post facto laws, the decision of a

court in construing a statute being as much a part of the law of the land as a legislative enactment, unlike their decisions relating to the common law, which are mere evidence of the law, and that no conviction may be had under the statute in question for violation committed between the first and second decisions of the court.

[See note at end of this case.]

#### Same.

Held, the rule announced being confined strictly to a criminal case, that to convict a defendant for an offense committed after a decision of the court holding a criminal statute not applicable to the facts, and before its reversal in a subsequent decision, would be to violate the constitutional provisions against the infliction of cruel and unusual punishments.

[See note at end of this case.]

Appeal from Circuit Court, Lawrence county: WARD, Judge.

Criminal action. A. T. Longino et al., indicted for violation of statute. Demurrer to indictment sustained. State appeals. **AFIRMED.**

[125] Appellees were indicted under section 1169 of the Mississippi Code of 1906, the indictment charging that appellees were officers, agents, and employees, to wit, [126] president, cashier and directors of a banking institution, and that—"being then and there engaged in conducting the business of receiving on deposit the money and other valuable things of other persons for the said Merchants' & Planters' Bank, which said bank was then and there wholly insolvent, and the said (appellees) agents, officers, and employees aforesaid then and there having good reason to believe that said bank was then and there insolvent, did then and there unlawfully and feloniously receive a deposit in said bank consisting of money, etc. . . . which was then and there received for deposit in the said bank from . . . a depositor, . . . and that said agents, officers, and employees did not then and there, or at any time prior thereto, inform said depositor that said bank was then and there insolvent."

Section 1169 of the Code of 1906 is as follows:

"If the president, manager, cashier, teller, assistant, clerk, or other employee or agent of any bank or broker's office or establishment conducting the business of receiving on deposit the money or other valuable things of such persons, shall remove or secrete or conceal the assets or effects of such establishment for the purpose of defrauding any of the creditors of the establishment, or shall receive any deposit knowing, or having a good reason to believe, the establishment to be insolvent, without informing the depositor of

such condition, on conviction, he shall be imprisoned in the penitentiary not longer than five years."

Appellees demurred to the indictment, and the demurrer was sustained, and the state appealed.

Ross A. Collins and Geo. H. Ethridge for appellant.

G. Wood Magee and Longino & Ricketts for appellees.

[131] COOK, J.—This court in Traylor's Case, 100 Miss. 544, 56 So. 521, decided that the act charged in the present case was not a violation of section 1169, Code 1906. Subsequently, this court, in State v. Rawles, 103 Miss. 807, 60 So. 782, overruled Traylor's Case, holding that the act which the indictment in the present case charges was a violation of the code section mentioned above. In the interim, the indictment charges that defendants in the present case did the acts which this court in the Traylor Case had decided did not come within the condemnation of the statute. The trial court sustained defendants' demurrer to the indictment, doubtless upon the theory that he was bound by the decision in Traylor's Case. So we have the question as to whether the decision in the Rawles Case is to have a prospective or a retroactive effect. In other words, after the decision of this court in the Rawles Case, will we consider Traylor's Case at all in the construction of the statute, in so far as the rights of the present defendants may be concerned?

We do not wish to be understood as announcing a general rule. We confine the rule herein announced strictly within the limits of this case. We are considering a change of decisions interpreting criminal statutes, and that alone.

The supreme court of Iowa, in State v. O'Neil, 147 Ia. 513, 126 N. W. 545, 33 L.R.A. (N.S.) 788, Ann. Cas. 1912B 691, discussed the precise question here presented. This case brought forth four opinions, all of which held that the defendant was not guilty; that he [132] was protected by the decision which was in force at the time it was alleged he did the act charged against him, and that a subsequent decision, overruling the former decision, would not destroy his defense. The several judges writing opinions in the case referred to gave different reasons for their conclusions, but all agreed that to hold otherwise would be unjust. Quoting from the majority opinion, written by Judge McClain, it is said:

"In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right

of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow many exceptions to statutory definitions of what shall constitute a crime."

This seems to express the dominant thought running through all the opinions, but the reasons given for the exceptions to the general rule were widely different.

The concurring opinion of Chief Justice Deemer, quoted this observation of the supreme court of the United States, in *Douglas v. Pike County*, 101 U. S. 677, 25 U. S. (L. ed.) 968:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

The learned judge, referring to this quotation from the supreme court of the United States, said:

"If this be the rule with reference to the interpretation of statutes in actions involving property or contract rights, and such seems to be the doctrine established by the weight of judicial decisions, there is the more reason for holding it applicable to criminal cases, particularly where the court has once held the criminal statute void [133] and of no effect, because contrary to some provision of the fundamental law."

We again quote from the opinion of the Chief Justice, as follows:

"I see no good reason for not holding that this case comes within the provision of section 21, of article 1, of the Bill of Rights, which prohibits the passage of *ex post facto* laws. An *ex post facto* law is one which makes an act innocent when done a crime. State v. Squires, 26 Ia. 340. Strictly speaking, perhaps, this refers only to laws passed by the legislature, but there is every reason for holding that it also applies to a change of judicial decisions. Decisions of courts construing statutes or declaring them unconstitutional are as much a part of the law of the land as legislative enactments. They become a part of the body of the law itself, and are not merely the evidences thereof, as are decisions relating to the unwritten or common law."

This reasoning appeals to us as sound, and in entire accord with the judicial decisions touching this question. Another reason given by Chief Justice Deemer for his concurrence in the conclusion of the court was thus expressed:

"I am very clearly of the opinion that no other basis is needed for the conclusion, which every one desires to reach in this case, than



the constitutional provision against cruel and unusual punishment."

It occurs to us that the punishment of an act declared by the highest court of the state to be innocent, because the same court had seen fit to reverse its interpretation of a statute, would be the very refinement of cruelty; it is certainly unusual because no precedent can be found for its infliction; that it is unjust is perfectly obvious.

We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. This rule seems to be the just and the most reasonable rule. This rule applies the same principle as [134] the constitutional prohibition of *ex post facto* legislation. It will prevent injustice and also prevent cruel and unusual punishment of individuals entirely innocent of any intention to violate the laws of the state.

The supreme court of North Carolina, in *State v. Bell*, 136 N. C. 674, 49 S. E. 163, reviewed its former decision interpreting a criminal statute, and reached the conclusion that the former decision was wrong in holding that the act in question did not violate the statute. In the case under review, the defendant was held to be not guilty because the act done by him was innocent under the former decision. The reason for its conclusion was stated this way:

"While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this court in *State v. Neal*, 129 N. C. 692, 40 S. E. 205, *supra*. If so, to try them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this court, to order a new trial, with the direction that the testimony offered in this case, in so far as it is made admissible by the ruling of this court in *State v. Neal*, be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in *Neal's Case* they are entitled to do so, but the construction now put upon the [135] statute will be applied to all future cases. While, as we have said, we find no au-

thority directly in point, we think this course is sustained by what is said in *Wells on Stare Decisis*, 566. See also *Center School Tp. v. State*, 150 Ind. 168, 49 N. E. 961, 26 Am. & Eng. Enc. of Law (2d ed.) 179; *In re Dunham*, 9 Phila. 471, 29 Leg. Int. 389, 2 Md. Law Rep. 485, 8 Fed. Cas. No. 4,146, p. 37."

*Ingersoll v. State*, 11 Ind. 464, and *Endlich on Interpretation of Statutes*, section 363, are authority for this holding.

The supreme court of the United States has uniformly held that a change of decision does not have the effect to impair contractual rights obtained while the changed decision was in force.

Our attention has not been directed to any judicial decision in conflict with our conclusions, and after much diligence in searching the books, we think it may be said that no such decision can be found.

The argument on behalf of the state is that when a decision is overruled, in legal contemplation, the decision never existed. This argument has been met and satisfactorily answered in the adjudicated cases. It is also said that every man is presumed to know the law, and no one can take the shelter under an erroneous decision of the highest court. This argument is, in our opinion, manifestly faulty. If the legal maxim has any application to a case like this, and is controlling, the maxim must be amended to read thus: "Ignorance of the law excuses no man, except members of the supreme judicial tribunal of the state."

The judgment of the trial court sustaining the demurrer to the indictment is affirmed and defendants are discharged.

Affirmed.

#### NOTE.

#### **Criminality of Act Committed after Decision Holding Statute Inapplicable and before Reversal of Decision.**

In the reported case it is held that where there has been a decision by the court of last resort holding that a certain criminal statute does not apply to a certain act and the decision has later been overruled, a commission of the act in question between the two decisions is not punishable under the statute. A similar decision was rendered in *State v. Bell*, 136 N. C. 674, 49 S. E. 163, wherein the defendant set up a defense that had been allowed in a previous case of an indictment under the same statute. After holding the previous decision to be unsound the court said: "While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based

upon the decision of this court in *State v. Neal*, supra. If so, to try them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this court, to order a new trial, with the direction that the testimony offered in this case, in so far as it is made admissible by the ruling of this court in *State v. Neal*, be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in *Neal's* case they are entitled to do so, but the construction now put upon the statute will be applied to all future cases."

By statute in *New York* the same rule has been adopted as to penalties and forfeitures. That statute was quoted and applied in *Hollaman v. El Arco Mines Co.* 137 App. Div. 862, 122 N. Y. S. 852, as follows: "Section 1961 of the Code reads: 'Whenever, by the decision of the appellate division of the supreme court, a construction is given to a statute, an act done, in good faith, and in conformity to that construction, after the decision was made, and before a reversal thereof by the court of appeals, is so far valid, that the party doing it is not liable to any penalty or forfeiture, for an act that was adjudged lawful by the decision of the court below. . . . The appellate division, in *Henry v. Babcock & Wilcox Co.* had construed this statute in an action for a penalty, so as to excuse the defendants in refusing examination of the book if they brought themselves within it. The decision denied the right of the stockholder to copy from the book the names and addresses, and held that the demand to so copy could not be separated from a conjoined demand to inspect. So in the present case the demand was to see the stock book and get a list of the stockholders. Plaintiff gave a legitimate reason for wishing the names and addresses, as he wished to communicate with other stockholders in reference to the conduct of the company. The decision on which defendants rely was erroneous, but it interpreted the defendants' duty and rights at the time of the refusal on which the recovery of the penalty is sought to be predicated.'"

The decisions herein noted harmonize with the view that where a criminal statute is first declared to be unconstitutional and later it

is held to be constitutional, a person committing the prohibited act between the times of the two decisions is not liable to indictment under the statute. See the note to *State v. O'Neil*, Ann. Cas. 1912B 691.

## WILLIAMS

v.

## PULLMAN COMPANY.

Minnesota Supreme Court—March 19, 1915.

129 Minn. 97; 151 N. W. 895.

### Malicious Prosecution — Proof of Want of Probable Cause — Acquittal.

In an action to recover damages for malicious criminal prosecution, proof of an acquittal upon a trial for the crime charged is not prima facie evidence of want of probable cause for the institution of the prosecution. [See note at end of this case.]

### Probable Cause Question for Court.

What facts, and whether particular facts, constitute probable cause, is for the court.

### Evidence Insufficient.

The facts in this case upon plaintiff's own testimony do not prove want of probable cause for his arrest and prosecution upon the charge of drunk and disorderly.

(Syllabus by court.)

Appeal from District Court, Ramsey county: Lewis, Judge.

Action for malicious arrest and criminal prosecution. George T. Williams, plaintiff, and Pullman Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Denegre & McDermott* for appellant.

*W. T. Francis* and *E. S. Thompson* for respondent.

[98] *HOLT, J.*—Action for malicious arrest and criminal prosecution in which plaintiff had a verdict. Defendant appeals from an order denying its motion for judgment notwithstanding the verdict or a new trial.

In an action to recover damages for a malicious criminal prosecution plaintiff must prove want of probable cause. All our decisions, from the early case of *Chapman v. Dodd*, 10 Minn. 350, to *Cox v. Lauritsen*, 126 Minn. 128, 147 N. W. 1093, are to that effect. The acquittal in the criminal prosecution is not evidence of want of probable cause for its institution. *Chapman v. Dodd*, supra;

Shafer v. Hertzog, 92 Minn. 171, 99 N. W. 796; Hanowitz v. Great Northern R. Co. 122 Minn. 241, 142 N. W. 196. It is the rule in this state that the discharge by an examining magistrate of the person accused of crime is, ordinarily, *prima facie* evidence of want of probable cause to enter the complaint or cause the arrest. Chapman v. Dodd, supra; Cole v. Curtis, 16 Minn. 182; Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431; Blazek v. McCartin, 106 Minn. 461, 119 N. W. 215. The reason for the distinction is obvious, for in the case of a preliminary examination the accused is entitled to a discharge if "it shall appear [99] that no offense has been committed, or that there is not probable cause for charging the prisoner with it,"<sup>1</sup> whereas upon the trial of the accused for a criminal offense he is entitled to an acquittal if no more than probable cause is proven against him. The instigator of the prosecution may have a strong case of probable cause, nevertheless on a trial upon an indictment or criminal complaint an acquittal results because the state is unable to prove guilt beyond a reasonable doubt. Probable cause is all that is required to protect the one who institutes a criminal prosecution.

What facts, and whether particular facts, constitute probable cause is for the court. This proposition is firmly settled. Burton v. St. Paul, etc. R. Co. 33 Minn. 189, 22 N. W. 300; Moore v. Northern Pac. R. Co. 37 Minn. 147, 33 N. W. 334; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Baldwin v. Capitol Steam Laundry Co. 109 Minn. 38, 122 N. W. 460; Mundal v. Minneapolis, etc. R. Co. 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Hanowitz v. Great Northern R. Co. 122 Minn. 241, 142 N. W. 196; and Lammers v. Mason, 123 Minn. 204, 143 N. W. 359. In the last cited case is reiterated the rule that when the question of probable cause "comes before us we consider the evidence as if heard here, and weigh it in order to determine the correctness of the determination below."

The only facts upon which must rest the claim of want of probable cause are found in plaintiff's own testimony. Therefrom it appears that plaintiff was in the employ of defendant as a porter on one of its sleeping cars operated by the Great Northern Railway Co. between St. Paul and Seattle. On his return to St. Paul, in the morning of March 26, 1913, the assistant superintendent, Mr. Healy, told him to go out with the coast train due to leave at 10:45 in the evening. Porters were required to be at their car one hour and forty-five minutes ahead of the leaving time. Plaintiff was 15 or 20 minutes late. One W. C. Williams was in the employ of defendant

as night superintendent of its sleeping car porters at the station. Plaintiff was well acquainted with him, knew that his authority was to see that everything pertaining to the cars and the employees thereon was in proper order, that he had power to assign [100] porters to cars, to take them off any particular car, and to hire and discharge them. Shortly after 9:15 p. m., while plaintiff was in the car changing his clothes, Mr. Williams came in and told him that he could not go out on the car but to take his belongings and get off. Plaintiff responded that it was not necessary for him to get off because Mr. Williams said so, but if Mr. Healy would give the order he would obey. Mr. Williams, however, insisted that plaintiff should leave, saying that if he did not he would call a policeman "and have you taken off." Plaintiff did not go, but resumed dressing and began to assist persons on. By that time another porter, placed in charge by Williams, also attempted to care for passengers. In a few minutes Mr. Williams came back where the two porters were both trying to act, and said to plaintiff: "You are going to get your things and get off?" Plaintiff said: "No, sir." Williams said: "Well, this is my second time. I told you, if you don't get off I am going to get a policeman and have you put off." Plaintiff refused to obey, and Williams got a police officer who arrested him. After the arrest the officer told plaintiff to go in the car and get his belongings, but he refused unless the officer went along. Thereupon plaintiff was locked up. When the officer asked Williams what offense plaintiff should be charged with, the answer was, drunk and disorderly. Such are in brief the facts according to plaintiff's version. From defendant's evidence there could be no possible claim of want of probable cause for the arrest. But we must accept plaintiff's story in determining whether a cause of action was made out. Our conclusion is that the proof fails to establish want of probable cause for the arrest. Plaintiff refused to obey the orders of his superior. Defendant is charged with a high measure of responsibility to the traveling public who make use of sleeping car accommodations. No servant showing the slightest indication of intoxication should be tolerated as a porter in charge of such car. A master should not be required to retain in his employ an insubordinate servant; especially is this true where the consequences might seriously involve the master and others to whom the master owes a duty of great care and protection. Mr. Williams was the one to determine whether plaintiff was in a fit condition or mood to be placed in charge as porter of that car. He determined that plain-

<sup>1</sup> [G. S. 1913, § 9083.]

tiff was not, and [101] selected another porter. Plaintiff refused to leave the car when ordered so to do, and insisted on interfering with the porter on duty. It could not be expected that Mr. Williams should engage in a physical encounter with plaintiff at that time and place. The most charitable and reasonable view to take of plaintiff's unwarranted insubordination was to lay it to strong drink, which was done. We are agreed that plaintiff utterly failed to prove want of probable cause, and that from the facts conceded by him it is clear that he can never establish a cause of action.

The order denying judgment notwithstanding the verdict is reversed and judgment ordered for defendant.

#### NOTE.

#### **Acquittal in Criminal Prosecution as Evidence, in Action for Malicious Prosecution, of Want of Probable Cause.**

The present note is confined to a treatment of the recent cases relating to the effect of an acquittal in a criminal prosecution as evidence, in an action for malicious prosecution, of a want of probable cause. The earlier decisions on that subject are collated and discussed in the notes to *Lindsey v. Couch*, 18 Ann. Cas. 60, and *Ross v. Hixon*, 26 Am. St. Rep. 123, 155.

By the weight of authority proof of an acquittal of a crime is not prima facie evidence, in an action for malicious criminal prosecution arising out of the prosecution for that crime of want of probable cause for the institution of the prosecution, and standing alone is insufficient to support a holding of want of probable cause. *Fowlkes v. Lewis*, 10 Ala. App. 543, 65 So. 724; *Harnonwitz v. Great Northern R. Co.* 122 Minn. 241, 142 N. W. 196; *Central Light, etc. Co. v. Tynon*, 42 Okla. 86, 140 Pac. 1151. See also *Casey v. Dow*, 94 Ark. 433, 21 Ann. Cas. 1046, 127 S. W. 708, 140 Am. St. Rep. 124; *Schott v. Indiana Nat. L. Ins. Co.* 160 Ky. 533, Ann. Cas. 1916A 337, 169 S. W. 1023; *Eckerle v. Higgins*, 159 Mo. App. 177, 140 S. W. 616; *Goodman v. Bedras*, 123 N. Y. S. 250; *Saunders v. Baldwin*, 112 Va. 431, Ann. Cas. 1913B 1049, 71 S. E. 620, 34 L.R.A.(N.S.) 958. And see the reported case. In *Saunders v. Baldwin*, supra, the court said: "One of the reasons given why an acquittal of the accused is not evidence of a want of probable cause is that the prosecution must not only prove that the accused is probably guilty, which would show that there was probable cause for the prosecution, but it must prove that he is guilty beyond a reasonable doubt; and it would be manifestly unreasonable to hold that the failure of the prosecution to

make out such a case is evidence of want of probable cause for instituting the prosecution. An acquittal may result from some technical error or irregularity, or other cause having no bearing upon the question of probable cause. The prosecution may be unable to produce a witness, and many other facts and circumstances may exist which, while having a bearing on the action of the trial court in acquitting, have no bearing whatever on the question of probable cause. See last case cited, and note to *Lindsey v. Couch*, 18 Ann. Cas. pp. 65, 66, and cases cited." In *Fowlkes v. Lewis*, 10 Ala. App. 543, 65 So. 724, while the rule was laid down that a want of probable cause cannot be inferred from the mere fact of acquittal, it was held that the fact of acquittal may be considered by the jury in connection with all the other circumstances as bearing on the question of want of probable cause.

But in some jurisdictions the courts have taken a contrary view and followed the rule that proof of an acquittal on the trial of the crime constitutes prima facie evidence of want of probable cause for the institution of the criminal prosecution. *Hanchey v. Brunson*, 175 Ala. 236, Ann. Cas. 1914C 804, 56 So. 971; *Delany v. Lindsay*, 46 Pa. Super Ct. 26.

#### **CENTRAL OF GEORGIA RAILWAY COMPANY**

v.

#### **SOUTHERN FERRO CONCRETE COMPANY.**

Alabama Supreme Court—May 20, 1915.

*193 Ala. 108; 68 So. 981.*

#### **Carriers of Goods — Duty to Collect Lawful Charge.**

Under the Interstate Commerce Act the freight rate on an interstate shipment is the lawful rate existing at the time of the shipment, which rate the carrier is required to collect.

[See Ann. Cas. 1914A 510.]

#### **Liability for Undercharge.**

Liability for the fixed freight charges is not affected by the carrier's waiver or loss of its lien on the goods by delivery without collecting the lawful rate, and conference ruling No. 314 of the Interstate Commerce Commission of May 1, 1911, governing a carrier's rights to collect freight undercharges, properly left it to the courts having jurisdiction to declare in each case whether the consignor or consignee is legally liable for the undercharges.

[See note at end of this case.]

**Sales — When Title Passes — Delivery to Carrier.**

The ownership of sand sold to the defendant f. o. b. its station does not pass until its delivery.

[See Ann. Cas. 1916A 1046.]

**Carriers — Liability of Consignee for Undercharge.**

The consignee's acceptance and removal of the goods sold to it f. o. b. its station with knowledge that the carrier was giving up a lien thereon for freight undercharges does not create an obligation on its part to pay the freight charges at the request and for the convenience of the consignor beyond the amount stated.

[See note at end of this case.]

Appeal from City Court of Birmingham:  
SHARPE, Judge.

Action for freight undercharges. Central of Georgia Railway Company, plaintiff, and Southern Ferro Concrete Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*London & Fitts* for appellant.

*Stokely, Scrivner & Dominick* for appellee.

[109] THOMAS, J.—During the years 1906 and 1907 the Southern Ferro Concrete Company bought of Kirkpatrick Sand & Cement Company and Alabama Sand & Supply Company a large quantity of sand, including the sand mentioned in the complaint, at a fixed price delivered at its works on the Birmingham Terminal Station, at Birmingham, Ala. The defendant, appellee here, had no voice in the selection of the points from which the sand was to be shipped, and no interest in the freight rate to be charged for the transportation of the sand from the initial shipping point to Birmingham Terminal Station. The sand was shipped from Bull Creek, in the state of Georgia, by the said company and was brought to appellee by the appellant, Central of Georgia Railway Company, as a common carrier engaged in interstate commerce. The freight that was prepaid by the defendant was at the request and for the convenience of the shipper, and the defendant was under no contract that would render it liable to plaintiff for these freights.

Defendant's plea alleges the above facts; also that, when the claim sued on was made against it for the claimed mistake in the amount of freights, plaintiff was informed of the true contract between the defendant and the owners and shippers of the sand, "who were obligated to pay" the freights, and "who were and are [110] entirely solvent," and that the defendant did not at any time make any agreement or contract with the plaintiff or

any other firm or corporation to pay the freight on said sand, and that there had been no agreement between the plaintiff and the defendant fixing the additional amount of freight due on account of said shipments. The plea was fully proved by the deposition of the witness, Thomas B. Harrison.

Appellant insists that, under the ruling of the Interstate Commerce Commission, appellant was required to collect the undercharges from the consignees. From Conference Rulings of the Interstate Commerce Commission, bulletin No. 6, ruling No. 3, made on November 4, 1907, we quote: "3. Collection of Undercharges.—The Commission adheres to its previous ruling that carriers must exhaust their legal remedies to collect undercharge from consignees."

From the same bulletin, conference ruling No. 187, made on June 8, 1909, we take the following: "187. Interpretation of Conference Ruling No. 3.—The case upon which this ruling was made was one where freight charges were collectible from the consignee. To give it general application, the words 'from consignee' are now stricken from the rule, so that it will read: 'Collection of Undercharges.—The Commission adheres to its previous ruling that carriers must exhaust their legal remedies to collect undercharges.'"

Conference ruling No. 314 (same bulletin) of the Commission reads as follows: "314. Collection of Undercharges.—The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or [111] parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharges that being a question determinable only by a court having jurisdiction and upon the facts of each case (superseding rulings 3 and 187)."

(1) Under the Interstate Commerce Act the freight rate on an interstate shipment is the lawful rate existing at the time of the shipment, and the carrier is required to collect the lawful rate.—*Southern R. Co. v. Harrison*, 119 Ala. 539, 546, 25 So. 552, 43 L.R.A. 385, 72 Am. St. Rep. 936; *Texas, etc. R. Co. v. Mugg*, 202 U. S. 242, 26 S. Ct. 628, 50 U. S. (L. ed.) 1011; *Gulf, etc. R. Co. v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 U. S. (L. ed.) 910.

(2) This liability for the fixed freight charges is not affected by the carrier's waiving or losing its lien on the goods by delivery without collecting the lawful rate. *Texas, etc. R. Co. v. Mugg*, *supra*; *Northern Alabama R. Co. v. Wilson Mercantile Co.* 9 Ala.

App. 269, 63 So. 34; Southern R. Co. v. Harrison, *supra*; Armour Packing Co. v. U. S. 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681; Louisville, etc. R. Co. v. McMullen, 5 Ala. App. 662, 59 So. 683.

The suit in this case, for the claimed freight undercharges on interstate shipments of sand, was filed on the 18th day of July, 1911. This was soon after the conference ruling of May 1, 1911, which we have quoted above. Clearly, the last ruling, before shipment, of the Interstate Commerce Commission, must govern the common carrier in its efforts to collect freight undercharges. The rule properly leaves it to the courts having jurisdiction to declare, in each case, whether the consignor or consignee is legally liable for the undercharge.

[112] The appellant relies on an expression in *Central of Georgia R. Co. v. Birmingham Sand, etc. Co.* 9 Ala. App. 419, 64 So. 202, declaring that generally the carrier may look either to the consignor or the consignee for such freight charges. This was but the general statement made in 6 Cyc. 500.

(3) The facts of the case now for decision are essentially different from those of the last-cited case, in that it is admitted that the shipments of sand in the case at bar were sold to appellee *f. o. b.* Birmingham Terminal Station, Birmingham, Ala. The ownership of the sand did not pass until its delivery and the amounts due as freight charges were paid by appellee at the request and for the accommodation of the consignor, and not by virtue of any agreement either with the appellant common carrier or with the consignor.

(4) That the mere acceptance and removal of the goods by the consignee, with the knowledge that the carrier is giving up a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay the charges beyond the amount stated, is declared in *Hutchinson on Carriers* (3d ed.) § 897. This statement is supported by *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575, wherein the opinion is written by Mr. Justice Pitney, and many authorities are collected.

Under the undisputed evidence in this case the title did not pass till the sand was delivered to appellee according to the contract of purchase. *Alabama Nat. Bank v. Parker*, 146 Ala. 513, 40 So. 987; *Brown v. Adair*, 104 Ala. 652, 16 So. 439; *Alabama Nat. Bank v. Parker*, 153 Ala. 598, 45 So. 161. Appellee was therefore under neither express nor implied liability for any carriage charges.

[113] The affirmative charge was properly given at the request of the defendant.

The judgment of the city court is affirmed. Affirmed.

Anderson, C. J., and Mayfield and Somerville, JJ., concur.

## NOTE.

### **Liability as between Consignor and Consignee for Payment of Freight Undercharges on Interstate Shipment.**

Assuming on the authority of *St. Louis, etc. R. Co. v. Wolf*, 100 Ark. 22, Ann. Cas. 1913C 1384, 139 S. W. 536; *Haurigan v. Chicago, etc. R. Co.* 80 Neb. 132, 16 Ann. Cas. 450, and cases therein cited, that a carrier can determine and collect the freight charges due on any interstate shipment according to the legally established rate despite a contract binding it to make the shipment for a smaller amount and therefore excluding from this note any consideration of that point, the present discussion is confined to the question to whom liability for the undercharge attaches.

From the ruling of the Interstate Commerce Commission on the question, found in *Bulletin No. 6, Conference Rulings*, and quoted in the reported case, it is clear that neither the consignor nor consignee may in every instance be held liable arbitrarily. It has been declared, however, as a guiding principle in affixing liability for undercharges as between the consignor and the consignee that the former is *prima facie* bound for their payment since he entered into the contract of shipment with the carrier. *Baltimore, etc. R. Co. v. New Albany, etc. Co.* 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575; *Pennsylvania R. Co. v. Titus*, 156 App. Div. 830, 142 N. Y. S. 43. See also *New York, etc. R. Co. v. Butler*, 145 N. Y. S. 918. Thus in *Pennsylvania R. Co. v. Titus, supra*, the court said: "It is well settled that it is unlawful for a carrier to contract to carry interstate freight at a lower rate than its duly scheduled tariff rates, and that neither by contract nor through mistake or inadvertence can it estop itself from demanding and collecting the balance of the lawful rate, where it has delivered goods without charging the same in full. . . . It does not follow, however, that the consignee is liable. It is not claimed and I do not understand, that the Interstate Commerce Act has made any change in the law with respect to the liability of a consignee for freight charges. The consignor or shipper, of course, is liable for such charges, for the contract is made with him, and he induces the carrier to transport the freight: . . . but there is no contractual relation between the carrier and the consignee by the mere designation of the latter as consignee which obligates him to receive the goods, or to pay the freight." So in *Baltimore, etc. R. Co. v. New Albany, etc. Co.* 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28, wherein it appeared that the carrier sued the

consignor of a carload of baskets, for undercharges thereon, the court allowed a recovery and in answer to a contention that the suit could not be maintained against the consignor since it was the duty of the carrier to collect all charges from the consignee, said: "It is urged that no cause of action is stated against appellee, for the reason that the complaint avers that the freight charges were paid by the consignee; that it was the duty of the last carrier to collect transportation charges, and to this end such carrier is given a lien upon the property transported, for such charges. While this is true, it was the shipper—in this case the appellee—who engaged the services of appellant, and who became liable for the charges in the first instance. Such liability could only be discharged by payment. Assuming that the complaint otherwise states a cause of action, the action was properly brought against appellee."

Nor does the consignee by accepting delivery of the goods relieve the consignor of liability for undercharges and obligate himself to pay them if at the time he is ignorant of their existence. By receiving the shipment he becomes bound only for the amount of the charges stated to him. *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575; *Pennsylvania R. Co. v. Titus*, 156 App. Div. 830, 142 N. Y. S. 43. And see the reported case. *Compare* *New York, etc. R. Co. v. York, etc. Co.* 215 Mass. 36, 102 N. E. 366. This view was presented in *Central R. Co. v. MacCartney*, supra, in the following language: "Where one accepts delivery of goods from a common carrier, receiving at the same time a statement plainly setting forth the amount of freight charges thereon, with knowledge that the carrier is giving up for the benefit of the consignee a lien upon the goods for the amount so stated, such conduct by the consignee is, of course, cogent evidence, and, standing unexplained and uncontradicted, is sufficient evidence of an implied promise to pay the amount of the stated charges. Such an undertaking was undoubtedly made by the defendants in this case. That undertaking has been performed by them. But we fail to see, in the facts as certified to us by the trial court, anything to support a finding that the defendants, by anything that transpired at or after the delivery of the ties, undertook and promised to pay freight charges indefinite in amount, or any sum beyond that which was stated on the bills as rendered. If the plaintiff, the railroad company, instead of waiving its lien had insisted upon retaining the ties until payment of the freight, at the same time rendering to defendants the freight bills, as, in fact, they were rendered, and if the defendants had thereupon paid the bills in order to secure the ties,

could a further liability be imposed upon them simply on the ground that the bills as rendered did not include the entire charges? We think not. In such case the plaintiff would have been left to its action against the consignor, as the party on whose engagement the service was performed." The same opinion was expressed in *Pennsylvania R. Co. v. Titus*, 156 App. Div. 830, 142 N. Y. S. 43, as follows: "Of course, if the consignee accepts the goods, with notice that the carrier has a lien for a specified amount, thereby depriving the carrier of its lien, he becomes obligated by an implied contract to pay the charges. . . . But if the carrier induces him to accept the goods on the theory that the freight charges are as stated, there is no principle upon which he thereby becomes liable to the carrier for the difference between the freight charges thus paid and those which the carrier by law was required to charge."

But the consignee is liable for undercharges if he receives a shipment with knowledge of their existence, having by his act deprived the carrier of its lien on the goods delivered. *Louisville, etc. R. Co. v. Magnus Co.* 32 Ohio Cir. Ct. Rep. 682. See also *Central R. Co. v. McCartney*, 68 N. J. L. 173, 52 Atl. 55.

And the rule apparently obtains in Massachusetts that a consignee, being the presumptive owner of goods shipped to him, is generally liable for their undercharges. *New York, etc. R. Co. v. York, etc. Co.* 215 Mass. 36, 102 N. E. 366.

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## BISHOP

v.

## STATE.

Texas Court of Criminal Appeals—November 12, 1913.

72 Tex. Crim. 1; 160 S. W. 705.

### Seduction — Evidence — Reputation of Defendant.

In a prosecution for seduction under promise of marriage, defendant is not limited to proof of his character for morality and chastity, but is entitled to prove that his general reputation as a peaceable law-abiding citizen is good.

[See note at end of this case.]

### Argument of Counsel — Abusive Language.

A prosecuting officer under no circumstances should resort to vituperative and abusive language in arguing a case to the jury.

[See 9 Am. St. Rep. 565.]

Appeal from District Court, Comanche county: ARNOLD, Judge.

Criminal action. Willie Bishop convicted of seduction and appeals. The facts are stated in the opinion. REVERSED.

*Callaway & Callaway and J. A. Stubblefield* for appellant.

*C. E. Lane* for appellee.

[2] HARPER, J.—This is the third appeal in this case, the opinions on the two former appeals being found reported in 68 Tex. Crim. 557, 151 S. W. 821, and 65 Tex. Crim. 484, 144 S. W. 278, and we deem it unnecessary to recite again the evidence, but merely refer to those opinions. In the first opinion the case was reversed on account of an error in the court's charge on corroboration of an accomplice; on the second appeal the case was reversed on account of the district attorney referring to the former conviction of appellant, and the failure of the court to give a special charge requested by appellant in regard to letters introduced in evidence, and which were proven up only by the accomplice, it being held that she could not corroborate herself. On this trial it seems the case must be reversed again.

The defendant, on the trial, tendered witnesses whom it is shown would have testified that they knew appellant; knew his reputation in the community where he resided, and that his reputation as a peaceable, law-abiding citizen was good. The State's objection to this testimony was sustained, and appellant reserved a proper bill of exceptions. The court, in approving the bill, states: "In explanation of the above bill I desire to say the defendant not having gone on the stand, and the State in no way attacked, his character in any respect, and being prohibited by law from so doing, the law making it a penal offense to seduce a woman under promise of marriage, I concluded that the particular trait of character involved the offense, to wit, morality or chastity, would be as far as the defendant would be permitted to go in proof and that he could not in such a case prove his general reputation as being law-abiding and peaceable, and this view is sustained in the case of *Jones v. State*, 10 Tex. App. 552; *Greenleaf on Evidence* 25; *Underhill on Evidence* (2nd edition) sec. 77, pages 137-139; with this explanation bill is approved and will be made a part of the record." The authorities cited by the court we do not think sustain his ruling. Under the cases cited by him it is held that wherever criminal intent is an issue in the case, his general reputation as a law-abiding citizen is admissible, if the defendant desires to put his reputation in issue. A case of

seduction proceeds upon the theory that by seductive wiles the man obtained the love of the woman; her trust and confidence, and he had entered into an engagement to marry her, leading her to believe that he intended to carry out the promise, yet, in fact had no such intention, was not sincere in his promise, and used the blandishment, [3] wiles and promise but to accomplish her ruin. That was his intention, and necessarily this would involve a criminal intent, and under all the authorities would render his general reputation as a law-abiding citizen admissible, if he desired to place it in issue. In *Branch's Criminal Law* the rule is said to be: "Defendant may prove his general good character when criminal intention is of the essence of the offense," citing *Poyner v. State*, 48 S. W. 516; *House v. State*, 42 Tex. Crim. 128, 157 S. W. 825; *Jones v. State*, 10 Tex. App. 552; *Coffee v. State*, 1 Tex. App. 548; *Lincecum v. State*, 29 Tex. App. 328, 15 S. W. 818, 25 A. S. R. 727; *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 A. S. R. 445; *Lockhart v. State*, 3 Tex. App. 567.

It is true that in the section of *Mr. Underhill on Evidence*, cited by the court, it is held that in prosecutions for rape his general reputation as a law-abiding citizen is not admissible, but the inquiry should be restricted as to his reputation for chastity and morality, but this has never been the rule in this State. In the case of *Jones v. State*, 10 Tex. App. 552, also cited by the court, this very question was involved, and this court held that in prosecution for rape that evidence of general reputation as a law-abiding citizen was admissible, and that the court erred in excluding such testimony. The decision in the *Jones* case, supra, was followed in the case of *Lincecum v. State*, 29 Tex. App. 328, and in all our decisions, and wherever criminal intention is the essence of the offense, such evidence has always been held admissible. And, as we have said, the crime of seduction is based upon the theory that the defendant used the means and made the promise to accomplish the ruin of the girl, with no intention of fulfilling his promise of marriage, this character of evidence comes clearly within the rule.

Appellant's bill as to the testimony of Miss Ethel Harrison, as qualified by the court, presents no error. The court stated the witness was unlettered and unable to understand and was a reluctant witness. Under such circumstances, questions leading in their nature may be propounded. Again, appellant groups a number of questions and answers, and makes a general objection to all of them. Some of the questions embraced were not leading, and this general exception would be insufficient to present any question for review. *Ortiz v. State*, 68 Tex. Crim. 524, 151 S. W. Rep. 1056.



Bills of exceptions Nos. 1 and 2 were reserved to the argument of the district attorney. As to the remarks actually made there is some confusion, the bills as offered, not making it clear what language was in fact used by the district attorney, but the court in approving the two bills says: "I withdrew from the jury all vituperation and abuse used in argument." This would evidence that the district attorney was vituperative and abusive in his argument, and as this case must be reversed on other grounds, we take occasion to say that under no circumstances is a prosecuting officer justified in resorting to vituperative and abusive language, and if this practice is carried too far, we might feel called upon to reverse a case for that reason alone.

[4] The two bills relating to the evidence of Lena Harrison and Mrs. Harrison, as qualified and explained by the court, present no error.

The judgment is reversed and the cause remanded.

Reversed and remanded.

#### NOTE.

#### Admissibility of Evidence of Defendant's Reputation in Prosecution for Seduction.

In the reported case it is held that in a prosecution for seduction, the defendant may introduce evidence as to his general reputation as a law-abiding citizen, and that he is not restricted to his reputation as to chastity and morality. But in another jurisdiction, it has been held that in a prosecution for seduction, the defendant may not introduce evidence of his general good moral character, but is restricted to evidence of his character for virtue. *State v. Curran*, 51 Ia. 112, 49 N. W. 1006.

It has been held that the defendant may introduce only his general reputation and not particular instances of good conduct. *People v. Bollman*, 178 Mich. 159, 144 N. W. 537, wherein the court said: "On the part of the defense, Lillie Gravenstein, a character witness, was sworn, and, after testifying that she was more or less in the respondent's company prior to her marriage, she was asked the following question: 'Q. What would you say as to the character of his conduct toward you while in his company?' This question was objected to and excluded.

It is argued by the respondent that the exclusion of this testimony was error. It is competent in a criminal case for a respondent to show what his general reputation is with reference to the particular offense charged (*People v. Evans*, 72 Mich. 367 [40 N. W. 473]); but we know of no rule which permits a respondent to show particular instances of good conduct in order to establish his reputation. The question asked was not directed to his general reputation, but simply to his conduct while in the company of the witness. The proffered testimony was rightly excluded."

Where the defendant puts his character in issue, the state, in rebuttal, may introduce evidence as to his bad reputation for chastity and morality prior to the time he was accused of the seduction, and is not limited to his reputation prior to the time the seduction was accomplished. *State v. King*, 9 S. D. 628, 70 N. W. 1046. In that case the court said: "Defendant having put his character in issue, witnesses for the state, in rebuttal, were permitted to testify that they knew defendant's general reputation for chastity and morality in the vicinity in which he resided during 1896, and prior to May 25th of that year, and that it was bad. The crime was committed, if at all, in the preceding February, and defendant insists that evidence touching his character should have been restricted to a period preceding the latter date. Manifestly, it is improper to introduce evidence showing the talk of people caused by the charge upon which the accused is being tried, and witnesses should state their knowledge of his reputation before being accused thereof; but there was no error in allowing the questions to be asked as they were in this case, for the reason that the undisputed evidence shows that defendant was not accused prior to May 25th, 1896, and the evidence offered by the state could not have been predicated upon any rumors resulting from defendant's conduct towards the prosecutrix."

Where the reputation of the defendant in a prosecution for seduction for truth and veracity has not been assailed, other than that his testimony is in conflict with that of the prosecuting witness, there is no rule of law which makes any distinction between the defendant as a witness and any other witness in the case, and hence the defendant cannot introduce evidence of his reputation for truth and veracity. *State v. Fogg*, 206 Mo. 696, 105 S. W. 618.

## FINCH ET AL.

v.

## MICHAEL.

North Carolina Supreme Court—November  
18, 1914.

167 N. Car. 322; 83 S. E. 458.

**Monopolies—Agreement Not to Engage in Business—Breach—Proof of Damage.**

In an action by the purchasers of a business and the good will thereof against the seller, who had agreed not to conduct the same kind of business in the same town, plaintiffs were bound to show, with some degree of certainty, not only that the seller committed the wrongs imputed to him, but that they produced an injury or resulted in a violation of plaintiffs' rights.

**What Constitutes Engaging in Business.**

An agreement by the seller of a retail grocery business and the good will thereof not to conduct the same kind of business in the same town for a specified period is not broken by loaning money to a new grocery firm, where he has no pecuniary interest in such firm, directly or indirectly, as member, manager, agent, or otherwise than as a creditor.

[See note at end of this case.]

**Same.**

That the telephone number, used by the seller of a retail grocery business in his store, has been changed, and the old number transferred to a new grocery firm, to whom he had loaned money, does not show a violation of his agreement not to conduct the same kind of business in the same town.

[See note at end of this case.]

**Same.**

The seller of a retail grocery business and the good will thereof who agreed not to conduct the same kind of business in the same town, is not thereby required to see that the purchaser retained all the customers of the old business.

[See note at end of this case.]

Appeal from Superior Court, Davidson county: LANE, Judge.

Action for damages. Finch, et al., plaintiffs, and J. L. Michael, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

*Phillips & Bower* and *E. E. Raper* for appellants.

*Walser & Walser* and *McCrary & McCrary* for appellee.

[322] WALKER, J.—This action was brought to recover damages for an alleged breach of a contract, by which defendant sold to the

plaintiffs his retail grocery business in Lexington, with the fixtures and good-will belonging thereto, at cost for the goods, wares, and merchandise, and \$1,000 for the fixtures and good-will, plaintiffs paying \$200 as a bonus, [323] and defendant agreeing not to conduct the same kind of business in said town for one and a half years thereafter. The breach alleged was that defendant loaned money to Michael & Parker, a new grocery firm, and that the telephone number which had been used by the defendant in the old store had been changed and the old number transferred to the phone of the new firm. There were some other minor complaints made against defendant, but we think they are not sufficient to show any breach of the contract. Even if defendant committed the small offenses imputed to him, and they were calculated to cause injury to plaintiff, the damages claimed are entirely too speculative and conjectural to form the basis of a recovery, and, besides, the causal connection between the imputed wrongs, if the latter are of sufficient consequence to be noticed by the law (*de minimis non curat lex*), and the alleged injury is not shown with any semblance of accuracy. We cannot jump to a conclusion, but the proof must be of such a character as to show with at least some degree of certainty that the alleged wrongs produced an injury, or resulted in a violation of plaintiff's rights. Both wrong and damage must be shown, and it must appear that the latter was the effect and the former the cause. *Byrd v. Southern Express Co.* 139 N. C. 273, 51 S. E. 851; *Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.* 141 N. C. 284, 53 S. E. 885, 8 L.R.A. (N.S.) 255. The defendant had no interest in the partnership of Michael & Parker, and he had a perfect right to lend them money. The principle is well stated by Justice Burwell in *Reeves v. Sprague*, 114 N. C. 647, 19 S. E. 707. It appeared there that Sprague sold part of his stock in trade and the good-will of his business to Reeves, with a stipulation that he would not engage in the same business in Waynesville, N. C., and afterwards Sprague sold the balance of the stock to one J. R. Davis, who started and conducted the same kind of business in said town in competition with Reeves. At the time he bought the remnant of the stock Davis gave Sprague his note for the price, secured by a mortgage, and thereafter took possession and prosecuted the business of druggist. With reference to these facts, the Court said: "It cannot be seriously contended that Sprague is violating a contract not to engage in the business of a druggist in Waynesville merely because he has a lien on a stock of drugs at that place. We find in the evidence adduced no substantial foundation for the plaintiffs' allegation

that the mortgage made by Davis to Sprague is a sham, and that Davis is merely the agent of Sprague. If, in fact, he is such agent, the injunction against the defendant Sprague and his agent is sufficient for the plaintiffs' purposes. They produce no proof whatever, as it seems to us, that the appellant is Sprague's agent—only facts that might raise a suspicion that he is. To stop his lawful business upon the evidence now before us seems unreasonable." The same was also held to be the law in *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 56 A. S. R. 650, 34 L.R.A. 389, but the evidence tended to show that the seller afterwards [324] attempted to enter into competition with his buyer by becoming a member of a corporation which carried on the same business within the territory prohibited to him by the agreement, and it was properly held that this was a breach of the contract; but the court thus referred to our point: "While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague*, 114 N. C. 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals." But in this case the defendant has no pecuniary interest in the firm of Michael & Parker, either directly or indirectly, as member, manager, agent, or otherwise, for he is only a creditor of the partnership, which is a very different thing from conducting the business or being interested therein. In a sense, he may be considered as having some concern for its success as its creditor, but this is all, and is not sufficient to constitute a breach of his contract, either under the sale of the good-will or the restrictive covenant.

We said in *Faust v. Rohr*, 106 N. C. 187, 81 S. E. 1096, referring specially to *Scudder v. Kilfoil*, 57 N. J. Eq. 171, 40 Atl. 602: "The negative covenant entered into by the petitioner, by which he bound himself not to engage in the same business within the borough, was of much more consequence than a

mere sale of the good-will of the business to Mr. Scudder. The sale of the good-will would have only precluded the vendor from soliciting trade from the old customers of the firm, but would not have prevented him from setting up a rival business in Princeton or anywhere else," and citing further the following cases: *Labouchere v. Dawson*, L. R. 13 Eq. (Eng.) 322; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Althen v. Vreeland* (N. J.) 38 Atl. 479. It has been stated, as a general rule, that good-will exists in a professional as well as in a commercial business, subject to the distinction that it is not so much fixed or as localized as the good-will of a trade, but attaches to the person of a professional man or woman, as a result of confidence in his or her skill and ability. "Consequently, in enforcing the agreement where there has been nothing more than a mere sale of 'good-will,' the courts, at most, have only held that [325] the vendor of the good-will is precluded by his contract from soliciting the former customers of the old partnership to deal with himself or not to deal with his vendee." 14 Am. & Eng. Enc. of Law (2d ed.) 1091.

The difficulty which plaintiff encounters in this case is that he offers no tangible proof of a breach of the contract. There is, perhaps, something from which we may suppose or conjecture that there was a slight interference with the quiet and reasonable enjoyment by plaintiff of the good-will which he had purchased; but this will not do, and the evidence must be more definite. We thus expressed ourselves in *Crenshaw v. Asheville*, etc. St. R. etc. Co. 144 N. C. 320, 56 S. E. 945: "The kind of proof which must be forthcoming in order to establish the issues in favor of the plaintiff was considered recently by us in *Byrd v. Southern Express Co.* 139 N. C. 273, where we said: "There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success." And in *Campbell v. Everhart*, 139 N. C. 516, 52 S. E. 201: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof.

But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury," citing *Lewis v. Clyde Steamship Co.* 132 N. C. 904, 44 S. E. 666; *Byrd v. Southern Express Co.* supra; *Wheeler v. Schroeder*, 4 R. I. 383; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Day v. Boston, etc. R. Co.* 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; *Catlett v. St. Louis, etc. R. Co.* 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Philadelphia, etc. R. Co. v. Stebbing*, 62 Md. 504.

The defendant may not have acted with due propriety, nor with perfect good faith, but we cannot see that he has committed any legal wrong. The telephone was entirely under the control of the telephone company, and Michael & Parker had the right to it if the company consented that they might use it, or did not object thereto, after notice of their doing so. It promised to restore it to the plaintiff, but, it seems, did not do so, for some reason, we suppose, satisfactory to itself.

It may be added that defendant was not required by his contract to see that plaintiff retained all the customers of the old business. He could not do this, as they were at liberty to trade where they pleased; nor does it sufficiently appear how many, if any of them, were lost by plaintiff, [326] whether by any action of defendant or not. We are, therefore, left suspended in the realm of conjecture, without any appreciable thing, either definite or certain, being proved, and the damages more uncertain than anything else, if there was any wrong.

The case, in its final analysis, seems to have been reduced to the very attenuated matter of a few eggs and a small quantity of butter sold by W. N. Shoaf, a former customer of defendant, to Michael & Parker: but Shoaf testified: "I had several places to trade and went everywhere, for that purpose, that I pleased," or words to that effect. Taking all the evidence together, it does not measure up to the standard fixed by the law.

The court nonsuited plaintiff at the close of his evidence, and we see no error in its doing so.

Affirmed.

#### NOTE.

An agreement by the seller of a business not to enter into a similar business in the vicinity is held in the reported case not to be violated by loaning money to persons establishing a competing business. The cases discussing what constitutes the carrying on

of business within a covenant not to carry on a similar business in the locality are collated in the note to *Hadsley v. Dayer-Smith*, Ann. Cas. 1915A 379, the promotion or financing of the business of another as a violation of such a covenant being specifically discussed.

## MATTER OF HEINSHEIMER

MEYER

v.

SCHULTE ET AL.

New York Court of Appeals—March 23, 1915.

214 N. Y. 361; 108 N. E. 636.

### Attorneys — Extent of Lien on Judgment — General Balance.

Under the common-law rule, giving an attorney a retaining lien on all papers, securities, or money belonging to his client which come into his possession in the course of his professional employment, and a charging lien against a judgment recovered through the attorney's efforts, and under Judiciary Law (Consol. Laws, c. 30) § 475, giving an attorney a lien on his client's cause of action which attaches to a verdict, judgment, or final order in his client's favor, and the proceeds thereof, an attorney, employed as general counsel at an annual salary, payable semiannually, has no lien for unpaid salary on the proceeds of a judgment procured by him after termination of the general employment, under an agreement to pay him reasonable value of services in the trial of the action.

[See note at end of this case.]

### Appeal — Notice of Appeal — Surplusage.

On appeal from an order of the Appellate Division, modifying and affirming an order of the Special Term, the mere fact that the notice of appeal stated that an interlocutory order of the Special Term was also to be reviewed is a harmless irregularity, for the right to review that order followed from the right to review the order of the Appellate Division affirming it.

*Matter of Heinsheimer*, 164 N. Y. App. Div. 265, modified.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Proceeding to enforce attorney's lien. Norbert Heinsheimer, petitioner. Order of Special Term of Supreme Court modified by Appellate Division of Supreme Court. Anton H. Meyer, as assignee for creditors of United

States Restaurant and Realty Company, appeals. The facts are stated in the opinion. MODIFIED.

*Alexander Gordon and William F. McCombs* for appellant.

*Henry K. Heyman and Norbert Heinsheimer* for respondent.

[363] CARDOZO, J.—The petitioner is a member of the bar. He was retained by the United States Restaurant and Realty Company as its general counsel at a salary of \$5,000 a year, payable semi-yearly. In February, 1910, there was due to him under this retainer a balance of \$3,096.92. The client then terminated the general employment and selected other counsel. The petitioner declined to surrender his papers unless the arrears of salary were [364] paid. In this he acted within his rights. At the client's request, however, he tried an action then upon the calendar, and recovered a judgment against one Schulte for \$4,176.64. For this he was to be paid whatever the service was worth. The client then made an assignment for the benefit of creditors. The assignee was substituted as plaintiff, and another lawyer was substituted as attorney, without prejudice, however, to the petitioner's right to enforce his lien, if any there was found to be. After appeals, first to the Appellate Division and then to this court, the judgment was affirmed.

This proceeding was thereupon begun by the petitioner to determine the extent of his lien on the proceeds of the judgment. The value of the services rendered in the trial of the action against Schulte, after the general employment was ended, has been fixed by the Appellate Division at \$500. That the petitioner has a lien to this extent is conceded. The question is whether he has a lien for the unpaid balance of his salary. The services under the general retainer included many matters other than the Schulte case. They included many matters having no relation to any lawsuit. All services alike were to be paid for by this salary; and the order under review makes the entire balance of salary a lien upon the judgment.

We think that this is an unwarranted extension of the scope of an attorney's lien. At common law, the liens available to an attorney were of two kinds. There was a retaining lien on all papers, securities or moneys belonging to his client which came into his possession in the course of his professional employment. (*Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Ward v. Craig*, 87 N. Y. 550, 560; *Goodrich v. McDonald*, 112 N. Y. 157, 163, 19 N. E. 649.) This was a general lien for the entire balance of account. It was dependent, however, upon possession. There

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was also a charging lien, which bound a judgment recovered through the attorney's efforts. This lien was not dependent on possession. The very reason for its [365] existence was to save the attorney's rights where he had been unable to get possession. "It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained." (*Goodrich v. McDonald*, supra.) A clandestine or collusive payment after notice, actual or constructive, of the lien, did not discharge the debtor. (*Coughlin v. New York Cent. etc. R. Co.* 71 N. Y. 443, 448, 27 Am. Rep. 75.) But the reason for the existence of this lien suggests the limitation of its scope. It was not a lien for a general balance of account. It was a lien for the value of the services rendered in that very action. (*Williams v. Ingersoll*, 89 N. Y. 508, 518; *Adams v. Fox*, 40 Barb. 442, 445; *West v. Bacon*, 13 App. Div. 371, 43 N. Y. S. 206; *Phillips v. Stagg*, 2 Edw. Ch. (N. Y.) 108; *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.) If the attorney got possession of the fund, he had a general lien. If he did not get possession, his lien was for the services that brought the fund into existence. This charging lien still exists under our statutes. It has been enlarged to the extent that it now attaches to a cause of action even before judgment. "From the commencement of an action or special proceeding" the attorney now has a lien "upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come." (*Judiciary Law, Cons. Laws, ch. 30, sec. 475.*) Except as thus changed, the charging lien is to-day what it was at common law.

Neither at common law nor to-day does such a lien embrace a claim for unpaid salary. Meritorious the petitioner's services doubtless were. They cannot, however, be made a charge upon the judgment. In serving under his general retainer, he was in the same position as [366] any other salaried employee. He was to receive \$5,000 a year, payable semi-annually. In return, he was to do anything and everything in the line of a lawyer's work that his client might require. It was a mere accident that part of his work included a lawsuit in which the client was a plaintiff. He would have earned his pay just the same if he had done office work exclusively. He might indeed have earned it though he had done nothing at all. In point of fact, the work that he did in the Schulte

case, while the general retainer was in force, must have been insignificant in amount. We think it cannot be made use of as an excuse for charging the entire salary on the proceeds of the judgment.

The charging lien of an attorney has been likened to the lien of an artisan or mechanic. But even the lien of an artisan or mechanic will be lost if the terms of payment are inconsistent with its existence. (*Chase v. Westmore*, 5 M. & S. (Eng.) 186.) If the work is done, not on the credit of the thing itself, but solely on the credit of the owner, there is a waiver of the lien. Such a waiver will result, for illustration, where the agreement is that the thing shall be first returned and payment made thereafter. It was pointed out by Lord Ellenborough in *Chase v. Westmore* (supra) that this has long been the law. We are referred by him to the Year-Book, Easter Term, 5 Edw. 4, fol. 2 b: "Note also by Haydon, that an hosteler may detain a horse, if the master will not pay him for his eating. The same law is, if a tailor make for me a gown, he may keep the gown until he is paid for his labour. And the same law is, if I buy of you a horse for 20s., you may keep the horse until I pay you the 20s.; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid." The same rule has been followed in this court. In *Wiles Laundering Co. v. Hahlo* (105 N. Y. 234, 241, 11 N. E. 500, 59 Am. Rep. 496) the plaintiff was in the laundry business. Its agreement was that the goods laundered for the manufacturer should [367] be returned as fast as the work was done, and payment made at the beginning of the following month. "The return of the goods . . . was to precede the right to demand payment for the work, by a longer or shorter period, according to circumstances." This was held to establish a waiver of the lien. Many other cases enforce the same rule. (*Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441, 31 Am. Dec. 198; *Fieldings v. Mills*, 2 Bosw. (N. Y.) 489; *Blumenberg Press v. Mutual Mercantile Agency*, 77 App. Div. 87, 78 N. Y. S. 1085.)

We think the petitioner's contract is inconsistent with an intent that he should be protected by a charging lien upon the fruits of the judgment. "The facts of the case must be looked at to see whether the solicitor has taken a security incompatible with the existence of his lien, or has made with his client an arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced." (*Matter of Morris*, L. R. [1908] 1 K. B. (Eng.) 473, 479; *Bank of Africa v. Salisbury Gold Mining Co. L. R.* [1892] A. C. (Eng.) 281, 284. See also *West v. Bacon*, 164 N. Y. 425, 58 N. E. 522.) The nature of the services for which

the salary was to be paid, is one token of intent. The time of payment of the salary, at semi-annual intervals, is another. Both tokens in the case at hand forbid the implication of a lien. The petitioner was not in the position of an artisan bestowing labor on the credit of the cause of action or the judgment. His salary covered services that had no relation to the judgment, and the right to payment did not accrue, even though judgment was recovered, until the semi-annual period had gone by. The same statute that gives an attorney a lien on the judgment, gives him a lien on the cause of action, and the lien attaches the moment that the action is begun. But plainly no such lien attached in favor of the petitioner. The cause of action was not security for the prospective installment of his salary; and the merger of the cause of action in the judgment did not change the security. The [368] prospective salary was a claim against the client personally, and not a lien upon anything. A charging lien cannot exist unless it is an element, express or implied, of the agreement that the lawyer is to be paid out of the fruits of the judgment. The petitioner waived that right by his agreement. He could not have arrested payment of the judgment and tied up the fund till his salary became due. He could not have prevented the judgment debtor from making payment at once and directly to the creditor, though his salary was to fall due the following day. His agreement in substance was that there should be no relation, either in time or in amount of payment, between his receipt of salary and his services in lawsuits. The laundry, in *Wiles Laundering Co. v. Hahlo* (supra), waived its lien when it agreed to deliver goods as fast as the work was done, and postpone payment till the following month. The petitioner waived his lien when he agreed that the proceeds of judgment should be remitted as collected, and payments of salary received at stated intervals. In both cases, it so happened that before the services were completed, the hour of payment had been reached, and the employer was in default. The lien is not affected by these accidents of time. It depends upon the nature of the agreement, and not upon the moment of performance. The agreement in its inception was either consistent with a lien or inconsistent. Whether it was the one or the other must be determined as of the hour of its making.

We think for these reasons that the lien for salary must fail. In reaching this conclusion, we give heed to the admonition of Lord Ellenborough in *Wilson v. Kymer*, 1 M. & S. (Eng.) 157, repeated in *McFarland v. Wheeler*, 26 Wend. (N. Y.) 487, and again in *Goodrich v. McDonald* (supra, at p. 164), that "in case of lien, we should be anxious

to tread cautiously, and on sure grounds, before we extend it beyond the limits of decided cases."

There has been no error in the appellant's practice in [369] bringing up for review an intermediate order of the Appellate Division. (New York, etc. R. Co. v. Erie R. Co. 170 N. Y. 448, 63 N. E. 448; Whitmore v. Tarrytown, 137 N. Y. 409, 33 N. E. 489.) The statement in the notice of appeal that the order of the Special Term is also to be reviewed, is a harmless irregularity. The right to review that order follows from the right to review the order which affirmed it.

The motion to dismiss the appeal in so far as it brings up for review the intermediate order of the Appellate Division, should be denied; and the final order of that court should be modified by subtracting from the lien awarded to the petitioner the sum of \$3,096.92, with accrued interest thereon, and as so modified the order should be affirmed, with costs to the appellant in this court.

Hiscock, Chase, Collin, Miller and Seabury, JJ., concur; Willard Bartlett, Ch. J., absent. Ordered accordingly.

#### NOTE.

##### Extent of Attorney's Lien on Judgment.

Scope of Note, 387.

Right to Lien for Services in Particular Suit:  
Majority Rule, 387.

Minority Rule, 390.

Right to Lien for Services Outside Particular Suit, 392.

##### Scope of Note.

This note in discussing the extent of an attorney's lien on a judgment is confined to the question for what fees and services an attorney is entitled to a charging lien on the judgment, and does not consider to what the lien extends. As to an attorney's lien on land which is the subject-matter of litigation see the note to *Holmes v. Waymire*, 9 Ann. Cas. 624.

##### Right to Lien for Services in Particular Suit.

#### MAJORITY RULE.

The rule now in force in the majority of jurisdictions, is that an attorney has an equitable lien on a judgment or decree recovered by him for his client, for the disbursements made on behalf of the client and for compensation for services rendered in procuring that judgment or decree, and this lien has been extended to cover the fees of counsel not

embraced in the taxable costs. In other words, the attorney has a lien on the judgment to the extent of the compensation his client has agreed to pay him, or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover of the client on quantum meruit a reasonable compensation for the services rendered.

*United States*.—In *re Paschal*, 10 Wall 483, 19 U. S. (L. ed.) 992; *International Imp. Fund v. Greenough*, 105 U. S. 527, 26 U. S. (L. ed.) 1157; *Georgia Cent. R. etc. Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *In re Wilson*, 12 Fed. 235; *Tuttle v. Claffin*, 86 Fed. 964; *McDougall v. Hazelton Tripod-Boiler Co.* 88 Fed. 217, 60 U. S. App. 209, 31 C. C. A. 487; *Brown v. Morgan*, 163 Fed. 395; *In re Gillaspie*, 100 Fed. 88. *Compare Massachusetts, etc. Constr. Co. v. Gill's Creek Tp.* 48 Fed. 145, *appeal dismissed* 154 U. S. 521, 14 S. Ct. 1154, 38 U. S. (L. ed.) 1073, mem. And see *Brooke's Case*, 12 Op. Atty-Gen. 216.

*Alabama*.—*Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Ex p. Lehman*, 59 Ala. 631; *Jackson v. Clopton*, 66 Ala. 29; *Mosely v. Norman*, 74 Ala. 422; *Higley v. White*, 102 Ala. 604, 15 So. 141; *Fuller v. Clemmons*, 158 Ala. 340, 48 So. 101; *Williams v. Bradley*, 187 Ala. 158, 65 So. 534.

*Arkansas*.—*Sexton v. Pike*, 13 Ark. 193; *Waters v. Grace*, 23 Ark. 118; *Gist v. Hanly*, 33 Ark. 233; *Porter v. Hanson*, 36 Ark. 591; *Lane v. Hallum*, 38 Ark. 385.

*Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; *Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769.

*Connecticut*.—See *Rumrill v. Huntington*, 5 Day 163; *Gager v. Watson*, 11 Conn. 168; *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752; *Cooke v. Thresher*, 51 Conn. 105.

*Florida*.—*Carter v. Bennett*, 6 Fla. 215; *Carter v. Davis*, 8 Fla. 183.

*Georgia*.—See *Jones v. Groover*, 46 Ga. 568; *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473. *Compare McDonald v. Napier*, 14 Ga. 89.

*Idaho*.—*Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243; *Kerns v. Washington Water Power Co.* 24 Idaho 525, 135 Pac. 70.

*Illinois*.—*Baker v. Baker*, 258 Ill. 418, 101 N. E. 587. *Compare Forsythe v. Beveridge*, 52 Ill. 268, 4 Am. Rep. 612.

*Kentucky*.—*Brown v. Lapp*, 89 S. W. 304, 28 Ky. L. Rep. 409. See also *Louisville, etc. R. Co. v. Proctor*, 51 S. W. 591, 21 Ky. L. Rep. 447.

*Minnesota*.—*Crowley v. LeDuc*, 21 Minn. 412; *Henry v. Traynor*, 42 Minn. 234, 44 N. W. 11; *Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Nebraska*.—*Burleigh v. Palmer*, 74 Neb. 122, 12 Ann. Cas. 777, 103 N. W. 1068; *Taylor v. Stull*, 79 Neb. 295, 112 N. W. 577.

*New York*.—*Ackerman v. Ackerman*, 11 Abb. Pr. 256, reversed on other grounds 14 Abb. Pr. 229; *Crotty v. MacKenzie*, 52 How. Pr. 54, affirmed 42 Super. Ct. 192; *Albert Palmer Co. v. Van Orden*, 44 Civ. Proc. 44, 64 How. Pr. 79, 49 Super. Ct. 89; *Whittaker v. New York, etc. R. Co.* 54 Super. Ct. 8, 11 Civ. Proc. 189, 18 Abb. N. Cas. 11; *Firmenich v. Bovee*, 1 Hun 532, 4 Thomp. & C. 98; *Brown v. New York*, 9 Hun 587, 11 Hun 21; *Rooney v. Second Ave. R. Co.* 18 N. Y. 368; *McGregor v. Comstock*, 28 N. Y. 237; *Ely v. Cooke*, 28 N. Y. 365; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Wright v. Wright*, 70 N. Y. 98; *Coughlin v. New York Cent. etc. R. Co.* 71 N. Y. 443, 27 Am. Rep. 75; *In re Regan*, 167 N. Y. 338, 60 N. E. 658; *Anderson v. deBraekeleer*, 25 Misc. 343, 55 N. Y. S. 721, 28 Civ. Pro. 306; *Smith v. Cayuga Lake Cement Co.* 107 App. Div. 524, 95 N. Y. S. 236; *Matter of Smith*, 111 App. Div. 23, 97 N. Y. S. 171. And see the reported case. See also *Ward v. Wordsworth*, 1 E. D. Smith 598, 9 How. Pr. 16; *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. S. 842. Compare *Phillips v. Stagg*, 2 Edw. Ch. 108; *People v. Hardenbergh*, 8 Johns. 335. And see *Power v. Kent*, 1 Cow. 172; *Bradt v. Koon*, 4 Cow. 416; *Haight v. Holcomb*, 16 How. Pr. 160, 7 Abb. Pr. 210; *Martin v. Hawks*, 15 Johns. 405; *Rooney v. Second Ave. R. Co.* 18 N. Y. 368.

*Pennsylvania*.—*Foster v. Jack*, 4 Watts 334; *Balsbaugh v. Frazer*, 19 Pa. St. 95; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632. Compare *Mooney v. Lloyd*, 5 Serg. & R. 412.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutele*, 56 Vt. 570, 48 Am. Rep. 821. See also *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267. Compare *Heartt v. Chipman*, 2 Aikens (Vt.) 162; *Walker v. Sargeant*, 14 Vt. 247.

*West Virginia*.—*Renick v. Ludington*, 16 W. Va. 378; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

In *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567, the court said: "Our statute recognizes both the general and special branches of the attorney's lien as it was enforced at the common law; but in some important particulars this lien under the statute is much more complete and satisfactory than it is at the common law. The statutory lien is not limited to costs or to taxable fees. It reaches all fees due for services rendered, whether the amount of such fees has been agreed upon, or is to be settled in suit as upon a quantum meruit. Nor is it limited to compensation for serv-

ices rendered by the attorney in procuring the judgment upon which he relies. In this respect it is more comprehensive than the mechanic's lien; it covers a balance legally due him for any and all professional services theretofore rendered his client. . . . There are a few decisions which seem to sustain the attorney's right to look, through his lien, to the land for his taxable fees, in such cases; but the weight of authority undoubtedly sanctions the proposition of counsel for appellant, that no such privilege is awarded by the common law. Whether the discrimination thus made in favor of money judgments is based upon satisfactory reason or sound principle, we need only consider in so far as it aids us in giving a proper construction of the statute, for we are not now dealing with the common law. This statute recognizes no distinction between judgments for money or personal property, and decrees or judgments by which the ownership or possession of land is awarded to plaintiff, or his interest therein is preserved. It gives the attorney a lien upon 'any judgment' obtained by him, and belonging to his client. The language used is clear and comprehensive; it seems to cover all kinds of judgments, regardless of the subject-matter to which they relate. We do not feel at liberty to say that it was the legislative intent to exclude from the operation of the statute all judgments or decrees involving the ownership or preservation of land. Had such been the legislative purpose, different language would have been used in framing the section. This view of the provision is not only consistent with established rules of statutory construction, but, in our judgment, it also comports with an equitable administration of justice in the premises." In *Rooney v. Second Ave. R. Co.* 18 N. Y. 368, it was said: "Under any system of proceedings the recovery of costs is a statutory right. By way of indemnity for his expenses, it has been thought fit to allow the prevailing party to recover, in addition to his debt or damages, certain prescribed allowances. These are as much a part of the recovery as the verdict itself. They become a part of the judgment. It is one entire thing. But, because the judgment has only been recovered through the instrumentality of the attorney, and his money and labor and talents have been expended for that purpose, courts have declared that he shall have a lien upon it to the extent of his claim against his client. The lien is not more upon one part of the judgment than another. It is upon the whole judgment. True, it was equal to the costs embraced in the judgment, but this was only because the legislature had thought fit to fix this amount as the limit of the compensation to which the at-



torney should be entitled. All that the code has done in this respect is to remove this restriction. The party recovers costs as before, but the amount of compensation which the attorney shall receive is no longer limited. The principle upon which his lien upon the judgment has been maintained is still the same. He still conducts the suit as before. His labor and skill and money still enter into the judgment as before. But now he may agree with his client, as he could not before, how much he shall receive for his services. In other words, the attorney and his employer may fix beforehand the amount for which he shall have a lien upon the judgment when recovered. . . . The only operation of the code, in respect to costs, is, to substitute a new fee bill in the place of that which had before existed, and to leave the attorney free to agree with his client for a greater or less amount than that which he may recover, according to circumstances. The lien of the attorney, upon the judgment he recovers, is unaffected by the change. That right stands now as it did before. It is a valid and established right to receive, out of the moneys to be collected upon the judgment, the amount due him from his client for his services and expenses in obtaining it. In the absence of any agreement on the subject, I suppose the sum recovered by the party as an indemnity for his expenses would be the measure of compensation allowed to the attorney. This, then, would be the extent of his lien. But where there has been an agreement for more or less than that sum, the amount which, by agreement, he is entitled to receive will determine the extent of his lien." In *Brown v. New York*, 9 Hun 587, 11 Hun 21, the court said: "The law of this state in respect of the lien of an attorney for costs seems to be well settled. Aside from the specific lien on deeds, papers and valuables in his hands as attorney, and which may be held for any general indebtedness for services (the extent of which lien is not now under discussion), an attorney has a lien for his cost in an action prosecuted by him, upon the recovery of a judgment. This formerly extended only to the taxable costs which were the legal measure and his compensation, but under the code, which authorizes express or implied agreements between attorney and client as to such compensation, it embraces any amount expressly or impliedly agreed upon, as well as such part of the taxable costs and disbursements as may belong to him." And in *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821, it was said: "No good reason can be given for limiting an attorney's charging lien to what under our law are the taxable costs in favor of his client in the suit. If he is to be given a lien at all upon

a judgment recovered by his services, it should be to the extent of the value of his services in the suit. His services are presumed to have been skillfully performed, and valuable because so performed. They enhance his client's claim presumably to the extent of the value of his services, the same as the tailor's services, in manufacturing a patron's cloth into a coat, enhance the value of the materials to the extent of the value of his services. We are aware that the decisions in this country are not uniform on the extent of an attorney's charging lien. In some states it is held to cover his reasonable charges and disbursements in the suit, while in others it is limited to the amount of costs taxable in favor of his client in the suit. But these are what the law allows to be recovered in favor of the prevailing party. They are taxed between party and party, and not between attorney and client, and are in no sense the measure of the value of the attorney's services and disbursements in the suit. They include frequently, court, clerk, witness, and officer's fees, in the suit, which the client has advanced. I cannot help thinking that this class of decisions has their origin in not observing the distinction between taxable costs, which, at the common law, was a taxation between the attorney or solicitor and his client, and taxable costs under our statutes, which is a taxation in favor of the recovering party against the defeated party. We are aware that this court in the early case of *Heartt v. Chipman* [2 Aikens (Vt.) 162], while holding that the distinction between attorney and counsel did not exist in this state but both were combined in the office of an attorney at law, and also that an attorney has a lien upon a judgment recovered by him which his client could not assign to his detriment, still held that this lien was confined to the taxable costs in the suit. This decision has never been overruled, that we are aware of, although it is said in *Hooper v. Welch* [43 Vt. 169, 5 Am. Rep. 267], by Judge Wilson: 'Any attorney has a lien upon a judgment recovered through his agency for his reasonable fees and disbursements.' This is what he is entitled to recover against his client. But no allusion is made to *Heartt v. Chipman* [2 Aikens (Vt.) 162], nor was the extent of an attorney's lien upon the judgment involved in the decision of *Hooper v. Welch* [43 Vt. 169]. But the decision of *Heartt v. Chipman* [2 Aikens (Vt.) 162], is in this respect so far contrary to reason, to the common law, and to the fundamental principles underlying the law of liens generally, that this court refuse to follow it; but hold that the attorneys, Livingston and Wing, have a lien upon the judgments recovered through their agency against the

trustees for their reasonable fees and disbursements in these suits." Likewise, in *Renick v. Ludington*, 16 W. Va. 378, the court said: "Many of the American courts . . . hold, that an attorney has a lien on the judgment in favor of his client for his compensation as an attorney in the obtaining of such judgment, whether his fee is taxed in the costs or not by law, and if so taxed, his lien is not restricted to the amount so authorized to be taxed by law, unless by the law he is prohibited from receiving of his client more than the amount so authorized to be taxed as a fee. The English rule, if it only secured legal costs, they alone being there allowed by law as a compensation, would by irresistible conclusion secure the compensation agreed upon by the parties, when none is provided by law. But the lien in England is not confined to the legal fees taxed, it extends to all the disbursements of the plaintiff's attorney. The same reasons, which in England extend the attorney's lien to these disbursements, would extend it to a charge for services, where such charge is proper, as it is in this country. . . . The courts, who hold these views, decide that the taxed costs of an attorney in England have no merit or justice superior to the claim of counsel for reasonable compensation in this day and country; nor does the former contribute more to the success of the party he represents in England, than does the latter in this country; and therefore there should be in reason and justice a lien in this country on a client's judgment for a just compensation for his counsel, for the same reasons as the attorney's lien is allowed in England. Substantially these views are held by many American courts; and they decide that the attorney has a lien for his fees or just compensation in a suit on the judgment he obtains."

In the case of *In re Regan*, 167 N. Y. 338, 60 N. E. 658, the court said: "It seems to us that the power of the surrogate's court to protect the lien of an attorney has been assimilated by modern legislation to the power exercised in that respect by the supreme court and the other courts of record of the state. There is now no reason that we can perceive for denying this power to a court that exercises such extensive jurisdiction over persons and property. An attorney, duly admitted to practice in all the courts of record of the state, is an attorney of the surrogate's court, and his functions as an officer of that court are quite as important to the community and to his clients as the services that he may perform in any other court. Assuming that there is no distinction with respect to the lien in question between the claim of an attorney for professional services in the surrogate's court

and that for services in any other court, the conclusion must follow that in this case the attorneys had a lien upon the decree entered by the surrogate of their reasonable compensation, and the surrogate had power to protect it by vacating the satisfaction of the decree made in disregard of their rights. . . . It must be regarded as settled law in this state that an attorney who has procured for his client a judgment or decree has a lien upon the same for his compensation, and this lien is not confined to mere taxable costs but to such sum as he is entitled to receive under his retainer or under an agreement expressed or implied."

In *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724, it was said: "We feel constrained to maintain that proposition [that the attorney's lien extends to the fees of counsel not embraced in the taxed costs], because it best comports with the principle of justice out of which the attorney's lien sprung. . . . The attorney's lien was allowed, not because his costs were taxed; but it is founded in the natural equity which forbids that a party should enjoy the fruits of the cause, without satisfying the legal demands of his attorney. . . . The taxed costs of the attorney, in England, had no merit or justice superior to the claim of counsel for a reasonable compensation in this day and country; nor did the former contribute more to the success of the party he represented, than does the latter under our system. Every reason, therefore, upon which the lien was founded in England, applies to the counsel fees in this country; and, therefore, the lien should be incorporated in our jurisprudence, as a security for the compensation of counsel."

#### MINORITY RULE.

In England and Canada the practice is to confine the lien of an attorney on a judgment obtained for his client to his costs and disbursements which are actually taxed therein. That rule was at one time followed by the courts in many of the jurisdictions of the United States, and appears to be still in force in some of them, though there have been few recent decisions to that effect.

*England.*—*Watson v. Maskell*, 1 Bing. N. Cas. 727, 131 Eng. Rep. (Reprint) 1297. And see *In re Taylor* [1891] 1 Ch. 590; *Welsh v. Hole*, 1 Dougl. 238, 99 Eng. Rep. (Reprint) 155; *Ormerod v. Tate*, 1 East 464, 102 Eng. Rep. (Reprint) 179; *Skinner v. Sweet*, 3 Madd. 244, 56 Eng. Rep. (Reprint) 499.

*Canada.*—*Bletcher v. Burn*, 25 U. C. Q. B. 92; *Nevills v. Ballard*, 18 Ont. Pr. 134. Compare *Linton v. Wilson*, 3 N. Bruns. 300;

Rogers v. Ledden, 4 N. Bruns. 59; Palgrave v. McMillan, 31 Nova Scotia 488.

*California*.—Ex p. Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 93; Hogan v. Black, 66 Cal. 41, 4 Pac. 943.

*Maine*.—Hooper v. Brundage, 22 Me. 460; Gammon v. Chandler, 30 Me. 152; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Cooley v. Patterson, 52 Me. 472; Stratton v. Hussey, 62 Me. 286; Peirce v. Bent, 69 Me. 381; Davis v. Ferrin, 97 Me. 146, 53 Atl. 1006.

*Massachusetts*.—Ocean Ins. Co. v. Rider, 22 Pick. 210; Blake v. Corcoran, 211 Mass. 406, 97 N. E. 1002. And see Woods v. Verry, 4 Gray 357; Baker v. Cook, 11 Mass. 236; Thayer v. Daniels, 113 Mass. 129.

*Michigan*.—Wells v. Elsam, 40 Mich. 218; Kinney v. Tabor, 62 Mich. 517, 29 N. W. 86, 512.

*New Hampshire*.—Chapley v. Bellows, 4 N. H. 347; Wright v. Cobleigh, 21 N. H. 339; Young v. Dearborn, 27 N. H. 324; Currier v. Boston, etc. R. Co. 37 N. H. 223; Wells v. Hatch, 43 N. H. 246; Rowe v. Langley, 49 N. H. 395; Whitcomb v. Straw, 62 N. H. 650. Compare Citizens' Nat. Bank v. Culver, 54 N. H. 327, 20 Am. Rep. 134 (decided under Vermont statute).

*New Jersey*.—Holmes v. Sinnickson, 15 N. J. L. 313; Phillips v. Mackay, 54 N. J. L. 319, 23 Atl. 941. And see Pride v. Smalley, 66 N. J. L. 578, 52 Atl. 955.

*Rhode Island*.—Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Tyler v. Superior Ct. 30 R. I. 107, 73 Atl. 467, 23 L.R.A. (N.S.) 1045.

*South Carolina*.—Scharlock v. Oland, 1 Rich. L. 207; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833.

*Texas*.—Casey v. March, 30 Tex. 180; Dutton v. Mason, 21 Tex. Civ. 389, 52 S. W. 651.

*Utah*.—See McClure v. Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. Rep. 938; Gray v. Denhalter, 17 Utah 312, 53 Pac. 976; Victor Gold, etc. Min. Co. v. National Bank of the Republic, 18 Utah 87, 55 Pac. 72, 72 Am. St. Rep. 767; Loofbourow v. Hicks, 24 Utah 49, 66 Pac. 602, 55 L.R.A. 874.

*Wisconsin*.—Rice v. Carnhart, 35 Wis. 282.

Thus, in Currier v. Boston, etc. R. Co. 37 N. H. 223, the court said: "The lien of an attorney upon the judgment which he has obtained for his client for the amount of his fees and disbursements, rests upon the equity of his claim to be repaid out of the proceeds of the judgment, for his advances and services, on account of which costs have arisen that have entered into and constitute a part of the judgment itself. It is consequently held that the lien is limited to the fee and

disbursements in that cause; Shapley v. Bellows, 4 N. H. 347; and does not extend to 'commissions' on the amount recovered in the judgment, though proper to be allowed as between attorney and client. Wright v. Cobleigh, 21 N. H. 339. In *Maine* it is held that the lien cannot, in any event, extend farther than to fees legally accruing, and advances made by way of disbursements for the accruing costs; Hooper v. Brundage, 22 Me. 460; and in *Massachusetts* that it is limited to the taxable costs, and does not extend to the counsel fees. Ocean Ins. Co. v. Rider, 22 Pick. (Mass.) 210. Upon these authorities, as well as upon a consideration of the nature of the lien, and of the reasons upon which it is founded, we think it is to be thus limited, and that consequently, if the attorney of the plaintiff is entitled to the lien which he claims upon the judgment to be rendered for the amount confessed, it can extend only to the taxable costs to be included in the judgment. Other fees accruing and advances made subsequently to the confession, are in no way incident to or connected with that judgment, but arise upon a separate proceeding, namely, the trial of the issue upon the question of damages beyond the amount confessed, and by which that amount is entirely unaffected." In Wells v. Hatch, 43 N. H. 246, it was said: "Every attorney has a lien upon a judgment which he has recovered as such for his client, to the amount of his taxable fees and disbursements only. He has no claim for counsel fees, commissions, or any claims against his employer, however just in themselves, beyond that limited amount. . . . If an attorney actually collects the amount of a judgment, his lien is satisfied to the amount of his taxable fees and disbursements, and he receives that amount as his own money; the residue he receives as the money of his client. And if any action is brought against him for his recovery, he may avail himself of his just claims for counsel fees and commissions, and of any other just debts, to defeat the action. This, however, results not from the law of lien, but from the law of set-off." So, in Holmes v. Sinnickson, 15 N. J. L. 313, the court said: "Any counsel fees beyond those allowed in the fee bill, are no part of the legal costs, and are just as much out of the prescribed rule, as buildings or improvements. I am therefore of opinion that counsel fees are not allowable." In Phillips v. Mackay, 54 N. J. L. 319, it was said: "The principle, however, upon which the attorney rests his claim to equitable consideration is identical with that which underlies his lien at law. At law the right of lien arises either from possession or from having imparted a value to the property of the lienee. The lien that the attorney has

upon the papers of his client and his right to deduct his costs from the money recovered are instances of the former kind of lien, while the claim we are now considering, if not an illustration of the latter class, is at least strongly analogous to it in principle. The judgment is the property of the plaintiff, which not only embodies the labor and skill of the attorney, but also includes the services of clerks and other officers of the court for whose payment the attorney has made himself liable. In respect to these matters the attorney is clearly within the principle of the artificer's lien. The employment of stenographers in the courts of this state and the use of printed transcripts of the testimony upon rules to show cause bring necessary disbursements for these purposes within the same principle. No better illustration of the fairness of this rule could be found than the present case. The plaintiff had recovered a verdict for six cents damages. In order to obtain substantial damages a new trial was necessary, and the testimony, stenographically taken, had, by the practice of the court, to be transcribed and printed. It was done at the cost of the attorney, who thereby obtained a new trial, which resulted in the judgment now before us. It is evident that these disbursements made in the client's interest must stand upon precisely the same plane as the costs of filing papers or of noticing the cause for trial. Whatever may be the debts of the client to the defendant, this particular fund should stand as security to the attorney for those costs and disbursements which he was compelled to make in order to recover it." To the same effect, see *Pride v. Smalley*, 66 N. J. L. 578, 52 Atl. 955.

It has been held that the costs for which a lien attaches may include travel and attendance fees. *Cooley v. Patterson*, 52 Me. 472, wherein the court said: "The plaintiff's attorney claims judgment in this suit for \$49.08. This latter sum includes the travel and attendance of the party, amounting to \$38.99; and, it is contended in defense that the fees accruing for these items belong to the party and not to the attorney, and that the latter cannot rightfully claim a lien upon the judgment to secure them. In strictness all the items included in the bill of cost belong to the party; but when the party employs an attorney to attend to the case for him, and the attorney does attend to it, the party becomes indebted to the attorney for his services and disbursements in the suit; and, to insure his pay, the law gives the attorney, not any particular items of cost that may have accrued in the case, but a lien upon the whole bill of costs for what may be justly due him for such services and disbursements; and when his client prevails in

the suit, we think the attorney may justly charge him, among other items, with the amount recovered for travel and attendance, and may rightfully claim a lien upon the judgment to secure the amount thus charged."

#### *Right to Lien for Services Outside Particular Suit.*

The charging lien whether it includes only costs and disbursements or extends to fees is limited strictly to the costs and disbursements incurred and to fees for services rendered in the particular action, suit or proceeding in which the judgment or decree is rendered.

*England.*—*Lucas v. Peacock*, 9 Beav. 177, 50 Eng. Rep. (Reprint) 311; *Stephens v. Weston*, 3 B. & C. 535, 10 E. C. L. 173, 107 Eng. Rep. (Reprint) 832; *Webber v. Nicholas*, 4 Bing. 16, 13 E. C. L. 326, 130 Eng. Rep. (Reprint) 673; *Wilson v. Round*, 4 Giff. 416, 9 L. T. (N. S.) 675, 66 Eng. Rep. (Reprint) 769; *Hall v. Laver*, 1 Hare 571, 66 Eng. Rep. (Reprint) 1158; *Ex p. Thompson*, 3 L. T. (N. S.) 317; *Lann v. Church*, 4 Madd. 391, 56 Eng. Rep. (Reprint) 749; *Bozon v. Bolland*, 4 Myl. & C. 354, 41 Eng. Rep. (Reprint) 138. And see *Haymes v. Cooper*, 10 Jur. N. S. 303.

*Canada.*—*London Mutual F. Ins. Co. v. Jacob*, 16 Ont. App. 392; *Canadian Bank of Commerce v. Crouch*, 8 Ont. Pr. 437; *Davidson v. Douglas*, 15 Gr. Ch. 347.

*United States.*—*International Imp. Fund v. Greenough*, 105 U. S. 527, 26 U. S. (L. ed.) 1157; *Georgia Cent. R. etc. Co. v. Petrus*, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *In re Wilson*, 12 Fed. 235; *Massachusetts, etc. Constr. Co. v. Gill's Creek Tp.* 48 Fed. 145, *appeal dismissed* 154 U. S. 521, 14 S. Ct. 1154, 38 U. S. (L. ed.) 1073, mem.; *Foster v. Danforth*, 59 Fed. 750.

*Alabama.*—*Jackson v. Clopton*, 66 Ala. 29; *McWilliams v. Jenkins*, 72 Ala. 480; *Mosely v. Norman*, 74 Ala. 422; *Higley v. White*, 102 Ala. 604, 15 So. 141.

*Arkansas.*—*Waters v. Grace*, 23 Ark. 118; *Porter v. Hanson*, 36 Ark. 591.

*District of Columbia.*—*Thurston v. Bulawa*, 42 App. Cas. 18.

*Indiana.*—*Harshman v. Armstrong*, 119 Ind. 224, 21 N. E. 662.

*Minnesota.*—*Forbush v. Leonard*, 8 Minn. 303.

*Mississippi.*—*Harney v. Demoss*, 3 How. 174; *Dunn v. Vannerson*, 7 How. 579; *Pope v. Armstrong*, 3 Smedes & M. 214; *Cage v. Wilkinson*, 3 Smedes & M. 223; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *Hallsell v. Turner*, 84 Miss. 432, 36 So. 531.

*Nebraska*.—*Oliver v. Sheeley*, 11 Neb. 521, 9 N. W. 689.

*New Hampshire*.—*Wright v. Cobleigh*, 21 N. H. 339; *Wells v. Hatch*, 43 N. H. 246.

*New York*.—*Phillips v. Stagg*, 2 Edw. Ch. 108; *Turno v. Parks*, 2 How. Pr. N. S. 35; *Adams v. Fox*, 40 Barb. 442, 27 How. Pr. 409, *reversed* on other grounds 40 N. Y. 577; *Williams v. Ingersoll*, 89 N. Y. 508; *Anderson v. de Braekeleer*, 25 Misc. 343, 55 N. Y. S. 721, 28 Civ. Pro. 306; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035, *reversed* on other grounds 136 App. Div. 658, 121 N. Y. S. 197; *Matter of Jones*, 76 Misc. 331, 136 N. Y. S. 819; *West v. Bacon*, 13 App. Div. 371, 43 N. Y. S. 206, *modified and affirmed* 164 N. Y. 425, 58 N. E. 522.

*Pennsylvania*.—*Martin v. Throckmorton*, 15 Pa. Super. Ct. 632; *Aber's Petition*, 18 Pa. Super. Ct. 110.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

*West Virginia*.—*Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

In *Wright v. Cobleigh*, 21 N. H. 339, the court said: "It [the attorney's lien] does not in any way depend upon possession, but rests on the equity of the attorney's claim, to be repaid out of the proceeds of a judgment, for his fees and disbursements which ordinarily constitute a part of the judgment itself. This right is limited to the fees and disbursements of the attorney in that cause, and cannot be extended to 'commissions,' or other charges, however proper in themselves."

It has been held that it is not necessary that all the services of the attorney shall have been rendered in the same court. *Weaver v. Cooper*, 73 Ala. 318. Thus, where the litigation appeared to have been one continuous proceeding, having been commenced in the probate court, and later removed into the chancery court, it was held that the attorney of a creditor had a lien on the fund in that court for any unpaid balance of his fee. *Weaver v. Cooper*, 73 Ala. 318. In *Close v. Shute*, 4 Dem. (N. Y.) 546, wherein it appeared that the attorneys for the plaintiff had obtained a judgment in the supreme court against the administrator of an estate, it was held that they had a lien in that court, on the amount of the recovery for their costs, and that while no lien could be recognized for services rendered by an attorney in the surrogate's court, yet such a lien established elsewhere must there be regarded and respected. It was further held that as the law creating this lien of the attorney operated as an assignment, pro tanto, of the amount of the recovery, and as § 2743 of the Code directed the surrogate to decree payment to an assignee of a claim,

the attorneys must, therefore, be considered proper parties to a proceeding to render an account. But in *Adams v. Kehlors Milling Co.* 38 Fed. 281, it was held that the federal court had no authority to tax against the defendants any fees due from the complainants to their solicitors for services rendered in the suit in the state court, although the judgment obtained in that suit formed the basis of the proceeding in the federal court. And to the same effect see *Robinson v. Hays*, 186 Fed. 295, 108 C. C. A. 373. In *Massachusetts, etc. Constr. Co. v. Gill's Creek Tp.* 48 Fed. 145, *appeal dismissed* 154 U. S. 521, 14 S. Ct. 1154, 38 U. S. (L. ed.) 1073, mem., it was held that as the law of South Carolina confined an attorney's lien on a judgment to costs and disbursements, the federal court could not give a lien on a judgment in the federal court for services in the state court in respect to the same subject-matter.

It has been held that an attorney's lien for fees will extend to services in suits incidental to or growing out of the principal object of his employment. *Blair v. Harrison*, 57 Fed. 257, 6 C. C. A. 326, *affirming* 51 Fed. 693; *Greeff v. Miller*, 87 Fed. 33; *Warren Deposit Bank v. Barclay* (Ky.) 60 S. W. 853, 22 Ky. L. Rep. 1555; *Butchers' Union Slaughter-House, etc. Landing Co. v. Crescent City Live-Stock Landing, etc. Co.* 41 La. Ann. 355, 6 So. 508; *Stoddard v. Lord*, 36 Ore. 412, 59 Pac. 710; *Renick v. Ludington*, 16 W. Va. 378; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Turriff v. McDonald*, 13 Manitoba 577; *Palgrave v. McMillan*, 31 Nova Scotia 488. *Compare Lann v. Church*, 4 Madd. 391, 56 Eng. Rep. (Reprint) 749; *London Mutual F. Ins. Co. v. Jacob*, 16 Ont. App. 392; *Adams v. Kehlors Milling Co.* 38 Fed. 281; *Massachusetts, etc. Constr. Co. v. Gill's Creek Tp.* 48 Fed. 145, *appeal dismissed* 154 U. S. 521, 14 S. Ct. 1154, 38 U. S. (L. ed.) 1073, mem. Thus, in *Butchers' Union Slaughter-House, etc. Landing Co. v. Crescent City Live Stock Landing, etc. Co.* 41 La. Ann. 355, 6 So. 508, it appeared that the prime object of the litigation referred to in the contract between the plaintiff and the attorney was to overthrow the monopoly and exclusive privilege claimed by the Crescent City Live Stock Landing and Slaughterhouse Company, and to maintain and establish the right of the Butchers' Union company with the sanction of the city council of New Orleans and of the board of health, to establish and conduct the business of landing and slaughtering live stock, and there were numerous cases in which the attorney rendered services under the contract, the litigation finally resulting in the complete triumph of the Butchers' Union company. Having obtained the concurrent approval of the city council and of

the board of health to its selected location, it was met by an injunction from the United States circuit court, sued out by the Crescent City company, restraining it from conducting its business, which injunction was perpetuated by a final decree in that court; but, on appeal to the Supreme Court of the United States, the decree was reversed, the pretensions of the Crescent City company to a monopoly and exclusive privilege were denied, and the rights of the Butchers' Union company to prosecute its business were fully recognized. Thereupon the Butchers' Union company brought its action in damages against the Crescent City Company on account of the wrongful issuance of the injunction above referred to. This action resulted in a judgment for \$21,000 damages; but on appeal to the Supreme Court of the United States, the decree was only partially affirmed and the damages allowed were largely reduced. It was admitted that the attorney had the right to retain out of the fund his fee in the particular suit in which the money was collected. The court said: "But considering the solidarity of defendant's contract and services, under the view heretofore expressed, we think that the right, admitted by plaintiff in rule, of defendant to retain his fee in the particular case, extends to and embraces all his fees in the subject-matter of the mandate, and is distinctly supported, not only by the authority of the United States Supreme Court, but by the express text of our own law on that subject." In *Blair v. Harrison*, 57 Fed. 257, 6 C. C. A. 326, affirming 51 Fed. 693, it was held that the plaintiff's attorneys had a lien on the amount of a judgment for the balance of the purchase price of certain property, which money had been paid into a court of equity for proper distribution, for meritorious services rendered as attorneys to the plaintiff in litigation growing out of the sale of the property, where at the time the services were rendered, they looked to this claim as the fund from which they would be paid.

In *Greeff v. Miller*, 87 Fed. 33, wherein it appeared that there was a group of some forty or fifty cases, all involving the same questions of law and practically the same questions of fact, and from time to time a case supposed to be typical and to present in a favorable light the propositions which the plaintiff sought to maintain was selected for trial, it was held that the amount allowed to the attorneys by the court as counsel fees and disbursements for the preparation for and the trial of such test cases, having been paid for services by which all who were interested benefitted equally, should be distributed proportionately against the several cases. But in *London Mutual F. Ins. Co. v. Jacob*,

16 Ont. App. 392, wherein two actions were brought by one plaintiff by the same solicitor against two insurance companies and were tried together, resulting in a recovery in one and a dismissal with costs in another, it was held that, despite a special agreement whereby the solicitors were to have a lien on the amount recovered in either suit for the costs of it and of the other, the attorney's lien was limited to the costs of the particular suit in which there was a recovery as the actions against the two insurance companies were not so connected with each other in their cause, institution, or progress as to form but one suit for the purpose of giving the solicitors a lien for the costs of the unsuccessful one, upon the fund recovered in the other. Likewise, in *Massachusetts, etc. Constr. Co. v. Gill's Creek Tp.* 48 Fed. 145 (*appeal dismissed* 154 U. S. 521, 14 S. Ct. 1154, 38 U. S. (L. ed.) 1073, mem.), wherein it appeared that there were eight separate suits, presenting but one question common to all, and they were argued together for the sake of convenience, it was held that the lien of the attorney on one particular fund, for his services in gaining that fund, did not extend to the services rendered in the other suits.

In the reported case, under the Judiciary Law of New York (Consol. Laws, c. 30, § 475), providing that "from the commencement of an action or special proceeding" the attorney now has a lien "upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosever hands they may come," it is held that an attorney's lien does not extend to a judgment obtained for his client, where it appears that he was employed by his client as its general counsel at an annual salary, payable semi-yearly, and on the termination of his general employment, though under this retainer there was a balance of salary due him, he prosecuted an action then on the calendar, under an agreement that he was to be paid whatever his services were worth, and recovered judgment for his client, and that it was on this judgment that he claimed a lien for the balance of the salary due him under the general retainer.

It has been held that a general balance due for legal services in other cases, is not covered by the lien. *Pope v. Armstrong*, 3 Smedes & M. (Miss.) 214; *Cage v. Wilkinson*, 3 Smedes & M. (Miss.) 223. Thus, in *Phillips v. Stagg*, 2 Edw. Ch. (N. Y.) 108, it was held that an attorney's lien did not extend beyond the costs in the action and that he could not claim the amount of other costs due him in other suits at law. And in *Foster v. Danforth*, 69 Fed. 750, wherein

it appeared that on the settlement of certain suits, an agreement was entered into that the fees of the attorney for the plaintiffs were to be included in his fees in another suit if there was a recovery for the plaintiff, which suit he brought and in which he recovered judgment, it was held that the agreement did not create a lien on the judgment for the fees of the attorney in the suits which were settled.

But in *Cooke v. Thresher*, 51 Conn. 105, the court, in holding that an attorney's lien, by virtue of his agreement with his client, also embraced services and disbursements in several suits and other matters, said: "If an attorney has rendered services and expended money in instituting and conducting a suit and the plaintiff orally agrees that he may retain so much of the avails thereof as will pay him for his services in other matters, and he thereafter conducts the suit to a favorable conclusion, he has, as against such plaintiff, an equitable lien upon the avails for the services embraced in the agreement."

However, in *New York* the courts have held that an attorney's lien extends to a general balance of account for professional services, and that such services are not confined to a litigation which terminates in a technical judgment. *Schwartz v. Jenney*, 21 Hun (N. Y.) 33; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *In re Knapp*, 85 N. Y. 284; *In re H—*, 87 N. Y. 521; *Ward v. Craig*, 87 N. Y. 550; *Krone v. Klotz*, 3 App. Div. 587, 25 Civ. Pro. 320, 3 N. Y. Ann. Cas. 36, 38 N. Y. S. 225, 73 N. Y. St. Rep. 719. In *Schwartz v. Jenney*, 21 Hun (N. Y.) 33, it was held that the attorneys for the holder of a promissory note, after judgment had been obtained and collected, had a lien on the money for their services and expenses in that suit, and also for their general account. And in *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489, it was held that the lien of an attorney on a bond and mortgage which he was foreclosing, extended throughout and included all the remedies open to the party, and attached to the money received or collected on the judgment.

But a lien for services and disbursements in a particular action or proceeding cannot be asserted against the recovery in another action or proceeding. *Brown v. New York*, 9 Hun (N. Y.) 587, 11 Hun 21; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035, reversed on other grounds 136 App. Div. 658, 121 N. Y. S. 197.

## ROSENTHAL ET AL.

v.

## INSURANCE COMPANY OF NORTH AMERICA.

Wisconsin Supreme Court—October 27, 1914.

158 Wis. 550; 149 N. W. 155.

**Insurance — Construction — Standard Policy.**

The rule that policies of insurance should be liberally construed in favor of insured, because prepared by the insurer, has no application, where the contract is in the form prescribed by statute.

[See Ann. Cas. 1913E 287.]

**Construction in Favor of Indemnity.**

In case of ambiguity in an insurance policy, it should be construed in favor of indemnity to insured, rather than as being useless and nugatory.

**Insurance on Live Stock — Absence of Stock from Designated Location.**

Where a policy insuring horses against fire while contained in a described barn also uses the language of St. 1913, § 1941—43, which provides for indemnity against loss of the property while contained in the location described, and not elsewhere, insured cannot, on the theory that it was contemplated between the parties that the horses might of necessity be taken from the barn to permit repairs, recover for their loss while away from the barn; there being no ambiguity of language or waiver of that provision in the policy.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: TURNER, Judge.

Action on fire insurance policy. *J. Rosenthal et al.*, plaintiffs, and *Insurance Company of North America*, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Gill & Barry* for appellant.*Michael Levin* for respondents.

[551] TIMLIN, J.—The amended complaint claimed damages on account of the loss by fire of two horses in a building at 924 Walnut street, Milwaukee. The horses were insured according to the written portion of the policy, "all while contained in the frame brick front barn situated at rear 425 Fifth street, Milwaukee, Wis."

Sec. 1941—43, Stats., being the statute form of policy authorized in this state, requires such policy to state that the insurer does insure . . . "against all direct loss or damage [552] by fire, except as herein-

after provided, to an amount not exceeding—dollars to the following described property while located and contained as described herein and not elsewhere.” The parties are permitted to select their description. The policy in question, in addition to the stipulation first above quoted, contained this latter requirement of the standard form. The complaint then avers that on or about the 9th of March, 1913, it was necessary to remove the horses from the described building in the rear of 425 Fifth street to the building in which they were burned because the former building was undergoing repairs and interior rearrangement, making it impossible to keep the horses there, and that the horses were taken for the night of March 9th to the Walnut-street premises and there destroyed by fire. The fire risk at the Walnut-street premises was less than that at the Fifth-street premises. The plaintiffs used the horses in the business of delivering and receiving goods, wares, and merchandise to and from various parts of the city and county of Milwaukee, and the defendant knew the purposes for which the horses were used, and knew it was customary, usual, and necessary for said horses to be in various parts of the city and county of Milwaukee; that prior to the fire in question the horses had spent a night or two temporarily in other barns, and the defendant knew or ought to have known that it might become necessary to house the said horses temporarily in some other place than that described in the policy by reason of some contingency or unforeseen event which could not have been anticipated at the time of the issue of the said policy, and that the repairs at the Fifth-street premises were such unforeseen and unanticipated event and the removal of the horses to the Walnut-street barn necessarily incident to the use of said horses by the plaintiff.

A demurrer to this complaint was overruled and the defendant appeals.

[553] It has been ruled many times that policies of insurance are to be liberally construed in favor of the insured because the insurer has prepared the contract. This reason for such construction would seem to drop out in case of a contract prescribed in its details by statute, at least so far as the statute covered such details. *Temple v. Niagara F. Ins. Co.* 109 Wis. 372, 85 N. W. 361; *Hewins v. London Assur. Corp.* 184 Mass. 177, 68 N. E. 62. But another and more fundamental rule of construction, applying alike to statutes and contracts, is that the writing must in case of ambiguity be considered valid and efficient to work out the ascertained object of the writer, i. e. in favor of indemnity to the insured, rather than useless or nugatory. This is considered with reference to policies of insurance in 1 May, Ins. (4th

ed.) § 174, p. 342, and cases there cited. Also 1 Phillips, Ins. sec. 124, p. 76; 2 Lewis's Sutherland, Stat. Constr. (2d ed.) § 370 et seq. But this does not mean that clear expressions should be distorted or that language should not be given its ordinary meaning. It is well known that fire risks and fire insurance rates vary greatly in different portions of a large city. And for this reason the fire insurance of chattel property of a kind that is not usually destroyed by fire except in connection with the burning of a building while contained in a designated building, is a very important stipulation in the policy. It affects the rates and affects the risk. When to this stipulation is added the words “and not elsewhere,” great emphasis and certainty is given to the stipulation, and it is also to be considered that the statute authorizes a policy to be limited to a designated place to insure the property against loss only while at that place and not elsewhere, leaving it to the parties to insert such written description of the place and the scope of the insurance in this respect as they see fit.

It has been held in *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. [554] 415, 25 N. W. 419, 54 Am. Rep. 631, where the policy of insurance was upon a sealskin coat “contained in the two-storied frame dwelling house occupied by the assured, and known as 302 Farwell avenue,” and the coat was destroyed by fire while in a downtown store for repair, there existed a liability on the policy. Argument was made by plaintiffs' counsel to the effect that where the insured property is of a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment and such use may be presumed to have been in contemplation of the parties when they made the contract of insurance, then and in that case the location of the property is specified in the policy merely to designate the accustomed place of deposit when the property is not absent therefrom in the course of its ordinary use; and that when the property is burned when so absent, the principal place of deposit remaining unchanged, the insurer is liable. This argument was approved in the opinion. *Peterson v. Mississippi Valley Ins. Co.* 24 Ia. 494, 95 Am. Dec. 748, relating to horses “situated upon section 22;” *Mills v. Farmers' Ins. Co.* 37 Ia. 400, relating to horses “on premises situated in section 7;” *McCluer v. Girard Fire, etc. Ins. Co.* 43 Ia. 349, 22 Am. Rep. 249, relating to the phaeton “contained in the frame barn;” *Longueville v. Western Assur. Co.* 51 Ia. 553, 2 N. W. 394 33 Am. Rep. 146, relating to family wearing apparel “contained in two-story frame dwelling on lot 6;” *Holbrook v. St. Paul F. etc. Ins. Co.* 25 Minn. 229, relating to mules



contained in a certain barn; London, etc. *F. Ins. Co. v. Graves*, 12 Ins. L. J. 308, relating to buggies contained in a certain livery stable, are cited and approved and selected from other decisions understood by the court to be to the contrary.

It is noticeable that in *Noyes v. Northwestern Nat. Ins. Co.* supra, and the other cases therein referred to the language as understood by this court in the *Noyes* case was not as restrictive as that in the instant case.

[555] In *Lathers v. Mutual F. Ins. Co.* 135 Wis. 431, 15 Ann. Cas. 659, 116 N. W. 1, 22 L.R.A.(N.S.) 848, it was said in deciding a like point:

"There is left to be determined this question of law: In case of insurance of a farm barn and of live stock customarily kept therein when not in use against loss by fire, the live stock being described as 'therein, on the farm and from lightning at large,' is risk of loss of the stock by fire while, temporarily and according to custom, off the farm, included in the contract, there being no negative thereof expressly or by necessary inference, other than suggested by the words 'therein, on the farm,' etc.? The proposition is ruled in the affirmative, as respondent's counsel contend and the trial court decided, by *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. 415, 25 N. W. 419. . . . The rule involved is one of construction. The idea is that the dominant purpose of the insurance being protection against loss from specified causes it could not be effectuated if the language of the policy restricted liability to loss occurring while the subject of the insurance remained in its customary location when not in use, incidental changes, as matter of common knowledge, being necessary to the enjoyment of the property in the ordinary way. . . . The rule is particularly applicable to horses because of the fact that the use thereof for any purpose is commonly outside of a barn and because, on a farm, even when not in use they are commonly turned out to pasture."

As observed in the case last cited, policies of insurance written in this state and conforming substantially to the policy in question in *Noyes v. Northwestern Nat. Ins. Co.* supra, must be considered to have been made with reference to the existing law of this state as there declared, which entered into and became a part of such contract. That case remains unshaken. The instant case, however, presents a different question. When the contract of insurance is so varied that the words describing the location of the insured chattels are prefaced by the word "while" and followed by the words "and not elsewhere," so as to read "while located and contained as described herein and not else-

where," does the rule [556] of *Noyes v. Northwestern Nat. Ins. Co.* supra, obtain? We think not. Express words exclude the implication which controlled in *Noyes v. Northwestern Nat. Ins. Co.* and it falls within the rule of *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* 173 Pa. St. 53, 34 Atl. 16, cited by respondent, and *Green v. Liverpool, etc. Ins. Co.* 91 Ia. 615, 60 N. W. 189; 19 Cyc. 741; and *Haws v. St. Paul Fire, etc. Ins. Co.* 130 Pa. St. 113, 15 Atl. 915, 18 Atl. 621, 2 L.R.A. 52, cited by appellant.

Upon this question of construction the implication that the property is covered although not in the designated place but elsewhere, arising from the known nature and uses of the property, is negated by the express words of the policy in the instant case. The law permits a contract of insurance against loss by fire to be limited to loss in a specified building if the parties so agree. Also to be unlimited as to place of loss if the parties so agree. Also to be worded as in *Noyes v. Northwestern Nat. Ins. Co.* supra. Neither is illegal, harsh, or unusual. It is in all such cases a question of the intention of the parties, and the first and most decisive test of the intention of the parties to a written contract is the language employed. If the words "while contained in the frame brick front barn situate at the rear of 425 Fifth street and not elsewhere" are not sufficient, what form of expression would be? The statute form of policy employing these words was adopted after the decision in the *Noyes* case, supra, and it seems to reject the words there considered and select a new, more exclusive and emphatic form of expression for the purpose of enabling the parties to get away from the rule of the *Noyes* case if they wish to do so. To hold that they cannot do so by the form of expression used here, but may do so by some form of expression differing in words but identical in meaning, would seem to be a sort of decree of outlawry against these useful and expressive words. We cannot think there is alleged anything which would make the policy enforceable by waiver on the part of the insurer. [557] The objection here does not go to the validity of the policy, which might be overcome by the larger evident intention that indemnity was intended, nor to a forfeiture or loss of a right or claim thereunder, but concerns only the scope of the insurance; that is to say, the interpretation of the written contract actually entered into. In cases of ambiguity this might be affected by extrinsic circumstances, but there is here no ambiguity. The property might be insured generally or only while it was contained in a specified building and not elsewhere, and the language employed shows that the parties selected the latter kind of insurance.

Sec. 1941—62 provides how waiver shall be made, viz. not at all as to some stipulations of the policy; by writing only, added to the policy, as to others. There might be waiver of a forfeiture or of a breach of contract, but waiver as a ground for extending the scope of a written contract beyond the usual and ordinary meaning of the language employed would be quite a novelty.

By THE COURT.—Order reversed, and the cause remanded for further proceedings according to law.

#### NOTE.

#### **Fire Insurance Policy on Live Stock in Designated Location as Covering Animals Temporarily Elsewhere.**

In *Lathers v. Mutual F. Ins. Co.* 135 Wis. 431, 15 Ann. Cas. 659, it was held that where live stock is insured by a fire insurance policy which designates the place where the insured stock is kept, the designation, in the absence of restraining language, is merely descriptive of the subject of the insurance and its customary location, and consequently, an insurance company is liable for the destruction by fire of an animal which is temporarily in a place other than the one designated. That decision was based on the holding of *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631. The reported case, however, expressly distinguishing the case last cited on the ground that the language used in the reported case is the more restrictive and negatives the implication that the policy was to cover property not in the designated place, and thus incidentally distinguishing *Lathers v. Mutual Fire Ins. Co.* 135 Wis. 431, holds that the defendant insurance company is released from liability for the loss of two horses destroyed by the burning of a building to which they had been temporarily removed in order to enable repairs to be made to the barn designated in the policy. Similarly, it was held in the recent case of *Thorp v. Aetna Ins. Co.* 75 N. H. 251, 72 Atl. 690, that under a policy containing a lightning clause and covering "horses . . . contained in frame barn," recovery could not be had where a horse, which was contained in the barn when the contract was made but had been removed therefrom to a pasture one eighth of a mile distant, was there, two months later, killed by lightning. The court construed the words "contained in" not as an agreement to insure for five years the horses which were in the barn at the date of the issuance of the policy but as confining the insurance to "horses belonging to the plaintiffs which were 'contained in' the barn during the life of the policy."

The case of *Cottrell v. Munterville Mut. Fire and Lightning Ins. Co.* 145 Ia. 651, 124 N. W. 612, supports the holding in *Lathers v. Mutual F. Ins. Co.* supra. It appeared therein that the defendant a mutual insurance association had issued to the plaintiff a certificate of membership stipulating to indemnify him in case of loss or damage by fire or lightning "on his different buildings, their contents, and 'on live stock . . . being situated as follows in section 15 Mantua township, Monroe county, Iowa.'" Included in the live stock was a brood mare which had been taken to the farm of one Gray about eight miles distant to be bred. After being there about ten days, she was found dead, and the jury found that lightning had caused her death. In holding that recovery could be had the court said: "Appellant urges that, if the animal was killed by lightning, this happened some eight miles from the section or land described in the certificate, and for this reason was not covered thereby. But that instrument merely identified the live stock by its location, and did not restrict the indemnity while on the premises described. The animal had been taken to Gray's farm temporarily with the intention of bringing her back as soon as safely in foal, and, even if the purport of the language of the certificate be that the place mentioned was the usual location of the live stock, this loss was within its terms." Similarly, in *Kinney v. Farmers' Mut. F. etc. Soc.* 159 Ia. 490, 141 N. W. 706, it was held that the plaintiff was entitled to recover for the loss of cattle, which were at the time of their death in a pasture some three or four miles distant from the land described in the policy of insurance. There was no provision in the policy that the property insured should not be removed and no provision that the removal from the premises would render the policy inoperative for the purpose for which it was issued. The court said: "We hold, therefore, that the removal of the cattle in controversy from the premises, on which they were at the time the policy was issued, under the circumstances of this case, did not forfeit the rights of the plaintiff, under his policy, nor suspend his insurance during the time they were so absent, for it appears that the absence of the cattle from the farm, on which they were located at the time the policy was issued, was only temporary; that their removal was incident to their care and keeping, and the usual and ordinary method pursued by the plaintiff at the time, in caring for and keeping the cattle; that from the very nature of the property itself it was apparent that it was not contemplated by either party to the contract of insurance that the property should be made permanently on the place designated in the policy. Otherwise,

if the property were lost or destroyed by any of the elements insured against, while on their way to market, or off the premises for any legitimate purpose, the policy would be void. It cannot be assumed that such was the intent of the parties, in the absence of any provision in the policy restricting the location to the premises described."

*C. W. Stringer* for plaintiffs in error.  
*Charles West* for defendant in error.

### IN RE APPLICATION OF STATE TO ISSUE BONDS TO FUND INDEBT- EDNESS.

Oklahoma Supreme Court—November 22,  
1913.

40 Okla. 145; 136 Pac. 1104.

#### Appeal — Law of Case — Subsequent 'Appeal.

Decisions of appellate courts of this state, upon all questions of law involved in any case, are binding, not only on the lower court, but on the appellate court as well, in case of a subsequent appeal.

[See 2 R. C. L. tit. *Appeal and Error*, p. 223.]

#### Statutes — Construction — Effect of Form of Issue.

No different rule of construction will be applied to a proceeding under the statute to procure the issuance of funding bonds, where a protest or remonstrance is filed thereto, and issues thus framed, from that to be applied in ordinary cases.

#### Municipal Bonds — Repeal of Author- izing Statute — Effect on Pending Proceedings.

The omission of sections 372 to 381, Compiled Laws of 1909, from the Revised Laws of 1910 does not operate to abate a proceeding pending under said sections prior to the date when said Revised Laws of 1910 went into effect.

[See note at end of this case.]

(Syllabus by court.)

Error to District Court, Oklahoma county:  
CARNEY, Judge.

Application by State, acting by and through its Governor, Secretary of State, and State Treasurer, to determine existence, character, and amount of its outstanding indebtedness, and to issue bonds to refund same. Certain citizens appear and file protest against issuance of bonds. Judgment entered approving bond issue. Certain protestants bring error. The facts are stated in the opinion. **AF-  
FIRMED.**

[146] CAMPBELL, J.—This is a proceeding instituted in the district court of Oklahoma county, by the Governor, Secretary of State, and State Treasurer, for the purpose of determining the existence, character, and amount of the legal outstanding warrant indebtedness of the state, and causing a statement thereof to be entered upon the records of the court, and to authorize and direct the issuance of funding bonds of the state, under the provisions of section 372 to 381, inclusive, of Compiled Laws 1909. The proceeding was filed and notice given as required by statute, and certain citizens of the state appeared and filed protests against the issuance of the bonds. The trial court, originally treating such protests as demurrers to the application or petition, sustained the same. From the judgment, an appeal was taken to this court, and here the judgment of the trial court sustaining such demurrers was reversed, and [147] the cause remanded for further proceedings; the opinion in the former appeal being reported in 33 Okla. 797, 127 Pac. 1065. After the case was remanded, the district court again heard and considered the matter, evidence being introduced in support of the application or petition. Judgment was duly entered, directing the issuance of funding bonds in the sum of \$2,907,122.19. A motion for new trial was filed and by the court overruled, and the case is again brought here on appeal by the parties filing one of the remonstrances or protests in the trial court. At the last hearing in the trial court, the officers of the state, making the application through the Attorney General, were permitted to amend the application by striking from the schedule of warrants originally submitted for funding certain warrants aggregating \$34,042.32, and by adding to said schedule certain other warrants not originally listed, and amounting to \$45,214.82, together with certain interest that had accrued upon the warrants as originally listed in the application filed. The case was tried in the lower court upon an agreed statement of facts and certain evidence introduced in open court, from all of which the trial court found that the total amount of outstanding indebtedness for the fiscal year ending June 30, 1911, would amount, on the 1st day of October, 1913, over and above the funds on hand to pay the same, to \$2,907,122.19.

It becomes important, at the outset, to determine just how far the decision of this case on this appeal is to be controlled by the decision on the previous appeal.

For convenience, we shall refer to the plaintiffs in error as the protestants.

The contention is made that the decision on the former appeal is not binding now on

the court. This contention is based, in part, upon the argument that the case presents, not the elements of litigated rights, but is merely an *ex parte* proceeding on the part of the state, acting by certain of its officers, and that the duty of the court is largely ministerial, having some relation to the duty of an auditor of the claims sought to be funded. This position, in our judgment, is not sound. It is true, the controversy arose upon the application of the state for [148] the determination of its outstanding indebtedness as a basis for issuing the bonds required to take up and cancel the warrants. No one was required by law to be personally served, or to answer the application, or to protest against the procedure in any way, and if no one had appeared within the time fixed by law and stated in the publication notice, it would not have been a technical default, and the proceeding would have been, in that case, largely in the nature of an *ex parte* hearing. But persons interested have the right, under the statute, to be present. The statute does not say in express terms that interested persons have the right to be heard by any form of pleading in opposition to the issuance of the bonds as sought. The protestants, however, appeared and filed their pleading, and the trial court rightly, we think, entertained and passed on the matters put in issue thereby. As we view it, the proceeding, both in form and substance, possessed, from the time such pleading by protestants was filed, the essential characteristics and elements of an ordinary suit between contending parties; it presented a real controversy, and one of much importance, not only to the parties actually before the court, but to the whole state as well, and to the holders of the warrants for which the funding bonds were sought to be issued.

But, even if it be granted that the proceeding was *ex parte* the state, by its officers, as contended, no good reason, in fact no reason at all, is suggested why the application of the doctrine of the "law of the case" should be different therein from its application in an ordinary controverted law suit. No reason for applying a different rule in those *ex parte* matters which the courts are sometimes called upon by the law to pronounce judgment in occurs to us. On the contrary, it would seem of equal, if not greater, importance that, where the decisions and actions of ministerial or executive officers are required to be reviewed by the courts, and the judgment of the courts expressed upon the regularity and validity of such ministerial or executive decisions and actions before finally in force, such judgments, when once solemnly given, should be final and conclusive to the same extent that any other judgment is. If this were not so, a judgment [149] reversing the

lower court in a matter of the character stated would furnish no standard for the conduct of the proceedings before the trial court after remand, and the officers of the state, after procuring judgment of the court of last resort, would find themselves, in subsequent stages of the action, right where they started.

It is the rule of this state that the decisions of appellate courts upon all questions of law involved in any case are binding, not only on the lower court, but on the appellate court as well, in case of a subsequent appeal. *Atchison, etc. R. Co. v. Baker*, 37 Okla. 48, 130 Pac. 577; *Oklahoma City Electric Gas, etc. Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758; *Chicago, etc. R. Co. v. Broe*, 23 Okla. 396, 100 Pac. 523; *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665; *Waterloo State Bank v. City Nat. Bank*, 26 Okla. 801, 110 Pac. 910; *Claremore First Nat. Bank v. Keys*, 27 Okla. 704, 113 Pac. 715; *Harper v. Kelly*, 29 Okla. 809, 120 Pac. 293; *Harsha v. Richardson*, 33 Okla. 108, 124 Pac. 34. This rule is in harmony with authority from other jurisdictions, and seems, in fact, not to be seriously questioned anywhere. *Terre Haute, etc. R. Co. v. Baker*, 4 Ind. App. 66, 30 N. E. 431; *Heidt v. Minor*, 113 Cal. 385, 45 Pac. 700; *Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L.R.A. 321; *Standard Sewing Mach. Co. v. Leslie*, 118 Fed. 557, 55 C. C. A. 323; *McKinney v. State*, 117 Ind. 26, 19 N. E. 613; *Wilson v. Binford*, 81 Ind. 588.

The rule as stated, however, is subject to the exception that if, to follow the former decision would work gross or manifest injustice, it should be overruled. *Atchison, etc. R. Co. v. Baker*, supra; *Oklahoma City Electric Gas, etc. Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758.

It follows that, unless gross or manifest injustice will result from allowing the former decision in this case to stand, that decision, in so far as it is applicable to the questions raised on the present appeal, will be treated as binding. The former decision was handed down on November 15, 1912, and we believe any lawyer, after an examination thereof, would be justified in advising his client that the warrants herein sought to be funded [150] constitute a safe investment, and that it is not the policy of this state to allow its just obligations, contracted for necessary expenses of government, at any time to be dishonored. Confidence in the integrity of the state's obligations is a necessary conclusion from the opinion, as written, and that the business world has, to some extent, acted on that decision is, we think, a perfectly legitimate inference. If any person or concern has extended credit to the state for its current needs, or purchased any of these warrants in reliance upon the assurance that the law of the state would not permit the repudiation of such

obligations, such person or concern would be injured by overruling the decision which fixed the law. In such a case the exact converse of the exception to the rule for application of "the law of the case," as above stated, would appear. We recognize fully that to issue these bonds will place upon the people the burden of some \$3,000,000, with interest, to be paid by taxation. Still it is shown, and in fact conceded, that the people who must pay this sum have received its equivalent in services and supplies actually necessary to the maintenance and conduct of the business of government—without which the state government could not be carried on at all. These warrants paid the officers, cared for the convicts, paid for food and clothing and treatment for the insane. These things have to be paid for from day to day, if the business of organized government is to continue, and there come times when only the stability of state credit will purchase supplies and procure the services necessary to their performance. We do not regard it as a gross or manifest injustice to the parties prosecuting this appeal to require them and their property and their posterity to pay a share of the burden thus created. That the warrants in question are evidence of obligations, sound in every moral regard, is conceded here. The very foundation of the law is found in good morals, and it would do no violence to correct legal interpretation, in case of conflict between law and morals, to require the former to yield to the latter. The moral code is the foundation of the proper legal code, and the ideal system will never be reached until [151] every expression of the law finds its response in sound moral principles.

The persons resisting the issuance of these bonds are, in a sense, representatives of the citizens of the state, for the decision here reached will affect all the people alike. We are not unmindful of the vast importance of the correct interpretation by the courts of the fundamental law, but we see nothing in the former decision that does violence to the safeguards the makers of the Constitution sought to throw around the people in the administration of public affairs. Treating the state as an individual, it is required, by the construction given in the former decision, to meet the necessary demands of its existence, and no more. There is nothing in that opinion that would form even an excuse on the part of the state's ministerial and executive agents for the exploitation of the people by expenditures, without their consent, of money for any enterprise in which said agents might conceive the state to be interested, and by following that interpretation we do not mean to furnish such an excuse.

Seeing no reason in this case to depart from the wise rule of construction stated, we de-

clare here that it is the duty of the court, in disposing of the appeal, to apply the law as laid down in the former decision, so far as that decision adjudicates the questions now before the court. In doing this, it is not necessary to discuss again the reason or the authorities by which a majority of the court was controlled in reaching the conclusions set forth in the former opinion. It is necessary, however, to apply the law as stated therein, and determine just how far it controls the controversy in its present state. It is interesting to note, since the former appeal in this case was decided, practically the same question, though arising in a little different manner, was before the Court of Appeals of the state of Kentucky in the case of *Rhea v. Newman*, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989, in a proceeding involving the expenditure of moneys by the state, and the same conclusion was reached as in the former decision by this court.

As has been said in the former appeal, the protest filed against the issuance of the bonds was treated as a demurrer. [152] It was held that the demurrer should have been overruled by the trial court. It becomes pertinent now to inquire whether or not the proceedings in the trial court, after the case was remanded, were in substantial compliance with the law as laid down in the opinion of this court. If so, the trial court's judgment to that extent must be affirmed. *Oklahoma City Electric, etc. Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758.

In pursuance of the order of this court, the trial court treated the petition or application as sufficient under the law, and heard evidence in its support. This evidence, and the stipulations of the parties, show that the warrants sought to be funded by substitution of bonds were largely for services rendered and supplies furnished during the fiscal year ending June 30, 1911, and that all of said warrants were issued against actual existing appropriations. Certain warrants were shown to have been withdrawn from consideration because of doubt as to their validity, but as to this action the protestants have no right to complain. The court did not examine in detail every warrant proposed to be funded, but the evidence introduced was sufficient to support the finding and judgment that all the warrants offered were legal and valid, representing actual obligations of the state.

The proceedings of the state's officers in arranging the funding proceedings, and preparing the requisite preliminaries to the court's action, were shown to have been regular and in substantial compliance with the law. The evidence supports the allegations of the application or petition in every material regard, and is sufficient to sustain the judgment and findings of the trial court.

The first paragraph of the syllabus of the former opinion states the construction given to the section of the Constitution relied on by protestants as follows:

"The limitations of section 23, art. 10, Williams' Ann. Const. Okla. were not intended to apply to that class of pecuniary obligations arising out of the ordinary necessary current expense of maintaining the state government, and which were in good faith intended to be paid, and were lawfully payable, out of the current yearly revenues, and other resources of the [153] state, for the fiscal year within which such obligations were incurred." (33 Okla. 797, 127 Pac. 1065.)

It is clear from the record that the warrants in question come within the law as thus stated, and that the bonds should be allowed to issue in the place of such warrants, unless they must be stricken down for some other reason than that they are prohibited by the constitutional provision referred to. Inasmuch as section 23, article 10, of the Constitution, does not apply to indebtedness incurred for necessary current expenses of state government, it must follow, as a matter of course, that said section does not prohibit the issuance of obligations as evidence of expenses of that character. We have not overlooked the force of counsel's argument, to the effect that no revenue was in fact provided to meet these warrants, and that as a consequence they are illegal and void, but it would be impossible to uphold that contention in the face of the declaration of law, as stated by the court on the former appeal. Inasmuch as we now hold that declaration to be binding on the court as the law of the case, it is apparent that the contention made cannot now be upheld. Indeed, it is frankly contended in the brief on file that this court was in error in holding that the issuance of warrants in excess of \$400,000, for the payment of which there were no funds on account of the failure in revenues, was not the creation of indebtedness, within the meaning of section 23, art. 10, of the Constitution. But a mere error in the holding made by an appellate court is not ground for overruling its decision in the same case on a subsequent appeal. In the absence of a showing of manifest or gross injustice on the subsequent appeal, such error is immaterial. *Ayer, etc. Tie Co. v. Com.* (Ky.) 85 S. W. 1096; *B. Roth Tool Co. v. Champ Spring Co.* 146 Mo. App. 1, 123 S. W. 513; *Jacobson v. U. S. Gypsum Co.* 150 Ia. 330, 130 N. W. 122; *Schmidt v. Beiseker*, 19 N. D. 35, 120 N. W. 1096; *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 932; *New York L. Ins. Co. v. McIntosh* (Miss.) 46 So. 401; *Baum v. Hartmann*, 238 Ill. 519, 87 N. E. 334; *Evans v. Nail*, 7 Ga. App. 129, 86 S. E. 543; *Lewis v. Jones*, 97 Ark. 147, 133 S. W. 596.

[154] Several "points for reversal not involved in the former appeal" are urged here.

It is contended that the warrants in question are within the inhibition of section 23, art. 10, of the Constitution, and that no revenue has been legally provided with which to meet at least a large portion of such warrants. These contentions are disposed of by the former holding that section 23, art. 10, of the Constitution was not intended to apply to indebtedness of the character under consideration in this proceeding. That being true, there is no constitutional inhibition against the warrants or the bonds sought to be issued in their stead.

The contention that the proof was insufficient to show the validity of the warrants has already been disposed of, and requires no further treatment.

Certain warrants first presented to the lower court were withdrawn or disallowed, and it is contended that the bond issue, as ordered by the trial court, is void for the reason that the bonds do not cover the outstanding indebtedness of the state. Warrants so withdrawn were withdrawn by consent of the court, for the reason they were of doubtful validity. The court's judgment recites that the proof established the total warrant outstanding indebtedness of the state in the amount of the bonds ordered issued. We see no reason why persons not the holders of the warrants omitted or denied should be heard to complain of this finding. Certainly it was the duty of the court not to allow bonds to issue covering illegal or doubtful warrants. It would seem that one of the strongest grounds for requiring the bond issue to be reviewed by the court would be in the nature of a precaution that all warrants of the illegal or doubtful class be eliminated from the bond issue.

The only other contention made that requires consideration is to the effect that the statute under which this proceeding was brought was repealed on May 16, 1913, when the Revised and Annotated Laws of Oklahoma, generally referred to as the Harris-Day Code, took effect, and that such repeal operated to abate the proceeding. Sections 372 and 381 of the Compiled [155] Laws of 1909 were not brought forward by the Harris-Day Compilation. Section 54, article 5, of the Constitution provides:

"The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."

This is certainly a proceeding begun prior to May 16, 1913. Sections 372 and 381, of the Compiled Laws of 1909, omitted from the Harris-Day Code, specifically gave the state, by its officers, the right to institute this proceeding, and when the protests or remonstrances were filed, the proceeding took on the nature of a litigated dispute, as has been ob-

served. It affects, not only the immediate parties, but the holders of the warrants and the taxpayers as well, and it appears to be a proceeding begun, saved by the Constitution in the sections just quoted.

The adoption of the Harris-Day Code operated to repeal pre-existing sections omitted therefrom, but such repeal does not affect the validity of a proceeding of the character under consideration, as appears from the express terms of the adoption act. The saving provision is found in section 1, chapter 39, Session Laws 1911, the act by which the Harris-Day Code was adopted as the Revised Laws of the state. It is in the following language:

"All general or public laws of the state of Oklahoma not contained in said revision are hereby repealed. Provided, that this act shall not be construed to repeal, or in any way affect any special or local laws, or any appropriation, special election, validating act or bond issue thereby authorized, nor to affect any pending proceeding or any existing rights or remedies, nor the running of the statute of limitations in force at the time of the approval of this act; but all such local and special laws, appropriations, special elections, validating acts, bond issues, pending proceedings, and existing rights and remedies shall continue and exist in all respects as if this act had not been passed; provided, further, that this act shall not be construed to repeal any act of the Legislature enacted subsequent to the adjournment of the extraordinary session of the Legislature which convened in January, 1910."

This proceeding being one begun prior to the date when the act of adoption went into effect, and being for the purpose of [156] procuring an issue of bonds, it comes within the letter of the statute, as a proceeding begun and pending, as a necessary step in a bond issue authorized by the omitted act. The bond issue can only be saved by saving the proceeding provided for that purpose. It follows that the proceeding did not abate or become invalid by reason of the repeal of the statute under which it was begun prior to such repeal.

The judgment of the trial court is affirmed.

Hayes, C. J., and Kane and Williams, JJ., being disqualified, the Governor appointed Messrs. J. B. A. Robertson, P. D. Brewer, and R. M. Campbell to sit in their places in the consideration of this case. Turner, Loofbourrow, and Brewer, JJ., concur. Robertson, J., dissents.

ROBERTSON, J. (*dissenting*).—I regret exceedingly the necessity that compels me to dissent from the conclusion reached by the other members of this court in this case. But, owing to the importance of the question involved, I feel that I would be remiss in my duty should I fail to express my views. This

being a dissenting opinion, I shall be as brief as possible, and will give only a skeleton outline of the reasons which impel me to dissent.

The general rule set out and relied upon in the majority opinion that a decision of an appellate court upon all questions of law involved in any case decided by it is binding, not only upon the lower court thereafter, but upon the appellate court as well, is conceded, and its correctness is not in any wise questioned, but the rule has well-defined exceptions, among which is that, if by following the former decision gross or manifest injustice or wrong should follow, the decision will be ignored and not looked upon or considered as an authority. It is the application of this rule to the present case without regard to the exception noted that causes me to differ with the majority in reference to the conclusion reached by them. Whether by following the opinion in the former case gross injustice, or wrong, would ensue can only be determined by considering the result reached in the [157] former case, and comparing it with what I conceive should have been the result.

Section 2, art. 10, of the Constitution, reads as follows:

"The Legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated ordinary expenses of the state for each fiscal year."

This section of the Constitution has been duly vitalized by proper legislative enactment. Section 7621, Comp. Laws 1909; section 7449, Rev. Laws 1910. The duty of meeting the necessary expenses of maintaining the state government is a solemn and binding one, and the various Legislatures of this state have not evinced any disposition to neglect the same, or to shift that responsibility to other shoulders; indeed the converse seems to be true, as shown by the amounts included in the various appropriation bills which have been enacted since statehood, and of which we take judicial notice. Nor does the necessary expense of maintaining the state government come within the constitutional debt-limiting provision of the Constitution. The framers of our organic law clearly had in mind occasions such as the present, when the regular revenue, on account of failure to collect, or for other reasons, would be insufficient to meet the current obligations of the state, and to obviate any such difficulty they provided by section 3 of article 10 of the Constitution that:

"Whenever the expenses of any fiscal year shall exceed the income, the Legislature may provide for levying a tax for the ensuing fiscal year, which, with other resources, shall be sufficient to pay the deficiency, as well as the estimated ordinary expenses of the state for the ensuing year."

As may be clearly seen, this section confers authority on the legislative branch of government to provide, in addition to the regular

levy provided in section 2 of article 10, *supra*, for a sufficient levy to meet such outstanding obligations as may have been brought forward from the preceding year. Section 7621, Comp. Laws 1909 (section 7374, Rev. Laws 1910), shows clearly that the Legislature has fully met the requirements of the Constitution in this respect, and in addition said section provides and makes it the specific duty of certain state officials to ascertain the amount of unpaid expenses for the preceding year, as well [158] as for the current year, in order that a proper estimate and levy may be made to meet them. The Constitution, however, makes provision for caring for these deficiencies in another way yet; *i. e.*, in case the Legislature or the state officials fail or refuse to provide the additional levy mentioned in section 3, art. 10, *supra*. Thus section 23, art. 10, of the Constitution, provides:

"The state may, to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts; but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed four hundred thousand dollars, and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debt so contracted, and to no other purpose whatever."

The debts thus provided for are to meet "casual deficits or failure in revenue or for debts not otherwise provided for," and may be contracted for in such manner as the Legislature may provide by statute. Article 1, chapter 8, Comp. Laws 1909, provides an ample and adequate remedy. The statute last referred to is now in full force and effect. The foregoing section of the Constitution is, without doubt, a limitation of the power of the state to contract debts; "argument cannot take away the forceful meaning of the plain, unequivocal language therein used. If this was the only section of the organic law dealing with the limitation of the power of the state to contract debts, I should, without hesitation, say thus far shall we go and no further." And, as has been well said:

"However great the need for revenues or grave the condition confronting the state, the power to raise revenues is vested in the Legislature and not in the courts; and, if there is no provision of law by which relief may be had from the present situation, then the legislative branch of our state government is confronted with a duty which should be discharged without delay, and without interference from or supervision by the courts."

However, as I view the situation, there are other provisions of the Constitution, though not wholly satisfactory, being fraught with more or less delay and uncertainty, by which it is intended that such contingencies as the present situation may be met. For, as I

view the law, while section 23 fixes a definite line of limitation upon the state as to the amount of debt it may contract, such [159] limitation is intended to apply only to that particular means of incurring the debt; that is, only as a limitation of the amount of debt which may be contracted in this manner, and not as a limitation upon the amount which may be contracted by other means. For in case the necessity arises for the creating of a debt in excess of \$400,000, the Constitution provides for the passage of a law creating the debt, and providing the means of payment, by the Legislature.

Section 25, art. 10, of the Constitution, provides:

"Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this state, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays, to be duly entered on the journals thereof, and shall be: 'Shall this bill pass, and ought the same to receive the sanction of the people?'"

Thus is seen by the foregoing section that provisions are made for every kind of debt except those mentioned in sections 23 and 24. Section 23 gives authority for the state to contract debts to the amount of \$400,000, to meet casual deficits, or failure of revenues, or expenses not otherwise provided for, and section 24 authorizes the state to contract debts without limit for the purpose of defraying expenses incident to war, repel invasion, and suppress insurrection. With exception of the debts mentioned in these two sections, section 25 reserves to the people alone the power to create debts. Is it for the courts to say that this is a just and proper provision? Shall the courts prevent the exercise of this power by the usurpation of legislative functions? Shall the judicial arm of government, on the ground of expediency alone, usurp the prerogatives of the Legislature, [160] or take from the people the rights they have specifically reserved to themselves in their organic law? If so, the majority opinion of the court is correct. But, to my mind, the language of the Constitution is so plain and so simple



as will admit of no construction, and if it needs must be construed, then it should be done under and by the well-recognized rules of construction for organic instruments; no strained or far-fetched meaning should be given it.

As was said by Mr. Justice Lamar of the Supreme Court of the United States in *Lake County v. Rollins*, 130 U. S. 662, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060:

"Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. . . . There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able to, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, [161] is the most likely to be that meant by the people in its adoption."

In *People v. Purdy*, 2 Hill (N. Y.) 35, Mr. Justice Bronson, commenting on the dangers of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says:

"In this way . . . the Constitution . . . is made to mean one thing by one

man and something else by another, until in the end it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we first lose sight of the instrument itself and . . . roam at large in the boundless field of speculation."

I think the above is the rule of construction we are bound to follow, if any construction at all is needed; and hence, in the light of the foregoing sections, we may properly ask ourselves the question, Is the issuance of approximately \$3,000,000 of bonds, to take up an equal amount of the outstanding state warrants, the creation of a debt within the meaning of the sections hereinabove quoted? If so, then the state cannot exceed the \$400,000-limit fixed by section 23 by this refunding method. If it is a debt, then the only relief is by the Legislature through the medium of section 25, *supra*. If it is not a debt, then can the state, in this manner, go beyond such limit even to meet a casual deficit on account of the failure of revenues for any cause? Or would it be reasonable to say that by sections 23 and 25, construed together, casual deficits may be made up to the amount of \$400,000 by the methods sought in this proceeding, but when that amount is reached, further evidence of indebtedness shall not be issued without the assent of the electors of the state, as provided by section 25 of the Constitution, *supra*? This to my mind is the only reasonable construction to be placed upon the constitutional provisions under consideration. As has been suggested by Hon. John B. Harrison, himself a member of the constitutional convention, in a paper on this subject, and whose views are in complete harmony with my own:

[162] "This conclusion is further borne out by the provisions of section 26 of the Constitution, which provides that no county, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any manner in any year in excess of the revenue provided for such year, without the assent of three-fifths of the electors voting on such question. Casual deficits in the affairs of municipal subdivisions shall not exceed the revenue provided for that year; while in the affairs of the state, they shall not exceed \$400,000 in excess of the revenues. In other words, a municipal subdivision of the state is expressly limited in the amount of indebtedness it may incur for any year to the revenue provided for such year. But the expenses of the state being far greater and more complicated and more difficult of accurate ascertainment, the state is wisely given a margin of \$400,000 in excess of the revenues provided. But in neither case shall those fixed limita-

tions be exceeded without a vote of the people on the question. In subdivisions of the state, the right is given to the voters of the municipality; in the state at large, such right is reserved to the electorate of the state, to be submitted by the Legislature. This thought runs through every revenue-raising and debt-limiting section of the Constitution. It is the one unbroken chain by which the entire revenue system is linked together as a comprehensible whole. To give it this meaning is to give it an effectual working force, which, though cumbersome in its operation, is nevertheless complete in itself. But to eliminate this thought is to strip it of its potency and render it a mere powerless, meaningless, incoherent rattle of words. This, in my judgment, should not be done. The inadequacy of the law to afford as speedy relief as is necessary under the present conditions is no fault of the courts. The functions of the court are to interpret and construe the law as it is found, and not to distort it to suit economical conditions or meet political expedencies. I have studied the authorities which attempt to distinguish between debts and questions like the one confronting us. Some of them, it must be conceded, are models of ingenious argument, and elusive, nifty, drapery of thought, but, in my judgment, their proper abode is in the realms of theory rather than of reason. If there is a real logical distinction, then I must confess that my mind is too dull of perception, too finite in scope, to trace those infinite lines. I am unable to see the legal difference between a debt and an obligation which ought to be paid and no money with which to pay it. I cannot comprehend the legal distinction between a debt and an unpaid warrant drawn on a depleted treasury. I cannot [163] differentiate between the significance of a debt and deficit which must be met. And I am not unmindful of the argument that the people of the state assumed the solemn, legal, and moral obligation to maintain the state government and pay the expenses thereof. Nor have I overlooked the contention that the necessary running expenses of the state is not a debt within the debt-limiting provisions of most state constitutions. Nor the argument that the issuance of bonds with which to meet unpaid outstanding warrants is not creating a debt, but merely changing the form thereof. But a concession of the full force of these arguments is a confession that the original unpaid warrants are a debt. Besides, it must be observed that the provisions of our Constitution are peculiarly and cautiously worded. It provides in section 23, art. 10, that to meet casual deficits the state may contract debts to the amount of \$400,000. This, of course, is to be done according to the procedure provided by statute. But,

whenever such deficit exceeds \$400,000, or whenever a debt for any purpose is sought to be contracted, the Legislature must pass a law creating such debt, and such law must be submitted to the voters of the state for sanction or rejection. This, in my judgment, is the procedure contemplated by the Constitution, and as herein stated, while it is cumbersome and tardy in granting relief, it is nevertheless the only procedure we have."

In view of the foregoing, how can we say that following the rule announced in *re Application of State*, etc. 33 Okla. 797, 127 Pac. 1065, would not result in working a gross or manifest injustice to all the people of the state, and would not do violence to the plain provisions of our organic law? To me such a result is inevitable, and, this being true, this court ought not to be bound by that, or any other decision, which would work such an irreparable hardship and wrong. The application to fund should be denied.

#### NOTE.

##### **Authority of Public Officer to Complete Bond Issue after Repeal of Statute Authorizing Issue.**

The question with which this note is concerned arises where proceedings have been begun under a statute authorizing an issue of bonds, and then the statute is repealed. It has been held that in the absence of a saving clause, the repeal of the statute nullifies the authority of the public corporation, rendering invalid bonds that may thereafter be issued. *Fritz v. San Francisco*, 132 Cal. 373, 64 Pac. 566; *McHugh v. San Francisco*, 132 Cal. 381, 64 Pac. 570; *Jeffries v. Lawrence*, 42 Ia. 498. See also *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 U. S. (L. ed.) 628 (issue of bonds prohibited by state constitution which went into effect after election favoring subscription); *Aspinwall v. Daviess County*, 22 How. 364, 16 U. S. (L. ed.) 296 (issue of bonds prohibited by state constitution which went into effect after election favoring subscription); *Veats v. Danbury*, 37 Conn. 412 (town vote favoring bounties to soldiers rendered inoperative by repeal of statute which had authorized it). Thus in *Fritz v. San Francisco*, supra, wherein it appeared that the statute under which bonds had been voted was superseded by another enactment before the issue of said bonds, the court said: "The scheme provided by the charter for the creation of a bonded indebtedness being materially different from the scheme provided by the Park and Boulevard Act for the creation of a bonded indebtedness, a proceeding inaugurated under the one scheme cannot be continued under the other. When the first scheme failed, the proceeding

failed. When the law was superseded, that moment the proceeding fell." And in *McHugh v. San Francisco*, supra, the court said: "The Public Improvement Act is superseded by the charter, and being superseded, it stands, as to the municipality, exactly the same as if it were repealed. No bonds can be issued under its provisions, for, as a law, it is dead to the city."

But the repeal of a statute cannot affect contract rights which have accrued by reason of acts under the statute, and therefore bonds issued in pursuance of such rights are valid. *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23 U. S. (L. ed.) 631; *Nevada Bank v. Steinmitz*, 64 Cal. 301, 30 Pac. 970. "The delivery of the bonds was no more than performance of the contract. . . . We hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn." *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, supra.

In a number of instances, the effect of the repeal of a statute has been controlled, as to proceedings already undertaken, by a saving clause in the repealing statute or by a separate provision in the constitution or statutes. See the reported case. See also *Murphy v. Utter*, 186 U. S. 95, 22 S. Ct. 776, 46 U. S. (L. ed.) 1070; *Balcheller v. Mascoutah*, 2 Fed. Cas. No. 792; *People v. Logan County*, 63 Ill. 374; *State v. Reno County*, 38 Kan. 317, 16 Pac. 337.

## CLAYTON

v.

## PRINCE ET AL.

Minnesota Supreme Court—March 19, 1915.

129 Minn. 118; 151 N. W. 911.

### Elections — Vote by Person Not Registered — Validity.

The provisions of section 38 of the Duluth city charter requiring an unregistered voter desiring to vote at a municipal election to deliver an affidavit of his qualifications to the judges of election is directory; and a failure to observe such requirement does not avoid the election.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, St. Louis county: DANCEB, Judge.

Election contest. W. W. Clayton, contestant, and W. I. Prince et al., contestees. Judgment for contestees. Contestant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Hugh J. McClearn* for appellant.

*Harvey S. Clapp* for respondents.

[118] **DIBELL, C.**—This is an election contest. An ordinance was submitted to a referendum vote in accordance with the provisions of the city charter to Duluth at a special election held on September 16, 1913. The court found that the ordinance was carried. The contestant appeals from the order denying his motion for a new trial.

At the election 9,514 ballots were cast. Of these 2,316 were cast by voters who did not register prior to the day of election. If all the ballots are counted the ordinance was adopted by a majority of 21. The question is upon the legality of the 2,316 ballots.

[119] Section 38 of the city charter is in part as follows:

"No person shall be allowed to vote at any municipal election unless his name be registered as herein provided, except that any qualified voter of the city, whose name does not appear among the registered voters, may, at the time he offers his ballot on election day, deliver to the judges of election his affidavit in which he shall state that he is a resident of the election district in which he offers to vote, naming the same, and that he is entitled to vote therein; that he has resided in said election district thirty (30) days next preceding said election and shall give the street number of his residence; that he is a citizen of the United States; that he is twenty-one years of age; that he has resided in the state six months immediately preceding said election, which said affidavit shall be substantiated by the affidavit of two freeholders and electors in such district corroborating all the material statements therein, and in case any person offering to vote at such election shall submit such affidavit so corroborated, the judges of election shall receive his vote although his name does not appear upon the registration rolls."

Under the charter it is not necessary that there be registration days prior to a special election. The council may provide them. It did not for the election here involved.

The provisions of section 38 relative to the making and filing of affidavits were not observed. A voter, not registered at the last preceding municipal election, took an oath satisfying the judges of election that he was

a legal voter, was then registered, and was permitted to vote. No affidavits were provided for use. The proceedings had were in accordance with instructions given to the judges of election by the clerk who erroneously supposed Laws 1907, p. 163, c. 148, § 2 (G. S. 1913, § 434), applicable.

From the beginning it has been the policy of the state to give effect to the votes of legal voters regardless of irregularities in the election. This policy is illustrated by the case of *Taylor v. Taylor*, 10 Minn. 107, and a long line of intervening cases down to the recent case of *McEwen v. Prince*, 125 Minn. 417, 147 N. W. 275, which reviews the prior cases.

In the *McEwen-Prince* case there was an endeavor to comply with [120] the charter by making affidavits; but they were irregular. It was held that the voter did not lose his vote. That case does not control this. Here there was no such endeavor. The voters, not before registered, in accordance with instructions of the judges of election registered and voted.

On the general question there is a conflict of decision. Some courts hold somewhat similar statutory provisions directory. *Tazwell v. Davis*, 64 Ore. 325, 130 Pac. 400; *Wiley v. Reasoner*, 69 Ore. 103, 138 Pac. 250; *Gibson v. Scotland County*, 163 N. C. 510, 79 S. E. 976; *State v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 59 Am. St. Rep. 797. Others hold that such provisions are mandatory and that a failure to comply with them avoids the election. *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95; *State v. Trask*, 135 Wis. 333, 115 N. W. 823; *Cusick's Election*, 136 Pa. St. 459, 20 Atl. 574, 10 L.R.A. 228; *In re McDonough*, 105 Pa. St. 488. We follow the line of authority most in consonance with the settled policy of our decisions and hold the provisions as to affidavits directory. In doing so we do not go beyond the holding in *Taylor v. Taylor*, cited *supra*, where, among other irregularities, there was a failure to observe the statute requiring the use of registry poll lists, and *Edson v. Child*, 18 Minn. 64, 351, where there was a like failure. In the latter case Justice Berry, in referring to the decision in *Taylor v. Taylor*, said that the position of the court was that "the provisions of statute requiring the use of registry poll lists were *directory only*, or, in other words, that the use of such lists was not *essential* to a valid election."

It may be noted that there is no claim of fraud in the election, and no claim that illegal votes were cast, as it is claimed that unregistered voters not presenting affidavits as required by section 38 are not qualified voters.

Order affirmed.

## NOTE.

### Effect of Failure to Comply with Registration Laws on Validity of Votes Cast at Election.

#### *Irregularity in Registration.*

The rule seems to obtain that where an irregularity in registration is due to the act or default of the registration officers, the vote of the person so irregularly registered will not be rendered invalid unless there has been an utter disregard of the law.

*California*.—*People v. Worswick*, 142 Cal. 71, 75 Pac. 663.

*Connecticut*.—*State v. Weed*, 60 Conn. 18, 22 Atl. 443.

*Georgia*.—*Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803.

*Illinois*.—*Choisser v. York*, 211 Ill. 56, 71 N. E. 940.

*Kentucky*.—*Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407; *Stewart v. Wurta*, 143 Ky. 39, 135 S. W. 434.

*Louisiana*.—*Tullos v. Lane*, 45 La. Ann. 333, 12 So. 508.

*Maine*.—*State v. Gilman*, 96 Me. 431, 52 Atl. 920.

*Minnesota*.—*Taylor v. Taylor*, 10 Minn. 107; *Edson v. Child*, 18 Minn. 64; *Soper v. Sibley County*, 46 Minn. 274, 48 N. W. 1112.

*Mississippi*.—*Barnes v. Pike County*, 51 Miss. 305.

*Missouri*.—*Gass v. Evan*, 244 Mo. 329, 149 S. W. 628.

*Montana*.—*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.

*Nevada*.—*Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997; *Stale v. Sadler*, 25 Nev. 131, 53 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 513.

*New York*.—*People v. Wilson*, 62 N. Y. 186 *reversing* 3 Hun 437.

*North Carolina*.—*Newson v. Earnheart*, 86 N. C. 391; *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767; *People v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; *Harris v. Scarborough*, 110 N. C. 232, 14 S. E. 737; *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 56 Am. St. Rep. 797; *Gibson v. Scotland County*, 163 N. C. 510, 512, 79 S. E. 976; *Bray v. Baxter*, 86 S. E. 163.

*Pennsylvania*.—*Reifsnyder v. Musser*, 12 W. N. C. 155; *In re Griffith*, 1 Kulp 157; *Wheelock's Election*, 82 Pa. St. 297.

*South Carolina*.—*Hunter v. Senn*, 61 S. C. 44, 39 S. E. 235; *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 958.

*Wisconsin*.—*State v. Baker*, 38 Wis. 71.

Thus in *Harris v. Scarborough*, *supra*, it was said: "Where an individual voter offers to comply with a reasonable regulation in

reference to registration, and is prevented from compliance by the wrongful act of the registrar, his vote should unquestionably be counted, and the judge below very properly so held." And in *People v. Wilson*, supra, the court in holding that the failure of the registry officials to comply with the registration laws did not invalidate the votes cast at an election said: "The election laws are designed to secure a fair expression by the electors of their choice of public officers. It is of paramount importance, under our system of government, that unqualified persons shall be excluded from the suffrage and that elections shall be conducted in a way which shall secure confidence that the results are truly and honestly declared. It is eminently proper that inspectors and boards of registry should act under the sanction of an official oath, and that they should comply with the forms prescribed by statute in conducting elections. They are punishable if they wilfully omit to do so. But it often happens that inspectors of election are men unacquainted with the duties of the position and the numerous and sometimes complicated provisions of the election laws. . . . It is claimed that by force of the sixth section of the registry act any failure to make and complete the register in the manner prescribed by the act is a fatal defect, rendering every vote received by the inspectors void, although the names of the persons voting are entered upon the list. . . . This section is construed by the counsel for the relator as prohibiting the inspectors from receiving a vote from any elector if the register is not made and completed, in all respects, in conformity with the statute, and the counsel is forced to take this position. The section makes no distinction between omissions in matters of substance and form, and the irregularities claimed to exist in this case would, under the general rule of construction as has been shown, be regarded as formal and not substantial. The act directs, in great detail, the mode of procedure in making the register and what it shall contain. If an exact compliance by the inspectors with these directions is essential to the right of an elector to vote, elections will often fail, and voters will be deprived without their fault of an opportunity to vote. . . . To hold that the omission of the inspectors to organize the board of registry in precise accordance with the statute, or their failure to take the oath of office or to certify the register, were jurisdictional defects which rendered the register void, and the whole vote of the ward illegal, would be to deprive citizens of the most important of their political rights without an opportunity to be heard."

In *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767, it was held

that the non-observance of the statutory directions in placing electors' names on the registry did not invalidate their votes cast at an election. To the same effect see *Stewart v. Wurts*, 143 Ky. 39, 135 S. W. 434; *Gass v. Evans*, 244 Mo. 329, 149 S. W. 628; *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797; *Reifsnnyder v. Musser*, 12 W. N. C. (Pa.) 155. See also *State v. Baker*, 38 Wis. 71, wherein the court in holding that votes cast at an election were not invalidated by the fact that the registry lists were not arranged alphabetically, certified, filed or posted said: "Nonfeasance or malfeasance of public officers could have no effect to impair a personal, vested, constitutional right. We see no such purpose in the registry law. Surely it would be a strange attempt to protect the elective franchise and preserve the purity of elections, to put it in the power of inspectors of election, by careless accident or corrupt design, to disfranchise constitutional voters. That, we take it, would be the actual effect of avoiding elections where the inspectors use defective or irregular registers at the election, as official and valid; so entrapping voters into dispensing with proof of their right, required and authorized only when their names are not registered at the election. We cannot think that such is a necessary or admissible construction of the statute. Undoubtedly the statute authorizes a large supervision of the process of registry by voters, and voters may so supervise the process as to be fully advised of all irregularities and defects. But all such supervision is voluntary. The statute does not impose it as a duty, or as a burthen on the right of suffrage, and could not. The statute must be so construed as to reconcile all its provisions to the unimpaired, unincumbered right of suffrage at the election. And we think that such is its obvious construction. It was said upon the argument that the voters whose names were on the registers in the several wards in question were bound to inspect the registers and to discover their apparent defects. We cannot think so. We need not pass upon the questions whether voters, at an election, have a right to inspect the registers used, or whether notice of defects of form in the registers would impair the right to vote without proof. Because we hold that voters are not bound to examine the registers, if they can, as a condition precedent to voting without proof; and that voters whose names are on a register de facto, used by the inspectors at the election as official and valid, need not inquire further. They may accept the registers de facto, as they accept the inspectors de facto. And they are no more bound to inquire into the qualifications de jure of the registers than into the qualifications de jure of the inspectors. It is

enough for voters to find at the election acting inspectors using actual registers virtute officii. They need look no further to see if their votes be challenged by statute. The statute cannot challenge them without notice. Their constitutional right cannot be baffled by latent official failure or defect. And the registry law sets no such trap, authorizes none such, for the constitutional right which it was passed to protect. In these five wards, there were registers de facto of the voters, used by the inspectors at the election, as official and valid under the law. The voters whose names were on them do not appear to have had any notice of irregularities or defects in them. They appear to have come to the polls to vote, and to have voted, in good faith, without any sort of warning that proof of their right to vote was required by law. . . . It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution." And in the case of *In re Griffith, 1 Kulp (Pa.) 157*, it was said: "The vote cannot be declared illegal where from an inspection of the lists of voters and the registry list, under all the circumstances, the names correspond so nearly as to lead any reasonable mind to conclude that they were intended for the same person, or were this similarity not appearing from the mere comparison there is satisfactory evidence that they were meant for the same person."

In *Tullos v. Lane, 45 La. Ann. 333, 12 So. 508*, it was held that the fact that the registering officer left the registration book in possession of a third person, giving him verbal authority to register the names of electors, did not render the votes of those electors cast at an election invalid, it not appearing that there was any fraud or any person was registered who was not entitled to be registered. To the same effect see *State v. Sadler, 25 Nev. 131, 58 Pac. 284, 50 Pac. 547, 63 Pac. 128, 83 Am. St. Rep. 513*. In *Quinn v. Lattimore, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797*, the court in making a similar holding said: "It appears that a number of persons were registered by other persons than the regularly appointed registrars; in one instance, by the son of the registrar in the absence of his father; and in another case by Williams, the register of deeds, with whom the registrar had left the registration books. These registrations were irregularly made and might have been rejected and erased by the registrars. But it would not have been

fair for them to have done this without notifying the parties, so registered, in time for them to have registered again. But instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations. And it would now be a fraud on the electors, as well as on the parties for whom they voted and also upon the state, to reject these votes for this irregularity. These votes cannot be rejected for this reason." And in *re Griffith, 1 Kulp (Pa.) 157*, it was held that votes cast at an election were not illegal because the names of the electors had been registered by one acting under a valid appointment but who was ineligible to hold the office of registrar.

The failure of the registering officer to administer an oath to an elector does not invalidate his vote. *Lane v. Bailey, 29 Mont. 548, 75 Pac. 191; Quinn v. Lattimore, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797; Gibson v. Scotland County, 163 N. C. 510, 512, 79 N. E. 976*. See also *State v. Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767*; In *Lane v. Bailey, supra*, it was said: "That the electors were registered without taking the oath was not their fault. That a registry agent neglects his duty should not deprive an elector of the right to exercise his franchise. If the elector may be deprived of his right to vote in this manner, an unprincipled registry agent may change the political status of a precinct at will, and by concerted action on the part of a number of such the political complexion of a county may be easily changed, and the popular will effectually thwarted. If the elective franchise may be thus tampered with, incalculable abuses will creep into the state. The purpose of the statute is to prevent any but legal electors from voting. It demands good faith. It is not intended to prevent those who are qualified to vote from doing so. Before the elector is entitled to be registered he may be compelled to take the oath prescribed in section 1209, *supra*—the statute contemplates that he shall be compelled to take it. If he fails to take the oath through the fault of the registry agent, and is challenged on that ground before that officer closes his book, he may qualify on election day. This is clearly one of the purposes of Sections 1213 and 1214 of the Political Code, as amended. . . . Election statutes, being intended to promote purity in public elections, to the end that a full and fair expression of the public will may be had, are remedial and beneficial, and should be liberally construed. We therefore hold that the electors of Hathaway and Rosebud precincts were not disqualified because, through no fault of theirs, they failed to take the oath prescribed." In *Rawl v. McCown, 27*

S. C. 1, 81 S. E. 958, it was held that votes cast at an election were not invalid because the officer in registering the electors failed to apply the tests required by the statute. The court said: "The next ground of contest is that the entire registration of the electors was invalid, because the registration officers failed to apply the tests of qualification prescribed by the constitution and statutes for those applying for registration, or to administer the prescribed oath to them. These provisions of the law are directed to the officers who are entrusted with its administration, and not to those who apply for registration, unless they are guilty of a fraudulent participation in violating them. It would be unreasonable and unjust to deny to honest electors, who complied with the law, and those who were ready and willing to comply with it, their constitutional right of suffrage on account of the fraud, caprice, ignorance or neglect of duty of the registration officers."

Irregularities as to the place of registering electors do not have the effect of vitiating an election where it does not appear that anyone was misled or that anyone was registered who was not a qualified elector. *Newsom v. Earnheart*, 86 N. C. 391; *People v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547. Neither do irregularities as to the office hours kept by the registrar have the effect of invalidating the votes cast at an election. *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407; *Stinson v. Sweeney*, 17 Neb. 309, 30 Pac. 997; *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767. Thus in *Cowan v. Prowse*, supra, the court, in holding that votes were not invalidated because the voters were registered after the time of day prescribed by law, said: "Another ground of exception is, that some of the voters registered after the time of day prescribed by law."

As testimony about a question of time is generally uncertain and conflicting, especially when reckoned by minutes, a court should not take cognizance of such matter, except when there has been a palpable or flagrant disregard of the law by officers, which is not made to appear in this case." In *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803, it was held that a defect in the notice as to the time of closing the registration books did not invalidate an election where it appeared that the books were not closed at an unauthorized time or no one was misled. And in *Barnes v. Pike County*, 51 Miss. 305, wherein it appeared that a statute required the registration officials to hold a session of three days for registering electors, it was held that an election was not vitiated by reason of the fact that the officers held a session on the fourth day in the absence of a showing that those who registered on that day could or did change the result.

It has been held in several cases that where votes are cast by qualified electors they are valid though the electors were registered by fraudulent means. *Cole v. McClendon*, 109 Ga. 183, 34 S. E. 384; *Drake v. Drewry*, 112 Ga. 308, 37 S. E. 432; *Cowan v. Prowse*, 93 Ky. 156, 19 S. W. 407.

It seems that the failure to use the register of electors at an election does not invalidate the votes cast where it is not shown that any illegal votes were cast. *Choisser v. York*, 211 Ill. 50, 71 N. E. 940; *State v. Gilman*, 96 Me. 431, 52 Atl. 920; *Taylor v. Taylor*, 10 Minn. 107; *Edson v. Child*, 18 Minn. 64; *In re Wheelock*, 82 Pa. St. 297. Compare *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95; *Bickford v. Ward County*, 20 N. D. 634, 127 N. W. 103. "If we, by our decision, should permit the carelessness or even the fraud of officers whose duty it is to furnish a list of voters at the election, to defeat the election and deprive the people of the county of the officer who was elected by a majority of their votes, we would thus make the people suffer for an act in which they did not participate, and which they did not sanction. In so doing, instead of punishing an officer for the violation of the election law, we practically punish the voters of the county by defeating their choice of a county officer as declared at the election. A decision of this kind would be fraught with danger, by inviting unscrupulous or unprincipled persons, on the eve of an important election, to secrete or destroy the list of voters or other important papers in a township in which the majority may determine the result in the county." *In re Wheelock*, supra. And so irregularities in the list of voters furnished by the registration officials and used at an election do not have the effect of vitiating the election. *State v. Weed*, 60 Conn. 18, 22 Atl. 443; *Coleman v. Board of Education*, 131 Ga. 643, 63 S. E. 41; *State v. Waldrop*, 104 N. C. 453, 10 S. E. 694; *Bray v. Baxter* (N. C.) 96 S. E. 163; *Hunter v. Senn*, 61 S. C. 44, 39 S. E. 235; *State v. Baker*, 38 Wis. 71. Compare *Caverhill v. Ryan*, 18 L. C. Jur. 323. Thus in *Coleman v. Board of Education*, supra, it was said: "It did not appear that the registrars did not furnish lists, with the exception referred to above; but the contention was that the lists were not made up and purged as the law directed. This was an irregularity, a grave one; and while the time was short, it would seem that by diligence and industry perfected lists might have been made. But these plaintiffs carry the burden of showing that the election held did not confer authority upon the local officers to assess and collect the tax as already stated. It does not appear that any unqualified voters participated in the election, or that any persons whose names should have been stricken off of the list voted, or

that the election would have resulted otherwise had this irregularity not taken place. While we do not mean to approve of irregular registration lists or irregular modes of conducting an election, we cannot say that the omission here referred to was such as to invalidate the entire election and authorize the plaintiffs to treat it as a nullity or as conferring no power on the local officers to act under the due declaration of the result."

Where a statute required the registration books for thirty days before a proposed election and required a notice of thirty days of the time of closing the books, it was held that the failure to comply with the statute invalidated the election. *State v. Stromme*, 49 Mont. 25, 139 Pac. 1002. *Compare Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803.

#### *Failure to Register.*

The prevailing rule is that where a voter has failed to register and has not when casting his ballot given the oath or affidavit required of nonregistered voters by the statute, his vote is illegal. *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95; *Bichford v. Ward County*, 20 N. D. 634, 127 N. W. 103; *In re Duffy*, 4 Brewst. (Pa.) 531; *In re Middelndorf*, 4 Pa. Dist. 78; *In re Wilkes-Barre Tp.* 4 Kulp (Pa.) 196; *In re Barber*, 10 Phila. 579, 31 Leg. Int. 300, 3 Luz. Leg. Reg. 153, *affirmed* 7 Leg. Gaz. 126, 32 Leg. Int. 229, 22 Pitts. Leg. J. 195; *In re McDonough*, 105 Pa. St. 488; *In re School Directors*, 18 Phila. 458, 42 Leg. Int. 304; *State v. Hilmantel*, 21 Wis. 566. See also *Webster v. Byrnes*, 34 Cal. 273; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *People v. Kopplekom*, 16 Mich. 342; *Zeiler v. Chapman*, 54 Mo. 502; *People v. Wilson*, 62 N. Y. 186. *Compare Dale v. Irwin*, 78 Ill. 170; *Clark v. Robinson*, 88 Ill. 498; *Kuykendall v. Harken*, 89 Ill. 126; *Gillin v. Armstrong*, 12 Phila. 626, 35 Leg. Int. 282. And *compare* the reported case.

The fact that no registration of electors has been had as required by the statute avoids an election. *Nefzger v. Davenport*, etc. R. Co. 36 Ia. 642; *Early v. Rains*, 121 Ky. 439, 89 S. W. 289, 28 Ky. Law. Rep. 415; *DeHaven v. Bowmer*, 125 Ky. 800, 102 S. W. 306, 31 Ky. L. Rep. 416; *Endom v. Monroe*, 112 La. 779, 36 So. 681; *People v. Kopplekom*, 16 Mich. 342; *State v. Albin*, 44 Mo. 346; *Zeiler v. Chapman*, 54 Mo. 502; *Pitkin v. McNair*, 56 Barb. (N. Y.) 75; *McDowell v. Massachusetts*, etc. Const. Co. 96 N. C. 514, 2 S. E. 351; *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737. See also *People v. Canady*, 73 N. C. 198, 21 Am. Rep. 465. *Compare Pickett v. Russell*, 42 Fla. 116, 28 So. 764; *Campbell v. Braden*, 31 Kan. 754, 3 Pac. 542; *State v. Piper*, 17 Neb. 614, 24 N. W. 204. Thus in *McDowell v. Massachusetts*, etc. Const. Co.

*supra*, it was said: "Opportunity must be offered to all persons eligible to become qualified voters, to register as such, next before each election, as prescribed by law. The law encourages electors to vote, and it provides and intends that each person eligible shall have opportunity to qualify himself to that end, before an approaching election. And if such opportunity shall be withheld or denied, on purpose, by accident, or by inadvertence, such denial would vitiate and render void the election, certainly if such denial should materially affect the result." And in *DeHaven v. Bowmer*, *supra*, the court in holding that the failure to order a registration for a special election invalidated the election said: "When an election is held in territory embracing a part of a city, the voters residing within the city cannot vote unless they shall have presented to the election officers their certificates of registration, and that when a special election is ordered, a special registration must be ordered as provided in section 1495 of the Kentucky Statutes. The lower court was correct in holding that the failure to provide for a special registration and in allowing voters who resided within the corporate limits of Cloverport to vote without presenting their registration certificates invalidated the election. The judgment is affirmed." So in *Zeiler v. Chapman*, 54 Mo. 502, the court said: "The second question presented is as to the result of the election in Dover Township or precinct. There the supervisor of registration refused to perform the duties imposed upon him by law. We adhere to the decisions of this court heretofore made on this registration law. that no votes can be counted where they have not been registered; and therefore the circuit court decided correctly, that the contestee was not elected, because his majority was the result of counting nonregistered votes. The act is peremptory on this subject, and requires registration before voting. But we do not concede that registration officers can defeat the will of the people by absenting themselves from the place of registration or resigning. If this can be done, elections are a farce dependent entirely on the officers selected to carry out the law. They may decline registration in a precinct, which they know to be hostile to their views, and thus defeat the votes of all the qualified voters at said precinct. This is not the object or intent of the registration law. We assume that a bona fide registration was designed, and every facility is afforded to attain this object. Whilst, therefore, we hold with the circuit court, that nonregistered votes could not be counted, we also hold, that the refusal to comply with the law on the part of the officers of registration rendered the election void, and that the contestor in this case was not elect-



187 Mich. 196.

ed. As the contestee in this case received the certificate of election and was commissioned, prima facie he was entitled to the office. A proceeding on the part of the state might have been instituted to oust him. There was really no election, as the officers appointed to supervise the registration failed or refused to perform their duty. It was never intended we presume to place it in the power of the registering officers to defeat the will of the electors by refusing or failing to perform the duties imposed on them by law. This would be an outrage on the principle of popular election which the law concedes. The only effect of no registrations in a case such as this, where no registration is possible, is to render the election a nullity. The circuit court refused to count the votes which were not registered, and in this we think the circuit court was right, but this did not give the contestant the office, when it was shown, that the nonregistered voters had no power of registering by reason of the failure on the part of the registering officers. To hold otherwise would be to submit the result of all elections to the officers of registration, who could attend at such precincts as they pleased, and refuse to attend to such as they thought unfavorable to their views, and a small minority of the electors could in this way elect. This was not the intent of the law, and although nonregistered voters cannot be counted, we think the election is void where the registration officer fails to perform his duty." Likewise in *People v. Kopplekom*, 16 Mich. 342, it was held that the failure to make a registration of voters in a township rendered all the votes received in that township invalid. In *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737 it was held that the vote cast in a township was invalid because there had been no registration of the electors, but it was said that the rule might be different had there been a fraudulent conspiracy to deprive the voters of the precinct the right to suffrage.

In *State v. Board of Canvassers*, 78 S. C. 461, 13 Ann. Cas. 1133, 59 S. E. 145, 14 L.R.A. (N.S.) 850, it appeared that a statute required voters at an election to have registration certificates, and votes were received from unregistered persons who had certificates from the county clerk which entitled them to be registered. It was held that the votes were invalid.

## STANDARD FASHION COMPANY

v.

## CUMMINGS.

Michigan Supreme Court—July 23, 1915.

187 Mich. 196; 153 N. W. 814.

**Foreign Corporation — Failure to Comply with Statute — Pleading Non-compliance.**

Where an action by a foreign corporation was begun in justice court, and the circuit court on appeal stated that the corporation had not filed any copy of its articles of incorporation, as required by statute, the Supreme Court, on writ of error to review a judgment for defendant, will determine the right of the corporation to maintain the action, though not complying with the statute, though the defense of noncompliance was not affirmatively pleaded.

**What Constitutes Doing Business in State.**

A contract between a foreign corporation manufacturing Standard patterns, and a resident of the state, which recites that the corporation grants to the resident an agency for the sale of the patterns in a city for a specified term, and from year to year thereafter, until termination of the agreement, and which binds the corporation to sell and deliver, f. o. b. at points outside of the state, the patterns to the resident at a specified discount from retail prices and advertising matter at prices fixed, and to allow the resident to return semiannually discarded patterns on terms specified, does not contemplate the carrying on by the corporation of intrastate commerce, but the corporation, in performing its part of the contract, is engaged in interstate commerce, and may sue on the contract without complying with Pub. Acts 1901, No. 206, as amended by Pub. Acts 1903, No. 34, regulating the right of foreign corporations to carry on business in the state.

[See note at end of this case.]

Error to Circuit Court, Wayne county: MURPHY, Judge.

Action on contract. Standard Fashion Company, plaintiff, and Mary E. Cummings, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. **REVERSED.**

Raymond E. Van Syckle for plaintiff in error.

Arthur H. Covert for defendant in error.

[196] STONE, J.—The plaintiff, a New York corporation, brought suit in assumpsit in justice's court, declaring orally on all the common counts, and specially on the contract hereinafter set forth. Defendant pleaded the

general issue. From a judgment for defendant, after [197] a trial upon the merits, plaintiff appealed to the circuit court. Plaintiff's case upon trial in the circuit court was substantially as follows: Prior to January 23, 1907, plaintiff had sold to I. Jay Cummings, who owned and conducted a retail store at Paw Paw, Mich., a stock of paper patterns amounting to \$150, of which \$75 remained unpaid. On that date Cummings entered into a written contract with plaintiff, signed by plaintiff's traveling representative, as follows:

"Mutual agreement between the Standard Fashion Company of New York, first party, and I. Jay Cummings of Paw Paw, State of Michigan, second party.

"First party hereby grants to the second party an agency for the sale of Standard Patterns for ——— in the city of Paw Paw, State of Michigan, for three years from date hereof, and from year to year thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver f. o. b. New York, or at Chicago, Ill., to second party, Standard Patterns at a discount of fifty per cent. from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party, at regular agent's rates; to allow second party to return discarded patterns semi-annually, between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its general office in New York.

"Second party agrees, in consideration of the above to purchase from the first party, for free distribution, Standard fashion sheets to a number not less than three thousand (3,000) per annum, and handy catalogues to a number not less than ——— per annum, to pay transportation charges on all goods ordered or returned under this agreement; to purchase and keep on hand at all times, except during the periods of exchange specified above, one hundred fifty (150) dollars' [198] value in Standard patterns, at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: ——— dollars at time of signing this contract, and ——— dollars in thirty days after shipment of stock, in regular monthly account as herein provided, the balance of the purchase price, seventy five (75) dollars, to remain unpaid, as a stand-

ing credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this standing credit at the rate of 5 per cent. per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

"Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard Patterns, to conserve the best interests of the agency at all times, to reorder promptly all patterns as sold, and to give the department a prominent position on the ground floor in the store.

"Either party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all standard patterns bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Neglect to return the pattern stock within two weeks after expiration of three months' notice shall relieve first party from all obligation to redeem the same. Failure to require compliance with the strict [199] letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

"It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

"Dated January 23rd, 1907.

"Done at New York, State of N. Y.

"Standard Fashion Company,

"Per A. J. Connell

"[First Party.]

"I. Jay Cummings.

"[Second Party.]"

Reverse side:

"Advertising Matter—Rates and Privileges.

"Fashion Sheets: \$6.00 per thousand.

"In lots of 500 and over per month, front card and upper portion of back printed with agent's advertisement (without extra charge) if changed only twice a year. Each additional change \$2.00.

"In lots of 1,000 and over per month, front card and upper portion of back page printed with agent's advertisement, which may be changed quarterly (without extra charge).

"In lots of 2,000 and over per month, front card and upper portion of back page printed with agent's advertisement, which may be changed monthly (without extra charge).

"Copy of advertisement for March issue must be in our hands by January 15th, to insure insertion. Make some allowance of time on all changes of advertisements. We reserve the right to repeat last advertisement if change is not received by us in due time.

"Fashion Sheets: In lots of less than 500 of one issue, without extra printing; 50 cents per hundred; blank space on front page in which merchant may stamp his business card. When 250 or more of one issue are ordered, merchant's card will be printed on front page at a charge of 50 cents for each printing.

"Handy Catalogues: (Issued February and August.) \$2.00 per hundred, with agent's card printed on first page of cover on orders of 100 or over of one issue, and entire last page of cover in addition, with [200] same advertisement as running on sheets, when 500 or more are ordered of one issue."

Subsequent to signing this contract Cummings carried in stock patterns he procured from plaintiff, until his death on September 28, 1908, before the contract terminated. After Cummings' death there was evidence tending to show that the business was conducted by the widow, the defendant, on her own personal responsibility, until she sold out the business in November, 1909. During that period she ordered and received patterns from the plaintiff, by mail, from time to time, in accordance with the terms of the contract. There was evidence tending to show that both parties treated the contract as subsisting. Between November 1 and December 10, 1909, defendant sold the business, returning no patterns to the plaintiff. Upon the original contract there was claimed to be due the \$75 remaining unpaid at the time the contract was signed, and \$2.62 for patterns later ordered.

At the conclusion of plaintiff's testimony, the trial court granted defendant's motion for a directed verdict in her favor, on the sole ground that plaintiff, a foreign corporation, was carrying on business in Michigan without having complied with the requirements of Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903, and was therefore precluded from maintaining this action. By the charge of the court it appears that its decision was based solely upon the ground above stated. In its charge the court said:

"The position is taken by the defendant that the plaintiff, which conceded is a for-

eign corporation, is engaged in carrying on its business, or was at the time in issue here, in this State without having first filed in the office of the Secretary of State a certified copy of its charter, or articles of incorporation. It is conceded that the plaintiff has not filed any such copy of its articles of incorporation in this State."

[201] After holding that plaintiff was carrying on its business in this State in violation of the statute, and that such business was not a sale of goods or merchandise which would be protected by the rights of interstate commerce, the court further said:

"This statute provided that any foreign corporation, subject to the provisions of the law in question, shall not maintain any action in this State upon any contract made by it, after the taking effect of this act, until it shall have fully complied with the requirements of the act. Now, not having complied with the requirements of the act, the plaintiff in my view cannot maintain this action. It is precluded by our law from doing it."

A judgment for the defendant was thereupon entered. There was a motion for a new trial, which was denied, the reasons stated for the denial being substantially those contained in the charge of the court. Plaintiff, having excepted to such reasons and the refusal of the court to grant a new trial, brings the case here upon writ of error, and the principal question discussed under appropriate assignments of error is: Was plaintiff carrying on business in this State within the meaning of our statute?

The point is made by plaintiff by assignment of error that this defense, not having been affirmatively pleaded, was improperly before the court under subdivision (c) of Circuit Court Rule 7. But as this case arose in justice's court, and as the learned trial judge stated that it was conceded that the plaintiff had not filed any such copy of its articles of incorporation in this State, we think that we should dispose of the question upon its merits.

It is the claim of the plaintiff that it was not, and the contract did not contemplate, carrying on business in Michigan within the prohibition of the statute, that the business carried on by a foreign corporation in this State, to be unlawful, must be local business, or [202] "intrastate" commerce, and that the importation and sale of goods to residents of Michigan by a foreign corporation constitute interstate commerce, and cannot be prohibited by the act. It is urged that the sale of plaintiff's merchandise to a citizen of Michigan, and its importation were protected by the rights of interstate commerce; that plaintiff did not go further and by the contract provide for the carrying on in Michigan of its

own business through defendant as its agent. We have read this contract with great care in connection with the other evidence in the record, and have also re-examined, not only our own recent cases, but the Federal cases as well. And while it may be said that the instant case is near the border line, yet we are of opinion that it falls within that line of cases holding that where a sale takes place under the circumstances surrounding this transaction, the rule relating to interstate commerce applies. The following Michigan cases have been examined upon this subject: *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147; *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404, 18 L.R.A. (N.S.) 142; *Haughton Elevator, etc. Co. v. Detroit Candy Co.* 156 Mich. 25, 120 N. W. 18; *Showen v. J. L. Owens Co.* 158 Mich. 321, 122 N. W. 640, 133 Am. St. Rep. 376; *Imperial Curtain Co. v. Jacob*, 163 Mich. 72, 127 N. W. 772; *Despres v. Zierleyn*, 163 Mich. 399, 128 N. W. 769; *Nernst Lamp Co. v. Conrad*, 165 Mich. 604, 131 N. W. 120; *E. A. Lange Medical Co. v. Brace*, 186 Mich. 453, 152 N. W. 1026. In our opinion, the instant case differs and should be distinguished from the foregoing cases, and is controlled by the decisions relating to interstate commerce. We are constrained to hold that under this contract and the evidence this plaintiff, a foreign corporation, was not doing business in Michigan, but that it sold its goods to I. Jay Cummings, who, it is true, had the exclusive right to sell them, [203] but they were not sold by Cummings for or on account of the plaintiff, but exclusively on account of said Cummings.

In the recent case of *E. A. Lange Medical Co. v. Brace*, supra, Justice Kuhn reviewed the Federal decisions upon this question. We call attention to the case of *Butler Bros. Shoe Co. v. U. S. Rubber Co.* 156 Fed. 1, 84 C. C. A. 167, where Judge Sanborn, of the United States Circuit Court of Appeals, reviews the Federal decisions, and also to the case of *In re Monongahela Distillery Co.* 186 Fed. 220, where Judge Denison, of the United States District Court, again reviews the question, and, referring to the case of *Butler Bros. Shoe Company*, states that a writ of certiorari was denied in that case by the Supreme Court of the United States, 212 U. S. 577, 29 S. Ct. 686, and also refers to the fact that the case has been cited and followed by the United States District Court in the Western District of Wisconsin, in *Atlas Engine Works v. Parkinson*, 161 Fed. 223, 229. The question of what is interstate commerce is a Federal question, and the Federal decisions are controlling; but we are of opinion that they are not in conflict with our own cases. Many other cases, Federal and State, might be cited. We content ourselves with citing only the following: *Standard Fashion Co. v. Hayes-Brown*

*Co.* unreported opinion of the Supreme Court of Tennessee, rendered July 5, 1907; *Standard Fashion Co. v. McLeod*, 7 Alberta L. Rep. 145, decision rendered April 25, 1914, in the supreme court of Alberta. Both these decisions reached the conclusion that the transactions under the contracts, similar to the one involved in this suit, amounted to a sale, and fell within the rule applicable to interstate commerce. In the instant case it is true that the written agreement between the plaintiff and Cummings purported to be an appointment [204] by the plaintiff of Cummings as the company's agent; but as was stated in the *McLeod Case*:

"There is no magic in a word, and we must see the sense of the agreement as a whole."

Taking the contract as a whole, the company agreed to sell and deliver, f. o. b. New York, or at Chicago, Ill., to Cummings "Standard Patterns" at a discount of 50 per cent. from retail prices, and also advertising matter at certain prices and on certain conditions, and also such other publications as might be used by the plaintiff at regular agents' rates, Cummings to be at liberty to return discarded patterns semi-annually, between certain dates, in exchange at nine-tenths cost for other patterns. Cummings agreed to purchase from plaintiff for free distribution "Standard Fashion Sheets" to a certain number, to pay transportation charges on all goods ordered or returned under the agreement, etc. We need not repeat all of the terms of the contract. We cannot doubt that when these articles of merchandise were delivered to Cummings they became his property, and the sales were made on his own account, and not on account of the plaintiff. We are of opinion that the delivery of these goods to the common carrier at the places named to be transported to Cummings at Paw Paw, Mich., was an act of interstate commerce, and so long as the business of plaintiff, a foreign corporation, was limited to the acts of interstate commerce, and did not establish within the State a local agency to represent it in the sale of its goods, wares, and merchandise, it was not amenable to the law of this State requiring foreign corporations, as a condition of transacting business in this State, to file a copy of their charter or articles of association as prescribed by the Michigan act. It is well established that the proper construction of a contract is not dependent upon any name given to the instrument by the parties, or any one provision, but [205] upon the entire body of the contract, and the legal effect of it as a whole. The learned trial court in its charge to the jury seemed to think that if the transaction tended to further the business of the plaintiff within this State, it fell within the terms of our statute. We do not think that a controlling

test. Probably the great bulk of interstate business is done for the purpose of furthering the business of the foreign corporation. We think the test is: Was the plaintiff engaged in carrying on a local business within this State? We are constrained to hold that under this record it was not, and that the learned trial court erred in directing a verdict for the defendant.

Many other questions relating to the liability of this defendant suggested themselves to one who reads this record, but as those questions were not presented to us, and have not been discussed by counsel, we express no opinion beyond holding that the directed verdict, for the reason stated by the trial court, was erroneous.

Some questions relative to the admission of testimony were discussed by appellant's counsel, especially the deposition of the witness John T. Scanlon, the president of plaintiff company. We think the court did not err in holding that some portions of his deposition were hearsay and inadmissible.

For the error pointed out the judgment of the circuit court is reversed, and a new trial granted.

Brooke, C. J., and Kuhn, Ostrander, Bird, Moore, and Steere, JJ., concurred.

The cases collated in the notes hereafter late Justice McAlvay.

#### NOTE.

This case was originally assigned to the referred to abundantly establish the rule that the sale of goods by a corporation to a person in another state does not constitute the doing of business by the corporation in that state, and that the maintenance by a corporation of a sales agency in another state does constitute doing business therein. Modern business methods have popularized a form of contract which is somewhat difficult of classification as between the foregoing rules, of which the contract dealt with in the reported case is typical. That contract provided for the grant by a foreign corporation of an exclusive agency binding the so-called agent to handle no competing lines and to sell at specified prices. It provided however that the so-called agent should pay monthly for all goods sent to him, and provided no form of remuneration to him except the profit realized on the sale of the goods. The court holds that the transaction was a sale to the so-called agent, and that it did not constitute the doing of business within the state. A like result was reached under an identical contract in an unreported case in Tennessee, referred to in the reported case, and in a recent Canadian case. *Standard Fashion Co. v. McLeod*, 7 Alberta L. Rep. 145, wherein the court said: Ann. Cas. 1916E.—27.

"In this case it is true that the agreement—which is in writing—between the plaintiff company and the defendants purports to be an appointment by the company of the defendants as the company's agents. But there is no magic in a word, and we must see the sense of the agreement as a whole. . . . The patterns and publications were, I think, clearly under the agreement sold by the company to the defendants; the provision for the return on certain conditions of those which the defendants failed to sell to their customers gave the right to the defendants to have the company 'redeem' them—that is, buy them back."

As is pointed out in the reported case the question whether a transaction constitutes interstate commerce so as to be without a regulation of doing business by a foreign corporation is one on which the federal decisions are controlling, and those decisions, reviewed at length in *Butler Bros. Shoe Co. v. U. S. Rubber Co.* 156 Fed. 1, 84 C. C. A. 167, and *In re Monongahela Distillery Co.* 186 Fed. 220, tend strongly to sustain the decision in the reported case. The cases discussing what constitutes doing business in a state by a foreign corporation are collated in the notes to the following cases: *John Deere Plow Co. v. Wyland*, 2 Ann. Cas. 304; *Osborne v. Shilling*, 11 Ann. Cas. 319; *Hessig-Ellis Drug Co. v. Sly*, Ann. Cas. 1912A 551; *John Deere Plow Co. v. Agnew*, Ann. Cas. 1913E 1145; *Abbeville Electric Light, etc. Co. v. Western Electrical Supply Co.* 85 Am. St. Rep. 890. The case of *Hessig-Ellis Drug Co. v. Sly*, supra, involved a contract very similar to that construed in the reported case, and a similar conclusion was reached therein.

BOPP

v.

CLARK.

Iowa Supreme Court—May 12, 1914.

165 Iowa 697; 147 N. W. 172.

#### Schools — Fixing Minimum Salary of Teachers — Validity of Statute.

Acts 35th Gen. Assem. c. 249, prohibiting and punishing the employment by any school officer, of a teacher at less wages than the amount fixed for the grade of certificate of such teacher, does not violate Const. art. 1, § 1, declaring all men equal and entitled to acquire, possess, and protect property, nor section 6, requiring all laws of a general nature to have a uniform operation,

and forbidding the granting of special privileges or immunities, as the school district is a creation of the legislature, and the powers and duties of its officers are defined by legislative act, and consequently it could enlarge or abridge the same; the object of the statute being to bring about higher standards in teaching and encourage competition in qualifications rather than wages.

[See note at end of this case.]

**Criminal Law — What Constitutes Crime — Statutory Misdemeanor.**

The hiring of a school teacher at less than the minimum wage, in violation of Acts 35th Gen. Assem. c. 249, section 4 of which provides that any school officer violating the act shall be fined from \$25 to \$100, is a "crime" within Code, § 5092, defining a "crime" as an act committed in violation of a public law forbidding it, and is triable as a "misdemeanor" under Code, §§ 5093, 5094, declaring a "felony" to be a public offense punishable by imprisonment in the penitentiary, and every other public offense a "misdemeanor," and section 4905, further defining a "misdemeanor" as the doing of any act prohibited by a statute which provides no penalty, it not being essential that the statute declare that its violation shall be a crime, and the collection of the fine by civil action being impossible until the amount is determined in a criminal prosecution, section 5095 forbidding punishment for a public offense except upon legal conviction.

**Courts — Jurisdiction of Criminal Case — Defect in Information.**

The court is not deprived of jurisdiction because the information states only legal conclusions, as it may be cured by amendment, and a defendant is not entitled to habeas corpus on that ground.

Appeal from District Court, Fayette county: HOBSON, Judge.

Habeas corpus proceeding. M. N. Bopp, plaintiff, and Ed. R. Clark, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*H. P. Hancock* for appellant.

*George Cosson, John Fletcher, and C. B. Hughes* for appellee.

[698] EVANS, J.—I. The statute which is assailed as unconstitutional by this proceeding is chapter 249 of the Laws of the 35th G. A., which is known by the published title as the "Minimum Wage for Teachers in the Public Schools." Sections 1 and 2 of such act fix certain rates of wages for school teachers, graded according to their proficiency as indicated by their official certificates. Sections 3 and 4 thereof are as follows:

"Sec. 3. It shall be unlawful for any school board or any school officer to contract for or pay a less wage to any teacher in the public

schools of this state than the minimum amounts herein fixed for the grade certificate held by such public school teacher. But nothing herein shall be construed as limiting the right to make a lawful contract for a higher wage than herein specified as a minimum.

"Sec. 4. Any school officer violating the provisions of this act shall be fined a sum of not less than twenty-five (\$25.00) dollars, nor more than one hundred (\$100.00) dollars in the discretion of the court, and shall be suspended from office."

Information was filed against the plaintiff charging that as a school officer he entered into a contract with a teacher for the public school of his district for a less rate of wages than provided in such act. A warrant being issued on such information, he was arrested thereunder. He immediately sued out a writ of habeas corpus in this proceeding. We infer from the record that the criminal prosecution is undetermined and still pending awaiting the outcome hereof.

Appellant challenges the validity of the act as being in violation of sections 1 and 6 of article 1 of the Constitution of Iowa. Such sections are as follows:

"Section 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

"Section 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any [699] citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens."

Counsel for appellant has been unable to cite any pertinent authorities in support of his contention. His argument is brief and is based wholly upon analogy. We think it clear that the sections of the Constitution above quoted have no special application to the case and that they are in no manner violated by the legislation complained of. The school district is a creation of the Legislature. Its powers and the method of their exercise are all defined by legislative act. In like manner the powers and duties of its officers are defined. Such officers have no powers except such as are conferred by legislative act. Prior to the act in question the power of the school officer to make contracts with teachers was conferred by section 2778 of the Code. If the Legislature was within its authority in conferring such power upon school officers, it necessarily had the same authority to enlarge or to abridge the same. Appellant's counsel concedes that the Legislature would have had authority to fix a maximum wage. Accepting this concession,

it would seem to follow of logical necessity that it had equal authority to fix a minimum wage. The argument at this point is that the statute in question interferes with the right of the particular teacher to accept such wages as he will, whether below the statutory schedule or not. The manifest purpose of the law is to offer and maintain an inducement to higher standards in the profession of teaching and to encourage competition in qualifications among teachers rather than in the amount of wages. Even teachers whose acquired standards may be equal, as indicated by their respective certificates, may yet vary greatly in their practical success as teachers. As to such teachers, school officers would naturally select the best in preference to the worst, unless such best were underbid in the competition. The purpose of the statute is to eliminate competition at this point below the specified rate.

[700] It is a matter of common observation that school officers are sometimes large taxpayers who have no children dependent upon the public schools for their education. Such officers are under constant temptation to overemphasize the importance of low wages for teachers and to attach too little importance to the qualifications of teachers. In such cases, the lowest bidder obtains the employment, and this often to the great detriment of the public interest. That the rights of individual teachers are not invaded by such legislation is well settled by the decisions of many eminent courts. It will be sufficient to cite *Atkin v. Kansas*, 191 U. S. 207, 24 S. Ct. 124, 48 U. S. (L. ed.) 148, and the cases therein cited.

Whether the practical working of this legislation will meet the intended purpose can be determined only by experience. All new legislation is necessarily experimental and in a sense tentative. The courts cannot be called upon to guarantee its wisdom nor to condemn it for want of wisdom. All that we hold here is that the legislation in question herein is within the domain of legislative authority.

II. It is further urged on behalf of the appellant that, though the act in question be constitutional, its violation does not constitute a crime within the meaning of the law. The reason urged is that such statute does not in terms declare that its violation shall constitute a crime, and that the only penalty imposed in terms for its violation is a fine, and that no penalty of imprisonment is imposed. The penal provisions of the act are contained in sections 3 and 4 which we have quoted above. Sections 1 and 2 of the act are mandatory; sections 3 and 4 thereof are prohibitory. Section 3 declares a violation of the act by any "school officer" to be "unlawful." Section 4 provides that any school officer who shall violate the provisions of the

act "shall be fined . . . not less than \$25, nor more than \$100, in the discretion of the court, and shall be suspended from office." Appellant's argument at this point is based upon the absence from the statute of the words [701] "crime," "misdemeanor" or "felony." The argument is that a mere "fine" is equivalent to "penalty" or "forfeiture," and that it may be recovered by civil action without criminal prosecution. In general terms, a crime is an act committed in violation of a public law. 4. Blackstone 15. Under our statute all crimes are classified as (1) felonies, and (2) misdemeanors. Code, section 5002. Each class is defined as follows:

"Sec. 5093. A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary.

"Sec. 5094. Every other public offense is a misdemeanor."

A misdemeanor is further defined by section 4905 of the Code as follows:

"Sec. 4905. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor."

It is well settled that it is not essential that any criminal statute shall declare in terms that its violation shall constitute a misdemeanor or felony. These terms are absent from a large number of our criminal statutes. The omission of these terms is fully supplied by the statutory definitions which we have just quoted. *State v. Shea*, 106 Ia. 735, 72 N. W. 300; *State v. York*, 131 Ia. 635, 109 N. W. 122; and *State v. Conlee*, 25 Ia. 237, involved the construction of criminal statutes which prohibited certain acts. These statutes did not in terms declare their violation to be criminal, nor did they provide any penalty. It was held, nevertheless, that the violation of such statutes constituted misdemeanors under the definition of sections 4905, 5093, and 5094, and they were held to be indictable as such under the provisions of section 4906, which is as follows: "Section 4906. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county [702] jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Counsel for appellant differentiates the cited cases from the case at bar on the ground that the statute under contemplation in the case at bar does in terms provide a penalty for its violation, and that therefore it fails to come within the definition of section 4905 which purports to apply to cases where "no penalty" is provided. This contention, how-

ever, distorts the statute by concentrating its emphasis upon this particular expression. Considering all the above statutes of definition, it is rendered quite clear therefrom that the doing of an act in violation of statutory prohibition is a public offense. Such public offense will be a felony or a misdemeanor according to the punishment which may be imposed therefor. If the statute itself fixes the punishment, such provision will be controlling, and the classification of the public offense either as felony or as misdemeanor will be thereby determined. If such statute fixes no punishment, then sections 4905 and 4906 become controlling. The first fixes the classification of the offense as a misdemeanor and the second fixes the range of punishment. In the case at bar the statute does provide for punishment in the way of a fine. This of itself implies a public offense. The limitation of the fine to a sum not in excess of \$100 classifies it as a misdemeanor. It is argued, however, that, because no imprisonment is imposed, a mere fine is collectible by civil action. For the purpose of the argument only, it may be conceded that a civil action may lie in an appropriate case to recover a fine as distinguished from a penalty or forfeiture. Such actions, however, are usually based upon express statutory provisions. There is no such provision in the statute under consideration. Neither does the statute fix the exact amount of fine which may be imposed. There is no way provided under our statutes whereby the amount of such fine can be determined except in a criminal prosecution. Section 5095 provides: "Sec. 5095. No person can be punished for a public offense except [703] upon legal conviction in a court having jurisdiction thereof." There is no way provided in our statutes to obtain jurisdiction over a defendant for the purpose of legal conviction for a public offense except by information and arrest thereunder. Until legally convicted of the public offense, the defendant is not liable for the payment of the fine.

It is our conclusion therefore that the violation of the provisions of the statute in question by the plaintiff herein was a misdemeanor and triable and punishable as such, subject in extent to the limitations of the statute itself.

III. It is further urged by the appellant that the information failed to charge any offense, in that it stated no sufficient facts, but stated legal conclusions only. If the information is not sufficiently specific, it is amendable. Proceedings thereunder are not rendered void by reason of its insufficiency. If they were, they could not be saved by its amendment. The jurisdiction of the criminal court over the defendant after his arrest is not lost by mere defect in information or indictment. This is illustrated by the pro-

visions of our statute which authorize the district court to hold a defendant pending the return of a second indictment where the prosecution against him has failed for insufficiency of a prior indictment. We reach the conclusion therefore that the appellant is entitled to no relief in this proceeding. The trial court so held.

Its order is therefore affirmed.

All Justices concur.

#### NOTE.

##### Validity of Statute Fixing Minimum Salary of School Teachers.

Apparently, the reported case is the only decision wherein a court has passed on the constitutionality of a statute establishing for public school teachers a minimum wage, the rate thereof being fixed by the grade of the certificate held. The experimental character of the statute in question is recognized by the court, which being unable to pass on its wisdom, declares it to be constitutional in that the legislature in enacting the statute did not exceed the legislative power granted to it by the constitution.

In this connection it may be noted that in New York legislation has been in force for a considerable time fixing minimum salaries to be paid to teachers employed in the city of New York. These provisions were originally embodied in Laws of 1897, chapter 378, section 1091. That section was amended by chapter 417 of the Laws of 1899, and by chapter 751 of the Laws of 1900, better known as the Davis Law. The purpose of the enactments was to effect equality and simplicity in the educational system of the city of New York as regards compensation of teachers.

A minimum rate of pay was established for teachers engaged in certain particular grades of work under certain prescribed conditions. They have frequently been before the courts both for construction and the enforcement of rights granted thereunder. It does not appear, however that anyone has questioned their validity on constitutional grounds. See *McCabe v. Cook*, 29 Misc. 679, 61 N. Y. S. 588; *Loewy v. Board of Education*, 59 Misc. 70, 112 N. Y. S. 4; *Brown v. Board of Education*, 70 Misc. 399, 125 N. Y. S. 16, *affirming* 136 App. Div. 721, 121 N. Y. S. 491; *Sheehan v. Board of Education*, 120 App. Div. 557, 104 N. Y. S. 1002, *affirmed* 193 N. Y. 627, 86 N. E. 1133; *Moore v. Board of Education*, 121 App. Div. 862, 106 N. Y. S. 983, *affirmed* 195 N. Y. 614, 89 N. E. 1106; *Hazen v. Board of Education*, 127 App. Div. 235, 111 N. Y. S. 337; *Bronx Borough Teachers' Assoc. v. Board of Education*, 118 N. Y. S. 483; *Thomson v. Board of Education*, 201 N. Y. 457, 94 N. E. 1082.



**FERGUSON ET AL.**

v.

**MARTINEAU ET AL.**

Arkansas Supreme Court—November 20,  
1914.

115 Ark. 317; 171 S. W. 472.

**Prohibition — Courts Subject — Probate Court.**

As the Arkansas Supreme Court controls inferior courts only through its supervisory jurisdiction over the circuit court, it cannot issue a writ of prohibition against the probate court.

[See generally 111 Am. St. Rep. 935.]

**Injunction — Interference with Criminal Proceeding.**

Courts of equity have no jurisdiction to interfere by injunction with criminal proceedings; their jurisdiction to be confined solely to civil and property rights.

[See 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

**Prohibition — Against Unwarranted Injunction.**

The writ of prohibition is that process by which a superior court prevents an inferior tribunal from exercising jurisdiction with which it has not been vested by law. Hence, where the chancery court attempts to enjoin execution of a judgment in a criminal proceeding, a writ of prohibition will be issued to prevent the court from exceeding its jurisdiction.

[See 111 Am. St. Rep. 930.]

**Same.**

That a chancery court which enjoined the execution of a criminal judgment did not propose to issue any further order is no ground for the denial of a writ of prohibition, for the denial of the writ would leave the injunction in force.

**Criminal Law — Present Insanity — Time When Issue May Be Tried.**

Kirby's Dig. § 4003, providing for insanity inquests by the probate court, was enacted solely for the purpose of protecting the civil and property rights of insane persons, and has no reference to determining the question of the sanity of one who has been convicted and sentenced to be executed for a criminal offense.

[See note at end of this case.]

**Same.**

Kirby's Dig. § 2454, providing for an inquest by sheriff's jury into the insanity of persons sentenced to be executed, affords such person a remedy in case he becomes insane after trial. Hence the chancery court cannot, on the ground that such person has no other remedy, justify an order enjoining his execution.

[See note at end of this case.]

**Same.**

Acts 1913, p. 172, providing that, when a judgment of death is pronounced on any per-

son, such person shall be conveyed to the state penitentiary and there kept until executed, does not by implication repeal Kirby's Dig. § 2454, authorizing the sheriff to hold an inquest into the sanity of the person sentenced to be executed.

[See note at end of this case.]

**Same.**

Regardless of statute, one convicted and sentenced to execution will, where he becomes insane after trial, be granted a stay of execution. Hence the chancery court cannot justify an order enjoining execution on the ground that the party had no remedy at law.

[See note at end of this case.]

Original petition for writ of prohibition. J. V. Ferguson et al., petitioners, and J. E. Martineau et al., respondents. WRIT GRANTED.

[318] One Arthur Hodges was convicted of murder in the first degree in the Clark Circuit Court. He appealed to this court and the judgment of the circuit court was affirmed. After the judgment of the Clark Circuit Court, Hodges made application to that court for a writ of *coram nobis* to inquire into the issue of his sanity at the time of the alleged offense for which he was convicted. The writ was issued, and upon a trial of that issue before a jury it was determined that Hodges was sane. Hodges was then conveyed to the State penitentiary and delivered to the superintendent thereof to await his execution [319] under the provisions of the act approved February 15, 1913, Act 55, the Acts of 1913.

On the 6th day of November, 1914, upon the petition of W. M. Rankin, with accompanying affidavits, setting forth that Arthur Hodges is now insane, and asking that inquiry be made into the question of his sanity at the present time, the county and probate judge of Pulaski County, upon consideration of the petition, granted the same and ordered a warrant to issue for the arrest of Arthur Hodges, and directed the sheriff to have him before the probate court on the 23d day of November, 1914, to have the question of his sanity determined.

On the 7th of November, 1914, application was made to the chancery court of Pulaski County for an injunction against the Commissioners of the Arkansas Penitentiary, restraining them from executing Hodges on the day set for his execution. The chancery court granted the petition and issued an order enjoining the commissioners from executing Hodges on the 14th day of November, 1914, or on any other date until the further orders of the chancery court.

The petitioners apply to this court for writs of prohibition, directed to the judge of the chancery court of Pulaski County and to the judge of the county and probate

court of said county, prohibiting them from interfering with the execution of Arthur Hodges on the day set for his execution under the sentence and judgment of the Clark Circuit Court.

The judge of the probate court of Pulaski County set up, in response to the petition, that the writ of prohibition should not issue for the reason that this court has no jurisdiction to issue a writ prohibiting the probate court of Pulaski County from exercising its jurisdiction to inquire into the question of the sanity of Hodges, and further set up that he had such jurisdiction and that he had exercised it for good cause shown. The chancellor of the Pulaski Chancery Court responded that he issued the injunction restraining the commissioners from executing Hodges until his sanity could be determined [320] by the probate court on the 23d day of November, 1914, the day set by that court for the inquisition; that he had issued all the orders that he could issue or would issue and that the petitioners, if aggrieved by his action, had their remedy by way of appeal, and not by writ of prohibition.

For the convenience of hearing, the cases are consolidated here and disposed of in one opinion.

*Wm. I. Moose and Jno. P. Streepey* for petitioners.

*Jones & Owens and Bradshaw, Rhoton & Helm* for respondents.

[321] *Wood, J. (after stating the facts).—*

(1) In *Featherstone v. Folbre*, 75 Ark. 510-512, 88 S. W. 554, we said: "This court has no original jurisdiction to control or supervise any proceedings of the probate court. That all belongs to the circuit courts, as matters of original jurisdiction, and to this court by appellate or supervisory jurisdiction over the circuit courts. This court supervises and controls all courts inferior to the circuit courts only through the latter courts. In no other way can the harmony of our judicial system, as at present constituted, be preserved."

In the same case we held that the supervisory jurisdiction of this court over the probate court "comes, not originally, but by way of appeal and supervision through the circuit courts."

It follows that this court has no jurisdiction to issue the writ of prohibition in this case, directed to the probate court. If the application for a writ of prohibition directed to the probate court had been first made in the circuit court and refused, then this court would have jurisdiction by reason of its superintending control over the circuit court, but this was not done.

[322] The petition for the writ of prohibition directed to the probate court must be denied.

(2) Courts of equity have to do with civil and property rights, and they have no jurisdiction to interfere by injunction with criminal proceedings. They cannot stay processes of courts having the exclusive jurisdiction of criminal matters, where no civil or property rights are involved. *Portis v. Fall*, 34 Ark. 375; *Medical, etc. Inst. v. Hot Springs*, 34 Ark. 559; *Taylor v. Pine Bluff*, 34 Ark. 603; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *High on Injunctions*, § 68; *Kerr on Injunctions in Equity*, p. 2, star; 1 *Wharton Cr. Law*, § 403.

This court in *State v. Vaughan*, 81 Ark. 125, 11 Ann. Cas. 277, 98 S. W. 685, 118 Am. St. Rep. 29, 7 L.R.A.(N.S.) 899, quoting from the Illinois Supreme Court, said: "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. . . . The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. It is no part of the mission of equity to administer the criminal law of the State. A court of equity has no jurisdiction over matters merely criminal or merely immoral."

The Supreme Court of the United States. In *re Sawyer*, 124 U. S. 200-209, 210, 8 S. Ct. 482, 31 U. S. (L. ed.) 402, 405, says: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, punishment or pardon of crimes and misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdiction or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officials, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government." See also *Fitts v. McGhee*, 172 U. S. 516, 19 S. Ct. 269, 43 U. S. (L. ed.) 535; 6 *Pom. Eq. Jur.* § 644, and authorities cited. Such suit is in effect a suit against the State.

[323] It follows that the chancery court was wholly without jurisdiction to stay the execution of the judgment of the Clark Circuit Court.

(3) "The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law." 2 *Spelling on Injunctions and Other Extraordinary Remedies*, § 1716. See also *Shortt on Informations, Mandamus and Prohibition*, p. 436.

(4) Here the want of jurisdiction on the part of the chancery court appears on the face of the proceedings, and the writ of prohibition to quash and to restrain the enforcement of its orders will go.

Learned counsel for the respondents insist that the writ should not be issued in this case because the chancellor shows that he has done everything that he proposes or can do in the matter. But the injunction issued by the chancellor is outstanding, and it will be presumed that unless recalled, the officers will obey the same, or, if they do not, the chancellor will proceed to punish them for contempt of court in disobedience of his order.

"If," said Lord Mansfield, "it appears from the face of the proceedings that the court below has no jurisdiction, a writ of prohibition may issue at any time either before or after sentence, because all is a nullity; it is *coram non judice*." *Buggin v. Bennett*, 4 Burr. (Eng.) 2037; Shortt on Information, etc. § 447, and cases cited in note.

(5) It is further insisted that the chancery court had jurisdiction to issue the injunction ancillary to or in aid of the jurisdiction of the probate court to enable it to enforce its orders. The chancery court has no such jurisdiction; but if it were conceded that the chancery court had such jurisdiction, the injunction could not properly issue in aid of the probate court's jurisdiction, for the probate court itself was without jurisdiction. The statute under which the respondents claim that the probate court has jurisdiction, to wit: section 4003 of Kirby's Digest, is as follows:

[324] "If any person shall give information in writing to such court that any person in his county is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court, and inquire into the facts by a jury, if the facts be doubtful."

(6) This statute was enacted solely for the purpose of protecting the civil and property rights of insane persons, as is clearly shown by the section itself and the other sections of the same chapter (chap. 83, Kirby's Dig.). It has no reference whatever to determining the issue of the sanity of one who has been convicted and sentenced to be executed for a criminal offense, and who is already in custody of the law for that purpose.

It is further contended that the injunction should go because if Hodges is now insane he has no other legal remedy than to apply to the probate court and to the chancery court as he has done and that a great wrong

would be perpetrated upon him for which there was no other remedy.

Section 2454 of Kirby's Digest provides that, when the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane he may summon a jury to inquire as to his insanity, and if the jury finds that he is insane, then the sheriff shall suspend the execution and immediately transmit the inquisition to the Governor.

The respondents contend that this section has been repealed by Act 55 of the Acts of 1913, providing that "when a judgment of death is pronounced upon any person upon conviction of a capital offense, said person shall be immediately conveyed to the State penitentiary and there kept awaiting execution," etc. And also that the "said superintendent or the assistants appointed by him, shall proceed, unless a suspension of execution be ordered, at the time named in said sentence, to cause the said felon under sentence of death to be electrocuted until he is dead."

[325] (7) There is no express repeal of the statute conferring power upon the sheriff of the county where the defendant has been convicted of inquiring into his sanity at the time set for his execution, and the statute conferring upon him such power is not repealed by implication, and if it came to his knowledge that the defendant was insane at the time set for his execution the sheriff would still have the power to make the inquiry, and if the superintendent of the penitentiary should refuse him the custody of the prisoner for that person he could invoke the aid of the circuit court or the judge of that court in vacation to have the custody of the prisoner surrendered to him for the purpose of making the inquisition as to his alleged insanity. But, if it be conceded that Act 55 of the Acts of 1913, supra, repealed, by implication, the statute conferring such power upon the sheriff, still there would be an adequate remedy for the defendant at the common law, in the absence of any statute upon the subject, for all of our statutes passed for the protection of insane persons against the punishment that the law would otherwise inflict upon them for the commission of criminal offenses, are but declaratory of the common law, or cumulative of the remedies that were there provided for their protection in such cases.

In *Taffe v. State*, 23 Ark. 34, this court said: "The first principles of the elementary books are, that whenever a person is disqualified from defending himself, by the loss or want of reason, he shall not be the subject of a legal prosecution or penalty." And, further, quoting from 4 Blk. Com. 24 and 395: "If a man in his sound memory commits a capital offense, and before his ar-

In *California* it is declared by statute (Pen. Code, § 1367) that no person shall be compelled to defend against a criminal charge while he is insane; and whenever and however up to and including the time of judgment a doubt of the present and presumed sanity of a defendant in a criminal case is created in the mind of the court having him in charge, it becomes the duty of that court, with the aid of a jury especially impaneled for that purpose, to inquire into the then mental condition of the defendant (Pen. Code, § 1368). The foregoing provisions are for the purpose of ascertaining if the defendant rightly comprehends the nature and object of the proceedings pending against him, and is mentally competent to make a just and rational defense. *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794. As to the showing required to make it the duty of the court to submit the question of sanity to a jury, there is no discretion left in the court when a doubt arises as to the sanity of the defendant. *People v. West*, 25 Cal. App. 369, 143 Pac. 793, wherein the court said: "Ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity and the question must be submitted to a jury. The only contingency is, Does a doubt arise? If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused."

The doubt on the existence of which a trial of the present sanity of a defendant must be had, is a doubt arising in the mind of the court having the defendant in charge. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341; *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794. But in the absence of such a doubt, where the court had ample opportunity to observe and note the defendant's mental condition from time to time, and in particular on the date when his present insanity is suggested, the court is not required nor is it an abuse of its discretion, to refuse to submit the question of the defendant's present insanity to a jury in advance of the trial, though affidavits of insanity are presented. *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794; *People v. Fountain*, 170 Cal. 460, 150 Pac. 341. And to the same effect was *People v. Geiger*, 116 Cal. 440, 48 Pac. 389. In *People v. Stock*, 19 Cal. App. 748, 127 Pac. 798, after conviction and after motions for new trial and an arrest of judgment had been denied, the counsel for defendant presented certain affidavits, and re-

quested that the sanity of the defendant should be inquired into and that the time for pronouncing judgment be continued in order that this might be done. The trial judge announced that in his opinion there was no doubt as to the sanity of the defendant, but that he would accede to the request of counsel for defendant and allow an examination to be made by a commission of physicians, which examination was immediately thereafter had. The physicians called to make this inquiry reported that they found the defendant to be sane, and the court thereupon proceeded to pronounce sentence. It was held that the examination was not had in accordance with the provisions of the statute (Penal Code, § 1368) providing that if, during the pendency of an action, up to and including the time when the defendant is brought up for judgment, a doubt arises as to his sanity, "the court must order the question as to his sanity to be submitted to a jury." It was further held that taking into consideration the announcement made by the court, both before and after the appointment of the commission which examined into the question of the defendant's sanity, that he, the trial judge, had no doubt at all as to the sanity of the defendant, the proceedings had on the inquiry might be disregarded wholly. And see *People v. Knott*, 122 Cal. 410, 55 Pac. 154.

In *Colorado* the statute (R. S. Colo. 1908, § 1614) authorizing inquisitions provides as follows: "A person that becomes lunatic or insane after the commission of a crime or misdemeanor ought not to be tried for the offense during the continuance of the lunacy or insanity. If, after verdict of guilty and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue, and if after judgment and before execution of the sentence, such person becomes lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the insanity or lunacy. In all these cases it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of the impaneling insane or lunatic." In *Bulger v. People (Colo.)* 156 Pac. 800, it was held that as the statute, however, did not state in what manner the fact of insanity should, in the first instance, be ascertained, the common law necessarily controlled in that regard; and thereunder, when insanity in such cases was suggested or alleged, the court might determine the condition of the prisoner's mind by a personal inspection or examination of him, either public or private, by inquiry from attending physicians, or from those around the prisoner who had means

of knowledge; and that if, after such investigation and inquiry, the judge had no doubt of the prisoner's sanity, he was neither bound to nor should he order an inquisition. It was said that it would seem that the sole modification of the common law by the statute was to require the court, in cases where it believed that the defendant was insane, or, perhaps, where it had doubt of his sanity, to impanel a jury and try the question.

In *Illinois* it is provided (Crim. Code, par. 284, Hurd's Stat. 1913, p. 865) that if on the trial of one charged with crime it appears he was insane when the crime was committed, the jury shall so find by their verdict, and shall also find whether he has entirely and permanently recovered. If he has not, he will be committed to the state hospital for the insane, to be kept there until fully and permanently restored. If he was insane when the crime was committed but has fully recovered he must be discharged. Paragraph 285 provides that when a person becomes insane after the commission of a crime he shall not be tried during the continuance of his insanity. If he becomes insane after a verdict of guilty and before judgment no judgment shall be rendered on the verdict during the continuance of the insanity. If after judgment and before execution of the sentence he becomes insane, in case the punishment is capital, the execution shall be stayed until the prisoner recovers from insanity. "In all of these cases it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impaneling, insane or lunatic." In *People v. Gavrilovitch*, 265 Ill. 11, 106 N. E. 521, the court said: "Our statute does not expressly declare that no one shall be tried for a criminal offense while he is insane, but the provision of paragraph 285 that where a person becomes lunatic or insane after the commission of the crime he shall not be tried for the offense during the continuance of the insanity is not and was not intended to be an abrogation of the common law that no person can be compelled to plead to a criminal charge and be placed on trial for the crime while insane. . . . It has been held in a number of decisions that where it was claimed on behalf of a person who has been indicted for crime that he was insane when the time came for him to be arraigned and called upon to plead, the court might exercise some discretion, in view of the known circumstances and condition of defendant, in determining whether the issue of insanity should be first tried before the defendant should be required to plead and be placed upon his trial for the crime. . . . When the trial is ordered for the purpose of de-

termining the defendant's sanity the inquiry is confined to his insanity at the time of the trial upon that question, for the purpose of determining whether he is sane and has the capacity to make a rational defense. His mental condition at the time of the commission of the alleged crime is foreign to the inquiry. That question is only competent to be considered and passed upon when the accused is placed upon his trial for the alleged crime. The provision of paragraph 285 of our criminal code that where a jury is impaneled, before the accused is placed upon his trial, to determine the question of his sanity, the inquiry is to be whether he was at the time of impaneling the jury insane, is applicable in all cases where the sanity of the accused is tried as a preliminary issue to his being placed on trial for the crime he is charged with. Even in a case where it is not claimed that the accused was insane at the time the crime was committed but where the claim is he has since the commission of the alleged crime become insane, the statute expressly limits the inquiry to the accused's mental condition at the time of the impaneling the jury, and in such case the inquiry into and finding as to what his mental condition was previous to the trial upon the question of his sanity are unauthorized and improper. The purpose of the inquiry is to determine whether the accused is then in a mental condition that would justify his being placed on trial for the crime."

In *Iowa* the statute (Code, § 5540) provides that if a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had on that question. In *State v. Cooper*, 169 Ia. 571, 151 N. W. 835, it was held that where the trial court saw the defendant at the time sentence was to be pronounced (which was the time his counsel made the request for a jury to determine his alleged insanity) and during the several days consumed in the trial, and evidently had no reasonable doubt as to the sanity of the defendant, it did not err in denying the request.

The *Kansas* statute (Gen. St. 1901, c. 99), the purpose of which was to provide procedure whereby a judicial determination might be had of whether or not the person being examined was a proper subject to become a patient in the state hospital for the insane, was applied in the case of *In re Wright*, 74 Kan. 406, 409, 86 Pac. 460, 89 Pac. 678, wherein the court said: "Upon the examination of the petitioner in this case he was found by the jury to be suffering from mental strain of five days' duration, and to be in such a condition as to make him a fit

person to be sent to the state hospital. The physician juror added his opinion to the verdict that the patient was suffering from temporary mental strain. It does not appear whether or not any evidence was offered upon the hearing of the plea in bar, except the proceedings in the probate court. These facts show that the examining magistrate had jurisdiction of the defendant continually from the time he was arrested until the order of commitment was issued, and that, having such jurisdiction, it was his right and duty to determine every question involved in a preliminary examination under the warrant, including the mental fitness of the defendant to make his defense. It is the law of this country, independent of any statute, that defendant shall not be compelled to answer to, or defend against, a criminal charge if mentally or physically unable at the time to do so in a rational manner, when such disability has developed after the alleged commission of such crime; but, in the absence of a statute to the contrary, the duty of determining whether or not such disability exists rests with the court whose duty it is to hear such answer or defense. When the attention of a court is called to the fact that the defendant about to be arraigned before it is unable, because of mental disability, to make proper defense to the accusation against him, it is doubtless the duty of the court to take notice of the suggestion and to make such inquiry concerning it as will fully protect the rights of the accused. Upon such an inquiry the findings of a court in a lunacy proceeding, and any other proper evidence, may be received and considered. The verdict and proceedings presented to the magistrate in this case can only be considered as evidence tending to show the present mental condition of the petitioner. It appears that this evidence was offered for another and different purpose, but the object and manner of its presentation are immaterial. It was sufficient to call the attention of the court to the claim that the defendant was insane and incapable of making proper answer to the charge pending against him. This was a matter of too much gravity to be ignored because of any supposed irregularity in the form of its presentation. It was the duty of the magistrate to take notice of this claim and determine the defendant's mental condition before proceeding further with the examination."

A Michigan statute (Act No. 238 of Pub. Acts of 1905, § 19) provides in part as follows: "When a person accused of the crime of murder, etc. . . . shall appear to be insane, or shall have escaped indictment upon the grounds of insanity or shall have been acquitted upon trial upon the grounds of insanity, the court, being certified by the

jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and if it does, shall order such person into safe custody and to be sent to the state asylum. If any person in confinement under indictment for the crime of . . . murder, . . . shall appear to be insane, the judge of the circuit court of the county where he is confined shall institute a careful investigation. He shall call two or more reputable physicians and other credible witnesses, and the prosecuting attorney to aid in the examination, and if it be deemed necessary to call a jury for that purpose, is fully empowered to compel the attendance of witnesses and jurors. If it is satisfactorily proved that such person is insane, said judge may discharge such person from imprisonment and order his safe custody and removal to the state asylum, where such person shall remain until restored to his right mind, and then, if the said judge shall have so directed, the superintendent of said asylum shall inform the said judge and prosecuting attorney, so that the person so confined may within sixty days thereafter be remanded to prison and criminal proceedings be resumed, or he be otherwise discharged." In *People v. Hall*, 185 Mich. 54, 151 N. W. 687, a petition of the prosecuting attorney was presented, wherein he represented to the court: "That he is informed and believes and has reason to believe that the said George Hall has been demented since childhood, and that on said 18th day of April, A. D. 1911, he was seriously demented, if not insane, and that your petitioner believes that he has not fully recovered from his mental illness and is still demented, if not insane." The petition was accompanied by four affidavits, wherein the affiants likewise set up that they "believed that said Hall since early childhood was demented, if not at times insane, and therefore that they doubted his sanity." It was held that the petition was sufficient to clothe the court with authority to make the investigation contemplated by the statute.

The practice in *Missouri* was stated in *State v. Church*, 199 Mo. 605, 98 S. W. 16, as follows: "If the accused is insane at the time of the commission of the offense with which he is charged, this is tried by the jury charged with the trial of the indictment or information, and in this way his insanity, if proven, is available as a defense; but if he becomes insane after he is indicted or information is preferred against him by the proper officer and before his trial for the offense, and the court having cognizance of the case should have reason to believe that he has so become insane, this preliminary question is made the subject of

statutory regulation (sec. 2603, R. S. 1899), and it is made the duty of such court to suspend all further proceedings against such person under said charge and to order a jury to be summoned to try and decide the question of the insanity of such person, etc. Section 2604, Revised Statutes 1899, provides that "if upon such inquiry the said jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshal or jailor, order such person to be conveyed to the lunatic asylum and there kept until restored to reason." Section 2605 provides that "when such person shall be restored to reason, he shall be returned to the county whence he came, and the proceedings against him shall be continued and be prosecuted, and his trial had as though no such inquiry and proceedings therein, as herein provided, had been made, and if upon such inquiry it shall be determined that said person has not so become insane as aforesaid, the criminal proceedings against him shall be continued and prosecuted, and his trial had in the same manner as though no such inquiry had been made and had." It will thus be seen that a person who is insane at the time of the commission of a criminal offense, and is afterwards indicted or informed against therefor, when put upon trial for the offense, may avail himself of his insanity as a defense to the charge against him, or, if he becomes insane after indictment or information presented against him, his insanity may be inquired into by a jury as provided for by statute, and in this way his rights are as fully protected and every opportunity afforded him to avail himself of his insanity, if insane, as are afforded him at common law." In *State v. Crane*, 202 Mo. 54, 100 S. W. 422, the foregoing was quoted with approval. In *State v. Church*, 199 Mo. 605, 98 S. W. 16, it was held that the foregoing statutes apply only to cases of insanity occurring subsequent to indictment; hence the right of a trial of the question of the insanity of a defendant in advance of the trial of the charge in which he was indicted only applies when such person became insane after his indictment; and where his plea was that he was insane at the time of the commission of the offense, the court should not make an independent inquiry into his sanity but leave him to make the defense on his trial. See also *In re McWilliams*, 254 Mo. 512, 164 S. W. 221.

In *Nebraska* a statute (Laws 1901, c. 105, p. 507, § 6) provides as follows: "If any convict under sentence of death shall appear to be insane, the warden shall forthwith give notice thereof to a judge of the district court of the county in which the peniten-

tiary is situated, and shall summon a jury of twelve impartial electors of the county to inquire into such insanity at a time and place to be fixed by the judge, and shall give immediate notice thereof to the attorney-general of the state and the county attorney of the county in which the conviction was had." In *Barker v. State*, 75 Neb. 289, 103 N. W. 1134, 106 N. W. 450, it was held that the statute transferred the jurisdiction from the county of the conviction to the judge of the court for the county in which the penitentiary is situated, and that, if, in the warden's judgment, the convict appears to be insane, the district judge cannot refuse to call a jury to investigate the matter; but, if the warden neglects to notify the judge that the convict appears to be insane, the judge should, on proper information of that fact, and a prima facie showing that the convict was insane, investigate the matter for himself so far as to determine whether the convict appears to be insane, and, if he finds that he does so appear, then it is his duty to impanel a jury to try the question of insanity. The trial judge cannot refuse to make any investigation of a proper allegation of insanity solely on the ground that the warden has not notified him that such investigation is necessary. And on a later appeal by the same defendant, the court said: "Upon the former appeal herein it was said that, when the application is made without the concurrence of the warden of the penitentiary, the judge to whom the application is made is not required to order a jury for the investigation of the matter, unless he finds that there are sufficient appearances of insanity to warrant him in so doing. The matter is left to the discretion of the judge to whom the application is made. If the application is manifestly made for purposes of delay, it should not be allowed to have that result. If the judge is satisfied that the convict appears to be insane, he should order an investigation by a jury. It was insisted by the attorney-general on the argument that in this case the judge unnecessarily continued the hearing, and that his order staying the execution was erroneous. We did not consider that we had power to interfere upon these grounds. From the nature of the case, the matter must be committed to the discretion of the judge to whom the application is made. Nothing should be allowed to delay the proceedings, so as to require a stay of execution, unless absolutely unavoidable. But the power of the judge to stay the execution, when the investigation cannot be had without such stay, is not doubted. Section 454, supra, contains these words: 'In case the punishment be capital, the execution thereof shall be stayed,' and the power of the judge

before whom the application is pending to stay the execution is necessarily implied from his power to make an investigation, which would be prevented without such stay." *State v. Barker*, 79 Neb. 361, 112 N. W. 1143, 113 N. W. 197.

The *New Jersey* statute (P. L. 1906, p. 722, § 13) provides: "If any person in confinement, under indictment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by way of any test, or under any other than civil process, shall appear to be insane, the judge of the circuit court of the county where he is confined shall constitute a careful investigation," etc. That statute has been held not to permit an inquiry into the mental condition of a person under sentence of death by proceedings thereunder. It has also been held that, while it did not change the common law rule that, in order to render the death sentence inoperative, it must appear that the prisoner had not, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, and his impending fate and execution, nevertheless, it was not the legislative intention that such a person should be removed to an asylum merely because he was insane, but, on the contrary, that he was to be removed only when a particular type of insanity was judicially found to exist. In *re Lang*, 77 N. J. L. 207, 71 Atl. 47, affirmed 76 N. J. L. 829, 72 Atl. 1118; In *re Herron*, 77 N. J. L. 315, 72 Atl. 133. In *State v. Savage*, 79 N. J. L. 583, 76 Atl. 1079, wherein it appeared that the state made an examination of the defendant during his confinement in the county jail, and it was objected that this examination was made without the defendant's consent, that it was involuntary and that it could not have been legally ordered, it was held that, so far as appeared in the case, the examination was a necessary precaution to the trial of the defendant, for the purpose of properly informing the state as to the mental condition of the defendant, before the trouble and expense of a trial were undertaken, and therefore was a perfectly proper proceeding.

In *New Mexico* it has been held that the court is required by statute (Comp. Laws 1897, § 1929) to submit the question whether the defendant is presently insane to the jury with the other questions in the case, when the question is first raised after the trial has begun. *Territory v. Kennedy*, 15 N. M. 556, 110 Pac. 854.

In *Oklahoma* the statute (St. Okla. 1893, p. 997, c. 68, art. 19, Wilson's Rev. & Ann. St. 1903, §§ 5660, 5661, 5662) provides: "Section 5372. An act done by a person in

a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense, while he is insane. Section 5373. When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant, the court must order a jury to be impanelled from the jurors summoned and returned for the term, or who may be summoned by direction of the court, to inquire into the facts. Section 5374. The trial of the indictment or the pronouncing the judgment, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury." In *Ex parte Maas*, 10 Okla. 302, 61 Pac. 1057, the court said: "There can be no question but what this statute expressly prohibits a court from sentencing a defendant if at the time there exists in the mind of the court any doubt of his sanity, and it is immaterial whether that doubt is produced by affidavits, by judgment of other courts, by the evidence produced upon the trial, or by the conduct and appearance of the defendant. If the court entertains an honest doubt as to the sanity of a defendant when his case is called for trial, or when he is brought before the bar of the court for judgment, it must defer the trial or sentence until after the question of the defendant's sanity has been passed upon by a jury as provided in sec. 5373, and the court must conform its future actions in the case to the verdict of the jury. But, who is to determine as to whether such doubt exists in the mind of the court? In reason only one answer can be given. The court alone must say if such doubt exists. The trial judge sees the defendant, and is necessarily more or less familiar with the circumstances surrounding him and his case, and the fact that the county board of insanity may have adjudged him insane prior to the time fixed for his sentence, even if the order of such adjudication was admitted in evidence or considered by the trial court, would not necessarily control its actions, because such order is not an adjudication of finding of any court, and is not admissible upon a trial to prove the insanity of such person. Such an order amounts to no more than the expression of an opinion by any other person or persons out of court as to the mental condition of a defendant's mind, except where the right of the officers of the asylum to confine and treat such person is called in question, or in other cases of a kindred character which fall within the spirit of the law authorizing such finding by the board of insanity." And in *Marshall v. Territory*, 2 Okla. Crim. 136, 101 Pac. 139, a later case under the same



statute, the court said: "There was sufficient testimony to authorize and require a hearing on the question of insanity by a jury. . . . After indictment the presumption of sanity continues until it is called in question from a reputable source and a sufficient specific declaration to the contrary. This was abundantly done under the testimony in this case. Whereupon it became the duty of the court under the law to impanel a jury to pass upon the sanity of the defendant. The jury, and not the court, should determine the question. . . . Under our law, if a doubt arises as to the sanity of the defendant, the court must order a jury, and if the facts presented to the court are such as to raise a doubt as to the sanity—that is, if there are statements under oath of a credible person, or persons, that the defendant is insane—a doubt is raised, because if the statements are true, the man is insane, and a jury must inquire into the facts as to the truthfulness of the alleged fact of insanity. It is to be observed that it is not a discretion on the part of the court, under our statute, to direct the calling of a jury. The only contingency is, Does a doubt arise? This means, has information come to the court through a proper channel, from a proper source or party—that is, during trial—and from a credible and trustworthy source information is brought to the court that the defendant is insane, or if from personal inspection or observation of the court such probable condition of the defendant is made known to the court, then the law requires that a jury should be impaneled, who shall inquire into the mental condition of the defendant. In this case there is small doubt, if any, that if the facts as presented in this record were presented to a jury, such jury would have found the defendant insane. To say the least, the testimony established that the defendant was not in such condition mentally as to be competent to make a rational defense."

In *Pennsylvania* under the rule of the common law, as changed by the statute (St. Geo. IV. c. 28, § 2), it has been held that when the question of the defendant's sanity at the time of the trial is raised, it may be tried either by a special jury impaneled for that purpose, or by the jury who are to try the indictment, and therefore the question of the guilt of the prisoner and his sanity may be submitted to the jury together. See *Com. v. Endrukat*, 231 Pa. St. 529, 80 Atl. 1049, 35 L.R.A.(N.S.) 470, *affirming* 20 Pa. Dist. 72.

In *Tennessee* the statute (Code, 1858, § 1554, and Acts of 1871, c. 138, § 7) provides that "when the plea of present insanity is urged in behalf of any person charged with a criminal offense punishable by im-

prisonment or death, the court shall charge the jury that if from the evidence they believe the defendant to be insane, and that it would endanger the peace of the community to set him at liberty, they shall so find." It then proceeds to provide that in case a defendant is found to be insane on such inquiry he shall be committed to the hospital for insane until he shall have recovered, when he shall again be delivered to the authorities of the state to be tried for the offense of which he is charged. In *Gordan v. State*, 124 Tenn. 81, 135 S. W. 327, 34 L.R.A.(N.S.) 1115, in holding that the statute does not fix the rule to be observed in inquiries on a plea of present insanity, the court said: "It is suggested that the rule to be observed in such inquiries is here fixed by statute. We do not think that such was the intention of the general assembly, because these provisions are found in chapters of the code and acts concerning the government of the hospitals for the insane in this state, and the sections referred to were only intended to provide for the admission of parties charged with crime who were found to be insane and for that reason should not be tried. However, the language of these sections shows a legislative recognition that only a preponderance of evidence is necessary to determine the issue of sanity in such proceedings, as well as that the trial should be had by jury, as the law in such proceedings. While the insanity of the defendant prevents him from being required to plead, be tried, sentenced, or punished, if existing at the time of such proceedings, yet he is not to be discharged, but kept in custody under proper orders of the court until it shall be ascertained that he has recovered from his infirmity, when the trial shall be had, judgment entered, or sentence executed. The statutes referred to only provide for the detention of defendants in certain cases in the hospital for the insane. . . . The issue of present insanity was presented and tried in all respects in accordance with the correct practice in such cases. The plea contained the proper averments, was verified by the oath of a friend of the defendant, and filed before trial upon the indictment. . . . The issue thus made was submitted to a jury specifically impaneled to try it. . . . In *Bonds v. State*, Mart. & Y. (Tenn.) 143, 17 Am. Dec. 795, the trial judge disposed of a plea of present insanity after trial and verdict of guilty; but, where there is any possible doubt upon the question of sanity, we think that in the trial court the issue should be submitted to a jury. In this court, however, where it is made to appear to the court that the plaintiff in error is probably insane and should not be tried, or judgment against him executed, the court will investigate and deter-

mine the question of sanity without a jury, and make such order as the dictates of humanity and the law require in the postponement of trial or judgment." *Jordan v. State*, 124 Tenn. 81, 135 S. W. 327, 34 L.R.A. (N.S.) 1115.

In *Texas* the statute (Pen. Code, 1895, art. 982, 983) provides that "if it be made known to the court at any time after conviction, or if the court has good reason to believe that the defendant is insane, a jury shall be impanelled to try the issue." It further provides that "information to the court as to the insanity of a defendant may be given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane." In *Holland v. State*, 52 Tex. Crim. 160, 105 S. W. 812, it was held that where after the verdict and judgment are entered up, but before the adjournment of the term, an affidavit in proper and legal form is filed, sworn to by a credible witness, and presented by the counsel employed by the relatives of the appellant to the district judge, in which affidavit the fact is suggested that the affiant is presently insane, the trial court is forced to organize a jury and try the question of his insanity. In *Springer v. State*, 63 Tex. Crim. 266, 140 S. W. 99, the court said: "We think the proper construction of these two articles clearly is that the affidavit, and especially when that issue was tried on the trial of the main case, should set forth that the defendant has become insane since the trial. This affidavit does not do this. The point was clearly raised by the state's objection thereto at the time, and, we take it, that the lower court so held, or if it did not directly do so, indirectly did so and necessarily must have done so. Otherwise, no sentence would have been pronounced against the appellant the next day and the issue would have been submitted to another jury. At any rate, we think as the proceeding is presented to us it does not show reversible error of the lower court. If as a matter of fact the appellant has become insane since the trial of his case, it can yet be properly presented to the lower court and that question can be tried. Certainly the law does not contemplate that after a defendant has been tried and has plead insanity and the court and jury on the main trial have heard and decided that issue against him, that he can again and again prevent the execution of that judgment by some one filing an affidavit on information and belief that the defendant is insane without stating that he has become insane since the trial." In *Witty v. State*, 69 Tex. Crim. 125, 153 S. W. 1146, it was held that where it appears that a person indicted for murder has been adjudged insane by the verdict of a jury and the judgment of the county court, the court should, before placing him on

trial for the homicide, impanel a jury to determine the question whether he is at the time of the trial insane, to the end that, if he is, he shall not be tried until his final recovery. In *Lester v. State* (Tex.) 154 S. W. 554, it was held that where the evidence shows that the defendant has always been insane, that he has been insane since early childhood and is insane at the time of the trial, it is not necessary to charge the jury specifically on the issue of his insanity at the time of the trial.

In *Washington* it has been provided by statute that the question of the insanity of the defendant at the time of trial may be determined by the jury under a special plea. (Rem. & Bal. Code, § 2174, et seq.). In *State v. Wilson*, 69 Wash. 235, 124 Pac. 1125, the court said: "These statutes are ample to protect the rights of a defendant, and the fact that such plea was not interposed warrants us in holding that the question was waived. In our judgment, this holding does no violence to the rule that an insane person shall not be put to trial; for, as we read the statutes, although that fact were proven, it would not operate to discharge the defendant, but only work a continuance until such time, as, in the judgment of the prosecuting officers, his reason became restored. We think the plain inference to be drawn from the reading of § 2174 is that such plea must be interposed before the case is submitted to the jury; and that, if it comes thereafter, it is too late. In holding that the question of insanity at the time of the trial is not now open to the defendant, we do not want to be understood as holding that his present mental condition cannot be inquired into. The superior court has original jurisdiction in such cases, and its exercise does not depend upon any order or judgment of this court, and the mental condition of defendant may be determined without in any way conflicting with any judgment we may render, or may have heretofore rendered. If the fact is found so to be, its legal effect would be to suspend our judgment, which is based on the merits, the plea of not guilty, and in no way limits the authority or jurisdiction of the superior court to take cognizance of facts and issues subsequently arising." In *State v. Superior Ct.* 45 Wash. 248, 88 Pac. 207, a case decided prior to the enactment of the foregoing statute, it was held that when, in good faith, an affidavit is filed alleging that a defendant charged with a capital offense is insane, it is within the inherent power and jurisdiction of the court, without regard to statutory authority therefor, to determine the issue of the sanity of the accused before putting him on trial for his life.

In *Wisconsin* it is provided by statute (Stats. 1898, § 4780) that it is the duty of the trial judge, on seeing indications of men-

tal incompetency insanity in the defendant, at any stage of the trial, to halt the proceedings and make an inquisition of the defendant's insanity. *Dietz v. State*, 149 Wis. 462, Ann. Cas. 1913C 732, 136 N. W. 166.

*In Absence of Statute.*

Some recent cases have, in the absence of a statute, applied the rule that, if at any time while criminal proceedings are pending, the trial judge, either from his own observation or on the suggestion of counsel, has facts brought to his attention which raise a doubt as to the sanity of the defendant, this question should be determined before further steps are taken, and in such a case, the court may itself enter on the inquiry, or may submit the question to a jury impaneled for that purpose. *U. S. v. Chisholm*, 149 Fed. 284; *Williams v. State*, 45 Fla. 128, 34 So. 279; *Johnson v. State*, 57 Fla. 18, 49 So. 40; *State v. Charles*, 124 La. 744, 18 Ann. Cas. 934, 50 So. 699; *State v. McIntosh*, 136 La. 1000, 68 So. 104. And see *State v. Potts*, 49 La. Ann. 1500, 22 So. 738. In *U. S. v. Chisholm*, supra, the defendant had been arraigned and pleaded not guilty, and the trial had proceeded on the merits for some days, when the counsel for the prisoner suggested, for reasons then partially stated in open court, that the prisoner was insane or partially so, and in such mental condition that it would be unjust to proceed further with the trial. It was held that the disposition of such a suggestion rested entirely in the conscience and discretion of the trial judge and that it was proper for him, on finding by conference with eminent experts that they differed radically as to his present mental condition, to submit the issue to the jury. In doing so, the court said, the trial judge only followed the pathway marked out by courts of the highest authority, which have frequently declared that in such a case "a just judge will not fail to relieve his own conscience by submitting the facts to a jury." In *State v. McIntosh*, 136 La. 1000, 68 So. 104, the court said: "Our conclusion is that a person who is accused of a crime is not thereby deprived of the right to have the question of his then present insanity inquired into and determined by the judge before being put on trial for his life or liberty. The plea of present insanity does not pertain to the guilt or innocence of the accused, but merely challenges the right of the state to put the defendant on trial at that time. That question should be decided by the judge when it is properly demanded of him before the criminal

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trial has commenced. In the cases in which it has been held that, where the question was as to the mental condition at the time of the alleged crime as well as at the time of filing the plea, the issue was properly submitted to the jury along with all other questions of guilt or innocence of the accused, it was because the defendant did not insist upon the plea of present insanity being first decided by the judge. But it has never been held that the plea of present insanity can be submitted to the jury with the question of guilt or innocence of the accused, against the protest of the defendant's representatives, even where it was not contended that the insanity asserted itself after the alleged crime. Our conclusion is that the accused cannot be compelled to submit that preliminary question to the jury." In *State v. Charles*, 124 La. 744, 18 Ann. Cas. 934, 50 So. 699, it was held that insanity arising after the commission of a crime, operates as a stay of proceedings, and that the court may have an issue of such present insanity tried before a jury, or may appoint a commission of experts, to examine into, determine and report the mental condition of the accused.

But it has also been held that if present insanity is suggested during the progress of the trial, the court may let the trial proceed and submit the question of present insanity, with that of guilt or innocence, to the jury. *State v. Douglas*, 116 La. 524, 40 So. 860.

In *State v. Khoury*, 149 N. C. 454, 62 S. E. 638, the court held that whether, on a suggestion of insanity made at the time defendant is put on his trial, the court should suspend proceedings and impanel a jury to ascertain whether he is then insane, is a matter resting in the sound discretion of the court. The court said that it could not be permitted that, with a defendant at the bar of the court so that his manner, appearance, etc., might be seen by the judge, the trial should be stopped upon the mere suggestion of counsel, unsupported by affidavit or otherwise.

In *State v. Bethune*, 88 S. C. 401, 71 S. E. 29, the defendant was convicted of murder, and after the judgment was affirmed, when called on to say why he should not be resentenced, pleaded insanity. It was held that the judge had the right to submit this issue to a jury, in the absence of any statutory enactment to the contrary, and that after ordering such a submission, it was not incumbent on him to explain the indictment, or to ascertain whether the defendant understood the nature of the offense of which he had been convicted.

**LLOYD**  
v.  
**COOTE & BALL.**

England—King's Bench Division—November  
4, 1914.

[1915] 1 K. B. 242.

**Limitation of Actions — Acknowledgment — Listing of Debt by Executor.**

An affidavit for probate made by an executor, containing a list of the debts of the testator is not such an acknowledgment of a claim included therein as will remove the bar of the statute of limitations.

[See 4 Ann. Cas. 939; 102 Am. St. Rep. 752.]

**Claim by Attorney — Acknowledgment by Client — Validity.**

An acknowledgment by a client of a debt to his attorney which is barred by the statute of limitations is within the rule that an attorney is not permitted to receive any benefit from a client unless the latter has had independent advice in the matter.

[See note at end of this case.]

[242] Appeal from the judgment of an official referee.

The plaintiff was the widow and executrix of one George Lloyd, who died on May 29, 1912. The defendant, John Robert Ball, was a solicitor carrying on business under the style of H. C. Coote & Ball. He had acted professionally for Lloyd from 1888 down to the date of his death, chiefly in connection with conveyancing matters; he had also made advances to Lloyd from time to time, and in respect of some of the advances certain securities had been deposited by Lloyd with him. No bills of costs had ever been delivered by the defendant to Lloyd, but draft bills of costs [243] were prepared contemporaneously with the conclusion of each transaction.

After Lloyd's death the defendant acted as solicitor for the plaintiff in obtaining probate of his will and in the administration of his estate. The defendant delivered to the plaintiff an account covering the whole period of his business dealings with the deceased, showing a balance of 563*l.* 16*s.* 1*d.* due from the deceased to the defendant. This account contained a number of items for costs incurred by, and money lent to, the deceased at various dates more than six years before his death.

The defendant continued to act as solicitor for the plaintiff up to February, 1913, when she instructed another solicitor to act for her.

On April 28, 1913, the writ in this action was issued. The plaintiff claimed, as executrix of her husband, an account under Order

III. r. 8, of all dealings and transactions by the defendant with Lloyd in respect of the account delivered by the defendant to the plaintiff and payment of any sum of money found due to the plaintiff on taking the account.

The action was transferred to the official referee, and an order was made that the plaintiff should deliver particulars of her objections to the account and the reasons for her objections. For the purpose of this report it is only necessary to refer to one objection, namely, that certain items in the account were statute-barred.

The contentions of the defendant in answer to this objection were, first, that the items were not statute-barred, because the account was, as the defendant alleged, a running account and there had been a payment on account by Lloyd in 1908; and, secondly, that there had been acknowledgments by the plaintiff of the indebtedness of the estate to the defendant, sufficient to take the case out of the Statute of Limitations.

The facts with regard to the acknowledgments made by the plaintiff, which were four in number, were as follows: First, on August 2, 1912, the plaintiff swore an affidavit for the purpose of obtaining probate; attached to the affidavit was a schedule of debts due from the estate, including the sum of 563*l.* 16*s.* 1*d.* shown by the account to be owing to the defendant. Secondly, [244] on October 2, 1912, the plaintiff at the defendant's request signed a list of the creditors of her husband's estate and the sums owing to them, which included the defendant's name as a creditor for the above-mentioned sum. Thirdly, the defendant had received on behalf of the plaintiff the proceeds of policies of insurance on her husband's life, and had paid the money into a separate account with his bankers, and on October 11, 1912, he drew a cheque for 200*l.* on this account with, as he alleged, the plaintiff's authority in order to make a payment to himself on account of the debt due to him from Lloyd's estate. On the counterfoil of this cheque the defendant wrote the words "on account of the indebtedness of Mr. Lloyd," and the plaintiff at the request of the defendant signed the counterfoil. Fourthly, on January 7, 1913, at an interview between the plaintiff and the defendant at the latter's office, the defendant told the plaintiff that he was prepared to deduct 150*l.* from the sum due to him, which would reduce the indebtedness of the deceased to the defendant to 213*l.* 16*s.* 1*d.*, and the plaintiff signed a letter at the request of the defendant authorizing him to pay himself this sum out of the moneys of the deceased's estate which he had in hand. When the plaintiff subsequently claimed to reopen the account, the defendant took up the position that

the plaintiff was in that case not entitled to claim this abatement of 150*l*.

At the trial it was contended for the plaintiff that the account could not be considered a running account as all the credits had been appropriated to debit items; and that the acknowledgments were not binding on the plaintiff by reason of the fact that the relation of solicitor and client existed between the defendant and the plaintiff, and the plaintiff had no independent advice at the time she made the acknowledgments.

The official referee gave judgment for the defendant for 150*l*., the balance due after giving credit for the two sums of 200*l*. and 213*l*. 16*s*. 1*d*. paid as above stated.

The plaintiff appealed.

*Parfitt, K. C.* and *Ricardo* for appellant.

*Rawlinson, K. C.* and *Moresby* for respondent.

*Churchman, Perkins & Co.* solicitors for appellant.

*Mills & Morley*, solicitors for respondent.

[246] HORRIDGE, J.—This is an action for an account which was tried by one of the official referees, who has found that the defendant is entitled to recover the sum of 150*l*. from the plaintiff. The plaintiff has appealed from the judgment of the official referee, and it is contended on her behalf that the account was taken on a wrong principle and that, if it had been rightly taken, the result would have shown that nothing was due from the plaintiff to the defendant, but that a certain sum was due from the defendant to the plaintiff. The plaintiff is the widow of one George Lloyd, who died in May, 1912. The defendant is a solicitor. The account in question relates to a series of transactions between Lloyd and the defendant spread over a number of years. After Lloyd's death the defendant acted as solicitor for the plaintiff in connection with the winding-up of her husband's estate, and he delivered to the plaintiff an account of his dealings with the deceased man which showed a sum of 563*l*. 16*s*. 1*d*. due to the defendant. The account consisted largely of statute-barred items, and the defendant relies on certain acknowledgments of indebtedness made by the plaintiff as being sufficient to take the case out of the statute. The question which we have to consider is whether the fact that at the time the acknowledgments were given the relationship of solicitor and client existed between the defendant and the plaintiff prevents the defendant from relying on these acknowledgments. The facts with regard to these acknowledgments are as follows: [The learned judge stated the facts as set out above, and continued:] With regard to the affidavit for probate, the case of *In re Beavan* [1912] 1

Ch. 196, is a direct authority for saying that that affidavit cannot be treated by the defendant as an acknowledgment to him of the debt. *Neville, J.*, in deciding *In re Beavan* [1912] 1 Ch. 196, followed the decision of the Court of Appeal in *Stamford, etc. Banking Co. v. Smith* [1892] 1 Q. B. 765, where Lord Herschell said "it has been abundantly settled that an acknowledgment to a stranger is not sufficient," and he referred to *Clark v. Hooper* (1834) 10 Bing. 480, 25 E. C. L. 480, as an authority for that proposition. I think, therefore, we are bound to hold the [247] defendant cannot rely on the affidavit for probate as an acknowledgment which takes the case out of the statute. With regard to the other acknowledgments, there is no doubt they were in such terms that a promise to pay the debt would be implied if they had been made by a debtor to a creditor between whom no fiduciary relationship existed. But the position is that they were given by a lady to her solicitor whose claim against her was statute-barred. The defendant by getting these acknowledgments put himself in the position of being able to recover judgment against the plaintiff as executrix of her husband. It is said this conferred no benefit on the defendant because he held security for his debt which he was entitled to realize. I do not agree. Whether he had security or not, he clearly obtained an advantage by getting from the plaintiff an acknowledgment which enabled him to recover judgment against the estate of the deceased in respect of a statute-barred debt. It is said that, in accordance with the rule which was always applied in the Court of Chancery and which is now universal, it was the duty of the defendant, as the solicitor of the plaintiff, to point out to her that she was not bound to pay out of her husband's estate debts of his that were statute-barred, and that he ought to have told her to obtain independent advice before giving these acknowledgments. The duty of persons dealing with others towards whom they stand in a fiduciary relation is exemplified by the well-known case of *Huguenin v. Baseley*, 14 Ves. Jr. 273; 1 White & T. Lead. Cas. 8th ed. 259, and is best expressed with regard to solicitors in *Liles v. Terry* [1895] 2 Q. B. 683, where Lord Esher, M. R. said: "The learned judge has found, and I believe it to be the truth, that the difference between a deed which would have that effect and a will which would be revocable was fairly and fully explained by the solicitor to her before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her. Although that was the case, and although she executed the deed, as I believe, not with the intention of benefitting the solicitor, whom in point of law it did not benefit,

but with the exclusive intention of benefiting her niece, yet, as I [248] understand the doctrine laid down by the Courts of Equity on the subject, there is a positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, and the plaintiff had not the advice of an independent solicitor, therefore the gift which the plaintiff intended to make for the benefit of her niece was invalid; or in other words, according to the authorities by which the rule of equity on the subject is determined, there is in such case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence." Therefore, if these transactions came within that rule, they cannot stand, because it is not suggested the defendant did advise the plaintiff as to her true position with regard to the statute-barred items in the account, or recommend her to go to another solicitor for advice. The question, therefore, is do these transactions come within the rule? In my opinion they do. A solicitor is not permitted to take a benefit from his client unless he first advises her to take independent advice, and in my opinion the defendant by obtaining these acknowledgments did obtain a benefit within the meaning of the rule, and the acknowledgments cannot stand. The items in question must therefore be treated as statute-barred, unless the account was what is called a running account. [The learned judge proceeded to deal with the other questions raised by the appeal and came to the conclusion that the account was not a running account and that in any case there had been no payment which could operate to take the case out of the statute; and that the security was not deposited with the defendant in respect of the general indebtedness, but only against certain specific advances.] For these reasons I am of opinion that the decision of the official referee was wrong and the appeal ought to be allowed.

ROWLATT, J.—I am of the same opinion, but I wish to guard myself with regard to the effect of a solicitor receiving from his client an acknowledgment of a statute-barred debt. The doctrine that a solicitor is not permitted to accept any benefit from a client, unless the client has had independent advice in the matter, is well known and is very strictly applied. The question [249] which we have to decide is whether what took place in this case was a transaction which conferred an advantage on the solicitor within the meaning of the rule. I am not prepared to hold that the mere receipt of an acknowledgment is necessarily an advantage to the solicitor which he is not permitted to retain. I can imagine a case where the client might of his own accord

write a letter to his solicitor containing an acknowledgment of a statute-barred debt due to the solicitor, or might voluntarily send money in payment of it, and the circumstances might be such that the solicitor was not precluded from relying on the acknowledgment or bound to return the money. I am, however, clearly of opinion on the facts of this case that the transaction was such as to bring it within the rule. The defendant conceived himself to be owed large sums of money for costs by a deceased client to whom he had never delivered any bills of costs. A large number of the items in the defendant's account were statute-barred. The plaintiff, who was the executrix of the deceased client, did not know of this. The defendant discussed with her the amount of his bill, and, having agreed to make a reduction in the amount, he put forward a claim for the reduced sum, and at his instance the plaintiff gave him three acknowledgments of the indebtedness of her husband's estate to the defendant. He now relies on those acknowledgments to take the case out of the statute. The result of this transaction was that the defendant obtained from the plaintiff, his client, a substantial and valuable advantage. In my opinion the case comes within the principle which is so well known and which has been acted on in numerous cases, and the defendant therefore ought not to be permitted to retain the advantage which he obtained from his client.

Appeal allowed.

#### NOTE.

#### Validity of Acknowledgment by Client of Debt to Attorney Barred by Limitations.

The reported case appears to be the only decision dealing with the validity of an acknowledgment made by a client of a debt to his attorney which is barred by limitations. To such an acknowledgment the court applies the rule that an attorney is not permitted to accept any benefit from a client unless the client has had the benefit of independent advice in the matter. The concurring opinion of Rowlatt, J. limits the holding to the facts of the particular case, and it is probable that the doctrine as broadly laid down would not be followed in the United States. While the court follows earlier cases applying to gifts from a client the fiduciary obligation of an attorney, it is to be borne in mind that a new promise avoiding the bar of limitations is sustained on the express ground that it rests on a moral consideration (see 25 Cyc. Limitation of Actions, p. 1329) and it is not, therefore comparable with an act which is

wholly gratuitous. Thus in *Wise v. Hardin*, 5 S. C. 325, a confession of judgment by a client in favor of his attorney was sustained.

Of course if an acknowledgment of a barred debt is procured by fraud it is avoidable to the same extent as any other contract. See *Bannister v. McIntire*, 112 Ia. 600, 84 N. W. 707.

## WESTCOTT

v.

## GILMAN ET AL.

California Supreme Court—July 15, 1915.

170 Cal. 562; 150 Pac. 777.

### Partnership — Scope of Firm Business.

The business agreed to be done by and between G. and P. is not limited to mere shipping, the contract, in the form of a letter from P. accepted by G., being: "We will do a joint account business with you on equal division of profits and losses. The business is to be the shipping of oranges and lemons, which you are to secure without any expense to the joint account, on consignment, or if any purchases are made, it shall only be done with our consent . . . when the amount of purchase exceeds \$100. You are to furnish the packing house and are entitled to \$5 per car for each car packed. We will furnish the funds required to handle the business and do the selling free of expense to the joint account, all legitimate packing house expenses are to be charged against the **Sufficiency of Agreement to Create joint account.**"

### Partnership.

That the agreement between G. and P. for obtaining fruit by purchase or on consignment, and shipping and selling it, while making G. the buyer, gives P., the seller, the right to veto prospective purchases if the price is not satisfactory to it, does not prevent the contract being one of partnership, at least as concerns third persons.

[See 115 Am. St. Rep. 420.]

### Same.

That by the agreement between G. and P. for procuring, shipping, and selling fruit G. is to devote his service to procuring the fruit, while P. is to devote its services to handling and selling it, each without charges, does not prevent the existence of a partnership between them.

### Same.

While the element of profit sharing does not alone and of itself establish a partnership, it is essential to a partnership.

### Same.

The existence, or not, of a partnership cannot be determined by dissecting the whole relationship, and considering each fragment as though it were the complete whole; but, especially as to third persons, it is to be determined by the contract, taken with the conduct and the dealings with the world of the parties to it.

### Partnership for Single Adventure.

A partnership may be for the prosecution of one or two adventures, and need not be for the conduct of a general and continuous business.

### Intent as Essential to Creation.

It is not necessary, as regards liability to third persons, that parties know that their contract in law creates a partnership; but it is enough that by contract, or conduct, or both, they have in law engaged in a partnership venture.

[See note at end of this case.]

### Definition of Partnership.

By express provision of Civ. Code, sec. 2395, a partnership is the association of two or more, for the purpose of carrying on business together, and dividing its profits between them.

Appeal from Superior Court, Orange county: WEST, Judge.

Action on contract. M. P. Westcott, plaintiff, and E. L. Gilman, et al., defendants. Judgment for plaintiff. Defendant Edmund Peycke Company appeals. The facts are stated in the opinion. **AFFIRMED.**

*Collier & Clark* for appellant.

*Langley & Thomas* and *Scarborough & Forgy* for respondent.

[564] HENSHAW, J.—Plaintiff on his own behalf and as assignee of thirty-one other fruit growers brought this action to recover sums of money asserted to be owing from defendants for oranges and lemons, in some instances sold to defendants, [565] in other instances consigned to them for sale. Plaintiff recovered judgment and the defendant Peycke Company appeals, the principal ground of appeal being that the findings are not supported by the evidence.

The defendants entered into a written contract with each other, a copy of which here follows:

"Mr. E. L. GILMAN,  
Orange, Calif.

May 22, 1909.

Referring to our conversation of a few days ago we now confirm that we will do a joint account business with you on equal division of profits and losses. The business is to be the shipping of oranges and lemons which you are to secure without any expense to the joint account, on consignment, or if

any purchases are made, it shall only be done with our consent, in each and every instance when the amount of purchase exceeds one hundred dollars. You are to furnish the packing house and are entitled to \$5.00 per car for each car packed. We will furnish the funds required to handle the business and do the selling free of expense to the joint account. All legitimate packing house expenses are to be charged against the joint account.

Yours truly,

EDMUND PEYCKE COMPANY.

The above is accepted by me.

E. L. GILMAN."

The defendant Peycke Company faithfully carried out the terms of its agreement. Gilman secured the fruit, either on consignment or by purchase, with the approval of the Peycke Company, Peycke Company disposing of the fruit, advancing moneys to Gilman when demanded for the payment of the fruit and for the attendant expenses of packing it. Gilman, however, being financially involved, did not use these moneys for the payment of the individual fruit men, and when the condition of his affairs forced him into insolvency, a number of them, the assignors of plaintiff herein, were unpaid. The Edmund Peycke Company balanced its account with Gilman, and there being due to him the sum of two thousand seven hundred and fifty dollars profits growing out of their transactions, this sum was deposited by the Peycke Company in a bank in Los Angeles in settlement of the account, the money to wait distribution under the proceedings in the matter of Gilman's insolvency. The dissatisfied fruit growers sought [566] and secured a recovery against these defendants growing out of their asserted joint liability by virtue of the contract above set forth and by virtue of their conduct and actions under the contract. The soundness of the judgment against Gilman is, of course, unquestioned. The liability of the Peycke Company, by virtue of its arrangements and transactions with Gilman is the question presented upon this appeal.

Appellant's first argument is that no partnership is shown to have existed between Gilman and the Peycke Company. Following that it argues that Gilman was not such an agent of the Peycke Company as to render the Peycke Company liable for Gilman's obligations.

Upon the subject of the existence or non-existence of a partnership, it is to be borne in mind that we are called upon to consider the contract of these defendants and their dealings with each other and with the world as that contract and those dealings affect the rights of third parties who have maintained business relations with them. At the outset

appellant places altogether too narrow an interpretation upon the nature of the business agreed to be done by and between the defendants. It is said that that business was limited specifically to the mere *shipping* of oranges; that the profits and losses were to be based upon the profits and losses arising from a mere shipping, and as it is not shown that any liability arose to third persons or any loss occurred to third parties by virtue of this mere shipping, so appellant is not liable. But such a strained construction does manifest violence to the expressed intent of the defendants. Their joint business relations involved shipping as a mere incident. True, to obtain profitable markets for the oranges and lemons the shipping was a necessary incident, but it was nothing more than an incident to the main business. The agreement between the defendants amounted clearly to this: Gilman was to devote his time and services to securing fruit which would be marketed by the Peycke Company. For such fruit as he secured "on consignment" there would in the usual course of business be the commissioner's percentage upon the returns of the sale. This was one kind of business in which the defendants were to jointly engage. Gilman was also to purchase oranges and lemons upon the joint account of the defendants, but only (when the value of the purchase exceeded one hundred dollars) upon the approval by the Peycke Company [567] of the price. This was a most natural and wise provision in the contract, since the Peycke Company, being shippers and handlers of this fruit, would the better know the market price at eastern and other points, and thus be the better able to tell whether any considerable amount of fruit at a given price could be profitably disposed of. A third term of the contract was that Gilman was to provide for the packing of the fruit and the placing it upon the cars, being entitled to charge the joint venture five dollars for each car thus packed for the joint account. In addition, all other legitimate packing house expenses were to be charged to this joint account, and the Peycke Company to furnish all the moneys necessary for these transactions. Gilman was to make no charge for his time and services in the matter, and, upon the other hand, the Peycke Company was to make no charge for its time and services in thus marketing the fruit. Such is the fair intentment of this contract, and it needs no argument to show that it goes far beyond the mere shipping of oranges.

Appellant next asserts that there is no mutuality of agency in the contract and relationship of these parties and that such mutuality of agency is essential to the partnership. Of course, it is elementary that each partner has authority to represent and



bind the copartnership within the scope of the partnership business. (Smith v. Schultz, 89 Cal. 534, 26 Pac. 1087; San Diego Water Co. v. San Diego Flume Co. 108 Cal. 562, 29 L.R.A. 830, 41 Pac. 495.) But the facts that Gilman was the fruit buyer for the joint venture and that the Peycke Company reserved the right to veto prospective purchases if the price was not satisfactory to it (these being the considerations which appellant advances in support of the proposition that there is no mutuality of agency) are far from determinative of the question. In this aspect the case is that presented in Clark v. Gridley, 49 Cal. 105. This court had no difficulty in declaring a partnership to exist where one of the parties to it was to buy wool in Marysville and ship the wool to the copartners in San Francisco, drawing drafts upon them for the payment of the wool, the profits and losses to be shared equally. The additional circumstance present in this case and nonexistent in the other, that one of the partners reserved the right of approval touching the price of prospective purchases, did not in any material sense affect [568] the relationship, certainly so far as concerns third persons. As between the partners themselves, an unwarranted purchase by the one would of course be open to rejection by the nonassenting partner. But no question of this kind, nor of the rights of partners, nor of third persons dealing with the partnership because of such unwarranted purchase, is here involved. It is not disputed but that all the purchases and consignments here made for which payment is sought were with the actual approval of all the defendants.

The nonexistence of a partnership in this case, it is further declared, rests upon the fact that there was "no community of interest in procuring the fruit." This can only mean that because Gilman was to devote his services to the procuring of it, precisely as the Peycke Company was to devote its services to the handling and sale of it, each without charge, no partnership existed. But so untenable is this position that it needs only the statement of it for its refutation.

Appellant last contends that there may be a division of profits as a basis of fixing compensation, apart from and independent of a partnership. This, of course, is perfectly true. A division of the profits amongst employees is not an unusual thing in modern business. The employees received a fixed compensation by way of wages or salary, and in addition thereto and as an inducement to more efficient service, are given a certain percentage of the net profits at stated intervals. This, of course, does not create a partnership. No more is a partnership created in that other large class of cases where leases of various kinds are made, the compensation to

the lessor being based upon the profits which the lessee may derive from his holding. But while thus the element of profit-sharing does not alone and of itself establish a partnership, it is an essential element of every partnership, and it is an element present in this contract. In truth, the existence or non-existence of a partnership in any case cannot be determined by the method appellant adopts, of dissecting the whole relationship into broken parts and members, and studying each disjointed fragment as though it were the complete whole. A partnership, especially where, as here, the rights of third parties are involved, is to be determined by the contract, taken with the conduct and the dealings with the world of those who are the parties to it. If that contract and if those dealings, so far as the world is concerned, measure up [569] to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third persons are concerned, who have had dealings with them, the defendants are partners. Again we repeat that the all-important difference in construing partnership and relationships of this kind as between the parties themselves upon the one hand, and as between the parties themselves and those who have dealt with them upon the other hand, is this: That as between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental questions are, what had those third parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them, and not as affecting each other. Each case, therefore, is adjudicated upon its own facts, and very little value will be found from any extended review of the authorities.

The contract in evidence in this case leaves little doubt but that the relationship between these defendants was that of a limited partnership or joint venture. Of course a partnership may be organized for the prosecution of one or two adventures, as well as for the conduct of a general and continuous business. It is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership. (Chapman v. Hughes. 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Hunter v. Martin, 57 Cal. 365.) If by contract or by conduct or by both they have in point of law engaged in a partnership venture, so far as third persons are concerned they cannot be heard to deny the relationship and the liabilities arising therefrom. It is plain from the very terms

of the agreement between these defendants that it measures up to the definition of a partnership as declared by section 2395 of the Civil Code. It was an association of two persons to carry on a definite business and to divide the profits and losses of that business. (*Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Quinn v. Quinn*, 81 Cal. 14, 22 Pac. 264; *Chapin v. Brown*, 101 Cal. 500, 35 Pac. 1051; *Sullivan v. Sullivan*, 122 Wis. 320, 99 N. W. 1022.)

In addition to the evidence of the contract there is the evidence of the conduct of the parties, and particularly of [570] the defendant corporation, which, through its officers and agents, visited the orchards bearing the fruit which Gilman proposed to buy, and in effect represented to the owners, as was of course the fact, that the fruit, if bought, would be bought upon the joint account of Gilman and the Peycke Company.

We have treated the subject generally since appellant's specific objections to the insufficiency of the evidence to sustain the findings have reference only to the liability of the Peycke Company, it being admitted, or stipulated, as has been said, that the fruit so purchased by Gilman was not paid for. The evidence sustains the findings.

The judgment and order appealed from are therefore affirmed.

Melvin, J., and Lorigan, J., concurred.

#### NOTE.

##### Intent as Essential to Creation of Partnership.

Introductory, 440.

As between Parties, 440.

As to Third Persons, 441.

What Intent Is Required, 443.

##### Introductory.

This note collates the cases discussing the question whether a partnership can be unintentionally created. It is concerned with the actual relation of partnership, and does not include the question of liability imposed by statute or incurred by estoppel.

##### As between Parties.

As a general rule, since the existence of a partnership rests on contract, persons cannot as between themselves create a partnership without so intending.

*England*.—*Walker v. Hirsch*, 27 Ch. D. 460, 54 L. J. Ch. 315, 51 L. T. N. S. 581, 32 W. R. 992; *Sutton v. Grey* [1894] 1 Q. B. 285; See also *Halvorson v. Bowes*, 22 Manitoba 447.

*United States*.—*London Assur. Co. v. Drennen*, 116 U. S. 461, 6 S. Ct. 442, 29 U. S. (L. ed.) 688; *Hazard v. Hazard*, 1 Story 371, 11 Fed. Cas. No. 6,279; *Earle v. Art Library Pub. Co.* 95 Fed. 544; *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263; *Fechteler v. Palm*, 133 Fed. 462, 66 C. C. A. 336; *In re Hirth*, 189 Fed. 926.

*Alabama*.—*Emanuel v. Draughn*, 14 Ala. 303; *Chisholm v. Cowles*, 42 Ala. 179; *Randle v. State*, 49 Ala. 14; *Couch v. Woodruff*, 63 Ala. 466; *Tayloe v. Bush*, 75 Ala. 432; *Bestor v. Barker*, 106 Ala. 240, 17 So. 389; *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192, 29 So. 800; *Brooke v. Tucker*, 149 Ala. 96, 43 So. 141.

*Arkansas*.—*Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Roach v. Rector*, 93 Ark. 521, 123 S. W. 399.

*California*.—*Wheeler v. Farmer*, 38 Cal. 203.

*Colorado*.—See also *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588. See also *Lee v. Cravens*, 9 Colo. App. 272, 48 Pac. 159.

*Georgia*.—*Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.

*Hawaii*.—*Tucker v. Metcalf*, 3 Hawaii 180; *Barnes v. Collins*, 16 Hawaii 340.

*Illinois*.—*Stevens v. Faucet*, 24 Ill. 483; *Lintner v. Millikin*, 47 Ill. 178; *Phillips v. Phillips*, 49 Ill. 437; *Bushnell v. Consolidated Ice Mach. Co.* 138 Ill. 67, 27 N. E. 596; *Grinton v. Strong*, 148 Ill. 587, 36 N. E. 559; *National Surety Co. v. T. B. Townsend Brick, etc. Co.* 176 Ill. 156, 52 N. E. 938, *affirming* 74 Ill. App. 312; *Leeds v. Townsend*, 228 Ill. 451, 81 N. E. 1069, 13 L.R.A. (N.S.) 191; *Reed v. Engel*, 237 Ill. 628, 86 N. E. 1110, *affirming* 142 Ill. App. 413; *Sailors v. Nixon-Jones Printing Co.* 20 Ill. App. 509; *Butler v. Merrick*, 24 Ill. App. 628; *Leeds v. Townsend*, 89 Ill. App. 646; *Briggs v. Kohl*, 132 Ill. App. 484; *Sample v. Farson*, 174 Ill. App. 334.

*Indiana*.—*Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 708, 49 L.R.A. 792.

*Indian Territory*.—*Noyes v. Tootle*, 2 Indian Ter. 144, 48 S. W. 1031.

*Iowa*.—*Ruddick v. Otis*, 33 Ia. 402.

*Kentucky*.—*Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026; *Boreing v. Wilson*, 128 Ky. 570, 108 S. W. 914, 33 Ky. L. Rep. 14; *Crawford v. Wiedemann*, 159 Ky. 18, 166 S. W. 505.

*Louisiana*.—*Leonard v. Sparks*, 109 La. 543, 33 So. 594; *Halliday v. Bridewell*, 36 La. Ann. 238.

*Maine*.—*Winslow v. Young*, 94 Me. 145, 47 Atl. 149.

*Maryland*.—*Kerr v. Potter*, 6 Gill (Md.) 404; *Bull v. Schuberth*, 2 Md. 38, 55; *Heise v. Barth*, 40 Md. 259; *Waring v. National Marine Bank*, 74 Md. 278, 22 Atl. 140; *Cannon v. Brush Electric Co.* 96 Md. 446, 54

170 Cal. 562.

Atl. 121, 94 Am. St. Rep. 584; Morgart v. Smouse, 103 Md. 463, 7 Ann. Cas. 1140, 63 Atl. 1070, 115 Am. St. Rep. 367; Morgart v. Smouse, 112 Md. 615, 77 Atl. 137.

*Massachusetts*.—McMurtrie v. Guiler, 183 Mass. 451, 67 N. E. 358.

*Michigan*.—Bird v. Hamilton, Walk. Ch. (Mich.) 361; Gray v. Gibson, 6 Mich. 300; Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Runnels v. Moffat, 73 Mich. 188, 41 N. W. 224; Corey v. Caldwell, 86 Mich. 570, 49 N. W. 611; Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. Rep. 397.

*Minnesota*.—McAlpine v. Millen, 104 Minn. 289, 116 N. W. 583.

*Mississippi*.—Fewell v. American Surety Co. 80 Miss. 782, 28 So. 755, 92 Am. St. Rep. 625.

*Missouri*.—Freeman v. Bloomfield, 43 Mo. 391; McDonald v. Matney, 82 Mo. 358; Bush v. Bush, 89 Mo. 360, 14 S. W. 560; Mackie v. Mott, 146 Mo. 230, 47 S. W. 897; Torbert v. Jeffrey, 161 Mo. 645, 61 S. W. 823; Nugent v. Armour Packing Co. 208 Mo. 480, 106 S. W. 648; Rankin v. Fairley, 29 Mo. App. 587; Hazell v. Clark, 89 Mo. App. 78; Boon v. Turner, 96 Mo. App. 635, 70 S. W. 916; Mingus v. Ethel Bank, 136 Mo. App. 407, 117 S. W. 683; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Sawyer v. Burris, 141 Mo. App. 108, 121 S. W. 321; Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363; Skinner v. Whitlow, 184 Mo. App. 229, 167 S. W. 463.

*Montana*.—Hunter v. Conrad, 18 Mont. 177, 44 Pac. 523.

*New Jersey*.—Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370.

*New Mexico*.—Trauer v. Meyers, 19 N. M. 490, 147 Pac. 458.

*New York*.—Salter v. Ham, 31 N. Y. 321; Heye v. Tilford, 2 App. Div. 350, 37 N. Y. S. 751; McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631, affirmed 177 N. Y. 543, 69 N. E. 1126; Schultz v. Brackett Bridge Co. 35 Misc. 595, 72 N. Y. S. 160; Smith v. Dunn, 44 Misc. 288, 89 N. Y. S. 881; Trask v. Hazzer, 4 N. Y. S. 635; Smith v. Lennon, 60 Hun 577, mem. 14 N. Y. S. 259, 260, affirmed 131 N. Y. 560, 29 N. E. 820; Hayward v. Barron, 19 N. Y. S. 384.

*Ohio*.—Channel v. Fassitt, 16 Ohio 166.

*Oklahoma*.—Municipal Paving Co. v. Her-ring, 150 Pac. 1067.

*Oregon*.—Willis v. Crawford, 38 Ore. 522, 63 Pac. 985, 64 Pac. 886, 53 L.R.A. 904; Hanthorn v. Quinn, 42 Ore. 1, 69 Pac. 817.

*Pennsylvania*.—Kaufmann v. Kaufmann, 222 Pa. St. 58, 70 Atl. 956; Hedge's Appeal, 63 Pa. St. 273; Krall v. Forney, 182 Pa. St. 6, 37 Atl. 846.

*South Carolina*.—Price v. Middleton, 75 S. C. 105, 55 S. E. 156.

*Texas*.—Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; Rush v. Amarillo First Nat. Bank, 160 S. W. 319.

*Utah*.—Morgan v. Child, 155 Pac. 451.

*Vermont*.—Duryea v. Whitecomb, 31 Vt. 395.

*Washington*.—Yatsuyanagi v. Shimamura, 59 Wash. 24, 109 Pac. 282.

*West Virginia*.—Setzer v. Beale, 19 W. Va. 274.

"The relation of partnership lies in contract and is to be determined always as between the alleged partners by reference to the matter of intention. If it is obvious as between the parties, that no partnership was intended, then the partnership relation does not obtain as between them, whatever arrangements they may have had for conducting the business." Sawyer v. Burris, 141 Mo. App. 108, 121 S. W. 321. "As between the parties partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct." Morgart v. Smouse, 103 Md. 463, 7 Ann. Cas. 1140, 63 Atl. 1070, 115 Am. St. Rep. 367. "A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation. . . . Even where the parties agree to enter into a joint enterprise and share in the profits, a partnership, as between themselves, does not necessarily result. The intention of the parties always controls." Reed v. Engel, 237 Ill. 628, 86 N. E. 1110, affirming 142 Ill. App. 413. "Whenever in an action between two persons alleged to be partners, a partnership is sought to be proved, the decision of the question depends entirely upon the intention of the parties as legally ascertained. That does not mean a mere arbitrary intention. If the terms of the contract between the parties are fixed and certain, the question of partnership is usually a question of law to be decided upon the construction of the contract, and in such a case the declarations of the parties outside the contract as to the nature of the agreement which it was their intention to form would be of little weight. But unless in some manner it is found to be the intention of the parties that they should become partners, then the partnership cannot be said to exist." Heye v. Tilford, 2 App. Div. 350, 37 N. Y. S. 751.

#### As to Third Persons.

Some few decisions apparently rest on the ground that the intent of the parties is not essential to the creation of a partnership where the question of creation affects the rights of third persons. See Buford v. Lewis, 87 Ark. 412, 112 S. W. 963; Cudahy Packing Co. v. Hibou, 92 Miss. 234, 46 So. 73, 18 L.R.A.(N.S.) 975; Cleveland v. Anderson, 2 Willson Civ. Cas. Ct. App. § 146. But com-

*pare Johnson v. Rothschilds*, 63 Ark. 518, 41 S. W. 996; *Rector v. Robins*, 74 Ark. 437, 86 S. W. 667; *Harris v. Threefoot* (Miss.) 12 So. 335.

The true rule, however, seems to be that an intent is essential to the actual creation of a partnership even as to third persons, the existence of that intent being determinable according to the facts and circumstances of each case.

*England*.—*Mollwo v. Wards Ct.* L. R. 4 P. C. 19.

*Canada*.—*Kelly v. Sayle*, reported in full, post, this volume, at page 444.

*Alabama*.—*Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; *Bass v. Clements*, 6 Ala. App. 167, 60 So. 443.

*Georgia*.—*Falk v. LeGrange Cigar Co.* 15 Ga. App. 564, 84 N. E. 93.

*Illinois*.—*Niehoff v. Dudley*, 40 Ill. 406; *Brown v. Melick*, 185 Ill. App. 3.

*Indiana*.—*Bradley v. Ely*, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251; *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37.

*Indian Territory*.—*Hart v. Hiatt*, 2 Indian Ter. 144, 48 S. W. 1031.

*Iowa*.—*Johnson v. Carter*, 120 Ia. 355, 95 N. W. 850.

*Kentucky*.—*Russell v. Gray*, 4 Ky. L. Rep. (abstract) 619.

*Louisiana*.—*Cameron v. Orleans*, etc. R. Co. 108 La. 83, 32 So. 208.

*Maryland*.—*Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Lighthiser v. Allison*, 100 Md. 103, 59 Atl. 182.

*Massachusetts*.—*Gunnison v. Langley*, 3 Allen 337.

*Michigan*.—*Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

*Minnesota*.—*McDonald v. Campbell*, 96 Minn. 87, 104 N. W. 760.

*Missouri*.—*A. N. Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Hughes v. Ewing*, 162 Mo. 261, 62 S. W. 465; *Diamond Creek Consol. Gold, etc. Min. Co. v. Swope*, 204 Mo. 48, 102 S. W. 561; *Kelly v. Gaines*, 24 Mo. App. 506; *Osceola Bank v. Outhwaite*, 50 Mo. App. 124; *Gille Hardware, etc. Co. v. McCleverty*, 89 Mo. App. 154; *Saine v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127; *A. Graf Distilling Co. v. Wilson*, 172 Mo. App. 612, 156 S. W. 23; *Ellis v. Brand*, 176 Mo. App. 383, 158 S. W. 705; *Aehle v. Brand*, 176 Mo. App. 395, 158 S. W. 709; *Willoughby v. Hildreth*, 182 Mo. App. 80, 167 S. W. 639.

*Montana*.—*Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791.

*Nebraska*.—*Garrett v. Republican Pub. Co.* 61 Neb. 541, 85 N. W. 537.

*Nevada*.—*Horton v. New Pass Gold, etc. Min. Co.* 21 Neb. 184, 27 Pac. 376, 1018.

*New Jersey*.—*Wild v. Davenport*, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

*New York*.—*Central City Sav. Bank v. Walker*, 66 N. Y. 424. *Compare Leggett v. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244; *Haas v. Roat*, 16 Hun 526; *Catskill Bank v. Gray*, 14 Barb. 471.

*Ohio*.—*Meridian Nat. Bank v. McConica*, 4 Ohio Cir. Dec. 106. *Compare Wood v. Vallette*, 7 Ohio St. 172.

*Oklahoma*.—*Citizens' Nat. Bank v. Mitchell*, 24 Okla. 488, 20 Ann. Cas. 371, 103 Pac. 720.

*Oregon*.—*Klosterman v. Hayes*, 17 Ore. 325, 20 Pac. 426; *North Pac. Lumber Co. v. Spore*, 44 Ore. 462, 75 Pac. 890.

*Pennsylvania*.—*Walker v. Tupper*, 152 Pa. St. 1, 25 Atl. 172.

*Rhode Island*.—*Boston, etc. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3.

*Tennessee*.—*Polk v. Bushanan*, 5 Sneed (Tenn.) 721.

*Vermont*.—*See Collidge v. Taylor*, 85 Vt. 39, 80 Atl. 1038.

*Washington*.—*See Z. C. Miles Co. v. Gordan*, 8 Wash. 442, 36 Pac. 265.

Thus in *Diamond Creek Consol. Gold, etc. Min. Co. v. Swope*, 204 Mo. 48, 102 S. W. 561, the court said: "Except in cases in which parties have held themselves out as copartners and credit has been extended to them as such, when in fact they were not partners between themselves, a partnership is a relation between two or more competent persons resulting from a contract, and accordingly only exists where the parties intend to enter into a contract of partnership, for this, like other contracts, must be construed according to the manifest intention of the parties and must be determined by the contract itself and the surrounding circumstances." And in *Niehoff v. Dudley*, 40 Ill. 406, it was said: "The first and controlling element in the contract is the intention of the parties between themselves. . . . There is no absolute rule of law, that a participation in the profits renders the participant a partner. It is only a presumption of the law, which prevails in the absence of controlling circumstances, but is controlled by them. This seems to be the extent of the rule announced by the authorities. And there is no hardship on third persons, where the party does not hold himself out as a partner. And this is only carrying into effect the intention of the parties, and is consonant with equity and justice."

In *Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 708, 49 L.R.A. 792, wherein the rights of the parties inter se were concerned, the court said: "An author of great and exact learning states the law thus: 'In short, the true rule, ex aequo et bono, would seem to be that the agreement and intention of the parties themselves should govern in all cases. If they intended a partnership in the capital stock, or in the profits, or in both, then, that

the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then, that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud and deceit upon third persons.' Story on Partnership, sec. 49. Such intention must, of course, be legally ascertained, and mere declarations of the persons interested and uniting in the prosecution of a common enterprise that no partnership existed, would not be permitted to control the legal effect of acts or proceedings from which the existence of a partnership is by the law presumed."

#### *What Intent Is Required.*

The rule is well settled that a partnership is created where the parties contract to do all that in law is necessary to the formation of a partnership, although the parties neither understand the legal effect of their agreement nor intend to incur the liabilities which the law imposes upon partners.

*England*.—Pooley v. Driver, 5 Ch. D. 458; Ex p. Delhasse, 7 Ch. D. 511; Moore v. Davis, 11 Ch. D. 261; Pawsey v. Armstrong, 18 Ch. D. 698, 50 L. J. Ch. 683, 30 W. R. 469; Adam v. Newbigging, 13 App. Cas. 315.

*Canada*.—Trustees v. Oland, 35 Nova Scotia 409.

*United States*.—Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748. See also Bigelow v. Elliot, 1 Cliff. 28, 3 Fed. Cas. No. 1,399.

*California*.—Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109. And see the reported case.

*District of Columbia*.—Robinson v. Parker, 11 App. Cas. (D. C.) 132.

*Florida*.—Webster v. Clark, 34 Fla. 637, 16 So. 601, 43 Am. St. Rep. 217, 27 L.R.A. 126.

*Hawaii*.—Tucker v. Metcalf, 3 Hawaii 180; Barnes v. Collins, 16 Hawaii 340.

*Illinois*.—Lintner v. Millikin, 47 Ill. 178; Fougner v. Chicago First Nat. Bank, 141 Ill. 124, 30 N. E. 442; Morse v. Richmond, 6 Ill. App. 160.

*Indiana*.—Bradley v. Ely, 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. Rep. 251; Breinig v. Sparrow, 39 Ind. App. 455, 702, 80 N. E. 37, 40.

*Iowa*.—Johnson v. Carter, 120 Ia. 355, 94 N. W. 850.

*Kansas*.—Jones v. Davies, 60 Kan. 314, 56 Pac. 484, 72 Am. St. Rep. 354.

*Kentucky*.—See also Crawford v. Wiedemann, 159 Ky. 18, 166 S. W. 595.

*Louisiana*.—Cameron v. Orleans, etc. R. Co. 108 La. 83, 32 So. 208; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332.

*Maine*.—Winslow v. Young, 94 Me. 145, 47 Atl. 149; Cummings Mfg. Co. v. Smith, 113 Me. 347, 93 Atl. 968.

*Massachusetts*.—Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

*Michigan*.—Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465; Purvis v. Butler, 87 Mich. 248, 49 N. W. 564; Dutcher v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L.R.A. 776; City Nat. Bank v. Stone, 131 Mich. 588, 92 N. W. 99.

*Mississippi*.—Lea v. Guice, 13 Smedes & M. 656.

*Missouri*.—Mulhall v. Cheatham, 1 Mo. App. 476; Monson v. Ray, 123 Mo. App. 1, 99 S. W. 475; Steckman v. Galt State Bank, 126 Mo. App. 664, 105 S. W. 674.

*New Jersey*.—Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464.

*New York*.—Haas v. Roat, 16 Hun 526; Manhattan Brass, etc. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Evans v. Warner, 20 App. Div. 235, 47 N. Y. S. 16; Griffin v. Carr, 21 App. Div. 51, 47 N. Y. E. 323, *affirmed* 165 N. Y. 621, 59 N. E. 1123; Wolf v. Lawrence, 33 Misc. 481, 67 N. Y. S. 900; Pell v. Baur, 16 N. Y. S. 258.

*Ohio*.—Wood v. Vallette, 7 Ohio St. 172.

*Pennsylvania*.—Righter v. Farrel, 134 Pa. St. 482, 19 Atl. 687; Poundstone v. Hamburger, 139 Pa. St. 319, 20 Atl. 1054.

*South Carolina*.—Price v. Middleton, 75 S. C. 105, 55 S. E. 156.

*Texas*.—Cothran v. Marmaduke, 60 Tex. 370; Stevens v. Gainesville Nat. Bank, 62 Tex. 499; Freeman v. Huttig Sash, etc. Co. reported in full, post, this volume at page. 446; Cleveland v. Anderson, 2 Willson Civ. Cas. Ct. App. § 146.

*Utah*.—Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

*Wisconsin*.—Spaulding v. Stubbings, 86 Wis. 262, 56 N. W. 469, 39 Am. St. Rep. 888; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A 1195.

That the foregoing rule supplements and does not conflict with the rule that the intention governs was pointed out in Barnes v. Collins, 16 Hawaii 340, wherein the court said: "Whether an agreement creates a partnership or not depends upon the intention of the parties. But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect. The parties may expressly agree that there shall be a partnership and yet such agreement will be ineffective if the specific stipulations do not establish a partnership as matter of law, and on the other hand they may expressly agree that their relation shall not be that of partners and yet it may be such as matter of law. Perhaps there is no single element that will necessarily show as a mat-

ter of evidence, that a partnership was intended. . . . Of course there need be no partnership name, nor need it be stipulated that there shall be a partnership, nor is it necessary that the partners should understand or realize what the legal consequences of their agreement will be. The question is whether that which they have agreed upon constitutes a partnership as matter of law." And in *Johnson v. Carter*, 120 Ia. 355, it was said: "The crucial test seems to be the intention of the parties. If it appears to have been their purpose to enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses, while securing certainty of the advantages to be derived from the relation, must be disregarded."

In *Fouger v. Chicago First Nat. Bank*, 141 Ill. 124, 30 N. E. 442, the court said: "While the intention of the parties is the criterion by which to determine whether or not a partnership has been formed, yet, as said by Justice Matthews in his work on Partnership (page 12, sec. 31), 'it is very plain that parties cannot, by agreement, enter into a partnership, and at the same time agree that what they have entered into shall not be a partnership.' Or, in the language of Breeze, C. J., in *Lintner v. Millikin*, 47 Ill. 178: 'Parties may become partners without their knowing it, the relation resulting from the terms they have used in the contract or from the nature of the undertaking. They may make a bargain together without knowing it, which creates or involves a partnership, and subjects them to the law of partnership.'"

The rule was applied in *Pooley v. Driver*, 5 Ch. D. (Eng.) 458 as follows: "It was said, and said with considerable force, by Mr. Chitty and Mr. Mathew, that they never intended to be partners. What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners. . . . I must say that I have come to a clear conclusion that this is not a transaction of loan within the meaning of the Act of Parliament; that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors; that in this case I need not rely on one provision or on two pro-

visions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership, without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that, looking at the law as it stands, I must hold that they are partners."

## KELLY, DOUGLAS AND COMPANY, LIMITED

v.

SAYLE ET AL.

British Columbia Court of Appeal—January  
15, 1914.

19 Brit. Col. 93.

### Partnership — Creation — Intention as Essential.

A partnership agreement executed to protect one of the parties thereto in respect to money loaned by him to the other and with no intention that it shall become operative according to its terms does not create a partnership.

[See note at end of this case.]

[94] Appeal by plaintiffs from the judgment of McInnes, Co. J., heard at Vancouver on the 8th of November, 1913. Defendant Sayle carried on business by himself and in the course of same obtained certain financial assistance from defendant Dick. Ultimately a partnership agreement was drawn up between them, but never registered. The partnership name was the Leonard-Sayle Company. The defence was that the partnership was merely a form of security to defendant Dick for his advances. The trial judge dismissed the action as against Dick. Plaintiffs appealed. DISMISSED.

Arnold for appellants.

J. W. de B. Farris for respondents.

C. S. Arnold, solicitor for appellants.

Farris & Emerson, solicitors for respondents.

MACDONALD, C.J.A.—I think the appeal should be allowed.

We have an extraordinary state of facts in this case. The respondent Dick advanced \$2,100 to the respondent Sayle to buy out the former partner in the business that Sayle was carrying on. A year afterwards a partnership agreement was drawn [95] up

between Sayle and Dick. That agreement, on its face, purports to be signed, sealed and delivered by the parties. Each carried away a counterpart of it. One of the parties, Sayle, took it to his banker: the banker was not called. Following that, Dick indorsed notes from time to time to assist in carrying on the business. Finally the business was a failure and now Dick decides to claim as a creditor of the firm for the \$2,100 which he advanced, and which is treated in the partnership agreement as his contribution to the capital. His status as a creditor is allowed on this extraordinary evidence: he and Sayle get into the witness box, the only parties who could give any evidence on the point at all, and say that this partnership agreement never came into force at all, that it was given for the purpose of enabling Dick's executors on his death to shew that Sayle owed Dick this money. Now this partnership agreement is a perfectly futile document for that purpose and if produced by the executors it would shew nothing of the kind. It would shew that the deceased had been a partner from the date of that partnership agreement and that his executors were entitled to an account of his share.

On that extraordinary evidence it has been found that Dick was not a partner at all, but was entitled to put in his claim as a creditor. The banker, who was the only person who could verify this tale, was not called.

I decline to accept evidence of that kind. I decline to accept it in the face of the document, on the faith of a story utterly ridiculous, to my mind.

MARTIN, J.A.—The question has admittedly come down to the weight of evidence, and in view of the fact that the trial judge has specifically accepted as true the harmonious evidence of the only two persons who had knowledge of the matter, shewing that the contract was contingent only, I am unable to say that we would be justified in interfering with his verdict.

McPHILLIPS, J.A.—I must admit at the outset the situation is a strange one, and it may, perhaps, seem singular that a court of law should come to the conclusion as against the [96] writing, that there was no partnership, when in the writing a partnership is said to exist. But what has taken place does not necessarily constitute legal liability. For instance, one may sign a document—put one's name upon a negotiable instrument and retain same, but that does not constitute a legal liability. We must go further and establish the facts attendant upon the execution and delivery—that the

document was delivered or the negotiable instrument was issued. I can quite readily understand that Sayle did not want to give a chattel mortgage. In my practice at the bar I many a time found people who were engaged in commercial business indisposed to give a chattel mortgage or such securities as would be noted by commercial agencies. Therefore, when it was suggested that something other than a chattel mortgage should be given, that was not exceptional and indicates truth. These two men, in a clumsy way, without legal advice, decided that a partnership agreement should be written out, but I do not find any evidence at all to satisfy me that it was really intended that there should be any partnership agreement. It was, after all, only to be evidence of the existing debt. Sayle thought it would assist in case of death. Dick does not say that. Dick treats it throughout as being merely an evidence of the debt. The plaintiffs frankly, through their counsel, state that they did not give credit upon Dick's worth or stability at all; they knew nothing whatever about the writing. I understand also that the only other person mentioned as having seen the writing was the bank manager, and if he did give credit upon the belief that Dick was a partner, nothing is owing to the bank. The indorsements of Dick would be evidence against there being a partnership, because if there was a partnership, the partnership signature would carry liability against Dick. It would rather preclude the contention that Dick was a partner.

In the end it resolves itself into this: was there an agreement of partnership in fact? There is no magic in the words of the writing and the learned trial judge has undertaken to believe Sayle and Dick; it is a question of credibility.

I wholly agree with the trial judge that Dick is not liable for the debts of this partnership. I could only come to the conclusion [97] that there was liability upon the most positive evidence, evidence that I should be constrained to give effect to against the trial judge's finding of fact, and I see no such evidence. I think that to say there was not partnership is to rightly apply the law to a state of facts, though peculiar, still truthful and quite believable, believed in by the one best able to decide, the trial judge.

I would dismiss the appeal.

Appeal dismissed.

MacDonald, C.J.A., dissenting.

#### NOTE.

It is held in the reported case that where a partnership agreement is signed by persons who know what they are signing but who

have no intention of forming a partnership, a partnership is not created. The question of intent as essential to the creation of a partnership is treated in the note to Westcott v. Gilman, reported ante, this volume, at page 437.

# **FREEMAN**

v.

## **HUTTIG SASH AND DOOR COMPANY ET AL.**

Texas Supreme Court—February 5, 1913.

105 Tex. 560; 153 S. W. 122.

### **Partnership — Incoming Partner — Liability for Past Debts.**

One becoming a partner of a going firm does not thereby become liable for debts previously incurred, in the absence of an agreement, express or implied, to that effect, but the presumption is against the assumption of liability.

**Same.**

The purchaser of a partner's interest in a going firm is not personally liable for existing firm debts merely because he recognized that the firm property was subject thereto, and did not expect to obtain the partner's interest free from the debts, but expected that a corporation, to be formed, should pay them in taking over the firm property, and though he advised a copartner to apply proceeds of sales of firm goods to the payment of firm debts, irrespective of the time of their creation.

**Same.**

The purchase of a partner's net interest in a going firm is not of itself sufficient to create an assumption of his individual liability for existing firm debts.

**Same.**

A purchaser of a partner's interest in a going firm is not liable for existing firm debts for goods purchased merely because the new firm receives and uses them for its own benefit.

### **Intent as Essential to Creation of Part- nership.**

Persons may form a partnership, though not intending so to do, since a partnership may be implied by agreement, whereby persons assume a relation in law constituting a partnership.

[See note at end of this case.]

**Same.**

A purchaser of a partner's interest in a going firm did not intend to enter the firm and there was no agreement that he should become a partner, but it was the purpose of the purchaser and the remaining partners

that the business should be incorporated. The formation of the corporation was unavoidably deferred, and it, in fact, was never formed, and, while the purpose to form it remained, the business went on under the firm name under the management of a copartner as before. Held, that the purchaser became a partner in a new firm composed of himself and the remaining partners in the old firm.

[See note at end of this case.]

### **Incoming Partner — Liability for Past Debts.**

Where a purchaser of a partner's interest in a firm became a partner with the copartners in a new firm, the purchaser, as partner, was liable for goods ordered by the firm before the purchase and delivered thereafter, and for goods ordered and delivered after the purchase, but was not liable for goods ordered and delivered before the purchase.

### **Lien of Creditor on Partnership Prop- erty.**

A creditor of a firm acquires no lien on the property of a new firm created by a third person acquiring the interest of a partner in the former firm.

Error to Court of Civil Appeals, Fifth Supreme Judicial District.

Action by Huttig Sash and Door Company, plaintiff, against C. F. Freeman et al., defendants. Judgment for plaintiff in District Court. Judgment affirmed by Court of Civil Appeals. Defendant Freeman brings error. The facts are stated in the opinion. **REVERSED.**

*Locke & Locke* for plaintiff in error.

*Chilton & Chilton, E. P. Bryan, W. S. Bramlett, Joe E. Phillips, Hill & Webb, Spence & Baker, Holloway & Holloway, John M. Henderson, Lawther & Worsham and W. N. Flippen* for defendants in error.

[567] PHILLIPS, J.—In this case we are called upon to determine the correctness of the decision of the Honorable Court of Civil Appeals for the Fifth District in affirming the judgment of the District Court of Dallas County [568] whereby the plaintiff in error, Freeman, was held liable as a partner for certain debts of the Independent Lumber Company, a partnership engaged in the lumber business at Dallas, contracted both before and after his association with it. The suit was instituted by the Huttig Sash and Door Company upon its debt, in connection with which an attachment was sued out and levied. Thereafter a receiver was appointed who took charge of all the assets of the company, including the property attached, all of which was subsequently sold and its proceeds held to abide the final judgment. Other creditors, parties to this appeal, in-



tervened, all seeking to enforce the liability of Freeman as a partner.

The defendants in error contend that Freeman became a partner in the business on July 29, 1908. The debts sued upon are of three classes: (1) for goods ordered and delivered before July 29, 1908; (2) for goods ordered and delivered after July 29, 1908; and (3) for goods ordered before and delivered after July 29, 1908. By the judgment Freeman was held liable for debts of all these classes.

Prior to July 29, 1908, the partnership known as the Independent Lumber Company was composed of C. B. Yost, T. H. Campbell and J. T. Sewell, each owning a third interest. Because of his friendship for Yost, Freeman had endorsed for the firm in a few instances to enable it to borrow money for the conduct of the business. On July 29, 1908, after some negotiation, Freeman, with knowledge that indebtedness was owing by the firm, affected a purchase of Campbell's interest, known and assented to by Yost and Sewell, for the sum of \$400.00, evidenced by a bill of sale executed by Campbell reciting the transfer of all his right, title, interest, etc. In making this purchase, Freeman did not agree to assume the payment of any of the firm's existing indebtedness. He did not intend to enter it as a partner; nor was there any agreement that he should become a partner. His purpose was, as it was of Yost and Sewell, that the business should be incorporated; and to that end articles of association were drawn and subscribed on August 6, 1908, but application for a corporate charter was refused by the Secretary of State because the proposed name of the corporation had been appropriated by another corporation. Because of Sewell's absence from the State, new articles were not then drawn. Freeman left the State for a trip on August 16th and was away until September 14th. The incorporation was not perfected on his return, or at any time afterward.

In the interval between July 29th and September 14th, Yost, as its active manager, conducted the business under the same name and in the ordinary course, as it had been conducted by him prior to Freeman's purchase of Campbell's interest, Freeman having no part in its control or management, nor any communication with any creditor; and, so far as shown, it still being the intention of all parties that the corporation should be formed.

A few days after his return to Dallas on September 14th, Freeman discovered that the condition of the business was not as favorable as he had supposed, and informed Yost that he did not care to proceed any further with the matter; that he wanted the

business wound up, and that it would be well to sell it if possible. Thereafter he discussed [569] the situation with Yost, advising that only such purchases be made as might be necessary to work off the stock on hand; that sales be made for cash to provide for the payment of creditors, and if possible that a purchaser for the business be found. He gave advice respecting the collection of accounts and other matters affecting the conduct of the business in this manner, but it may be said that other than as stated he took no part in its direction. The business was thereafter so conducted and such was his relation to it to the time of the institution of the suit.

In short, the record presents a case of this character: The purchase, without an express assumption of liability for existing indebtedness, of the interest of a partner in a going concern by one who does not intend to become a partner and is not by agreement received as such, but whose intention, shared by the other owners, is only to become a stockholder in a corporation to be immediately formed for the conduct of the business. The formation of the corporation is deferred and finally abandoned. During the time that the formation of the corporation is merely suspended, from July 29th to September 14th, the purchaser, without any participation in its management, suffers the business to be conducted in the ordinary course, under the same name, by the active manager of the original partnership. About September 14th, he determines to proceed no further and counsels the liquidation of the business or its sale. From that time until December 30th, when a receiver took it in charge, the business is conducted with this end in view, but nevertheless as an existing business, without his active participation in its management, but to some extent with his direction.

It is an accepted rule in the law of partnership that one who becomes a member of an existing partnership does not thereby become liable for debts already incurred in the absence of an agreement to that effect, express or implied. The presumption of law is against the assumption of such liability. 1 Bates on Partnership, sec. 507; Story on Partnership, sec. 152; 1 Lindley on Partnership, sec. 206; Baptist Book Concern v. Carwell (Tex.) 46 S. W. 858; Oliver v. Moore (Tex.) 43 S. W. 812; Sternburg v. Callanan, 14 Ia. 251; Wright v. Brosseau, 73 Ill. 381; Gauss v. Hobbs, 18 Kan. 500; Kountz v. Holthouse, 85 Pa. St. 235; Wolff v. Maden, 6 Wash. 514, 33 Pac. 975; Dean v. Collins, 9 L.R.A.(N.S.) note p. 57.

It is not contended that in his purchase of Campbell's interest in this firm there was any express agreement on Freeman's part

to assume any liability for the existing indebtedness, nor is there anything in the record from which such an agreement may be fairly implied. In this connection it is only shown that he recognized the property of the firm was subject to its debts; that he did not expect to obtain Campbell's interest free from the debts; that he did expect the intended corporation to pay them in taking over the property, and that he later advised Yost to apply proceeds of sales to their payment irrespective of the time of their creation. But the law will not construct a personal liability upon Freeman's recognition of a legal status of the property imposed by indebtedness with the creation of which he had no connection, nor upon his mere intention that [570] it should be paid by a corporate association that was never formed, which, if effected, would have exempted him from such liability. His liability for these prior debts, if it exists, must rest upon agreement, created either by express assent or resulting by legal implication from proof of such facts or circumstances as fairly indicated a purpose to become personally bound for their payment. There is nothing in this evidence that indicates that such was his intention; its tendency is in support of the contrary conclusion.

Nor will such an agreement be implied from the amount paid by Freeman for Campbell's interest. That amount may have been reckoned as the value of such interest after deducting the liabilities of the firm, but it cannot be said that the purchase of a partner's net interest in a business is of itself sufficient to create an assumption of his individual liability for existing indebtedness. Freeman recognized that he took Campbell's interest in the assets charged under the law with the payment of the debts, but there is a marked distinction between ownership of property burdened with a debt and personal liability for the debt itself. For the same reason the fact that the business as constituted after Freeman's purchase of Campbell's interest received the benefit of goods then on hand for which the old firm was indebted, did not render Freeman personally liable for such debts. If it be considered that the result of such purchase was the creation of a new firm, there was no novation of this indebtedness, and it retained its character as an obligation only of the old firm. The rule has been definitely announced that an incoming partner is not rendered liable for such debts because the new firm receives and uses as stock the old firm's property. *Brooke v. Evans*, 5 Watts (Pa.) 196; *Duncan v. Lewis*, 1 Duv. (Ky.) 183; *Morlitzer v. Bernard*, 10 Heisk. (Tenn.) 361; *Poindexter v. Waddy*, 6 Munf. (Va.) 418, 8 Am. Dec. 749.

We now pass to the consideration of the question of whether Freeman became a partner with Yost and Sewell following his purchase of Campbell's interest in the firm, upon the decision of which depends that of his liability for the two other classes of debts sued on. A decision of the question requires first, the ascertainment of their actual relation, and then the determination of whether a partnership was thereby constituted, giving effect to their intention, if possible, but having regard for the rule that parties may intend no partnership and yet form one. *Cothran v. Marmaduke*, 60 Tex. 370; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. There is no doubt but the Freeman had no partnership relation in view when he acquired Campbell's interest, or as to its being his purpose that his only association with the business should be that of a stockholder in a corporation to be formed for its conduct. In this initial stage of his connection it is clear that his status was simply that of a co-owner, having none of the elements of a partnership relation. The intended corporation, however, was not formed. While the purpose to form it still remained, it became necessary to defer it; and it was deferred as by common consent until the return of Freeman from his eastern trip. The business, though, went on, exactly as it had theretofore, under the same name, still under Yost's active management, in the full guise of a going concern, [571] and in the full exercise of its ordinary functions. It did not cease its operations to await the organization of the corporation, and it does not seem to have been considered that it should do so. It continued to make sales and to contract indebtedness for goods as in ordinary course throughout this entire interval; and, with the qualification that its scope was narrowed for the possible purpose of liquidation after Freeman's return in September, it may be said to have been operated as a going concern down to the time of the appointment of the receiver.

The question that arises is, did Freeman remain simply a naked co-owner during this period, or by such operation of the business with his knowledge and acquiescence, as is shown by the record, did the relationship of the parties undergo such change and assume such a nature as to create a partnership in law? There is nothing in the record to indicate that the continuance of the business in this manner was merely for the benefit of Yost and Sewell, or that its operation was other than for the equal benefit of the three owners and their common profit. Freeman, as has been stated, knew that it was being actively conducted, and permitted it, if not with approval, certainly without interference. He entrusted the management of

his interest to Yost, and must have known that it was being devoted to the common object of the business. As completely as did either Yost or Sewell in respect to their interests, he dedicated his interest to its purposes and aims, not by express direction, it is true, but by tacit agreement, having all the force of positive authorization. No other interference can be indulged than that his intention was that it should share the general fate of the business during this entire period. It amounted to a contribution to the capital, and it will not be supposed that he thus permitted its use without the expectation of sharing in whatever profits it might help to produce, in which his right to participate must, at all events, be conceded. *Manson v. Williams*, 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869. The result, necessarily, was the creation of a relation between Yost, Sewell and himself, as principals, that amounted to an agreed joinder of their interests in a common enterprise, its prosecution for their joint account, and an ensuing right in each of them to share in its net returns as such. He ceased to be a naked co-owner when, by a clearly implied agreement, he permitted his interest to be put to work as capital in the business. He thereby became a partner under elementary principles of the law upon the subject. It is immaterial that the business yielded no profits, and that in consequence Freeman shared in none. There existed by his tacit agreement a community of interests, the common enterprise, its operation for the joint account, and a right in the owner of each interest to share as a principal in its profits as such, which under the established rule in this State is a recognized test of the relation. *Miller v. Marx*, 65 Tex. 131; *Stevens v. Gainesville Nat. Bank*, 62 Tex. 499; *Kelley Island Lime, etc. Co. v. Masterson*, 100 Tex. 38, 93 S. W. 427; *Dilley v. Abright*, 19 Tex. Civ. App. 487, 48 S. W. 548. The law recognizes that partnership is the creature of contract, but it is not essential that parties agree to become partners by name, or that their agreement be an express one. [572] If by implied agreement they assume a relation that the law constitutes a partnership, they become partners in fact.

It is unnecessary to review the authorities, which are numerous, covering many different aspects of the relationship, and have been diligently presented in the able briefs of counsel for both the plaintiff and defendants in error. The question is resolved at last by a general principle, which furnishes an accurate and conclusive test and is as safe

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and authoritative a guide as an imposing number of adjudicated cases. Holding as we do that Freeman became a partner in the business, he was liable for the indebtedness sued on that was contracted after July 29, 1908.

We likewise hold that the new firm, and Freeman as a member of it, were liable for the third class of debts here involved; that is, those contracted before July 29, 1908, for goods delivered thereafter, as those transactions were equivalent to a direct purchase of such goods by the new firm.

The debt of the plaintiff below, Huttig Sash & Door Company, was that of the first class we have discussed, for which Freeman was not liable. Its debt being due by the old firm, it acquired no lien upon the property of the new firm seized under its attachment. 1 *Bates on Partnership*, sec. 555; *Schneider v. Roe* (Tex.) 25 S. W. 58; *Meyberg v. Steagall*, 51 Tex. 351.

Freeman should not be held liable, in our opinion, for the first class of debts herein discussed—that is, those that were contracted prior to July 29, 1908, for goods delivered before that date; but we approve the holding of the Honorable Court of Civil Appeals that he should be held liable for the second and third classes—that is, those contracted after July 29, 1908, for goods ordered and delivered subsequent to that date, and those contracted before July 29, 1908, for goods ordered before and delivered after that date. As the record furnishes us with no finding of fact that enables us to accurately classify the debts of all the defendants in error, it becomes necessary to remand the case. The judgments of the District Court and the Court of Civil Appeals are therefore reversed and the cause remanded with instructions that judgment be rendered upon the claims of the several defendants in error in accordance with this opinion.

Reversed and remanded.

#### NOTE.

In the reported case the court, "having regard for the rule that parties may intend no partnership and yet form one," holds that where persons by implied agreement assume a relation which in law constitutes a partnership they thereby become actual partners. The cases discussing the intent as essential to the creation of a partnership are collated in the note to *Westcott v. Gilman*, reported ante, this volume, at page 437.

**KENNEY**

v.

**SEABOARD AIR LINE RAILWAY  
COMPANY.**North Carolina Supreme Court—September  
30, 1914.*167 N. Car. 14; 82 S. E. 968.***Illegitimacy — Person Entitled to Re-  
cover for Death of Illegitimate Child.**

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 9, 35 Stat. 65, amended by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 [Fed. St. Ann. 1912 Supp. p. 335]), giving a right of action for the death of an employee for the benefit of the surviving widow, husband, children, or parents, and, if none, then of the next of kin dependent upon such employee, the next of kin are to be determined by the law of the state in which the action is brought, and under Revisal 1905, § 137, and section 1556, rule 10, providing that illegitimate children of the same mother shall be considered legitimate as between themselves and their representatives, and that their personal estates shall be distributed as if they had been born in lawful wedlock, and that, in case of the death of any such child without issue, his estate shall be distributed among his mother and such persons as would be his next of kin, if all such children had been born in lawful wedlock, a suit can be maintained for the death of an illegitimate child, whose mother is dead, for the benefit of his mother's legitimate children, who are dependent upon him.

[See note at end of this case.]

**Death by Wrongful Act — Dependents  
— Brother or Sister.**

In an action under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), for the death of an employee, for the benefit of his brothers and sister, evidence that the brothers and the sister are of tender age and without estate makes a question for the jury as to whether they are dependent upon deceased.

[See Ann. Cas. 1912B 733.]

Appeal from Superior Court, Bertie  
county: CONNOR, Judge.

Action for death by wrongful act. S. W. Kenney, administrator, plaintiff, and Seaboard Air Line Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion.  
**AFFIRMED.**

Murray Allen for appellant.

Winston &amp; Mattheus for appellee.

[14] CLARK, C. J.—This is an action for wrongful death under the Federal employers' liability act by the administrator of an illegitimate child. The Federal statute provides that such action shall be maintained "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." The mother of the intestate is dead, but left two sons and a daughter of tender age and dependent, born in wedlock.

The sole contention of the defendant requiring our consideration is that the expression "next of kin" as used in section 1 of this act is to be construed by the common law, disregarding the State law defining those words. Rev. 137, provides: "Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same [15] manner as if they had been born in lawful wedlock. And in the case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock." To same purport, Rev. 1556, Rule 10. *Powers v. Kite*, 83 N. C. 156; *McBryde v. Patterson*, 78 N. C. 412.

The Federal statute provides that this action may be brought in our courts. It is very clear that in North Carolina the two half-brothers and the sister of the intestate are his next of kin. It seems to us immaterial whether it were formerly otherwise in this State either by statute or the common law before any statute. The question is, Who was the "next of kin" at the time of such death in the State where the wrongful death occurred?

In *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 14 S. Ct. 504, 38 U. S. (L. ed.) 356, the Court held: "In States whose laws permit illegitimate children, recognized by the father in his lifetime, to inherit from him, such children are 'heirs' within the meaning of U. S. Rev. Stat. sec. 2269, which provides that when a party entitled to claim the benefits of the preemption laws of the United States dies before consummating his claim, his executor or administrator may do so, and the entry in such case shall be made in favor of his heirs, and the patent, when issued, inures to them as if their names had been specially mentioned."

In that case it was contended that the word "heirs" was used in the common-law sense. The Court said: "Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting; but it

does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State, which was both the *situs* of the land and the domicile of the owner." It has been often held that there is no common law for the Federal courts. The contention that the next of kin must be the same in all the States is not in accordance with the intent of the act. Indeed, there could be no uniformity if that was desirable, for there is no common law in Louisiana, and the common law is much modified in some of the States which we acquired from Mexico and France, and on many subjects the rule of the common law has been held differently in the different States. This case cites *U. S. v. Fox*, 94 U. S. 315, 24 U. S. (L. ed.) 192, and is cited *Moen v. Moen*, 16 S. D. 214, 92 N. W. 13.

In *Cutting v. Cutting*, 6 Fed. 268, where the act of Congress prescribed that the heirs of a married settled should receive a patent where he had not taken it out, it was held: "Who are the *heirs* of Charles Cutting is a matter to be determined by the local law—the law of Oregon—as is also the question who is his *wife*. Both these are left to the local law of Oregon," quoting from *Lamb v. Starr*, 1 Dedy 358, 14 Fed. Cas. No. 8,021: [16] "Who would be entitled to claim as heir (or wife) of the deceased would in all cases depend upon the law of Oregon at the time of the death."

The same ruling was made as to "next of kin" being governed by the law of the domicile in *McCool v. Smith*, 1 Black 459, 17 U. S. (L. ed.) 218.

The object of the act of Congress was to permit a recovery for wrongful death or injuries on interstate railroads, and that the recovery should go to the next of kin in the cases specified, the next of kin being determined by the law of the State in which the action is brought; for the status of the citizen, and the statute regulating descent and distribution, are purely State matters, with which Congress has no concern. By the reasoning in the case above cited the words "next of kin" are taken, like the word "heirs," as meaning those to whom the property would go; but who are the heirs and who are the next of kin are matters solely for State regulation.

The decision in *Taylor v. Taylor*, 232 U. S. 363, 34 S. Ct. 350, 68 U. S. (L. ed.) 638, decided February, 1914, holds that the right of action given to the employee survives to his personal representative for the benefit of his parents only when there is no widow, and that the act of Congress prescribing what class are the beneficiaries, and the order in which they take, controls, though the State statute fixes a different order of

succession. But there is nothing in this decision which militates against the holding in *Hutchinson Invest. Co. v. Caldwell*, *supra*, that who are the "heirs" or the "next of kin" is regulated by State statute.

The evidence as to the tender age of the children and their being without estate was sufficient evidence to be submitted to the jury on the question of their being dependent. And the fact has been found by the jury, who evidently gave due weight to the evidence of the earning capacity of intestate, as may be inferred from the smallness of the verdict. The exception to evidence need not be discussed.

No error.

WALKER, J. (*concurring*).—It seems to me that this case is governed by *McCool v. Smith*, 1 Black 459, 17 U. S. (L. ed.) 218, in which the question arose as to the law by which is to be determined who are the "next of kin" of a person, as those words were used in a Federal statute. The Court there held that the law of the domicile controlled, and not the common law; and in *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 14 S. C. 504, 38 U. S. (L. ed.) 356, relied on by plaintiff, it is said that in the *McCool* case the Court decided that the common law governed simply because the State of Illinois, where the parties were domiciled, had adopted the common law by statute, and, therefore, the term "next of kin" was construed by the local law, or law of the domicile, and that was the rule of the common law, as Illinois had then only the common law in force. She afterwards enacted a statute of [17] distributions. In the *Hutchinson* case the same rule was applied as to the meaning of the word "heirs," and the question was decided by the *lex loci rei sitae*—the law of the State where the land was situated. In the cases cited by defendant and also in the dissenting opinion, the Court was referring to the common law as applicable, when deciding upon the legal rights of the parties—such, for instance, as the question of negligence, where there is no Federal statute defining those rights, or, rather, the principles by which they are to be determined. The Court, therefore, held in the *McCool* case that the "next of kin," as referred to in the Federal statute, are those who answer to that description under the State law where the parties are domiciled, and not by the common law, unless that be the law of the particular State.

BROWN, J. (*dissenting*).—1. It is admitted that this action is brought under the Federal employers' liability act by the administrator of *Beb Isaac Capehart*, deceased, for the benefit of his next of kin. I admit that

under the statute in this State it is not necessary to allege or prove who are the next of kin in order to recover for the negligent killing of a person. But the language of the Federal statute is different, and the action is brought by the personal representative of the decedent "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee."

The right to recover damages for wrongful death is purely statutory, and did not exist at common law, and it follows that the provisions of the statute under which the particular action is brought must control it.

Under the Federal act it seems to be settled by the current of recent authority that the existence of beneficiaries, such as are named in the statute, must be pleaded and proved. Where a statute gives a right of action for death by wrongful act, if no such persons or class of persons exist as are described in the statute, as the beneficiary of the recovery, the action cannot be maintained. 13 Cyc. 335.

The liability of the defendant is made contingent upon the existence of one or more beneficiaries, or the fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary which meets the description of the statute, there is no right of action. *Melzner v. Northern Pac. R. Co.* 46 Mont. 277, 127 Pac. 1002.

In *Illinois Central R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1121, 47 L.R.A.(N.S.) 31, the Court of Appeals of Kentucky distinguishes the Kentucky statute, which is very much like ours, from the Federal act, and holds that under the act of Congress, if there is no one for whom a recovery can be had, there can [18] be no recovery. This Federal act is supreme in all actions brought to recover for the death of an employee in interstate commerce, and supersedes all State statutes creating a right of action for death by wrongful act. *American R. Co. v. Birch*, 224 U. S. 547, 32 S. Ct. 603, 56 U. S. (L. ed.) 879.

2. His Honor instructed the jury: "If the jury shall find from the evidence that Bob Isaac Capehart, Sills Hardy, Joe Hardy, and Nettie Hardy were all the children of the same mother, then I charge you that at the death of Bob Isaac Capehart the said Sills Hardy, Joe Hardy, and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead, that Bob Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'"

I am of opinion that the words "next of kin," as used in the Federal act, are not to be defined by the various and different statutes of the many States of this Union, but are to be construed in the light of the common law. It is not to be supposed that this act, intended for the benefit and protection of employees engaged in interstate commerce, should be administered differently in every State in the Union.

Mr. Doherty says: "It is inconceivable that the power of Congress to create a fund for the benefit of the widows and orphans of railroad employees, and to determine the beneficiaries of this fund or to make the personal representative trustee for its distribution in the manner set forth in the statute, is in any manner impaired or affected by the laws of a State governing the distribution of the estate of the deceased." *Doherty Liability of Railroads to Interstate Employees*, p. 241.

In its sphere the Federal act is complete, and in matters of substance it is not to be added to or changed by State regulations. In *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417, the late Justice Lurton says: "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States."

It seems to be pretty well settled by the decisions of the Supreme Court of the United States that in the construction of the laws of Congress rules of the common law furnish the true guide. *Rice v. Minnesota*, etc. R. Co. 1 Black 374, 17 U. S. (L. ed.) 147; *U. S. v. Sanges*, 144 U. S. 311, 12 S. Ct. 609, 36 U. S. (L. ed.) 445; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 U. S. (L. ed.) 773; *Standard Oil Co. v. U. S.* 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619; *U. S. v. American Tobacco Co.* 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663.

"The principles of the common law are operative upon all interstate transactions except so far as they are modified by congressional enactment." *Western Union Tel. Co. v. Call Pub. Co.* 181 U. S. 92, 21 S. Ct. 561, 45 U. S. (L. ed.) 765.

[19] In *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B 475, 34 S. Ct. 635, 58 U. S. (L. ed.) 1062, Mr. Justice Pitney says: "It is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several States,

to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to State control two of the essential factors that determine the responsibility of the employer."

The learned judge further says that "The adoption of the opposite view would in effect leave the several State laws and not the act of Congress to control the subject-matter." See also *Southern R. Co. v. Crockett*, 234 U. S. 725, 34 S. Ct. 897, 58 U. S. (L. ed.) 1564.

I am unable to see anything in the case relied upon by the plaintiff and cited in the opinion of the Court, *Hutchinson Invest. Co. v. Caldwell*, which militates against this position. In that case the Court was passing upon the rights of certain parties to pre-empt land, and it was in respect to local laws that the Court was speaking. The Court held what is universally known, that in respect to the designation of heirs the matter is to be determined by the *situs* of the land and the domicile of the owner. The construction which the majority opinion gives to the Federal statute in this case is opposed to the decision of the Supreme Court in the recent case of *Taylor v. Taylor*, 232 U. S. 363, 34 S. Ct. 350, 58 U. S. (L. ed.) 638, in which it is held that nothing in the State statute for the distribution of personal property can affect the right of the childless widow of an interstate railway employee, who was fatally injured while employed by the carrier in interstate commerce, to the entire net proceeds of a judgment for the resulting damages recovered by her as administratrix in an action against the carrier.

We think the elementary principles of statutory construction, applied to the act of Congress, compel the conclusion that in the use of the words "next of kin" Congress must have had in mind the well known meaning of those words according to the common law.

"It is a well settled principle that if a statute makes use of a word, the meaning of which is well known, and which has a definite sense at common law, it shall be received in that sense, unless for some reason it clearly appears that it was intended to use the word in a different signification." *State v. Engle*, 21 N. J. L. 360; *Adams v. Turrentine*, 30 N. C. 147.

"It is a sound rule that whenever a legislature in this country uses a term without defining it, which is well known in the English law, it must be understood in the sense of the English law." *McCool v. Smith*, 1 Black 459, 17 U. S. (L. ed.) 218; *Kitchen v. Tyson*, 7 N. C. 314.

[20] Any other construction of the act would bring disorder and confusion in its administration, as the laws of the State

differ in so many particulars. In North Carolina illegitimate children, born of the same mother, by statutory enactment are rendered legitimate as between themselves. In Alabama one illegitimate child can inherit from another of the same mother; in Missouri he cannot. In Tennessee and Vermont legitimate children inherit from illegitimate children, but illegitimate children do not inherit from legitimate children of the same mother. In Pennsylvania illegitimate children inherit from the mother and the mother from the children, but the children cannot inherit from each other. In Kentucky, when an illegitimate child dies intestate without issue, leaving no mother surviving, the legitimate children of his mother cannot inherit his estate. In North Carolina they can.

If the laws of the States governing the distribution of personal property are to determine who are next of kin, then in the event the deceased was a resident of another State at the time of his death, our courts would have to look to the law of the domicile to determine for whose benefit the action can be maintained, because "the law of the decedent's domicile governs the distribution of his personal estate." *Smith v. Howard*, 41 Am. St. Rep. 537, and note; *Leake v. Gilchrist*, 13 N. C. 75; *Albany v. Powell*, 55 N. C. 51; *Medley v. Dunlap*, 90 N. C. 527.

In the present case it appears that the deceased was a resident of Boykins, Va., at the time of his death, and we would have to look to the law of Virginia to determine whether an illegitimate child can leave next of kin as defined by the Federal act.

At common law the words "parent," "child," "next of kin," and words of similar import were held not to include illegitimates.

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested." *McCool v. Smith*, 1 Black 459, 17 U. S. (L. ed.) 218.

After stating this principle, the United States Supreme Court says: "This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it. The legal position of Alonzo Redman at the time of his death was what the common law made it. In the eye of the law he was *nullius filius*. He had neither father, mother, nor sister. He could neither take from nor transmit to those standing in such relations to him any estate by inheritance."

Prior to the enactment of Revisal, sec. 137, the courts of this State recognized the common-law rule that an illegitimate child can have no next of kin. In *Coor v. Starling*, 54 N. C. 243, Chief Justice Nash says: "Edwin Jones was a bastard, and by the common

law no such consanguinity existed between him and his bastard brother as enabled the [21] latter or his issue to claim any portion of his estate, real or personal. A bastard can be heir to no one, nor can he have any heirs, but of his own body; for, being *nullius filius*, he is kin to no one."

It has been frequently held by the State courts in which the question has arisen that terms of kindred used in statutes based upon Lord Campbell's act relate exclusively to legitimate and not to illegitimate children.

In South Carolina the statute gives the right of action to the parent or parents. The Supreme Court of that State has held that "A mother cannot recover as sole beneficiary under Lord Campbell's act for the wrongful death of her illegitimate child." *McDonald v. Southern Ry.* 71 S. C. 352, 51 S. E. 138, 110 Am. St. Rep. 576, 2 L.R.A. (N.S.) 640.

When the right of action for death by wrongful act is given to a "child" or "children" of decedent, it has been held by the Supreme Court of Georgia to mean legitimate child, and the mother of a bastard was denied the right to recover, notwithstanding statutes of the State of Georgia provided that "bastards may inherit from their mother and from each other, children of the same mother, in the same manner as if legitimate." *Robinson v. Georgia R. etc. Co.* 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L.R.A. 555.

In *Illinois Cent. R. Co. v. Johnson*, 77 Miss. 727, 28 So. 753, 51 L.R.A. 837, the Mississippi Supreme Court says: "An illegitimate daughter cannot maintain an action for damages caused by the wrongful killing of another illegitimate daughter of the same mother, since our statute creating causes of action for the death of a person, like Lord Campbell's act, confers the right to sue only on legitimate relatives."

"The father of an illegitimate child has no right of action for the child's death under Rev. Stat. 1894, sec. 267, giving a father a right of action for the death of a 'child,' although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him." *McDonald v. Pittsburgh, etc. R. Co.* 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L.R.A. 309.

There is nothing in the act of Congress which indicates that illegitimate children should be regarded as legitimate as between themselves and should take as beneficiaries under the act.

I am, therefore, constrained to hold, upon the admitted facts, that this action cannot be maintained.

Hoke, J., concurs in this dissent.

## NOTE.

### Right of Person Other than Parent to Recover for Death of Illegitimate Child.

In the few cases wherein the courts have passed on the question of the right of a person other than the parent of an illegitimate child, to recover for its death by wrongful act, the right has been held to depend on the construction to be given to the expression "next of kin," as used in the statutes which permit of a recovery for the wrongful death of a person, for the benefit of his next of kin. In the reported case, an action was brought for the wrongful death of an illegitimate child by an administrator, under the Federal Employers' Liability Act (Act April 5, 1910, c. 143, § 2; 36 Stat. 291, Fed. St. Ann. 1912 Supp. p. 335; amending Act April 22, 1908, c. 149; 35 Stat. 65, Fed. St. Ann. 1909 Supp. p. 584) which provides that such an action may be maintained "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." The court holds that who are next of kin within the meaning of the act is to be determined by the law of the state wherein the action is brought, and applying a North Carolina statute (Revisal § 137), holds that two half-brothers and a sister of an intestate illegitimate child, who were dependent on him for support, were entitled to sue as next of kin. That decision was affirmed by the United States Supreme Court, in *Seaboard Air Line R. Co. v. Kenney*, 240 U. S. 489, 36 S. Ct. 458, wherein the court sustained the holding of the reported case that the question of the definition to be applied to the term "next of kin" to whom a right of recovery was granted, was to be left to the determination of state law.

In the *District of Columbia* a statute (Code § 1361, 31 Stat. L. 1394, c. 854) provides that the damages occasioned by the death of the person killed by the wrongful act, neglect, or default, etc., "shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person." Another statute (31 Stat. L. 1250, c. 854, § 387) provides as follows: "The illegitimate child or children of any female, and the issue of any such illegitimate child or children, shall be capable to take from their mother, or from each other, or from the descendants of each other, in like manner as if born in lawful wedlock. When an illegitimate child or children shall die, leaving no descendants, or brothers or sisters, or the descendants of



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such brothers or sisters, then and in that case the mother of such illegitimate child or children, if living shall be entitled as next of kin; and if the mother be dead, the next of kin of the mother shall take in like manner as if such illegitimate child or children had been born in lawful wedlock." It is also provided (Code § 386) that in the distribution of personal estate there shall be no distinction between the whole and the half blood. Under the foregoing statutes it has been held that an action for death by wrongful act may be maintained by the personal representative of the decedent, who was also illegitimate, for the benefit of an illegitimate half brother of the deceased female. *Southern R. Co. v. Hawkins*, 35 App. Cas. (D. C.) 313, 21 Ann. Cas. 926.

In *Indiana*, an action for the wrongful death of an illegitimate child may be brought by an administrator for the benefit of the decedent's next of kin (§ 285, Burns' Rev. Stat. 1908). A statute conferring on illegitimate children the right to inherit from the mother provides as follows: "Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person" (§ 2098 Burns 1908, § 2474 R. S. 1881). Another statute conferring on the mother of an illegitimate child and her descendants the right to inherit from the illegitimate child provides as follows: "The mother of an illegitimate child dying intestate, without issue or other descendants, shall inherit his estate; and if such mother be dead, her descendants or collateral kindred shall take the inheritance in the order hereinbefore prescribed" (§ 3002 Burns 1908, § 2477 R. S. 1881). Applying the foregoing statutes it has been held that the phrase "next of kin" includes such persons as are entitled to inherit the personal property of the decedent, and accordingly includes the mother, half sister and half brothers of an illegitimate decedent. *L. T. Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N. E. 411.

The right of a parent to recover for the death of an illegitimate child, is discussed in the note to *Lynch v. Knoop*, 10 Ann. Cas. 807.

## EVANS

v.

LORD PROVOST, MAGISTRATES,  
AND COUNCIL OF CITY OF EDIN-  
BURGH, ET AL.

England—House of Lords—March 28, 1916.

[1916] 2 A. C. 45.

**Negligence — Door Opening Outward  
into Street — Liability.**

The owner of premises on which is a door opening outward into the street is not liable to a pedestrian who is injured by being struck by reason of the sudden opening of the door by a third person, the injury resulting from the negligent use of the door and not from the manner of its construction. [See note at end of this case.]

**Same.**

A municipality is not liable to a pedestrian injured by a door on private premises which opens outwards into the street, in the absence of a regulation forbidding such a construction which it has neglected to enforce.

[See note at end of this case.]

[45] Appeal from an interlocutor of the First Division of the Court of Session in Scotland [1915] Sc. Ct. Sess. 895, recalling an interlocutor of the Lord Ordinary.

[46] The appellant (hereinafter called the pursuer) raised an action against the respondents, the Lord Provost, Magistrates, and Town Council of the city of Edinburgh and Binnie and Russell (hereinafter called the defenders), for damages in respect of personal injuries sustained by him on July 6, 1914. The case made by the pursuer by his condescendence was as follows: The defenders Binnie and Russell were the owners of the property at 1, Tower Bank, Portobello. The other defenders were sued as the road authority in the city of Edinburgh, of which Portobello formed part. The property in question abutted on Ramsay Lane, Portobello, for a considerable length and was separated from it by a high wall. In this wall there was a door which gave access from the garden of the property on to the public street. A pavement which had been recently laid with granolithic skirted the wall for the whole length of the property and passed this door. The pursuer then averred as follows: "Ramsay Lane is a thoroughfare between the promenade at Portobello and the High Street of the town. It is a frequented street."

The pursuer about 1:30 on the afternoon of July 6, 1914, was proceeding with some haste along the pavement of Ramsay Lane, and was passing the property in question,

when the door suddenly opened outwards, and the pursuer was struck violently on the face by it and sustained very severe injuries. The pursuer was not aware at the time of the accident that the door opened outwards. This door had for more than twenty years before the accident been so constructed that it opened outwards across the pavement, forming when open a complete obstruction to passage along the pavement. The door was a main access to the house at 1, Tower Bank and was in frequent use. As constructed at the time of the accident the door constituted a grave danger to the public and one which was obvious to the defenders. The pursuer averred fault against the owners of the property for having on their premises a door of this dangerous construction, and he averred fault against the corporation of Edinburgh in failing to remove this dangerous obstruction to the street, and he alleged that both sets of defenders were liable for the accident both at common law and by statute. As against the owners of the property the pursuer founded upon the Police and Improvement (Scotland) Act, 1862, s. 165, and the [47] Burgh Police (Scotland) Act, 1892, s. 161, but upon the present appeal he did not allege any statutory liability against these defenders. As against the corporation the pursuer founded on the Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. cxxii.), s. 151, and the Roads and Bridges (Scotland) Act, 1878, ss. 3, 94, 123, and Sched. C, s. 105. The defenders pleaded that the averments of the pursuer were irrelevant.

The Lord Ordinary (Lord Anderson) granted an issue against both sets of defenders. He found a case relevantly averred against the owners of the property at common law but not under statute, and against the corporation of Edinburgh under the Roads and Bridges Act but not at common law; but on appeal the First Division (the Lord President, Lord Skerrington, and Lord Cullen) recalled the interlocutor of the Lord Ordinary and dismissed the action.

*Constantine Gallop* for appellant.

*Clyde, D. F., Walter Robertson, William Watson, K. C., and F. A. Macquisten* for respondents.

*W. Drummond Milliken*, for *M. Graham Yooll, S. S. C.*, Edinburgh, agents for appellant.

*Beveridge, Greig & Co.* for *Sir Thomas Hunter, W. S.*, Town Clerk, Edinburgh, agents for respondent corporation of Edinburgh.

*Wetherfield, Son & Baines*, for *Hosack & Hamilton, W. S.*, Edinburgh, agents for respondents *Binnie and Russell*.

[48] LORD BUCKMASTER, L. C.—My Lords, in this case on July 6, 1914, as the appellant

was going down Ramsay Lane, Portobello, he ran his head against a door which was suddenly opened from a house that is in the possession of two of the respondents, Messrs. Binnie and Russell. It appears that this door was a door which opened from a garden of the premises into the road, and the allegation made by the appellant with regard to its use is that it was suddenly opened on the occasion in question, that he was consequently struck violently upon the face, and I regret to say suffered grave, and it is suggested by his counsel in some respects permanent, injuries. The question is, Who is responsible for the results of this accident? It is alleged by the appellant that the owners of the premises are responsible, and also the Lord Provost and the magistrates of the city of Edinburgh. So far as the respondents Messrs. Binnie and Russell are concerned, the case against them rests upon this—that they were the owners of premises, part of which consisted of a door made to open outwards, and that [49] that was the possession of a dangerous structure rendering its owners liable to any person who suffered injury by reason of the door being opened across the highway.

Now it is not suggested anywhere in the condescendence in this case that the door on July 6, 1914, was opened by the respondents or by any one in their service; the claim against them begins and ends with the allegation that they were responsible for having premises which, if negligently used, might cause injury to a passer-by.

My Lords, in spite of the industry of counsel for the appellant, it has been impossible to find any authority for such a proposition as that. It is perfectly true that if a man has premises so constructed that they may become a danger to passers-by—as for example by having affixed to the premises a projecting lamp which he negligently allows to get out of repair so that it falls upon the head of a passenger—he is liable for the accident that results. But that case has no relation to the case where the premises in themselves and apart from their use are perfectly harmless, as in the present instance. The utmost that can be urged here is that the respondents own premises which, if carelessly used by the occupant, might be a cause of injury to an innocent passer-by. That is insufficient, in my opinion, to establish any liability against them for the accident that arose.

Then if that be so, the claim against the Lord Provost and magistrates of the city of Edinburgh cannot be established on the ground of their allowing premises to be in a dangerous condition at common law; it is, however, sought to render them liable by virtue of two statutes; the one is the Edinburgh Municipal and Police Act of 1879, s.

151 of which provides that "No person shall make any encroachment, obstruction, or projection in, upon, or over any street, court, foot-pavement, or footpath," and that if such obstruction is in fact made "the magistrates and council may order the removal of such encroachments, obstructions, or projections;" and every person who fails to comply with the direction of their removal shall be liable in damages. In my opinion, the words of that section have no application to a door that is normally entirely within the proper limit and boundary of the man's premises and only projects over the highway when [50] it is opened. Encroachment, obstruction, and projection in that section mean something in the nature of a permanent encroachment, obstruction, or projection, something that can be removed by order of the magistrates, and failure to remove which will render the owner of the premises liable in damages. It has no relation to a door which, unless it is opened, neither encroaches on nor projects over nor obstructs the highway or footpath.

The other statute requires a little more careful consideration. It is said on behalf of the appellant that by virtue of the Roads and Bridges (Scotland) Act of 1878 there was power given to the authorities to require the removal of this door or the alteration of the premises so that the door should be permanently closed. That arises in this way. By s. 123 it is provided that certain sections, including ss. 96 to 108, of an Act passed in 1831 in the reign of William IV. should be incorporated, and from and after the commencement of the said statute should extend and apply to all highways made or to be made within any of the counties to which the statute applied, of which the county of Edinburgh is one. Now among the sections so included there is s. 105, which is set out in Sched. C. to the statute, and that provides "that no gate of any park, field, or enclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open except the hanging post thereof shall be fixed or placed so far from the centre of any part of such road as that no part of such gate shall when open project over any part of such road or of any footpath belonging thereto;" and then there are powers given to direct the removal of the obstruction of the gate or the door and a penalty if the request for its removal is not complied with.

That section would certainly apply to the present case, if in fact Ramsay Lane were a highway within the meaning of s. 123, and for the purpose of seeing whether it is a highway or not it is necessary to examine the definition section of that statute. That section is s. 3, and it defines "highway" as

including among other things certain streets. It expressly includes streets or roads that were within the burgh and were not vested at the commencement of the Act in the local authority. It does not include streets that were so vested or streets which any person [51] was at the commencement of the Act bound to repair at his own expense. If, therefore, it were desired to invoke the aid of that statute it would be essential to show that Ramsay Lane was a street of such a character as that it would be included in the statutory definition of a highway. The condescendence in this matter refers to this street in general terms as a frequented street, and it gives no further information as to what its character is or was—whether in 1878 it was vested in the local authority or not, and whether in 1878 any person was bound to maintain it at his own expense; in other words, the appellant has not defined this street in such a manner as to show that the provisions of the Act of 1878 apply, and consequently he is unable to obtain whatever advantage he might have derived had he been able to bring himself within the shelter of this protection.

The claim, therefore, so far as it is laid against the Lord Provost and magistrates of the city of Edinburgh falls under the statute as it failed against the owners at common law, and I only desire in conclusion to say that I must not be taken as assenting to the proposition urged on behalf of the appellant that even if this door were to be regarded as an encroachment or obstruction under the Act of 1879, or even if the street were to be taken as within the definition of a highway under the Act of 1878, it would therefore follow necessarily upon the facts as they are alleged in the condescendence that the Lord Provost and magistrates of the city of Edinburgh would be responsible for the unfortunate accident that has occurred.

VISCOUNT MALDANE.—My Lords, I have very little to add. I agree with what is proposed by the noble and learned Lord on the woolsack, and with the reasons which he has given for the motion which he will propose.

The appellant seeks to make out his case on a twofold basis. In the first place he says that at common law he is entitled to succeed against the owners of the property on the ground of their breach of duty in so far as they have kept a door dangerously constructed in their wall and that he has suffered from the natural and probable consequences of keeping a door in this fashion. But, my Lords, I am far from satisfied that there was any negligence [52] or dereliction of duty at common law on the part of the owners in keeping the door in this fashion.

A door so made certainly could have been rightly originally so constructed. In the absence of statutory prohibition there was no reason why the door should not be made opening out on to the highway, the owners either keeping it locked or imposing such injunctions upon those who made use of it as would secure the safe opening. But it appears that in the present case some one who is not named or specified is alleged to have opened this door with undue rashness and rapidity. There is no reason why the door should have been so opened, and if it has been so opened, then I think the consequences arise, not from the door being of this structure, but from the use which has been made of it by somebody who is not shown to have been acting under the authority of the owners so as to make the maxim *respondet superior* apply. For that reason I think the case fails on its common law footing.

Then, turning to the statutes, there are two statutes which are invoked. One is the Edinburgh Police Act of 1879, under which it is said that this is an obstruction of the highway. But reading the Act carefully, for the reasons which have been assigned by the Lord Chancellor, I am of opinion that this door opening outwards was not an obstruction within the meaning of that Act. An obstruction means something permanently projecting out into the highway and not a door which may or may not at any given moment be opened so as to occupy part of the space of the highway.

My Lords, the second statutory provision which was relied on was the Roads and Bridges (Scotland) Act of 1878, which was invoked for the purpose of showing that this Ramsay Lane was a highway under the control of the corporation of Edinburgh. But, my Lords, for the reasons which have been given by my noble and learned friend already, and which I need not repeat, I do not think that there are sufficient allegations in the condescendence to enable the appellant to succeed upon that part of his case. The appeal as it is presented at the Bar fails, and I will only say that I can see nothing which could have been urged by the appellant's counsel which he has failed to bring forward. I think he has said all that could be said on behalf of his client.

[53] LORD KINNEAR.—My Lords, I agree entirely with both my noble and learned friends who have preceded me, and I do not think it necessary to add anything to what they have said.

LORD ATKINSON.—My Lords, I also concur. In my view this case does not fall within either of the statutes that have been mentioned, for the reasons already pointed out

by my noble and learned friend on the wool sack.

As to the question at common law, negligence is a breach of duty, and to give a cause of action it must be a duty owed to the pursuer. Now what is the duty here which at common law the owners of these premises owe to the pursuer? There is no duty upon them at common law not to keep premises with a door opening on the street where that door while unopened is a perfectly harmless thing. Neither do I think that there is a duty cast upon them owing to a mere passer-by to prevent any person ever opening the door. The peculiarity of this case is that there is no averment that the person who did open the door was a person for whom the owners of the premises were in any way responsible. So that in order to succeed, inasmuch as this door is perfectly harmless if kept closed, the pursuer should show that the defenders owed a duty to him never to allow any person to open it on to the street so that it would be an obstruction. I do not think the common law attaches any such duty to the owner of premises. On these grounds I think there is no cause of action disclosed in these proceedings.

Lord Parker of Waddington. My Lords, I agree.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed.

#### NOTE.

##### **Liability for Injuries Caused by Door or Gate Opening Outwards in Street.**

Where the evidence does not show that doors opening outwards into a street so as to obstruct the passage of users thereof, have been defectively constructed, or that they constitute a nuisance or a danger to passers-by, it has been held that there is no liability on the part of the owner or of the municipality for injuries received by a pedestrian by reason of his coming into contact with a door so opened. *Kies v. Erie*, 135 Pa. St. 144, 19 Atl. 942, 20 Am. St. Rep. 867. And see the reported case.

In *Kies v. Erie*, *supra*, it appeared that the plaintiff was injured by being struck by the door of a fire engine house which was suddenly opened as she was passing by on the sidewalk, and which, in opening, swept outwards and across a considerable portion of the pavement. It was held that she could not recover either under the doctrine of *respondet superior* on the ground that the injury was the negligent act of a municipal fireman, nor could she recover on the ground that the doors were defectively constructed and therefore dangerous to citizens using the

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pavement. The court said: "It was urged, however, that the injury of which the plaintiff complains was not the result of the negligence of the firemen, but of the manner in which the building was constructed. If this were so, it might present a different question. But the evidence does not sustain this allegation. It is true, the doors of the engine house opened outwards, and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the doors suddenly and with great violence. In such case, as they swept across a considerable portion of the pavement in opening, it can be readily seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject was substantially as follows: 'When the bolts are pulled, you have to start the doors a little bit, and then the spring takes hold, and helps swing the door open. Sometimes they are opened quick, and sometimes not so quick. If the wind is blowing, it is difficult, and you have to follow the door, and push it along; and when there is no wind, they swing freely.' As the plaintiff was nonsuited, she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify a jury in finding that the doors of the engine house were defectively constructed, and dangerous to citizens using the pavement. It is evident the only object and effect of the springs was to aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened violently and rapidly, as contended by the plaintiff, it was the result of a push by the person who opened it. For his carelessness or negligence, the city, under all the authorities, is not liable; and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury."

But where a door so constructed that it opens out over the sidewalk constitutes a nuisance, it has been held that the owner of the premises, and his tenant, are liable for injuries received by a passer-by who is injured by the opening of the door. *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. S. 442, *appeal dismissed* 166 N. Y. 634, 60 N. E. 1112. In that case it appeared that a barn stood practically flush with the sidewalk, and had large heavy doors, which in opening swung over the sidewalk a little more than a third of its width, and that the doors, having been negligently left unfastened, swung out and struck the plaintiff, injuring her. The court said: "That this construction constitutes prima facie a nuisance seems to us clear."

In *Campbell v. Chillicothe*, 239 Mo. 455, 144 S. W. 408, 39 L.R.A.(N.S.) 451, it appeared that the plaintiff was injured by running into or against a wooden picket gate in front of a residence, which was standing partly open on or across the sidewalk. There was evidence to the effect that the gate had been rehung several times, that the top hinge had broken a week or ten days before the accident so as not to hold the gate, and that the gate would naturally lean out if not kept closed, and the latch would not fasten. It was held that if the gate was so constructed and used that at times, while no one was passing through or holding the same, it would stand open on or across the sidewalk, and if its condition and use were such that an ordinarily prudent person, responsible for and knowing its condition and use, would have remedied the same, then the city was liable, provided it had notice of that condition, or by the exercise of ordinary care, could have discovered it, in time to remedy it prior to the injury, and that it was not necessary that the city should know that the gate was standing open at the particular time of the injury.

*Knight v. Foster*, 163 N. C. 329, 79 S. E. 614, 50 L.R.A.(N.S.) 286, was an action for damages for personal injuries sustained by the plaintiff by reason of his coming in contact with a gate opening on the sidewalk in front of certain premises owned by the defendant, which gate the plaintiff alleged had been left open and so long neglected, without any fastenings, that it had become permanently fixed in the sand on the sidewalk. The court said: "There was evidence from the tenant that the owner in this case contracted to do the repairing, and had promised time and again to repair the gate. There was evidence also that the owner knew of the ruinous condition of the premises, and that the gate had been in this condition for four or five months and one of the witnesses testified that it had been in that condition for three years. We have found no case in which the landlord has been held not liable to a third person for an injury resulting from a street obstruction or a defect known to the landlord to exist at the time of the renting and permitted by him to continue. It was in evidence that the ordinance of the city, section 40, adopted in 1902, and which is still in force, provides: 'It shall be unlawful for any person to have on their premises a gate so constructed as to swing out on the sidewalk of any street or alley of the city of Wilmington when open.' This gate swung outward, and was in that condition when the premises were first rented to the present occupant, seven years ago, which was at a date subsequent to the adoption of the ordinance. The liability for any injury resulting therefrom is necessarily upon the owner. . . . Even if the ordinance

had been passed subsequent to making this lease, this was a change, and not a repair, and hence the duty of making it devolved upon the owner, and not upon the tenant."

In *Allen v. Linguist*, 43 App. Cas. (D. C.) 538, an action to recover for injuries sustained by a pedestrian by coming in contact with a gate negligently permitted to swing outwardly over the sidewalk from a fence enclosing the parking in front of the defendant's premises, it was held that the defendant was liable for the injuries so received, though he did not own the parking or the fence, but merely had the right to use the land so enclosed.

GIST ET AL.

v.

JOHNSON-CAREY COMPANY.

Wisconsin Supreme Court—June 17, 1914.

158 Wis. 188; 147 N. W. 1079.

**Sunday — Validity of Contract.**

A contract made and delivered on Sunday is void.

**Ratification of Sunday Contract.**

Such contract is incapable of ratification. [See Ann. Cas. 1912A 293.]

**New Contract — Evidence Insufficient.**

Evidence in an action upon a contract for grading and construction work, executed on Sunday, held not to show a new contract thereafter made between the parties.

**Trial — Duty to Submit Issue — Necessity of Request.**

Under the express provision of St. 1913, § 2858m, the trial court, in the absence of any request to submit an issue to the jury, may find thereon in conformity with its judgment.

**Sunday — Validity of Contract — Part Performance.**

Partial payments made under a Sunday contract are not sufficient to import a new contract.

**Building Contract — Waiver of Invalidity.**

In an action to recover the balance upon a grading contract, evidence held to show that defendant did not require plaintiff to quit work, even if defendant had the right to do so.

**Invalid Contract — Recovery on Quantum Meruit.**

Where a contract, classifying the material to be removed by plaintiff in his grading and construction work, is void because made on Sunday, plaintiff is entitled to recover the reasonable value of the work, regardless of the classification.

**Trial — Immaterial Issues.**

It is not error to refuse to submit immaterial issues.

**Sunday — Invalid Contract — Estoppel to Repudiate.**

Under a subcontract for grading and construction work, void because made and delivered on Sunday, and in place of which no new contract was made, plaintiffs, by execution of the work and by accepting and giving receipts for payments made on the basis of estimates by the defendant's engineers, are not estopped to dispute the correctness of the estimates, where defendant knew that the payments were not received as settlements but were subject to final adjustment, and had full knowledge of plaintiffs' claim before it settled with the general contractor, so that it could not have been misled or prejudiced.

[See note at end of this case.]

**Same.**

The terms of a Sunday contract cannot be given life upon the principles of estoppel.

[See note at end of this case.]

**Trial — Failure to Request Submission of Issue — Presumption.**

Under the express provision of St. 1913, § 2858m, an issue of settlement in an action for the balance due upon a contract for grading, as to which defendant requested no submission, will be deemed, after judgment for plaintiff, to have been found by the court against defendant, where there was ample evidence to support such finding.

**Appeal — Review of Question of Fact.**

Where there is any credible evidence to support the verdict, it cannot be disturbed.

**Review — Immaterial Question.**

The objection that a finding was immaterial, and that it was not necessary to submit the question to the jury, will not be passed upon on appeal, where the finding is supported by the evidence.

**Pleading — Trial Amendment.**

In an action for the balance due upon a contract for grading, which, after several days of trial and after the close of plaintiff's evidence, was shown to have been made and delivered on Sunday, as previously known to defendant, the allowance of an amendment, so as to proceed on the theory that plaintiff was entitled to recover on a quantum meruit, setting up nothing which could have surprised the defendant, who had had ample time to prepare for trial, is not an abuse of the trial court's discretion.

[See Ann. Cas. 1914A 1268.]

**Trial — Amendment of Pleadings — Necessity of Reimpaneling Jury.**

Such action, after amendment, is properly tried before the jury impaneled to try it under the original issues.

**Pleading — Amendment without Terms.**

In such action the allowance of plaintiffs' amendment without terms is not an abuse of the trial court's discretion.

[See Ann. Cas. 1913A 600.]

Appeal from Circuit Court, Columbia county: FOWLER, Judge.

Action for services. William M. Gist et al., plaintiffs, and Johnson-Carey Company, defendant. Judgment for plaintiffs. Defendant appeals. **AFFIRMED.**

[190] The plaintiffs sued to recover for services performed in the construction of a railroad and doing certain grading. The original complaint was amended, and under the amended complaint the plaintiffs set out two causes of action, the first upon an express contract alleged to have been entered into between the plaintiffs and defendant on April 25, 1910, a copy of which contract is attached to the complaint. The first cause of action alleges the execution of the contract with the defendant which provided that the plaintiffs would do the grading between stations 3464 and 3755 in Columbia county on the new line of railroad then being constructed between Clyman and Necedah, Wisconsin; that Winston Brothers Company was the principal and general contractor of the railway company and that the defendant was the subcontractor of said Winston Brothers Company; that before the commencement of the action the plaintiffs performed all the terms of their contract; that in grading said line between said stations and in the performance of said contract the plaintiffs necessarily excavated, hauled, and moved earth and rock as follows, to wit:

Earth, 205,745 cu. yds. at 27c. per cu. yd. ....	\$55,551 15
Loose rock, 29,734 cu. yds. at 42c. per cu. yd. ....	12,488 28
Solid sand rock, 50,000 cu. yds. at 70c. per cu. yd. ....	35,000 00
Solid lime rock, 44,898 cu. yds. at 80c. per cu. yd. ....	35,918 40
	<hr/>
	\$138,957 83

That by the terms of said contract the defendant agreed to pay said prices for said work, and prior to the commencement of this action the defendant became indebted to the plaintiffs in the sum of \$138,957.83.

It is further alleged that the defendant agreed to provide for plaintiffs' right of way between certain stations for the grading work specified in the contract, and that it failed for a long period of time to do so, in consequence of which plaintiffs sustained damages; that defendant has paid the plaintiffs the sum of \$88,341 and no more.

[191] For a second cause of action, in addition to other facts pleaded, it is alleged that several months prior to the commencement of this action a controversy arose between the parties hereto, principally regarding the

excavation of large amounts of material moved by plaintiffs in the prosecution of the work embraced in said contract between the parties, the defendant insisting that it would pay plaintiffs therefor only after the receipt of a final estimate of and according to the classification placed thereon by the chief engineer of the railway company, and the plaintiffs insisting, as they now insist, that they were and are in no manner bound by the classification or estimate thereof which should be placed thereon by the engineer, and that final settlement would not be accepted by them except on the basis of a classification of materials which should accord with the actual facts; that the estimate of the railroad company and the engineers, particularly as regards the classifications of large quantities of material moved by plaintiffs in the execution of the contract, was made without investigation and in ignorance and disregard of the nature of such material and of the meaning of the contract and at variance with the true and proper classification thereof; that in grading said line and in the performance of said contract the plaintiffs necessarily excavated, hauled, and moved earth and rock as follows:

Earth, 205,745 cu. yds. at 27c. per cu. yd. ....	55,551 15
Loose rock, 29,734 cu. yds. at 42c. per cu. yd. ....	12,488 28
Solid lime rock, 44,898 cu. yds. at 80c. per cu. yd. ....	35,918 40

That the defendant agreed to pay the plaintiffs for the excavation, hauling, and moving of the aforesaid materials the amounts specified; that in doing said work, and particularly at what was known as cut number 1, the plaintiffs necessarily excavated, hauled, and moved 50,000 cubic yards of material other and in addition to the said earth, loose rock, and solid lime rock above mentioned; that said 50,000 cubic yards did not consist of nor was the same customarily or generally [192] known as earth, loose rock, solid lime rock, or solid granite, but of a different formation; that at the time of the commencement of the excavation of said additional 50,000 cubic yards it was understood and agreed between the parties that compensation for the hauling thereof should not be based upon the prices named in said contract for the handling of earth. Plaintiffs upon information and belief allege that said additional material was not earth, loose rock, solid sand rock, solid lime rock, or solid granite rock, but that the material was not within the contemplation of the parties when said contract was made and for the hauling of which the contract makes no provision, and that the same was excavated, hauled, and

moved at the special instance and request of defendant, and that the defendant agreed to pay to the plaintiffs the reasonable value per cubic yard for the excavating, hauling, and moving thereof, and that such reasonable value was and is seventy cents per cubic yard.

The parties went to trial upon the foregoing complaint and answer thereto. After the plaintiffs had made out their case and rested, the defendant moved for a nonsuit as to the second cause of action, which was granted. The defendant then raised the point that the contract set forth in the complaint was executed on Sunday, therefore was void, and insisted that the complaint be dismissed. The court refused to dismiss the complaint, but ordered the parties to proceed on the theory that plaintiffs were entitled to recover on *quantum meruit* and ordered the pleadings amended. The pleadings were amended accordingly and further proof was made by plaintiffs and evidence upon the issues also offered by defendant. The jury returned the following verdict:

"(1) Was there a general custom prevailing in this section of the United States at the time the work in controversy herein was performed, as between contractors and subcontractors engaged in railroad construction work, in the absence of express stipulation or agreement upon the subject, that the subcontractor should accept and be bound by the classification [193] and estimates of the railway company's engineer in computing the subcontractor's compensation? A. No.

"(2) What was the reasonable value of the work performed by the plaintiffs? A. \$130,000."

Judgment was rendered for the plaintiffs on the verdict for the amount of the reasonable value of the work performed by the plaintiffs, with interest, less the amount which had been paid, from which judgment this appeal was taken.

*Ely & Bush* and *Daniel H. Grady* for appellant.

*W. S. Stroud, R. F. Clark* and *Olin, Butler & Curkeet* for respondents.

[194] KERWIN, J.—It is assigned as error that the court erred in refusing to answer question number 2 of the special verdict \$107,728.10, and in refusing to instruct the jury in reference to question number 2 as requested, and in refusing to include in the special verdict questions proposed by counsel for defendant.

These assignments of error go to the point insisted upon by counsel for appellant, namely, that the plaintiffs were bound by the alleged contract set up in the complaint as having been executed on April 25, 1910, and remade afterwards, and also by estoppel. It

was conceded, after plaintiffs rested, that this contract, although alleged to have been executed on April 25, 1910, and bearing that date, was in fact fully executed and delivered on April 24, 1910, which was Sunday, and was therefore void. The defendant, however, contends that, since the plaintiffs set up this contract in their complaint and made proof of the execution of the work under it, they adopted it, and that their acts amounted to the making of a new contract on the terms of the Sunday contract, therefore they are bound by it. This contention is not consistent with counsel's position on the trial, since he insisted there, after plaintiffs had made their proof, that the contract set up in the complaint was void because executed on Sunday, therefore no recovery could be had on it.

The contract having been made and delivered on Sunday was void and incapable of ratification. *King v. Graef*, 136 [195] Wis. 548, 117 N. W. 1058, 128 Am. St. Rep. 1101, 20 L.R.A. (N.S.) 86; *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. It is insisted, however, by counsel for appellant that a new contract was made by the parties on the same terms as the Sunday contract and that their acts in execution of the Sunday contract and in performing the work under it show this. We cannot agree with counsel in this contention. We think the evidence not only fails to show a new contract, but on the contrary shows that no new contract was made. In order to make a contract on the terms specified in the Sunday contract the minds of the parties must meet on the terms of the contract. The acts shown in execution of the work were clearly done, and so understood by the parties, under the Sunday contract. And it further appears that in the execution of the work and performance under the Sunday contract the parties did not agree upon its terms, especially on the terms respecting classification and estimates. Neither party, upon the undisputed evidence, had any thought of making a new contract on the terms of the Sunday contract, but both were operating under the Sunday contract, the construction of which they did not even agree upon.

Even if acts of the parties under a void contract could have the effect of infusing into it life by way of creating a new contract, the execution must be such as to bring the minds of the parties in accord upon all terms of the contract. This clearly was not the case here. The Sunday contract was not even fully executed or the terms of it either agreed upon or performed, at least as to payment or amount due, after the day of its execution, April 24, 1910.

The court below was asked to change the answer of the jury to the second question of



the special verdict from \$130,000 to \$107,728.10, the theory of counsel for appellant being that, if a new contract was made on the terms of the Sunday contract, the amount of plaintiffs' recovery would be limited to \$107,728.10 less the amount paid. No issue of new contract [196] was made by the pleadings or insisted upon before the plaintiffs rested, and as soon as the question was raised that the contract was made on Sunday, therefore void, further proceedings were had on *quantum meruit*. No request was made to submit to the jury the question whether a new contract had been made, and the court below was therefore authorized to find on the subject under sec. 2858m, Stats. The evidence was ample to show no new contract was made; indeed it is very doubtful whether there was sufficient evidence to support a finding that a new contract on the terms of the Sunday contract was made. But we need not and do not decide that question.

Partial payments made under a Sunday contract are not sufficient to import a new contract. *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808; *Reeves v. Butcher*, 31 N. J. L. 224; *Pillen v. Erickson*, 125 Mich. 68, 83 N. W. 1023; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77. Moreover, the payments made were made under monthly estimates, and were not final estimates, but subject to change both as to estimates and classification of material.

A contention is made by counsel for appellant that prior to the date of the Sunday contract and on April 20, 1910, plaintiffs sent a telegram to defendant offering to do the work, and because it afterwards did the work there was created a contract prior to the Sunday contract, similar substantially to the Sunday contract. This contention cannot be sustained for many reasons. It is clear from the evidence that the work was not done under such alleged contract and that the parties never understood that it was; that no contract similar in terms to the Sunday contract was made prior to April 24, 1910. The defendant did not even request the submission to the jury of a question as to whether such a contract was made.

After the work had been partially performed a controversy arose between plaintiffs and defendant as to classification of material being removed by plaintiffs, the plaintiffs claiming [197] a different classification than that being made by defendant in its monthly estimates. Thereupon defendant sent to George W. Gist, one of the plaintiffs, the following telegram: "In case no classification is given you, do you wish to pull off that work? Would like to know it now as we have outfit and organization ready to

install. Answer." Defendant claims plaintiffs did not answer, as Carey, of defendant company, testified that he did not receive any reply. Carey further testified that after sending the telegram he had a talk with Gist, of plaintiff company, about pulling off the work, and asked him if he did not want to pull off, and that Gist said he had been to great expense getting on there and did not feel like pulling off. That Carey then offered him \$1,000 or \$2,000, if he would pull off. Carey testified: "I told him if it was not satisfactory to him he could pull off. I don't remember just what he said, but he didn't want to." Gist testified that he replied to the telegram and that about eighty per cent or more of cut number 1 had been excavated when the telegram was received.

It is quite obvious from the evidence that defendant did not consider it had the right to discharge plaintiffs. The evidence merely shows that defendant was endeavoring to get an agreement with plaintiffs to discontinue the work. Even if it be conceded that defendant had the right to force terms or require plaintiffs to quit, the evidence does not show that it did so. Had the defendant given plaintiffs peremptory orders to "pull off" or continue under classification as claimed by defendant, the situation would be different.

Plaintiffs continued on the work to completion, and it is clear from the evidence that no agreement was made as to classification or terms of the contract. The learned trial judge in his opinion, referring to the fact that defendant offered to relieve the plaintiffs from their contract, said:

"But the plaintiffs, as defendant knew, insisted on their right to complete the job and be compensated according to their contract as they construed it. The defendant never demanded [198] of the plaintiffs to accept the railway engineer's estimates and classification or quit the job, but only offered to take the work off their hands and do it itself if the plaintiffs wished. Both parties understood and acted on the understanding that the plaintiffs could not lawfully be prevented from completing the work under the said contract."

Both parties were in fact acting under the Sunday contract, though not agreeing upon the construction which should be given its terms.

Error is assigned for refusal to submit the following questions to the jury as part of the special verdict:

"(1) Was the material in cut number 1, referred to as hard material, properly classified as earth?"

"(2) Did Mr. Gist by accepting monthly payments and signing the accompanying receipts, in view of the written statements, estimates, and classifications accompanying said

receipts and statements and all the conversations or communications had by him with or from Mr. Carey or Mr. Walsh respecting the matter of the railway company's engineer's classifications and estimates, give the defendant to understand that he would accept payment according to the estimates and classifications of the railway company's engineer?

"(3) Did Mr. Gist, by accepting monthly payments and signing the accompanying receipts, in view of the written statements, estimates, and classifications accompanying said receipts and statements and all the conversations or communications had by him with or from Mr. Carey or Mr. Walsh respecting the matter of the railway company's engineer's classifications and estimates, give the defendant to understand he would accept payment according to the engineer's estimates and classification in the manner and at the rate of compensation shown upon said statements?"

"(4) Did the defendant allow Mr. Gist to proceed with the work because of such understanding?"

"(5) Did the defendant act to its prejudice or detriment because of such understanding?"

Respecting request No. 1, as the court below held, it was wholly immaterial, because the contract classifying the material was void, and the plaintiffs were entitled to recover the [199] reasonable value of their work no matter what the classification in the Sunday contract was, therefore there was no error in refusal to submit the request.

We shall consider the errors assigned on refusal to submit requests 2, 3, 4, and 5 together. If requests Nos. 2 and 3 were not proper to be submitted, Nos. 4 and 5 became immaterial, and it was not error to refuse to submit them. These requests are based upon the assumption that there was evidence of estoppel.

The contention of appellant under this head is that the evidence shows that the plaintiffs were bound by the estimates made by the engineers, and were also bound by the provisions of the Sunday contract respecting classification because remade by execution. We have seen that no new contract was made; that all the acts of the parties under the Sunday contract were done by way of ratification of the Sunday contract, therefore did not validate it. The plaintiffs, therefore, were not bound by any of the provisions of the Sunday contract; there was no agreement that plaintiffs should do the work or any part of it according to the terms of the Sunday contract, nor can the acts and doings of the plaintiffs in the execution of the work amount to an estoppel. The evidence does not show that the monthly estimates were final or intended to be. They were subject to correction on final adjustment. They were design-

nated as "estimates" and were in fact so understood by the parties. The idea was to pay monthly about ninety per cent upon the work performed, and at the conclusion of the job the balance due was to be ascertained and adjusted. Moreover, it appears from the evidence that plaintiffs were constantly insisting to defendant that they were entitled to rock classification for the hard material, which was put in the estimates as earth under the classification specified in the Sunday contract.

The receipts and vouchers given on the estimates and payments made were given and taken and the money paid and received [200] on the hypothesis that the Sunday contract was in force and the basis of such acts. As said by the learned trial judge in his opinion, "To hold that these receipts and the acts of the parties operate as a settlement would be nothing more or less than to enforce the Sunday contract."

It is clear that some of the essential elements of estoppel are wanting under the undisputed evidence in the case. The defendant was not misled to its prejudice by the acts of the plaintiffs. It knew that the plaintiffs were at all times insisting upon a different classification and that the monthly payments were not received as settlements, but were subject to revision and adjustment on final settlement. The defendant, relying on the conduct of the plaintiffs, had no right to act or refrain from acting to its injury by reason of any conduct or action on the part of plaintiffs.

Some claim is made by counsel for appellant to the effect that defendant settled with Winston Brothers Company, principal contractor, in reliance upon the acceptance by plaintiffs of the monthly estimate statements. There is no merit in this contention. The plaintiffs were not concerned with the defendant's contract with Winston Brothers Company. Doubtless the defendant made the settlement with Winston Brothers Company which it was legally bound to make under its contract with that company, and furthermore the defendant did not settle with Winston Brothers Company until after this action was commenced. The defendant had full knowledge of the claim of the plaintiffs before it settled with Winston Brothers Company, therefore it could not be misled to its prejudice by reason of any act of the plaintiffs. On any theory there is no basis for estoppel in the case. The acts of the parties, as we have seen, did not create a new contract on the terms of the Sunday contract. They were merely acts in ratification of a Sunday contract and were of no effect for that purpose. And the terms of a Sunday contract cannot be given life upon the principles of estoppel any more than upon [201] the principles of ratification. *Vinz v. Beatty*, 61 Wis. 645, 21 N.

W. 787; *Black v. Dressell*, 20 Kan. 153; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L.R.A. 404; *Robison v. Wolf*, 27 Ind. App. 683, 62 N. E. 74; *Brown v. Columbus First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L.R.A. 206.

There are other reasons which might be urged why there is no estoppel binding upon plaintiffs, but we need not discuss them, since sufficient has already been said upon the subject to show that the claim of estoppel is not well founded.

It is also insisted by counsel for appellant that there was an accord and satisfaction. This contention is based upon the idea that the monthly statements and payments made under them and receipts given operated as an accord and satisfaction. Assuming that the issue of the settlement or accord and satisfaction was in the case, the submission of no question on the issue was requested by defendant and the issue must, therefore, under the statute, be deemed to have been found by the court against the defendant, since there is ample evidence to support such finding.

It is insisted that the court erred in refusing to answer question No. 2 in the verdict, \$107,728.10. This contention is made upon the theory that this was the amount due under the contract as created by the conduct of the parties irrespective of the Sunday contract, which defendant claimed had been adopted and remade on secular days. The defendant tendered judgment for \$19,382.10, claiming that this was the amount due after deducting payments made, on the basis that the whole value of the work under the contract was \$107,728.10.

It is unnecessary to reargue this proposition. What is said by counsel under this head has been sufficiently answered by what has heretofore been said in this opinion. The jury found that the plaintiffs were entitled to recover \$130,000, this being found to be the reasonable value of the services performed. It may be observed in this connection that had the [202] case been tried on the defendant's theory the judgment recovered would in all probability have been practically the same. The main contention on amount of recovery was as to classification of 50,000 yards of material in cut number 1, the plaintiffs claiming it should have been classed as hard material, rock, or its equivalent, worth seventy cents per yard to remove, and the defendant claiming it earth and worth only twenty-seven cents per yard to remove. The defendant's tender of judgment was made on the basis of this 50,000 yards being earth, and if hard material, as claimed by plaintiffs, \$21,500 more should have been tendered on this item alone, which would bring the recovery near what plaintiffs claim and what the jury allowed.

Ann. Cas. 1916E.—30.

Error is assigned because the court refused to set aside the answer of the jury to the first question of the special verdict. There is ample evidence to support the answer to this question. Under the rule of this court, if there is any credible evidence to support the verdict it cannot be disturbed. It is claimed by counsel for respondents that in any event the finding was immaterial and that it was not necessary to submit the question to the jury. We do not pass upon that point, since the finding is supported by the evidence.

Complaint is also made because of amendment of pleadings and trial of the case before the jury impaneled to try the case on the original pleadings. This situation was contributed to, if not caused, by the appellant. The plaintiffs sued on the Sunday contract; made their complaint accordingly and proceeded to trial, and after the trial had progressed for about eight days and the plaintiffs had closed their evidence the defendant conceived the idea of then springing the Sunday contract question. While the plaintiffs were making their case the defendant exhibited no signs of any intention to raise the Sunday contract question, and the plaintiffs had a right to believe that it would not be raised. Counsel for defendant knew several days before the trial began that the contract [203] was made on Sunday. Under such circumstances it would seem the court properly exercised its discretion in ordering the action to proceed before the same jury, at least unless justice otherwise demanded. Practically all the facts were alleged by the pleadings upon which the case proceeded to trial. There was nothing set up by the amendment which could have surprised the defendant. Moreover, ample time was given the defendant to plead and prepare for trial, the case having been held open for the accommodation of the parties for about two weeks. Nor do we perceive any objection to trying the case before the jury impaneled to try it under the original issues.

Counsel for defendant argues that the course which the trial took, up to the point of raising the question of Sunday contract by defendant, and subsequent change to action on *quantum meruit*, was well calculated to prejudice the jury. We do not think any prejudicial error was committed by the action of the court in this regard.

It is said terms should have been imposed, upon allowing plaintiffs to amend, which was not done. Whether terms should have been imposed under the circumstances rested in the sound discretion of the trial court and we do not think the discretion was abused. *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095; *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064; *Ainsworth v. Williams*, 111 Wis. 17, 86 N. W. 551; *Illinois Steel Co. v. Bud-*

zis, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 80 Am. St. Rep. 54, 48 L.R.A. 830.

Some other errors are assigned, all of which have been carefully examined, but we do not regard them of sufficient gravity to require treatment. We desire to say in closing that we have been favored by the learned trial judge with an able and exhaustive opinion on the material questions in the case which has been very helpful in our investigation.

We find no prejudicial error in the record.

BY THE COURT.—The judgment is affirmed.

[204] MARSHALL, J.—The parties to this litigation dealt with each other, from the beginning to the end of plaintiffs' work, upon the theory that it was commenced and prosecuted under contract in harmony with the estimates made by the engineer from time to time, so far as they conformed to the verbal arrangement embodied in the Sunday contract. Their minds thus met day after day, week after week, and month after month, as the work progressed, covering a period of more than a year and a half. Their whole manner of dealing shows, conclusively, that they had, in general, a mutual understanding as to their contractual relations. No question was raised other than such as might have arisen under the writing had it been valid, until after issue joined in this action. Under such circumstances, to allow either side to repudiate the situation created by their mutual conduct, and efficiently insist that there was no contract because of the circumstance that, through their mutual negligence, the writing was made on Sunday, and to hold that there is an arbitrary rule of public policy, admitting of no exception, permitting or requiring the court to sanction such unconscionable conduct, seems to me to be a very serious reflection upon the state of the law. There is little wonder laymen are sometimes heard to remark that justice is one thing and law is another. That is a misconception though not entirely without basis. It is within the competency of the courts to remove all ground therefor. It is believed that there is very little reason for such thought in the jurisprudence of this state. The court itself has proceeded far in doing the rescue work. It can complete it without much if any legislative assistance or violating any valuable principle.

Why shut our eyes to the plain story which the acts of the parties tell us? Such work as was done, universally, is performed under contract. Common knowledge and common sense tells us that the work would not have been performed upon the one side or permitted upon the other without a contractual [205] understanding. What that understanding was is plain from the conduct of the parties. Had the writing been delivered on the

day after it was executed, no question would exist as to what the contract was. Why, from a commonsense standpoint, should such a circumstance have more dignity than the conduct of the parties for over eighteen months of continuous operations in adopting the terms of the invalid agreement? Where is the principle or authority which tells us that parties cannot make a contract by conduct unmistakably proclaiming their mutual understanding? None is referred to by counsel or court as I read, while there is ample authority that the act of the parties, as in this case, will make a binding contract. 27 Am. & Eng. Enc. of Law (2d ed.) 407; Adams v. Gay, 19 Vt. 358; Day v. McAllister, 15 Gray (Mass.) 433; Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

There are many of such authorities as those referred to. Some put the result upon the ground of ratification, which is perhaps illogical. In general, the basic reason is competency to adopt, and actual adoption, expressly or by conduct, on a secular day, of a Sunday writing. That is in harmony with the decisions of this court. Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; Troewert v. Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. The logic of those cases is that the unqualified affirmation on a secular day does not ratify and make good the Sunday contract, but makes a new one. That rule is recognized in Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551. It does not militate at all against the doctrine that a Sunday contract is void and that a recovery cannot be had where the plaintiff's cause of action has to be traced through such an agreement or cannot be established without proving it. Here the acts of the parties proclaim, clearly, what their mutual understanding was. They show an unequivocal adoption of the Sunday writing,—in practical effect, a contract independent of such writing,—so that no reference need, necessarily, be made thereto at all. [206] The writing may be of use as explanatory of the conduct, but the latter is the substantial thing.

The mere form of the action here is of little consequence, since all the transactions between the parties were fully brought to the attention of the court by the evidence and passed upon. Much time and energy seems to have been spent over mere matters of form. The facts constituting the plaintiff's cause of action and the evidence are the only really essential things.

Whether the view I take of the case, if worked out in detail, would make any difference in the result is not clear. I understand the attitude of counsel on the oral argument was that the gist of the matter would still be as to whether the large amount of material

classified by defendant as earth should be treated as rock and whether the estimates made by the engineer were conclusive as to the actual amounts and kinds of material moved. On those matters, I incline to the view that, had the trial court disposed of the case as one on contract, in harmony with the acts of the parties, the dispute as to kinds and quantity of material would have been settled, and properly so, as they were. Whether the finality would have been substantially the same, it would do no good for me to personally determine.

A motion for a rehearing was denied, with \$25 costs, on October 6, 1914.

#### NOTE.

##### Principle of Estoppel as Applicable to Rights of Parties under Void Sunday Contract.

The reported case holds that a party to a building contract made on Sunday is not, by receiving payments according to estimates made by an engineer under the contract, estopped to recover further compensation on a quantum meruit on the theory that the contract is void. Apparently the reported case is the only decision wherein it has been sought to apply the principle of estoppel to the rights of the parties under a void Sunday contract. It is rendered in a jurisdiction wherein it is held that a Sunday contract cannot be validated by ratification. (See the note to *McAuliffe v. Vaughan*, Ann. Cas. 1912A 290.) Undoubtedly a different result would be reached on the same facts in a jurisdiction maintaining the contrary view with respect to ratification. There is apparently some conflict in the decisions as to the general principle involved,—the applicability of the principle of estoppel to a contract which is illegal and incapable of ratification. The case of *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108, is in accord with the reported case. In that case, dealing with a contract void as against public policy, the court said: "It was argued on the part of the Central company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defense to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the states, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied." The conclusion of the court was stated as follows: "In no way and through no channels, directly or indirectly,

will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract." So in *Brown v. Columbus First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L.R.A. 206, it was said: "The contention of counsel that the appellee, having received the benefit of the contract, is estopped to defend against it, on the principle that a corporation which has such benefit is estopped to assert that it had no power to contract, is unsound as applied to the case at bar. The rule suggested applies to cases where private rights alone are concerned, while in contracts void as against public policy the public is interested. The public concern cannot be made a matter of private bargain. A number of maxims apply to interdict the enforcement of such a contract; and many decisions hold that the receipt of benefits and retention of property under such a contract give no right of recovery. If the contract has not been executed it will not be enforced; if it has been executed the law will not extend relief. It cannot be rendered valid by invoking the doctrine of estoppel."

However, in *Ashland Second Nat. Bank v. Ferguson*, 114 Ky. 516, 71 S. W. 429, it appeared that a notary public agreed to receive from his employer a certain salary for his services including notarial fees, the contract contravening a statute forbidding any officer to contract to receive less than his legal fees. The court said: "He who accepts monthly for his services the money of another, knowing that it is paid in satisfaction thereof, will be estopped, after thus remaining in the employment, to demand greater pay for his services. . . . The facts of this case illustrate the justice of this rule, for the bank, acting on the idea that it did not have to pay these notarial fees, failed to collect something like three-fourths of them from its customers; and, if appellee is now allowed to recover, a loss will be thrown upon it, without remedy."

#### SHANKS

v.

#### DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

New York Court of Appeals—March 26, 1915.

214 N. Y. 413; 108 N. E. 644.

##### Employers' Liability Act — Employees within Act — Machinist in Repair Shop.

Under the Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Fed. St.

Ann. 1909 Supp. p. 584), making every common carrier by railroad engaged in interstate commerce liable in damages to any person injured while he is employed by such carrier in such commerce from the negligence of the carrier's officers, agents, or employees, or from any defect in its appliances and equipments, an employee of a railroad which was engaged in interstate and intrastate commerce working as a mechanic principally in running a machine where he shaped parts to be used in the repair of locomotives in immediate need of repair, and generally, but not exclusively, in the repair of locomotives used in interstate commerce, while engaged on Sunday in moving the countershaft, which supplied power to the shaping machine, and whose hand, while over the rail on a girder which he was drilling, was cut off by the wheels of a traveling crane moving on the girders, is not employed in interstate commerce, and cannot recover.

*Shanks v. Delaware, etc. R. Co.* 163 N. Y. App. Div. 565, affirmed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action for damages. Bruce Shanks, plaintiff, and Delaware, Lackawanna and Western Railroad Company, defendant. Judgment for plaintiff in trial court. Judgment reversed by Appellate Division of Supreme Court. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Joseph A. Shay* for appellant.

*Frederick W. Thomson* for respondent.

[414] CHASE, J.—This action is brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, ch. 149; Fed. St. Ann. 1909 Supp. p. 584; U. S. Comp. Stat. Supp. 1911, p. 1322), to recover damages for personal injuries sustained by the plaintiff while engaged as an employee of the defendant in a shop near Hoboken, N. J.

[415] The defendant is a railroad corporation and common carrier and at the times hereinafter mentioned was engaged in interstate commerce. It was also engaged in intrastate commerce. Its road extends from Hoboken, N. J., to Buffalo, N. Y., and passes through and is in part located in the state of Pennsylvania. The Federal Employers' Liability Act provides, "That every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars,

engines, appliances, machinery, track, road-bed or other equipment."

The defendant has but two shops devoted particularly to the repair of locomotive engines. One is the shop located near Hoboken, N. J., and the other is located at Scranton, Pa. The plaintiff was employed as a mechanic and his principal work was in running a shaping machine, where he shaped parts to be used in the repair of locomotives that were in immediate need of repair. His work was known as rush work. His work was generally, but not exclusively, in the repair of locomotives used in interstate commerce. The power was applied to the shaping machine used by him from a countershaft and pulley attached by hangers to girders which were about eighteen feet above the floor of the shop. The defendant desired to move such countershaft for one reason to make room for another shaping machine, and to do so it was necessary to take the countershaft down and change the hangers on which it was suspended. On top of the girders from which the countershaft was suspended were the rails constituting the track upon which a traveling crane of heavy weight was moved. On a Sunday morning the plaintiff, working overtime, with a helper, was directed to move such countershaft and a platform or [416] scaffold was erected on which to do such work. The countershaft was taken down and placed upon the floor and while the plaintiff was engaged in making new holes in one of the girders for the purpose of fastening one of the hangers at its new proposed location and while he had his right hand over the rail on the girder in which he was making the holes, the crane was moved along without warning (as it is alleged) and a wheel cut off his hand. In his effort to save himself he involuntarily threw his left hand over the rail in front of the wheel and that too was cut off.

An examination of the record satisfies us that the question of the defendant's negligence was one of fact. The one important question for our determination in this action under the Federal Employers' Liability Act is whether the plaintiff at the time of the accident was within the meaning of that act engaged in interstate commerce.

The defendant is not liable under the act unless the plaintiff suffered injury while he was employed by the defendant as a common carrier in interstate commerce. (*Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914C 163, 34 S. Ct. 646, 58 U. S. (L. ed.) 1051.)

In the *Behrens* case it was held that a fireman employed on a switch engine in the city of New Orleans, the crew of which with said engine handled interstate and intrastate traffic indiscriminately, frequently mov-

ing both at once and at times turning directly from one to the other, was not engaged in interstate commerce or entitled to recover under the act for injuries arising by a collision when moving several cars loaded with freight which was wholly intrastate and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state.

Whether the plaintiff can recover under the act depends upon whether he was personally engaged in interstate commerce at the time of the injury. That he was not so [417] directly engaged must be conceded. He claims, however, that he was so engaged within the interpretation given to the act in *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, *Ann. Cas.* 1914C 153, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125. In that case the plaintiff sought to recover damages for personal injuries against the same defendant as in the case now before us and in connection with commerce intrastate and interstate carried on by it over the same system of railroad. In that case the plaintiff was employed as an ironworker in connection with the repair of a bridge used by the defendant for railroad purposes near Hoboken. The repair consisted of the removal of a girder in a bridge in regular use and the insertion of a new one in its place. The plaintiff at the time of the accident was engaged in carrying from a tool car to the bridge certain bolts or rivets which were to be used in such repair. The bridge was used in interstate and intrastate commerce. The plaintiff was struck by an intrastate passenger train, and it was alleged that such train did not give any warning. Recovery was sustained, and the court say: "That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. . . . We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely

related [418] to such commerce as to be in practice and in legal contemplation a part of it. . . . The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? . . . Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce." (p. 151.)

It is of great importance to employers and employees that rules be established by which it can be determined with reasonable certainty whether a person at a given time is engaged in interstate or intrastate commerce. It does not seem to us that each specific act of employment by a carrier can be satisfactorily defined and classified by generally and unqualifiedly including as a part of interstate commerce every act of employment closely connected therewith, and every act the performance of which is not a matter of indifference in such commerce.

It is not a matter of indifference to interstate commerce whether ore is mined and iron is manufactured, but employment in mining and manufacturing is so remote from the employment intended by the act that it would not, we assume, be claimed by any one that persons so remotely employed, even if so employed by the carrier, are engaged in interstate commerce within the meaning of the act. In every case a person to be protected by the Federal Employers' Liability Act must, by the express terms of the act, be engaged in commerce.

[419] Conceding, as was held in the *Pedersen* case, that a person directly engaged in assembling material for the immediate repair of a bridge necessarily used in interstate commerce by a carrier, is engaged in interstate commerce, it does not follow that a person engaged at a shaping machine in a repair shop is engaged in interstate commerce, at least unless it appears that the work he is doing is for the immediate repair of a locomotive or other instrumentality actually engaged in interstate commerce. Making parts to be used in a locomotive is a step further removed from commerce than the assembling of parts for the locomotive, and corresponds to the work of making bolts and rivets for use in bridge repairs. If the

plaintiff had been injured while engaged at the shaping machine in shaping parts for immediate use in a locomotive engaged in interstate commerce, it may be assumed that his claim would come within the terms of the statute, but if he was so engaged in shaping parts for a locomotive used in intrastate commerce, his claim would not, under the decision in the Behrens case, be included in the act.

The plaintiff in moving the countershaft was doing millwright work that in itself had no immediate or direct connection with commerce. He was not engaged in repairing or moving the shaping machine. The shaping machine was in no way affected by the operation of the crane. His work, in the most favorable light for the plaintiff, had to do with the supply of power to a machine that might thereafter be used in shaping parts for the repair of locomotives. It does not even appear that his work as a millwright was designed to bring about an improvement in the power or otherwise of the shaping machine that he had theretofore used. Even if it was designed to improve the power supplied to that machine, or to enable the defendant to add to the number of machines that could thereafter be used indiscriminately in shaping parts to repair interstate and intrastate locomotives, his work was at least one or more steps further [420] removed from interstate commerce than was the plaintiff's work in the Pedersen case. The rearrangement of the countershaft may have been desirable as a matter of shop arrangement or for economy, but it was not apparently essential for any purpose. It was remote from any act of commerce. If the plaintiff, while engaged in millwright work, as appears in this case, can be said to have been engaged in interstate commerce, all work in the repair of the shop and shop machinery where interstate locomotives are repaired may in some remote degree be said to constitute commerce.

It was, of course, necessary in running the shaping machine to obtain power, and to obtain power it was necessary to burn coal, and to obtain coal it was necessary to perform other acts far removed from the purposes of the statute in question, but these several steps surely do not constitute interstate commerce by a carrier, or commerce of any kind.

Unless some reasonable and practical limit and boundary is prescribed in acts constituting employment in interstate commerce, every act that can be shown to have affected interstate commerce in a remote degree, is included within the terms of the statute. The decision in the Pedersen case has been frequently referred to as extending the provisions of the act to the limit of legislative

intention, and we think it should not be by us further extended. The remedy of the unfortunate plaintiff is by the Compensation Act of the state of New Jersey, in which state the accident occurred.

The judgment should be affirmed, with costs.

SEABURY, J. (*dissenting*).—I dissent. The plaintiff was employed by the defendant in a repair shop devoted principally to the repair of locomotives transporting passenger and freight trains between Hoboken, N. J., and Scranton, Pa. The defendant had only two shops devoted to this purpose. One was the shop in Hoboken where the plaintiff [421] was employed, and the other was at Scranton. The "rush work" which plaintiff was employed to do consisted in repairing broken valves or other necessary parts of locomotives engaged in interstate commerce, although sometimes locomotives engaged in intrastate commerce were sent for repair to the shop where plaintiff worked. In the shop where plaintiff worked there was an electric crane used for transporting parts of locomotives from one part of the shop to the other. The crane operated on wheels which ran on rails or girders about thirty feet above the floor. The rails or girders were parallel and ran the whole length of the shop. The crane was operated by a man who sat in the center of it and it is said to have moved "the same as a trolley." When the crane reached its destination the operator lowered his "block and fall" and picked up whatever was required and the crane carried it to another part of the shop. It was not equipped with any signal. The only method by which workmen were warned that the crane was in motion was for the operator to shout, "Keep clear there" or "Get out of the way."

In the shop where the plaintiff worked there was a shaping machine. The function of this machine was to fashion keys, cotter pins and brasses to be used for keeping in place the piston rods in the crossheads of locomotives. The machine was driven by a countershaft which was affixed to the girder or rail upon which the wheels of the electric crane traveled. On the day of the accident the plaintiff was engaged, under the direction of the superintendent, in repairing the shaping machine, by moving it two feet to make room for the shaft. In removing it, it was necessary to take down the countershaft, to bore new holes in the girder and to refasten the hangers and countershaft so that the shaping machine could be used without interruption from the operation of the crane. While engaged in this work plaintiff stepped on the girder. Without warning the crane came upon [422] him and knocked him off the girder. In falling he threw out his left



hand and caught hold of the rail. The crane cut this hand off and to keep from falling plaintiff again caught the rail with his other hand. This hand was also struck by the crane. The result of the accident to the plaintiff was that he lost both hands. The defendant offered no evidence. This action is brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149; Fed. St. Ann. 1909 Supp. p. 584; U. S. Comp. Stat. Supp. 1911, p. 1322). The act provides:

"That every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed or other equipment."

The verdict of the jury established that the injuries which the plaintiff sustained were due to the negligence of the defendant. The learned Appellate Division reversed the judgment entered upon the verdict of the jury in favor of the plaintiff on the ground that the plaintiff was not at the time of the accident engaged in interstate commerce. In the opinion below two suggestions are made which seem to me to have no importance in this case. One relates to the fact that at the time of the accident the plaintiff was engaged in Sunday work, from which the inference is suggested that this was not the regular work of the plaintiff. The fact shown by the evidence is, that repair work in this shop was done on Sundays as well as on other days and the fact that the plaintiff was engaged in Sunday work injects no exceptional feature into the case. The other suggestion, made below, is that the shop in which plaintiff worked was also used as the repair shop of a railroad which had extensive local service in which the locomotives were used only in intrastate commerce. [423] It appears from the testimony that the "rush work" upon which plaintiff was engaged was generally done upon locomotives used in interstate commerce and that this was the principal work of that shop. Upon the trial it was conceded that the defendant at the time of the accident was engaged in interstate commerce. The claim is made that the plaintiff was not at the time of the accident engaged in interstate commerce. If the plaintiff had been engaged at the time of the accident in working upon a locomotive engaged in interstate commerce, it is conceded that he would be within the Federal statute. Is he without the protection of this statute because he was working to put in order a machine that was to be used

in repairing locomotives engaged in interstate commerce? In my opinion he was not. The work of repairing the shaping machine was not independent of interstate commerce. It was essential to the carrying on of that commerce. The work of putting that machine in order so that it could be used in the repair of locomotives engaged in interstate commerce, was just as much an act of interstate commerce as if the work had been done upon such a locomotive. The work in which the plaintiff was engaged was, as the United States Supreme Court said in the Pedersen Case, 229 U. S. 146, Ann. Cas. 1914C 153, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125, "so closely related to such commerce as to be in practice and in legal contemplation a part of it." In that case it was held that a plaintiff who was acting under the direction of his foreman and injured while carrying bolts from a tool car to a bridge which was used in interstate commerce, was engaged in interstate commerce. In his opinion, rendered in that case, Mr. Justice Van Devanter said: "The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and [424] the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the round house to the track on which are the cars he is to haul in interstate commerce." (p. 152.)

This is a case where the plaintiff was injured while engaged in the performance of an act necessary to maintaining in proper condition the shaping machine which was as much an instrumentality of interstate commerce as are bolts used in the repair of a bridge. Without this machine the locomotives engaged in interstate commerce could not have been repaired and put in a condition to be used in such commerce. It may have been minor work, but it was none the less an essential part of the larger work of putting in repair locomotives engaged in interstate commerce. The Pedersen Case (supra) seems to me to sustain the contention of the plaintiff that at the time of the accident he was engaged in interstate commerce. Since that case was decided it has been held that a boilermaker's helper employed in the shop of a railroad company, injured while assisting in the repair of an engine used in interstate commerce, is within the statute. (Law v. Illinois Cent. R. Co. 208 Fed. 869, 126 C. C. A. 27, L.R.A. 1915C

17.) In the recent case of *Barlow v. Lehigh Val. R. Co.* 214 N. Y. 116, 119, 107 N. E. 814, it was said by Judge Miller; speaking for this court: "If the plaintiff had actually been coaling an engine preparatory to its moving interstate cars, he would plainly have been engaged in interstate commerce. . . . The placing of the coal cars on the trestle was one step removed from such work, but it was certainly no more remote than the carrying of bolts to repair a bridge, which was held to be so closely connected with interstate commerce as to be a part of it."

In the *Pedersen Case* (*supra*) the court said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged." It is [425] clear that the construction of tracks, bridges, engines or cars or shops to be used for the repair of such cars is not an act done in interstate commerce, because until constructed these things "have not as yet become instrumentalities in such commerce." But after these things have been constructed and have been used as instrumentalities of such commerce, the work of maintaining them in proper condition is work done in interstate commerce. Such is, as I understand it, the rule which the United States Supreme Court has applied in its construction of the Federal Employers' Liability Act and I think that we should apply it to this case. The test prescribed in the *Pedersen Case* (*supra*) has the merit of definiteness. It draws a line of distinction between construction and the work of maintaining in proper repair. Until the track or bridge or car, shop or whatever it is, actually becomes an instrumentality of interstate commerce the provisions of the Federal statute have no application. After construction, and after it has been placed in use and has taken on the character of an instrumentality of interstate commerce, any act done in maintaining it is within the Federal statute. One of the chief merits of the construction put upon the statute by the United States Supreme Court is the clearness with which it defines the line of demarcation between what is and what is not within the statute, and thus provides a definite test by which the person injured may determine whether his remedy is under the Federal statute or under the state law. The fact that the shaping machine upon which the plaintiff was working was used to repair locomotives engaged in intrastate commerce, as well as locomotives engaged in interstate commerce, did not cause it to cease to be an instrumentality of interstate commerce. In the *Pedersen case* it was said: "True, a track or bridge may be used on both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former."

[426] In my opinion this case is within the provisions of the Federal statute as that statute has been construed by the United States Supreme Court. I, therefore, vote in favor of the reversal of the judgment of the Appellate Division which reversed the judgment entered upon the verdict of the jury in favor of the plaintiff.

Willard Bartlett, Ch. J., Hiscock, Cuddeback and Miller, JJ., concur with Chase, J.; Seabury, J., reads dissenting opinion, and Cardozo, J., concurs.

Judgment affirmed.

#### NOTE.

#### Employees Entitled to Protection under Federal Employers' Liability Act.

Introductory, 472.

General Rule, 472.

Application of Rule:

Employee Operating Train, 473.

Employee Coupling, Uncoupling or Switching Car, 474.

Employee Engaged in Construction or Repair, 476.

Employee Supplying Fuel or Water, 480.

Employee Guarding or Inspecting Property, 481.

Employee Going to or Returning from Work or Temporarily Diverted Therefrom, 481.

Employee Working on Watercraft, 482.

#### Introductory.

The present note reviews the recent cases which discuss, what employees are entitled to protection under the Federal Employers' Liability Act. The earlier cases passing on that question are collected in the note to *Illinois Cent. R. Co. v. Behrens*, Ann. Cas. 1914C 163.

#### General Rule.

Whether an employee of an interstate carrier is engaged in interstate commerce, so as to be entitled to the protection of the Federal Employers' Liability Act, is to be determined not from the general nature of his employment but from the work in which he is engaged at the particular time with respect to which the question arises. Thus in *Corbett v. Boston etc. R. Co.* 219 Mass. 351, 107 N. E. 60, in speaking of the general effect of the act, it was said: "The federal act has no greater extent. It does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme exclusive in its applica-

tion to intrastate commerce as is the federal law to interstate commerce. If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the federal law; if in the latter service, such liability rests wholly upon the state law. . . . The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. *Illinois Cent. R. Co. v. Behrens* 233 U. S. 473, 478 [Ann. Cas. 1914C 163, 34 S. Ct. 646, 58 U. S. (L. ed.) 1051, 1055]. Whether a railroad employee is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not always in harmony." So in *Bolch v. Chicago etc. R. Co.* (Wash.) 155 Pac. 422, the court said: "When the employer is engaged in interstate commerce by railroad, the specific labor in which the employee is engaged at a given time takes its character as a part of state or interstate commerce, not from the nature of his general employment nor from the nature of the specific work, but from the relation of that work to interstate commerce. The same specific act with one set of concomitants may be a part of interstate commerce and with another set a part of intrastate commerce. The same employee, without the slightest change in the intrinsic nature of his habitual tasks, may pass many times daily from employment in one kind of commerce to the other. *New York Cent. etc. R. Co. v. Carr* 238 U. S. 260, 35 S. Ct. 780, 59 U. S. (L. ed.) 1298. Each case therefore must depend upon its peculiar facts. When these are conceded or established by proof so conclusive that there can be no reasonable difference of opinion, the question is one for the court. When not so conceded or conclusively established, the question is one for the jury under proper instructions. . . . It was essential to its future progress that this car remain upon the repair track until repaired. Every movement of it necessary to its so remaining was an incident to its furtherance on its journey. To get out the repaired empty cars this car had to be removed from and returned to the repair track. It is self-evident that this was as much a part of its movement in interstate commerce as was its movement onto the repair track in the first place." In *Shanks v. Delaware, etc. R. Co.* 239 U. S. 556, 36 S. Ct. 188, it was said in speaking of the general scope of the Federal Employers' Liability Act: "In so far as its words are material here, the Employers' Liability Act declares that 'every common carrier by

railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,' if the injury results in whole or in part from the negligence of the carrier or of any of its officers, agents or employees. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in intrastate commerce or in what is not commerce at all, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employees, must look for redress to the laws of the state wherein the injury occurs, save where it results from the violation of some federal statute, such as the safety appliance acts."

#### *Application of Rule.*

##### EMPLOYEE OPERATING TRAIN.

A conductor on a local electric car engaged wholly in intrastate service, who is injured while watching for an interstate train, so that it may pass his car, is not engaged in interstate commerce, it has been held, and cannot bring an action under the federal act. *Miller v. Kansas City Western R. Co.* 180 Mo. App. 371, 168 S. W. 336. And in *Kiser v. Metropolitan St. R. Co.* 188 Mo. App. 169, 175 S. W. 98, a conductor on a street car which ran between two points in the same state, which transferred or connected with lines running out of the state and which at the time of the accident carried one passenger going to a railroad station, to which the trolley was destined, to board a train for Nebraska, and who was killed in an accident, was said not to come within the federal act. To substantially the same effect see *Watts v. Ohio Valley Electric R. Co.* (W. Va.) 88 S. E. 659.

In *Chicago, etc. R. Co. v. Wright*, 239 U. S. 548, 36 S. Ct. 185, it was held that an engineer who was injured while taking a road engine from Phillipsburg, Kansas to Council Bluffs, Iowa, was engaged in interstate commerce, and was entitled to recover within the meaning of the Federal Employers' Liability Act, and it was said to be immaterial whether the engine was in actual commercial use or whether it was being taken to a repair shop. In *Hearst v. St. Louis, etc. R. Co.* 188 Mo. App. 36, 173 S. W. 86, it was held that a fireman engaged on an interstate line and killed while hauling a number of empty freight cars from a point in one state to a point in another was en-

gaged in interstate commerce despite the fact that the cars were empty, the court holding the view that the return trip of the empty freight was just as essential to the continuance of and just as much a part of interstate commerce as a trip with loaded freight cars. To the same effect see *Thompson v. Wabash R. Co.* 262 Mo. 468, 171 S. W. 364.

In *Findley v. Coal, etc. R. Co.* (W. Va.) 87 S. E. 198, an intrastate railroad under contract to haul to points in the state cars of merchandise shipped by other railroads from points without the state was declared to be within the interstate commerce provision of the federal act and a student fireman on such a train although carrying largely intrastate merchandise was held to be within the act.

But it has been held that a fireman on a switch engine which was used in hauling coal between two intrastate points was not engaged in interstate commerce, even though the coal might be forwarded later into other states. *Barker v. Kansas City, etc. R. Co.* 94 Kan. 176, 146 Pac. 358. Likewise in *Bay v. Merrill, etc. Logging Co.* 220 Fed. 295, 136 C. C. A. 277, *affirming* (D. C. Judg.) it was held that a logging concern which transported its lumber from one point in a state to another and there disposed of it, was not engaged in interstate commerce, even though the lumber might be thereafter shipped to other states. To substantially the same effect see *Nordgard v. Marysville, etc. R. Co.* 218 Fed. 737, 134 C. C. A. 415, *affirming* 211 Fed. 721.

As to employees on work trains, see *infra*, the subdivision *Employees Engaged in Construction or Repair*.

#### EMPLOYEE COUPLING, UNCOUPLING OR SWITCHING CAR.

In *Fairchild v. Pennsylvania R. Co.* 170 App. Div. 135, 155 N. Y. S. 751, a brakeman or switchman killed while uncoupling empty cars from an intrastate train, was declared to be engaged in intrastate rather than interstate commerce, even though the train had contained two cars with interstate baggage which had been unloaded before the accident. To the same effect see *Atchison, etc. R. Co. v. Pitts*, 44 Okla. 604, 145 Pac. 1148. *Compare* *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99. So in *Moran v. Central R. Co.* 88 N. J. L. 730, 96 Atl. 1023, wherein it appeared that the plaintiff, a railroad employee, was injured by a car which had delivered a cargo of interstate merchandise and was at the time of the injury not in service but was awaiting an order for service, it was held that the car had ceased to perform its function in interstate commerce as soon as it disposed of its cargo and therefore the plaintiff was not injured in inter-

state commerce and could not recover under the federal act. See also *Pennsylvania R. Co. v. Knox*, 218 Fed. 748, 751, 134 C. C. A. 426.

In *Noel v. Quincy, etc. R. Co.* (Mo.) 182 S. W. 787, it was held that a brakeman employed between two intrastate points on a line making interstate trips, and carrying commerce from one state to another, who was injured while so engaged, and while the train on which he was at work carried interstate commerce, was engaged in interstate commerce and entitled to sue under the federal act. To the same effect see *Mattocks v. Chicago, etc. R. Co.* 187 Ill. App. 529; *Peery v. Illinois Cent. R. Co.* 128 Minn. 119, 150 N. W. 382, 1103, *affirming* 123 Minn. 264, 143 N. W. 724.

In *Thornbro v. Kansas City, etc. R. Co.* 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410, *affirmed* on rehearing 92 Kan. 681, 142 Pac. 250, a brakeman employed on an intrastate train, who was injured while attaching to his train a car used in intrastate traffic, was declared to be engaged in interstate commerce and as such within the federal act. In support of its ruling the court said: "It cannot be doubted that the work of the deceased had a real and substantial relation to interstate commerce. The rearrangement, as well as delay required in picking up a car by the way necessarily affects the operation and movement of a train, and it cannot be held that an employee upon such a train as this, while doing such work, is not engaged in interstate commerce; whatever may be the origin or destination of the particular car. To hold otherwise would be contrary to the manifest purpose of the act, which, as we have seen, has been generally construed broadly and liberally, as it should be, in the interest of humanity and commerce alike." And a brakeman on a train running between two points in the same state who was injured while engaged in switching interstate cars from out of the train on which he was working, on to other tracks, was declared to be engaged in interstate commerce and as such could maintain an action under the federal act. To substantially the same effect see *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250. *Graber v. Duluth, etc. R. Co.* 159 Wis. 414, 150 N. W. 489; *Bruckshaw v. Chicago, etc. R. Co.* (Ia.) 155 N. W. 273.

In *Texas, etc. R. Co. v. Sherer* (Tex.) 183 S. W. 404, it was held that a brakeman injured while setting a brake on a string of cars which were being switched, and which carried both interstate and intrastate merchandise, was engaged in interstate commerce and was entitled to sue under the federal act, though the car on which he was working at the time of the accident contained intra-

state freight only. In *New York Cent. etc. R. Co. v. Carr*, 238 U. S. 260, 35 S. Ct. 780, (59 U. S. (L. ed.) 1298, *affirming* 157 App. Div. 941, 142 N. Y. S. 1111, it was held that a brakeman on an interstate train, who was injured while uncoupling a car to be left on a siding in order that the interstate train might proceed on its journey, came under the act. To substantially the same effect see *Vaughan v. St. Louis, etc. R. Co.* 177 Mo. App. 155, 164 S. W. 144. See also *Texas, etc. R. Co. v. White*, 177 S. W. 1185. So a baggage master employed on a train making an interstate journey and injured while assisting in side tracking the train for the purpose of permitting another train to pass has been held to be engaged in interstate commerce, and entitled to recover under the federal act. *Chesapeake, etc. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653. And in *Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 352, 36 S. Ct. 126, it was held that an employee of an interstate railroad company injured while switching and distributing the cars from an interstate train for the purpose of clearing the track for another interstate train was engaged in interstate commerce and came within the provisions of the act.

In *Pennsylvania R. Co. v. Knox*, 218 Fed. 748, 134 C. C. A. 426, it appeared that a brakeman having been engaged in delivering certain cars from Pennsylvania destined to a point in New York, which was concededly an interstate commerce journey, was killed while at work on one of the cars which were again being moved from New York, and were picked up at a point in Pennsylvania, to be moved to other points in Pennsylvania to be assembled and distributed. The cars were not billed or marked for any particular destination and were moving about more or less aimlessly. The court held that the brakeman was not employed in interstate commerce and did not come within the purview of the act. In *Louisville, etc. R. Co. v. Parker*, 165 Ky. 658, 177 S. W. 465, it was held that a member of a switching crew, killed while engaged at work as a fireman on a switching engine, drawing intrastate cars at the time of the injury, did not come under the federal act.

A switchman injured in coupling a car on an interstate train has been held to come within the act. *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834. To substantially the same effect see *Kansas City Southern R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164; *Sears v. Atlantic Coast Line R. Co.* 169 N. C. 446, 86 S. E. 176.

A switch foreman, who was injured in breaking up a train which had come into his state from the west, while in the act of switching a car that had been marked for repairs, by reason of a defect in the auto-

matic coupler on the car, has been said to be engaged in interstate commerce and to come within the provisions of the federal act, the court holding that the car had not been withdrawn from interstate commerce but merely subjected to a delay, particularly in view of the fact that on the next day the car was carried into another state. *Great Northern R. Co. v. Otos*, 239 U. S. 349, 36 S. Ct. 124. And in *Bolch v. Chicago, etc. R. Co.* (Wash.) 155 Pac. 422, it was held that moving a car loaded with lumber for an interstate journey and standing on a repair track off the repair track to get at certain other cars and then moving it back again to the repair track, constituted an act of interstate commerce.

In *Crandall v. Chicago Great Western R. Co.* 127 Minn. 498, 150 N. W. 165, wherein it appeared that a foreman of a switching crew while engaged in making up a train destined for another state but containing some intrastate cars was run over by one of the intrastate cars, it was held that a suit under the federal act was maintainable. To substantially the same effect see *Willever v. Delaware, etc. R. Co.* 87 N. J. L. 348, 94 Atl. 595. And in *Pittsburgh, etc. R. Co. v. Glinn*, 219 Fed. 148, 135 C. C. A. 46, a workman engaged in switching cars in a freight yard containing both interstate and intrastate cars was struck by a freight train and killed, was declared to be within the act. To substantially the same effect see *Devine v. R. Co.* 185 Ill. App. 488; *Snyder v. Great Northern R. Co.* 88 Wash. 49, 152 Pac. 703.

In *Norton v. Erie R. Co.* 163 App. Div. 466, 149 N. Y. S. 769, it was held that a yard switchman killed while switching freight cars which had been carried from one point to another within the state by a fast through train on an interstate road, but which did not contain any interstate freight, was not engaged in interstate commerce at the time of the accident and was not within the federal act.

In *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580, wherein it appeared that the plaintiff was a member of a switching crew engaged in switching and handling cars coming from all points of the country, which were made up into trains going to all parts of the country, and that the particular cut of cars on which the plaintiff was working when injured contained cars destined to go outside of the state, the court held that the plaintiff was engaged in interstate commerce under the federal act.

In *Oberlin v. Oregon-Washington R. etc. Co.* 71 Ore. 177, 142 Pac. 554, it was held that a brakeman in a switching crew operating on a locomotive used in both interstate and intrastate traffic but which at the time of the accident was moving an intrastate

car was said to be engaged in interstate commerce and hence within the federal act. The court said: "The accident under consideration, it is true, occurred at the particular moment the plaintiff was engaged in coupling the locomotive to a private car used by the superintendent of a division wholly within the State of Oregon, and as the plaintiff began his night's work, that being the first car which the crew was directed to move. It happened, however, on the tracks constantly used by the defendant in handling interstate as well as intrastate commerce, and it was in connection with a locomotive used in both those kinds of traffic. Hence there was testimony which the jury was authorized to consider in arriving at the conclusion that there was a natural connection between the employment of the plaintiff and the interstate commerce feature of the defendant's business."

In *Ruppell v. New York Cent. R. Co.* 157 N. Y. S. 1095, it was held that a member of a switching crew of one interstate railroad, who was killed while making up an interstate train for another railroad which used the same yard was engaged in interstate commerce under the first railroad.

In *Hardwick v. Wabash R. Co.* 181 Mo. App. 156, 168 S. W. 328, an employee of a railroad company engaged in both interstate and intrastate commerce, and killed while sweeping snow from a switch in the yard which was used in both interstate and intrastate traffic, by reason of his being run down by a train carrying both kinds of cars, was considered to be engaged in interstate commerce at the time of his injury.

In *Shanley v. Philadelphia, etc. R. Co.* 221 Fed. 1012, a member of a shifting crew in a freight yard of a railroad company who handled both interstate and intrastate cars, and who was injured while shunting "empty cars upon a siding of a local private manufacturing company," was held not to be engaged in interstate commerce at the time of the accident.

A member of a switching crew, or a railroad company engaged in both interstate and intrastate commerce, who was injured while switching cars loaded with coal which had been standing on a storage track to a coal shed, where it was kept to supply locomotives both for interstate and intrastate commerce, has been said not to come under the act, the crew of which he was a member being confined to intrastate work. *Chicago, etc. R. Co. v. Harrington*, 241 U. S. 177, 38 S. Ct. 517.

#### EMPLOYEE ENGAGED IN CONSTRUCTION OR REPAIR.

In *Gaines v. Detroit, etc. R. Co.* 181 Mich. 376, 148 N. W. 397, it was held that a car-

penter employed by an intrastate road, who was injured while repairing an empty freight car which had just made an interstate trip, and which was side tracked for the purpose of being repaired preparatory to its return trip, was engaged in interstate commerce and entitled to maintain an action under the federal act. But in *Parsons v. Delaware, etc. R. Co.* 167 App. Div. 536, 153 N. Y. S. 179, a workman repairing an empty car which had been used in interstate commerce, and which after being repaired was returned empty for the purpose of making an interstate trip, was said not to be engaged in interstate commerce.

In *Thompson v. Cincinnati, etc. R. Co.* 165 Ky. 256, 176 S. W. 1006, it was held that a carpenter who was injured while employed in erecting an extension to a round house used in interstate commerce, which extension had to some extent been used in the storage of cars, was engaged in interstate commerce and within the provisions of the federal act.

A member of a construction crew who was injured while transporting an outhouse to a depot, which was used for the accommodation of passengers both in interstate and intrastate commerce, has been declared to be engaged in interstate commerce at the time of his injury. *Nash v. Minneapolis & St. L. R. Co.* 131 Minn. 166, 154 N. W. 957.

In *McAuliffe v. New York Cent. etc. R. Co.* 158 N. Y. S. 922, it was held that a freight conductor in charge of a locomotive tender and caboose, and ordered to take them together with a disabled locomotive across the state line and also of a local freight train carrying merchandise destined for another state, was within the interstate commerce provision of the federal act. Compare the decision on a former appeal whereon a somewhat different state of facts was shown. *McAuliffe v. New York Cent. etc. R. Co.* 164 App. Div. 846, 150 N. Y. S. 512.

In *Alexander v. Great Northern R. Co.* (Mont.) 154 Pac. 914, a conductor on a work train, operating wholly within the state, and carrying timber to a point within the state from where it would be carried by a tributary branch to the company's tie treating plant within the state, from which place it was shipped to various points either within or without the state as the need arose, was held not to be engaged in interstate commerce.

In *Holmberg v. Lake Shore, etc. R. Co.* (Mich.) 155 N. W. 504, it was held that an engineer of a train used for carrying gravel for the repair of the road bed of an interstate railroad, when injured by a head-on collision, was engaged in interstate commerce and as such entitled to the benefit of the federal act. The court said: "It is undisputed that defendant's line extends into other states, and that it is regularly engaged in

transporting interstate merchandise over its lines. Plaintiff's train was engaged in hauling gravel for use in repairing or improving the roadbed over which interstate commerce regularly passed. While there is unusual conflict and contradiction in both the state and federal authorities upon the question of when an employee of an interstate commerce road is or is not working under the provisions of the act, and even upon this direct question of track repair or improvements, it must be conceded the federal authorities are controlling. The greatest number and latest decisions from that source have, we think, made a distinction between rolling stock, tools, and other appliances of a railroad which may or may not be used in its interstate service and its tracks, and settled the proposition that track maintenance or repairs not only facilitate, but are imperatively necessary to, all interstate commerce passing over the line; and the work of one engaged in such repairs is so directly connected and immediately beneficial to all commerce which uses the road that he must be regarded as covered by the act." But in *Louisville, etc. R. Co. v. Carter* (Ala.) 70 So. 655, it was held that an engineer who was injured while repairing a locomotive used to draw a work train engaged in filling a washout on an interstate line, but which locomotive moved within the state at all times, was not employed in interstate commerce and could not bring an action under the Federal act.

In *Lloyd v. Southern R. Co.* 166 N. C. 24, 81 S. E. 1003, it was held that an engineer injured during an intrastate trial run of an engine, used exclusively in interstate commerce and immediately preparatory to an interstate run was performing a duty in interstate commerce, citing *North Carolina R. Co. v. Zachary*, 232 U. S. 248, Ann. Cas. 1914C 159, 34 S. Ct. 305, 58 U. S. (L. ed.) 591.

In *Cincinnati, etc. R. Co. v. Clarke* (Ky.) 185 S. W. 94, it appeared that a workman engaged as an assistant to an engine hostler and called a pan puller, whose duty it was to get into a pit, under both interstate and intrastate engines, and remove the ashes, was injured by reason of the negligent backing up of a switch engine. The court held that the plaintiff was entitled to sue under the federal act, and in support of its conclusion said: "There is no contradiction in the evidence in regard to the use to which the ash pit was put. It was situated under one of the tracks of appellant, and was an instrumentality designed, constructed, and used by the carrier for the purpose of ridding the engines used in its operations of the ashes produced by the materials used in the engines to make the power which was

necessary to propel them. It was daily and at night used for that purpose by its engines, which were engaged in interstate commerce. The pit was a useful and necessary instrumentality in the operation of its engines, engaged in interstate commerce. The ashes must necessarily be taken from the engines, and, when dropped into the pit, the ashes must be thrown from the pit to keep it in condition and repair to do the service for which it was used and designed. If appellee, when injured, had been employed in repairing the track of a railroad which was used for hauling cars containing freights from one state into another, no one would question the fact that he was then engaged in an act in aid and furtherance of interstate commerce, and that his case would properly be one under the provisions of the federal act. The pit in question was a permanent structure and part of the equipment of appellant for the transportation of interstate commerce, just as the bridge was in the much-quoted case of *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125, Ann. Cas. 1914C 153. . . . In the case at bar the ash pit was a necessity for the 'expedition and efficiency of the commerce,' as mentioned in the *Pedersen* case. It was constructed and used for the purpose of cleaning the ashes and cinders from engines used in interstate commerce. When appellee received his injuries, according to his evidence, he was employed in his customary work of throwing the ashes from it so as to preserve its efficiency for use for the purpose of taking the ashes from the interstate and intrastate engines, and the ashes which he was then throwing out were deposited in the pit from engines then in use by appellant in interstate commerce. His work was intimately connected with the transportation of interstate shipments of freights and other interstate commerce, and necessary for its efficient and expeditious transportation, and so closely connected with it as a part of it. Hence at the time of his injury the appellant was employed in interstate commerce." To substantially the same effect see *Grybowski v. Erie R. Co.* 88 N. J. L. 1, 95 Atl. 764.

In *Staley v. Illinois Central R. Co.* 268 Ill. 356, 109 N. E. 342, L.R.A. 1916A 450, reversing 186 Ill. App. 593, it appeared that a machinist about to repair the whistle rod of an engine used in interstate commerce was knocked down and killed by another engine used in both interstate and intrastate commerce. The court held that the federal act applied.

In *Chesapeake, etc. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523, it appeared that a machinist while engaged in repairing a turntable which was used for both inter-

state and intrastate trains, was injured by reason of use of the turntable in turning an engine, which had just arrived from an interstate journey and was being placed in the roundhouse. It was held that it was engaged in interstate commerce and was within the provisions of the act. In refuting the contention that the incoming train had completed its interstate trip before the engine was placed on the turntable the court said: "The argument is made that this engine had ended its interstate trip when it was disconnected from the train, and that it, therefore, ceased to be an appliance used in interstate commerce. We cannot agree with this contention. If the question hinged entirely upon the correctness of this position, the appellant could not succeed, because we are convinced that the engine at the time was still being used as an appliance in interstate commerce until it reached the location where it would remain until called upon for another trip or for other purposes, and its interstate trip was not ended until then."

In *Shanks v. Delaware*, etc. R. Co. 239 U. S. 556, 36 S. Ct. 188, *affirming* the reported case, it was held that a workman employed in a machine shop of a railroad company engaged in both interstate and intrastate commerce whose usual duties consisted in repairing locomotives but who was injured in taking down an overhead shaft, which was used to communicate power to some of the machinery used in the repair shop, was said not to be engaged in interstate commerce at the time of the occurrence and did not come under the Federal Employers' Act.

In *Truesdell v. Chesapeake*, etc. R. Co. 159 Ky. 718, 169 S. W. 471, it was held that a laborer injured while engaged in laying rails on the roadbed of an interstate railway, was entitled to sue under the federal act. To substantially the same effect see *Cincinnati*, etc. R. Co. v. *Tucker*, 168 Ky. 144, 181 S. W. 940; *Glunt v. Pennsylvania* R. Co. 249 Pa. St. 522, 95 Atl. 109. So a section hand killed while working on a road used in interstate commerce has been said to be within the purview of the federal act. *Rogers v. New York Cent.* etc. R. Co. 157 N. Y. S. 83.

An assistant foreman of a gang of men on a work train, engaged in removing old rails and other material from the tracks and roadbed of a railroad company, which road was used both in inter and intra state commerce, and who was injured while so employed, has been declared to come within the act even though the train on which he was at work did not go without the state in which it was in on the day of the accident. *Philadelphia*, etc. R. Co. v. *McConnell*, 228 Fed. 263, 142 C. C. A. 555. To substantially the same effect see *Lombardo v. Boston*, etc. R. Co. 223 Fed. 427; *Canadian Pac. R. Co. v.*

*Thompson*, 232 Fed. 353 (— C. C. A. —). But in *Bravis v. Chicago*, etc. R. Co. 217 Fed. 234, 133 C. C. A. 228, a laborer employed in the construction of a railroad bridge, 600 ft. distant from a railroad, and on a cut-off more than a mile in length which had never been provided with rails or used as a railroad, but which when completed was intended to be used in interstate commerce, was held not to be engaged in interstate commerce. The court said: "The Federal Employers' Liability Act protects only those employed in interstate commerce. Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in interstate commerce, and are not protected by that act." So in *Chicago*, etc. R. Co. v. *Steele*, 183 Ind. 444, 108 N. E. 4, it was held that a laborer injured while working on a track which was intended to be used in interstate commerce, but which had not up to that time been so used, was said not to be engaged in interstate commerce. In *Raymond v. Chicago*, etc. R. Co. 233 Fed. 239 (— C. C. A. —), it was held the construction of a tunnel for a railroad engaged in interstate and intrastate commerce, was not in itself an act of interstate commerce, and that a laborer injured during the construction of the tunnel could not recover under the federal act, *following Bravis v. Chicago*, etc. R. Co. *supra*.

A person employed as a laborer in a construction gang, operating a steam shovel for the purpose of removing earth from the roadbed and tracks of a railway company to facilitate the transportation of trains used in interstate commerce, has been declared to be entitled to the benefits of the act. *Tralich v. Chicago*, etc. R. Co. 217 Fed. 675.

In *Columbia*, etc. R. Co. v. *Sauter*, 223 Fed. 604, 139 C. C. A. 150, an employee of a railroad company who was killed while working on the construction of a temporary railroad bridge which was intended to be used in interstate commerce was declared to come within the act. To the same effect see *Long v. Lusk* (Ark.) 186 S. W. 601.

In *Louisville*, etc. R. Co. v. *Walker*, 162 Ky. 209, 172 S. W. 517, an employee who was engaged in repair work on a trestle and who was injured while walking from work on the trestle to a bunk house was regarded as being still engaged in interstate commerce. But in *McKee v. Ohio Valley Electric* R. Co. (W. Va.) 88 S. E. 616, it was held that a laborer in an excavation, made under a wooden trestle over which the trains of an interstate railroad ran and engaged in making a foundation for a new steel bridge to be substituted for the wooden trestle, was not



engaged in interstate commerce, his work not being intimately enough connected with interstate commerce.

An employee of a railroad company repairing a locomotive which had been retired to the roundhouse for a period of three days, but which when in service was used for both inter and intra state commerce, being used 70 % of the time in interstate commerce, has been held to be engaged in interstate rather than intrastate commerce. *Southern Pac. Co. v. Pillsbury* (Cal.) 151 Pac. 277. And in *Cross v. Chicago, etc. R. Co.* 191 Mo. App. 202, 177 S. W. 1127, a roundhouse employee of an interstate road who while stepping from a ladder which he used in cleaning an engine, and on his way to operate a turntable, was injured by turning his ankle on a piece of hose that had been negligently left at the foot of the ladder, was held to be engaged in interstate commerce and entitled to sue under the federal act.

A person injured while engaged in tearing down a roundhouse, which had been partially destroyed by fire, for the purpose of erecting a new one which "very likely was to be used" in interstate commerce, has been held not to be engaged in interstate commerce. *Thomas v. Boston, etc. R. Co.* 218 Fed. 143, *reversing* 219 Fed. 180, 134 C. C. A. 554.

In *Deal v. Coal, etc. R. Co.* 215 Fed. 285, *affirmed* *Coal, etc. Co. v. Deal*, 231 Fed. 604, it was held that an employee of an interstate railroad who was injured in repairing a telegraph line maintained by the railroad company for the purpose of directing the operation of its trains was within the act. To substantially the same effect see *Ross v. Sheldon* (Ia.) 154 N. W. 499. And in *Saunders v. Southern R. Co.* 167 N. C. 375, 83 S. E. 573, it was held that a railroad employee who met his death while installing a block signal system between points in the same state, to be used in interstate commerce, in which the road was engaged, was within the federal act. So in *Cincinnati, etc. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79, a signal man whose duty it was to keep in repair a certain part of a signal system used by a railroad company in both interstate and intrastate commerce, was held to be engaged in interstate commerce.

In *Wesseler v. Great Northern R. Co.* (Wash.) 155 Pac. 1063, an express messenger in charge of the electric plant on an interstate train whose duty it was to stay on during the entire journey, who was injured while turning on the electric current to illuminate the train, was declared to be engaged in interstate commerce even though there was not at that particular moment of time any interstate freight or passengers.

A person engaged in making repairs on an engine used to carry both interstate and intrastate merchandise, and which on its last trip prior to the accident, and its first trip after the accident carried both interstate and intrastate freight has been held to be employed in interstate commerce at the time of the accident, and entitled to sue under the federal act. *Winters v. Minneapolis, etc. R. Co.* 126 Minn. 260, 148 N. W. 106, motion to send down remittitur denied 127 Minn. 532, 148 N. W. 1096. But in *Okrzsezs v. Lehigh Valley R. Co.* 170 App. Div. 15, 155 N. Y. S. 919, a railroad employee working in a repair shop at the repair of a car which had been used previously in both interstate and intrastate commerce was held not to be engaged in interstate commerce at the time of the injury. In *Missouri, etc. R. Co. v. Denahy* (Tex.) 165 S. W. 529, a contrary view was taken on similar facts. And see *Lorick v. Seaboard Air Line Ry.* 102 S. C. 276, 86 S. E. 675.

A person engaged in repairing a pumping station which supplies water to engines carrying interstate and intrastate commerce is at work on an instrumentality of interstate commerce and is within the federal act. *Newkirk v. Prior* (Mo.) 183 S. W. 682. And a workman on a station used in both interstate and intrastate commerce has been held to be engaged in interstate commerce. *Chrosziel v. New York Cent. etc. R. Co.* 159 N. Y. S. 924.

In *Illinois Cent. R. Co. v. Rogers*, 221 Fed. 52, 136 C. C. A. 530, it was held that an employee of a railroad company who while standing near a railroad track and engaged in cleaning stencils for the marking of cars used in interstate commerce was injured, was not engaged in interstate commerce and was not entitled to the benefit of the act.

In *Salmon v. Southern R. Co.* 133 Tenn. 223, 180 S. W. 165, a superintendent supervising the unloading of a car of paint which was to be placed in a storehouse and later to be used on cars in interstate commerce, intrastate commerce, and other properties of the railroad, was held not to be engaged in interstate commerce.

In *Clark v. Chicago Great Western R. Co.* (Ia.) 152 N. W. 635, it was held that a trainmaster injured while supervising the repair work on a side track which had been used for interstate trains was said to come within the purview of the federal act. And in *Lynch v. Central Vermont R. Co.* (Vt.) 95 Atl. 683, it was held that a division roadmaster who while repairing a broken beam on the caboose of a train carrying both intrastate and interstate commerce, was killed, was within the federal act. To substantially the same effect see *Anest v. Columbia, etc. R. Co.* 89 Wash. 609, 154 Pac. 1100.

## EMPLOYEE SUPPLYING FUEL OR WATER.

In *Southern R. Co. v. Peters* (Ala.) 69 So. 611, it was held that a worker employed at a coal chute, who was injured while getting a "buggy" of coal ready for an interstate train, was engaged in interstate commerce and entitled to maintain an action under the act. To substantially the same effect see *Armbruster v. Chicago, etc. R. Co.* 166 Ia. 155, 147 N. W. 337. Compare *Zavitovsky v. Chicago, etc. R. Co.* 161 Wis. 461, 154 N. W. 974.

And it has been held that a laborer employed to wheel coal to heat a repair shop of a railroad company, engaged in both intrastate and interstate commerce, in which shop most of the cars repaired were those used in interstate commerce, was engaged in interstate commerce. *Cousins v. Illinois Cent. R. Co.* 126 Minn. 172, 148 N. W. 58, the court said: "That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employee, carrying materials to the shop to be used in repairing the cars, would be employed in interstate commerce, the Pedersen case decides. It seems no extension of the construction thus given to the statute to hold that an employee carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated."

But a person employed as a miner of coal for railroad use cannot recover under the federal act. *Delaware, etc. R. Co. v. Yurkonis*, 220 Fed. 429, 137 C. C. A. 23.

In *Harrington v. Chicago, etc. R. Co.* (Mo.) 180 S. W. 443, it was held that the fact that a person was employed in hauling coal to a shed for the purpose of supplying engines in both interstate and intrastate trips was not in itself sufficient to warrant the finding that he was engaged in interstate commerce. But in *Barlow v. Lehigh Val. R. Co.* 214 N. Y. 118, 107 N. E. 814, *affirming* judgment 158 App. Div. 768, 143 N. Y. S. 1053, wherein it appeared that an engineer of a switch engine was injured while switching cars of coal which had arrived from a point without the state, for the purpose of being placed on a trestle, so that the coal could be dumped into pockets to supply engines used in both intrastate and interstate commerce, it was held that he was engaged in interstate commerce. The court said: "The plaintiff's right to recover under the federal act is maintained on two grounds: 1, that the transportation of the coal from Sayre, Pa., though for the defendant's own use, was interstate commerce and was not completed until the cars were actually placed on the trestle to be unloaded; 2, that the act

of placing the cars on the trestle, so that the coal could be dumped into pockets from which it could be transferred to the tenders of engines engaged in interstate commerce was so closely connected with and related to interstate commerce as to be a part of it. We think the action may be sustained upon both theories. Transportation, if not strictly commerce, is at least the particular part of commerce in which the defendant is engaged and which said act was intended to regulate. It is not practical in determining the application of the federal or the state law to distinguish between the transportation of supplies from one state to another for the carriers' own use and the transportation of merchandise for sale or exchange. Enough difficulties from conflicting laws and authorities in the case of carriers engaged in both interstate and intrastate commerce now exist without unnecessarily creating others. Congress has undertaken to regulate the liability of carriers to their employees while engaged in interstate commerce, and modern conditions require that all interstate transportation be regarded as commerce or an agency of commerce, subject to the federal statute and under the supervision of the federal authorities. . . . If the plaintiff had actually been coaling an engine preparatory to its moving interstate cars, he would plainly have been engaged in interstate commerce. (*North Carolina R. Co. v. Zachary* [232 U. S. 248, 34 S. Ct. 305, 58 U. S. (L. ed.) 59], *supra*.) The placing of the coal cars on the trestle was one step removed from such work, but it was certainly no more remote than the carrying of bolts to repair a bridge, which was held to be so closely connected with interstate commerce as to be a part of it." In *Kamboris v. Oregon-Washington R. etc. Co.* 75 Ore. 358, 146 Pac. 1097, it was held that a workman whose duty it was to unload into coal bins or pockets coal which was to be used later for interstate and intrastate engines was engaged in interstate commerce, and the court went so far as to hold that the act of blocking the wheels of a car of coal before emptying it, was within the limits of interstate commerce, and that a suit for the death of such employee could be maintained under the federal act. In support of its position the court said: "In the case at bar we cannot see why the act of furnishing the coal for fuel, and placing the same in the pockets of the chute to be used partly in the engines engaged in interstate traffic, was not just as essential in the matter of running interstate trains as the act of taking the same out of such chute or pockets and placing it upon the tenders of the engines, or any other act of the employees in running the engines and trains transporting such commodities. If it were impossible to fill

the position of the deceased, and the coal was not furnished, interstate commerce would stop or be retarded to that extent, and it clearly seems, to us that the general duties of the decedent, as well as the act he was performing at the particular time of the injury, had a very substantial bearing upon and relation to interstate commerce. It cannot be said consistently that the decedent was not engaged in his duty because he was waiting for the cars to approach the proper place in order to block the wheels. It might as well be said that a switchman was not engaged in his duty while waiting for a train to pass a switch in order to turn the same. The act of placing the cars of coal in the chute was similar to decedent's general duties of shoveling coal, and was a necessary service in preparing the fuel for the engines hauling the interstate trains."

In *Tonsellito v. New York Cent. etc. R. Co.* 87 N. J. L. 651, 94 Atl. 804, it was held that an employee of a railroad company who was injured in adjusting a switch, to enable an engine to make a short trip to a storehouse for the purpose of taking down a barrel of oil preparatory to making an interstate journey, was engaged in interstate commerce and as such was entitled to maintain an action under the federal act.

But in *La Casse v. New Orleans, etc. R. Co.* 135 La. 129, 64 So. 1012, it appeared that the plaintiff's intestate was employed in a railroad roundhouse and was killed while steaming up a locomotive which was sometimes used in interstate and sometimes in intrastate commerce. It had on the preceding day made an intrastate run and its next run was uncertain. The court held that the deceased was not engaged in interstate commerce and hence was not within the federal act.

A person engaged in repairing a pumping station which supplied water to engines carrying interstate and intrastate commerce is at work on an instrumentality of interstate commerce and as such is within the federal act. *Newkirk v. Prior (Mo.)* 183 S. W. 682.

#### EMPLOYEE GUARDING OR INSPECTING PROPERTY.

In *Boyle v. Pennsylvania R. Co.* 221 Fed. 453, *affirmed* *Boyle v. Pennsylvania R. Co.* 228 Fed. 266, 142 C. C. A. 558, it was held that there could be no recovery for the death of a train inspector killed while inspecting a train which sometimes was engaged in interstate and at other times intrastate commerce, depending on the destination of the passengers, but which on the particular occasion did not have any passengers whose destination was beyond the state.

In *Pecos, etc. R. Co. v. Rosenbloom (Tex.)* 177 S. W. 952, *denying rehearing* 173 S. W. Ann. Cas. 1916E.—31.

215, a yard clerk employed in a railroad yard having interstate and intrastate cars, who at the time of his accident was walking by the side of an interstate freight car for what purpose it was not known, was said not to be engaged in interstate commerce and not within the federal act.

In *Smith v. Industrial Acc. Commission*, 26 Cal. App. 560, 147 Pac. 600, it was held that a watchman employed in the yards of an interstate railroad whose duty it was to keep trespassers from the trains, and who boarded an interstate train in compliance with this duty, and then alighted to chase several trespassers from the train and the railroad yards and was injured by the accidental explosion of a cartridge in his revolver, was held to come under the act. But in *Chicago, etc. R. Co. v. Industrial Board of Illinois (Ill.)* 113 N. E. 80, a watchman employed in a railroad yard, which contained a few cars used in interstate commerce and others not carrying interstate commerce, who was injured while inspecting certain cars not shown to be used in interstate commerce, was declared not to be engaged in an act of interstate commerce at the time of his injury. *Compare* *Pittsburgh, etc. R. Co. v. Farmers' Trust, etc. Co.* 183 Ind. 287, 108 N. E. 108.

#### EMPLOYEE GOING TO OR RETURNING FROM WORK OR TEMPORARILY DIVERTED THEREFROM.

In *Baltimore, etc. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060, it appeared that a brakeman employed on an interstate train was just about to board the train when he was requested to look about the railroad yard for a boy to get the crew a drinking cup, and while so doing was injured. It was held that he was engaged in interstate commerce at the time of his injury and was entitled to maintain suit under the federal act.

In *Knowles v. New York, etc. R. Co.* 164 App. Div. 711, 150 N. Y. S. 99, it was held that a switchman who was killed on his way to work on a switch engine, used sometimes in interstate and sometimes in intrastate work was not engaged in interstate commerce in the absence of proof that the engine was used exclusively in interstate commerce or that it was about to be used immediately for that purpose.

However, in *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809, wherein it appeared that a train inspector while on duty inspecting interstate trains, which was concededly work of interstate commerce, was suddenly summoned to aid in extricating an injured fellow employee from underneath a car, it was held that while so engaged he was still within the federal act.

In *Erie R. Co. v. Van Buskirk*, 228 Fed. 489, 143 C. C. A. 71, it appeared that an engine hostler assisted a fellow workman to remove the yoke from a clam-shell bucket and while doing so was killed. It was held that even assuming that his duties as hostler were within the scope of interstate commerce, the act of hoisting the yoke from the clam-shell bucket was not an act of interstate commerce and that consequently the deceased was not within the act.

In *Louisville, etc. R. Co. v. Walker*, 162 Ky. 209, 172 S. W. 517, an employee who was engaged in interstate commerce duties and who was injured while walking from work on the trestle to a bunk house was held to be an employee and engaged in interstate commerce.

A fireman who was engaged in "making up trains" for an interstate journey, but who during a temporary lull in the work was injured has been held to come under the act. *Alabama Great Southern R. Co. v. Skotzy* (Ala.) 71 So. 335. See also *Byram v. Illinois Cent. R. Co.* (Ia) 154 N. W. 1006.

#### EMPLOYEE WORKING ON WATERCRAFT.

In *Erie R. Co. v. Jacobus*, 221 Fed. 335, 137 C. C. A. 151, it was held that an employee of an interstate railroad company, who was engaged on a tugboat owned by the railroad, to carry freight between points in New Jersey and New York, and who was injured while fastening the tug to a dock was employed in interstate commerce. The court said: "What the tug was doing at the instant of the accident was simply tying up to the wharf; but the character of the trip which she was completing, or the character of the trip which she contemplated, depended, of course, upon what she had done just before, or what she intended to do just subsequent to, the time of the injury. The thing which she had immediately done, or intended immediately to do, was pertinently and properly charged by the court, in order to determine the character of the thing she was then doing. In other words, in order to ascertain whether she was engaged in interstate or intrastate commerce, and therefore whether redress for the injury done was within or without the act, it was necessary to determine whether her presence and the act of tying up to the dock constituted the last act in a transaction of interstate commerce or the first act preliminary and necessary to such a transaction." But in *Hammill v. Pennsylvania R. Co.* 88 N. J. L. 717, 94 Atl. 313, it was held that an employee of a railroad company, which was the lessee of a canal and which used the same as an interstate waterway, was not engaged in interstate commerce because, the court said, he was employed on a canal and not on a railroad.

**STRONG ET AL.**

v.

**BROWN ET AL.**

Idaho Supreme Court—April 15, 1914.

26 Idaho 1; 140 Pac. 773.

#### Mines and Minerals—Shaft as Nuisance.

It is lawful for the miner to sink holes, pits, and shafts on mineral lands, and to do so is not of itself an act of negligence, and an excavation, pit, or shaft made by a miner in the prosecution of his work is not of itself a nuisance.

#### Unguarded Shaft—Liability of Owner.

The owner of a mining claim is not liable to the owner of live stock for damages resulting from live stock running at large falling into a pit, prospect hole, or mining shaft left open by the miner, and the locator or owner of mining claims is not bound by law to fence or inclose the same in order to protect live stock running at large on the public domain from being injured by falling into the same.

[See note at end of this case.]

Appeal from District Court, Bear Lake county: BUDGE, Judge.

Action for damages. Elisha Strong et al., plaintiffs, and Lucius P. Brown et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

T. L. Glenn for appellants.  
Chas. E. Harris for respondents.

[3] AILSHIE, C. J.—This action was commenced to recover damages for the loss of livestock that were running on the public range and strayed on to the premises of the defendants and fell into certain "pits" or excavations that had been made on the defendants' premises in the prosecution of work on [4] their phosphate mines. A demurrer to the complaint was sustained and judgment of dismissal was entered and this appeal was thereupon prosecuted.

The only question arising, therefore, is as to the sufficiency of the complaint to state a cause of action. The material allegations thereof are as follows:

"2. That at all times herein mentioned the defendants were joint owners of and in possession of the following phosphate mining claims. (Here follows a description of the claims which are located in Bannock county.)

"3. That on the — day of May, 1912, plaintiffs were and for some time prior thereto were the owners of, in possession of and entitled to the possession of the following de-

scribed animals, to wit: (Here follows a description of the animals and allegations of the value thereof.) That in the month of April, 1912, the said mares and horses were turned upon the public range to graze, that so while on said range, the blue mare fell into a pit on said first claim and was killed thereby; that the gelding while so upon said range fell into a pit on said second claim and was killed thereby; that the said gray mare, while so upon said range, fell into a pit on said third claim, and was killed thereby; that the defendants in utter disregard of the rights of plaintiffs negligently, wrongfully and carelessly, after digging said pits, failed to inclose the same, so as to protect stock turned upon the range, and when said pits became filled with snow they were so hidden from view that the said horses walked into said pits and were thereby killed and destroyed to plaintiff's damage in the sum of five hundred and twenty-five dollars (\$525.00.)"

The important and material question in this case is whether a miner, prospector or land owner is guilty of negligence in leaving prospect holes, pits or shafts open and unfenced on the public domain or elsewhere upon mineral lands. In other words, must the miner and prospector fence and inclose prospect holes, pits and mining shafts and tunnels to protect livestock running at large from falling into them? In this case it stands admitted that the respondents were the owners and in possession of certain phosphate claims, and that they had [5] opened "pits" on these claims and the horses belonging to the appellants strayed on to the claims, fell into the pits and died.

The statutes of the United States authorize the prospector and miner to go upon the public domain and prospect for precious metals and locate mining claims, and the statutes require that certain work must be done, which includes digging a pit or sinking a shaft in order to hold such location. It is clear, therefore, that to make such excavation, either on a man's own land or upon the public domain, is not of itself a wrongful act, and the thing done does not of itself constitute a nuisance. The miner has a right to do these things, and that right is not one of sufferance or tolerance, but it is authorized by positive statute. On the other hand, under the laws of this state a man may allow his horses to run at large, and they may roam and graze wherever their instinct may lead them upon unfenced and uninclosed lands. In other words, the owner of unfenced or uninclosed land cannot maintain an action for damages against the owner of such stock because they happen to feed and graze upon his lands.

Neither the government of the United States nor the state of Idaho has enacted

any statute requiring the locator of a mining claim to fence the same or to in any way protect or inclose any pits, shafts or excavations on such claim against livestock. In order for one to be liable for damages he must be guilty of some act of negligence. Such negligence may consist of omission or commission. It seems to us that when a mining claim is left unfenced, as between the owner thereof and the owner of grazing livestock, there exists concurrent risks. The owner of the mining claim incurs the risk of having livestock herd and graze over his land and claim, and he takes the chances of any incidental damages which they may do his property by reason of having free ingress thereto. On the other hand, the owner of such livestock, while he has the privilege of permitting his livestock to run at large and graze over the uninclosed property, takes the concurrent risk of such stock getting into dangerous places, falling into pits or excavations or getting into buildings or works belonging to the land owner and getting maimed or killed.

[6] While the owner of such trespassing livestock cannot be held in damages by the owner of the real property unless the land has been lawfully inclosed, on the other hand, the owner of such realty should not be held liable for an injury which such trespassing animals may receive under such circumstances. The man who turns his livestock out on to the public range takes innumerable risks of their being killed or injured. The mountainous country is full of crags, canyons, pitfalls and innumerable places where they may as easily become injured as from falling into mining excavations. It would be a very dangerous precedent to establish in a state like this, where mining and prospecting are carried on by such a large number of people, to say that every miner and prospector must fence or in some way secure and protect every prospect hole, mining shaft and pit against roaming livestock. We cannot believe that the law imposes such an obligation.

This court, in considering the respective rights of property owners to enjoy the free, unrestricted use of their several properties, in the case of *Bellevue v. Daly*, 14 Idaho 545, 125 Am. St. Rep. 179, 94 Pac. 1036, 14 Ann. Cas. 1136, 15 L.R.A. (N.S.) 992, quoted with approval from Professor Beach as follows:

"It may be stated as a general proposition that every man has a right to the natural use and enjoyment of his property, and if, while lawfully in such use and enjoyment without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong."

Our attention has been called to but one case which seems to be in point on the facts

under consideration in this case, and that is the case of *Beinhorn v. Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 69 Pac. 557, 59 L.R.A. 771. There the defendant was the lessee of a mining claim and mill site. The property was not inclosed by any legal fence. He had placed upon the property a number of vats containing a solution of certain poisonous chemicals and water, and the plaintiff's cattle strayed on to the premises and drank of the solution and [7] died. The plaintiff thereupon commenced an action against the defendant to recover damages to the extent of the value of the cattle. The supreme court of Montana gave the matter a very thorough consideration, and reached the conclusion that the mine owner was not liable for damages, that he had committed no wrong or tort and was in no respect guilty of negligence, and should not be held for damages. In process of the court's discussion and consideration of this question it was said:

"This is his right, for the cattle are trespassing. The owners of domestic animals hold no servitude upon, or interest, temporary or permanent, in the open land of another, merely because it is open. If the land owner fails to 'fence out' cattle lawfully at large, he may not successfully complain of loss caused by such livestock straying upon his uninclosed land. For under these circumstances the trespass is condoned or excused—the law refuses to award damages. While the land owner, by omitting to fence, disables himself from invoking the remedy which is given to those who inclose their property with a legal fence, and while the cattle owner is thereby relieved from liability for casual trespasses, it is nevertheless true that the cattle owner has no right to pasture his cattle on the land of another, and that cattle thus wandering over such lands are not rightfully there. They are there merely by the forbearance, sufferance, or tolerance of the nonfencing land owner; there they may remain only by his tolerance. The cattle-owning plaintiff did not owe to the land-owning defendant the duty to fence his cattle in. The latter did not owe to the former the duty to fence them out. Neither of them was under obligation to the other in that regard. The defendant is not liable in this action unless he was negligent. There cannot be negligence without breach of duty. Hence, manifestly, the defendant was not guilty of negligence in omitting to prevent the plaintiff's cattle from going upon his unfenced land."

The foregoing observations are peculiarly applicable to the facts of the case we have under consideration. We are satisfied that the trial court properly sustained the demurrer and [8] dismissed the action, and that under the allegations of the complaint the defendants were not liable for damages.

The judgment should be affirmed, and it is so ordered, with costs in favor of respondent. Sullivan, J., concurs.

Petition for rehearing denied.

#### NOTE.

#### **Liability of Mine Owner or Operator for Injuries Resulting from Unguarded Mining Excavations.**

It has been held that a mine owner or operator though not the owner of the soil is bound to fence or guard the opening of the shaft of his mine and liable for injuries to a horse resulting from its falling into an unguarded mining excavation. *Williams v. Groucott*, 4 B. & S. 149, 116 E. C. L. 149, 9 Jur. N. S. 1237, 32 L. J. Q. B. 237, 8 L. T. N. S. 458, 11 W. R. 886; *Green v. Kansas, etc. Coal Co.* 53 Mo. App. 606. Thus in *Williams v. Groucott*, supra, it was held that the defendant who had a license to dig a shaft for mining purposes was liable in damages for the death of a horse caused by falling into the shaft which was not properly and effectually covered. Sustaining a judgment for the plaintiff, Cockburn, C. J. said: "The question is certainly a nice and also a novel one, namely, whether, when a mine has been severed from the ownership of the surface soil, with license to the owner of the mine to sink a shaft through the surface, it is incumbent on him to protect the owner of the surface against injury to his cattle by reason of the shaft, or whether it rests with the owner of the surface to protect them against it himself. On this subject there is no positive law, or statutory enactment, or mining custom, and in the actual case there is no stipulation as to the duty of fencing the shaft. On the one hand the owner of the surface may say to the owner of the minerals, 'You have had license given you to dig this shaft, still it is incumbent on you to fence it, for it is a reasonable thing to impose upon you the duty of seeing that no injurious consequences beyond the loss of so much soil shall accrue to me in consequence of it.' On the other hand, the man who sinks the shaft may say, 'In making this shaft I did no more than I was given a right to do; and if, in consequence of that, dangerous consequences are likely to arise to your cattle on the surface, it is for you to guard against them.' And the question is, whether the man sinking the shaft is entitled to make that answer, or is he under an implied obligation to fence the shaft? I am of opinion that it is more reasonable to expect that the man whose act produces the danger should do all that is reasonably necessary to prevent injurious consequences to the owner of the surface soil, who does not know that a shaft will be sunk.

or, if so, when or where it will be sunk." And in *Green v. Kansas, etc. Coal Co.* 53 Mo. App. 606, it appeared that the plaintiff was in possession of a pasture as "co-cropper or tenant" of his father, the owner. The defendant purchased the coal underlying this land, and the right to mine it, from the plaintiff's father. By reason of mining the coal from under the surface a part of it fell in, leaving a hole into which the plaintiff's horse fell. Neither the defendant nor the plaintiff had fenced or guarded the hole although each had known of its existence for a month before the accident. Affirming a judgment for plaintiff the court said: "The sole question presented to us by the instructions, which were offered by defendant below, the refusal of which is urged here as error, is whether the court should have found as a matter of law that it was contributory negligence in plaintiff to turn his animal into the pasture knowing the hole in the ground was unfenced. The instructions declare that notwithstanding defendant's negligence (which the case concedes), yet, since plaintiff knew the hole was unguarded, he could not recover. We cannot say that it was error in the court to refuse these declarations. We are not willing to assert as a matter of law that it is contributory negligence for an owner to turn his horse into 'a pasture' which has a hole made by the falling in of a portion of the surface. We are not advised as to the size of the pasture or the hole. We are not advised as to whether there was anything about the opening in the ground to attract a horse, such as pasturage or food of any kind. In short we have no information except that it was a pasture, and that 'a part of its surface' had fallen in, 'leaving the hole into which plaintiff's mare fell.' There may have been many circumstances or facts, connected with the act of turning in, which would tend strongly to relieve the act altogether of negligence, or which would make it a matter of, at least, questionable propriety. If the latter was the case it could not be said to be negligence as a matter of law." In *Knuckey v. Redruth Rural Dist. Council* [1904] 1 K. B. (Eng.) 382, it was held that the liability to fence is cast either on the actual owner of a mine or on a person who has an interest, akin to ownership, in the minerals of the mine. The action was brought to recover damages for injuries sustained by a horse belonging to plaintiff by reason of its having fallen down a well, formed by the shaft of an abandoned mine within the district of which the defendants were the sanitary authority. The county court judge found as a fact that the well was a public well and that it was an old pit shaft; but he held that the defendants

were not owners of the mine or persons interested in the minerals of same within the statute, and that they were, therefore, not under any statutory duty to fence the shaft. Dismissing an appeal from a judgment for the defendants Lord Alverstone said: "The plaintiff's case is based upon s. 13 of the Metalliferous Mines Regulation Act, 1872, and the question which we have to determine is whether the defendants were bound to perform the statutory duty of fencing the shaft of this mine imposed by that section. If the section stood alone, without the interpretation section, it would be clear that the duty to fence is placed upon the owner of the mine, and upon every other person interested in the minerals of the mine; the word 'thereof' clearly refers to the word 'mine.' Sec. 41 extends the meaning of the word 'mine' in the act so as to make it include every shaft in and adjacent to and belonging to a mine; and I agree, therefore, that the owner of a shaft connected with a mine would be a person liable to fence under s. 13. But s. 41 goes on to define the term 'owner' when used in relation to a mine, and it is expressly provided that it does not include, amongst others, a person who is merely the owner of the soil and not interested in the minerals of the mines. In my opinion, whether you take s. 13 alone or in conjunction with s. 41, it is not the person in whom is vested merely the legal ownership of the soil round the shaft, but the actual owner of the mine or of a shaft connected with the mine, or any other person interested in the minerals of that mine, who is liable under s. 13 to fence the shaft. It is quite clear that the defendants are not interested in the minerals of this mine, and therefore they are not the owners of the mine or of the shaft, so as to bring them under the statutory liability to fence imposed by s. 13."

On the other hand the reported case holds that a mine owner or operator is not guilty of negligence in leaving pits and shafts open and unfenced on the public domain or elsewhere on mineral lands, and that there can be no recovery for damages resulting from live stock running on a public range and falling into the same. To practically the same effect is *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, wherein the court said: "He who suffers his cattle to go at large, takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a saw pit, dig a ditch or a mill-race, or open a stone quarry or a mine hole on his own land, except at the risk of being made liable for consequential damage from it, which would be a most unreasonable restriction of his enjoyment."

LEDY

v.

**NATIONAL COUNCIL OF KNIGHTS  
AND LADIES OF SECURITY.**

Minnesota Supreme Court—March 19, 1915.

129 Minn. 137; 151 N. W. 905.

**Beneficial Societies — Amendment of  
By-laws—Effect on Existing Con-  
tracts.**

Where the insurance contract between a fraternal beneficiary association and its members provided that if the insured committed suicide, sane or insane, within two years, the association should be liable for only one-fifth the amount of the benefit certificate, and that the insured should be bound by the laws of the order then in force or thereafter enacted, a subsequent amendment making the suicide provision effective for a period of five years is binding upon a member who commits suicide while sane, and upon those claiming under his benefit certificate.

[See Ann. Cas. 1913C 675.]

**Insanity — Suicide as Evidence.**

Sanity is presumed, and the taking of one's own life does not, in itself, establish insanity.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Ramsey county: BRILL, Judge.

Action on benefit certificate. Elsie Ledy, plaintiff, and National Council of Knights and Ladies of Security, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Arthur Christofferson, Joseph A. A. Burnquist and Alvin B. Christofferson* for appellant.

*William G. White and H. E. Hall* for respondent.

[138] TAYLOR, C.—On February 12, 1908, defendant, a fraternal beneficiary association, issued a benefit certificate to Bernard A. Ledy in which plaintiff, his wife, was named as beneficiary. The contract provided that the insured should be bound by the laws of the order then in force or thereafter enacted. On December 10, 1912, Ledy committed suicide. The laws of the order, in force in 1908, provided that, if the assured committed suicide within two years after receiving his certificate, the association should be liable for only one-fifth the amount of such certificate. By an amendment to such laws which went into effect in September, 1910,

the time during which the above provision should be in force was extended to a period of five years from the issuance of the certificate. Ledy died by suicide about two months before the five years expired. Plaintiff sued for the full amount of the certificate. The trial court held that she was entitled to recover one-fifth thereof and no more. She moved for a new trial and appealed from the order denying her motion.

The only controversy is whether she is entitled to recover the full amount of the certificate, or is limited to one-fifth thereof by the above provision. In either event, certain deductions are to be made for the benefit of the reserve fund, but these amounts were agreed upon and are not in controversy. The statute in force when the contract was made provided that:

"Any changes, additions or amendments to said charter or articles of association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries and shall govern and control the contract in all [139] respects the same as though such changes, additions or amendments had been made prior to or were in force at the time of the application for membership." G. S. 1913, § 3544.

It is contended that the amendment, extending the period during which the suicide provision should remain in force, is unreasonable and void as against contracts entered into before its adoption, unless the rule announced in *Thibert v. Supreme Lodge*, etc. 78 Minn. 448, 81 N. W. 220, 47 L.R.A. 136, 79 Am. St. Rep. 412; *Tebo v. Supreme Council of Royal Arcanum*, 89 Minn. 3, 93 N. W. 513; *Olson v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622; *Rosenstein v. Court of Honor*, 122 Minn. 310, 142 N. W. 331; *Ruder v. National Council of Knights*, etc. 124 Minn. 431, 145 N. W. 118, has been changed by the above statute; and that the present case turns upon the construction to be given to that statute. We cannot assent to this proposition.

Where a fraternal beneficiary association, in the contract for insurance entered into with its members, stipulates that they shall be subject to, and bound by, the subsequently enacted laws and regulations of the order, the rule is well nigh universal that the association must exercise the power so reserved in a reasonable manner, and that a law of the order, enacted under such power, which would make an unreasonable change in the terms of prior contracts, is void as against such contracts. While the courts differ little as to the general rule, they differ much as to what amendments are unreasonable within the meaning of the rule.



They agree quite generally, however, that an amendment, which relieves the association, in whole or in part, from liability in case the assured intentionally ends his own life, is not forbidden by the rule and is valid. Supreme Commandery, etc. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Fraternal Union of America v. Zeigler, 145 Ala. 287, 289, 39 So. 751; Scow v. Supreme Council, etc. 223 Ill. 32, 79 N. E. 42; Knights of Macca-bees of World v. Nelson, 77 Kan. 629, 95 Pac. 1052; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712, 55 Am. St. Rep. 310; Dornes v. Supreme Lodge, etc. 75 Miss. 466, 23 So. 191; Lange v. Royal High-landers, [140] 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786; Tisch v. Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188; Su-preme Lodge, etc. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L.R.A. 833; Clement v. Clement, 113 Tenn. 40, 81 S. W. 1249; Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co. 98 Wis. 292, 73 N. W. 1015. In the above cases it appeared that the insured committed suicide, but it did not appear that he was insane. While the various amendments con-sidered in those cases purported to bar a recovery, whether the insured was sane or insane, at the time of the suicide, and the courts held them valid in language which ap-parently upheld all the provisions therein, the question actually decided was that they were valid as against those claiming under a member who committed suicide while sane. Such amendments have also been held valid where the insured committed suicide while insane. Supreme Tent of Knights of Mac-cabees v. Hammers, 81 Ill. App. 560, 82 N. E. 89; Court of Honor v. Hutchens, 43 Ind. App. 321, 79 N. E. 409; Chambers v. Supreme Tent, etc. 200 Pa. St. 244, 49 Atl. 784, 86 Am. St. Rep. 716; Eversberg v. Supreme Tent, etc. 33 Tex. Civ. App. 549, 77 S. W. 246. Other courts have held such amendments valid where the insured was sane at the time of the suicide, but invalid where he was insane and not responsible for his act. In Weber v. Supreme Tent, etc. 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753, the New York court held that an amend-ment extending the suicide provision from one year to five years was unreasonable and void as to a member who committed suicide while insane. In the later case of Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L.R.A. 347, the court approved the decision in the Weber case, but said that in the Weber case there was a finding that the insured was insane at the time of the suicide, while there was not such finding in the case then under consideration, and held that the insured was presumed to have been sane, and that the amendment was valid

in such cases and barred a recovery. In Supreme Conclave, etc. v. Rehan, 119 Md. 92, Ann. Cas. 1914D 58, 85 Atl. 1035, 46 L.R.A.(N.S.) 308, the court, after discussing the authorities, say:

"We, therefore, hold upon what we regard as the safer, sounder, [141] and more rea-sonable rule upon this question, that the after enacted by-law before us is not binding upon the plaintiff, if her husband took his own life *while insane*; but that it is binding upon her, if he committed suicide *while sane*."

In Plunkett v. Supreme Conclave, etc. 105 Va. 643, 55 S. E. 9, it did not appear affirma-tively that the insured was insane. The court held that he must be deemed to have been sane and that the by-law was therefore valid and binding, but say they do not de-termine whether it would be binding in case the member had been insane. In Olson v. Court of Honor, 100 Minn. 117, 110 N. W. 374, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622, this court held that the by-law, there under consideration, was not valid or binding in a case where the member was insane, and under treatment for in-sanity, at the time he took his own life. Whether an amendment enacting a suicide provision is valid and binding in a case where the insured committed suicide while sane, does not appear to have been considered or de-termined by this court. A few courts have held such amendments void (Lewine v. Supreme Lodge, etc. 122 Mo. App. 547, 99 S. W. 821; Sautter v. Supreme Conclave, etc. 72 N. J. L. 325, 62 Atl. 520); but, as shown by the cases hereinbefore cited, the great majority of courts hold them valid. The reasons as-signed are various. Attention is frequently called to the fact that, at common law, sui-cide was a crime which entailed forfeiture of property; that, while the successful perpetra-tor is beyond the reach of the law, he com-mits an act which is *malum in se* and which the law tries to prevent by all the means in its power; that he has no moral, legal or other right to commit such an act; that the law cannot say that a provision which pre-vents him from fastening liability upon the association by his own criminal act volun-tarily committed is unreasonable; and that such a provision not only invades no legal or vested right, but takes away a possible in-centive to commit a heinous offense.

In the instant case there is no claim that the insured was insane, and he is presumed to have been sane. 2 Dunnell, Minn. Dig. § 4516. The fact that he committed suicide is not, in itself, sufficient to establish insanity. Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, [142] Ann. Cas. 1912A 41, and cases cited in note. We think there is a wide distinction between a case where death results from the

irresponsible act of an insane person, and a case where it results from the intentional act of a person in his right mind; that the amendment in question cannot be declared unreasonable, either upon principle or authority, when applied to a case in which the insured committed suicide while sane, even if the statute quoted should be construed as merely a legislative enactment of the rule previously recognized by this court; and that plaintiff is bound by the provision as amended.

Order affirmed.

#### NOTE.

##### **Suicide as Evidence of Insanity.**

The present note is confined to a review of the recent cases discussing suicide as evidence of insanity. The earlier decisions on that point are collected in the notes to *Wilkinson v. Service*, Ann. Cas. 1912A 41, and *Supreme Conclave, etc. v. Miles*, 84 Am. St. Rep. 528. Cases relating to the effect of an act of self-destruction, while sane or insane, on the contract or other act of the person committing suicide, are without the scope of this note.

The recent decisions support the rule that the mere fact of suicide does not remove the presumption of sanity which obtains in all cases where human conduct is under investigation, nor does the law draw any inference of insanity therefrom. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 84 L. J. K. B. 847 [1915] W. C. & Ins. Rep. 250, 112 L. T. N. S. 840, 59 S. J. 233, 31 Times L. Rep. 158; *Supreme Council, etc. v. Wishart*, 192 Fed. 453, 112 C. C. A. 591; *In re Miller*, 3 Boyce (Del.) 477, 85 Atl. 803; *Rudolph v. U. S.* 36 App. Cas. (D. C.) 379; *Mutual L. Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 205; *In re Holmberg*, 83 Misc. 245, 145 N. Y. S. 846. See also *Benard v. Protected Home Circle*, 161 App. Div. 59, 146 N. Y. S. 232. And see the reported case. In *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 84 L. J. K. B. 847 [1915] W. C. & Ins. Rep. 250, 112 L. T. N. S. 840, 59 S. J. 233, 31 Times L. Rep. 158, it appeared that a workman's eye was injured as the result of an accident arising out of and in the course of his employment, in consequence whereof he suffered severe pain and became greatly depressed, and while in that condition some days later committed suicide. It was held that there was no right to compensation unless it was shown that the suicide was itself due to insanity caused by the accident. It was also held that the fact that the deceased had committed suicide was not evidence of insanity. On that point, Lord Cozens-Hardy, M.R., said: "Some of

the witnesses who were called took the view that the fact that a man commits suicide is in itself evidence that he is insane. That of course is quite hopeless; it would go to show that there never could be a criminal offense in suicide. Attempts to commit suicide come before criminal courts in many forms, and it is idle to say that the fact that a man shoots himself with intent to kill himself is evidence of insanity. It is nothing of the kind." And in concurrence, *Swinfen Eady, L.J.*, said: "Really the only fact here is the suicide, and, from that alone, the inference cannot be drawn that the man was insane when he committed suicide."

However, the fact of suicide or attempted suicide may be taken in connection with other evidence with which it is consistent, to show insanity; but, standing alone, it cannot support the issue. *Supreme Council, etc. v. Wishart*, 192 Fed. 453, 11 C. C. A. 591; *Wasserman's Estate*, 170 Cal. 101, 148 Pac. 931; *In re Miller*, 3 Boyce (Del.) 477, 85 Atl. 803; *Rudolph v. U. S.* 36 App. Cas. (D. C.) 379; *Sovereign Camp, etc. v. Ethridge*, 166 Ky. 795, 179 S. W. 1022. And see the reported case. In *Sovereign Camp, etc. v. Ethridge*, supra, an action on an insurance policy, wherein it appeared that the decedent had been arrested on a charge of stealing, and between the time of his arrest and the day set for his trial he had committed suicide, the court said: "Aside from the manner of his death it may well be doubted if there was sufficient evidence to show that the young man was insane. But considered in connection with the evidence of his curious, unnatural conduct observable for some weeks before his death, the fact that he took his life under the circumstances stated, furnished sufficient evidence that at the time his mind was so unbalanced as that he did not know or appreciate the quality of his act or on account of mental unsoundness did not have sufficient will-power to control his actions to authorize the submission of this issue to a jury. The charge against him was not a serious one, although calculated to deeply humiliate and distress him, and it is hardly conceivable that he should have taken his life unless his mind was so unbalanced as to render him incapable of knowing or appreciating what he was doing."

This general rule, that no legal inference or presumption of insanity is to be drawn from the fact of suicide, has been applied in determining the liability of a life or benefit insurance company, where it appeared that the insured had committed suicide. *Supreme Council, etc. v. Wishart*, 192 Fed. 453, 112 C. C. A. 591. *Sovereign Camp, etc. v. Ethridge*, 166 Ky. 795, 179 S. W. 1022. And see the reported case. In such a case, the burden is on the plaintiff to prove that the

insured was not of a sound mind at the time of his act of self-destruction. Supreme Council, etc. v. Wishart, *supra*.

Likewise, the rule that the law does not infer or presume insanity from the fact of suicide, has been applied in determining the testamentary capacity of a person committing suicide, with the result that the suicidal act has been held not to show a lack of testamentary capacity. Wasserman's Estate, 170 Cal. 101, 148 Pac. 931; *In re Miller*, 3 Boyce (Del.) 477, 85 Atl. 803; *In re Holmberg*, 83 Misc. 245, 145 N. Y. S. 846. In the case of *In re Miller*, *supra*, the court said: "Neither from an attempt at suicide, nor from the completed act, does the law draw any inference of insanity. The proof of such an attempt or act does not establish unsoundness of mind at an antecedent or subsequent period of time. It stands simply as a fact, together with all the other facts shown by the evidence, from which the jury are to determine whether the deceased, at the time of making his will, was of sound or unsound mind." And in the case of *In re Holmberg*, *supra*, it was held that the mere fact that the testatrix had taken poison with suicidal intent, did not of itself warrant the deduction that her mind was unsound, or that she lacked testamentary capacity at the time of making her will, which she drew herself six days later.

WIFFEN

v.

BAILEY ET AL.

England—Court of Appeal—November 18, 1914.

[1915] 1 K. B. 600.

**Malicious Prosecution — Nature of Prosecution — Proceeding to Abate Nuisance.**

An action for malicious prosecution will not lie for the malicious filing of a complaint under the Public Health Act against the occupier of premises to compel the cleaning and disinfecting thereof.

[See note at end of this case.]

[600] Appeal from the judgment of Horridge, J., on further consideration after the trial of the action with a jury; reported [1914] 2 K. B. 5.

The plaintiff was the occupier of a house at Romford, certain of the rooms in which were in so dirty a condition that on April 1,

1913, his wife wrote to the defendant Bailey, the inspector of nuisances for the Romford urban district, asking him to view the premises, and inviting his assistance to compel the landlord to do the necessary cleansing and repairs. Bailey inspected the premises, and as the result of his inspection served on the plaintiff a notice, dated April 3, under s. 94 of the Public Health Act, 1875, that the want of cleansing of the rooms in question amounted to a nuisance and requiring him within twenty-one days to abate the same, and for that purpose to strip the paper off the walls and cleanse and distemper the ceilings and walls of the rooms. The plaintiff having failed to comply [601] with the notice, on May 21 the defendant Bailey, acting upon the instruction of the defendant council, preferred a complaint against him before the Romford justices under s. 95 of the said Act to enforce the abatement of the nuisance as required by the notice. At the hearing the justices dismissed the complaint and awarded the plaintiff 5*l.* 5*s.* costs. The plaintiff had in defending himself against the prosecution incurred further costs as between solicitor and client amounting to 5*l.* 15*s.*, or 11*l.* in all. The plaintiff thereupon brought this action for malicious prosecution. At the trial the jury found that the defendants in taking proceedings under s. 95 were actuated by malice, and the judge ruled that they had no reasonable and probable cause for so taking them. A verdict was given for 250*l.* damages.

Horridge, J., on further consideration held that the complaint was a proceeding involving damage to the plaintiff's fair fame within the first of the three heads of damage stated by Lord Holt, C. J., in *Savile v. Roberts* (1698) 1 *Ld. Raym.* 374, at p. 378, as being sufficient to support an action for malicious prosecution, and he accordingly gave judgment for the plaintiff.

The defendants appealed.

*Compston, K. C.* and *H. Maddocks* for appellants.

*G. W. H. Jones* and *A. Crew* for respondent. *Hunt & Hunt*, solicitors for appellants.

*Lloyd Richardson & Co.* solicitors for respondent.

[606] BUCKLEY, L. J. (*after stating the facts*).—The first question which has been argued before us is whether the action is in the circumstances maintainable. An action for malicious prosecution will lie under the circumstances stated by Lord Holt, C. J., in *Savile v. Roberts*, 1 *Ld. Raym.* 374, at p. 378. There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a

man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if and only if it falls within one or other of those three heads. An action for malicious prosecution may lie where the proceedings are civil and not criminal. But, as was pointed out by Bowen, L. J., in *Quartz Hill Consol. Gold Min. Co. v. Eyre*, 11 Q. B. D. 674, at pp. 689-691, it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings. The Lord Justice gave this reason (at p. 689): "It is clear that Holt, C. J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action of malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame [607] cannot be assailed in any way by the bringing of the action." So the exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that in civil proceedings the poison and the antidote are presented simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made. If there be no scandal, if there be no danger of loss of life, limb, or liberty, if there be no pecuniary damage, the action will not lie. Sir James Mansfield, C. J., in *Byne v. Moore*, 5 Taunt. 187, at p. 191, 1 E. C. L. 69, 73, seems to me to have said very much the same: "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it: this bill was a piece of mere waste paper." So that what I have

to ascertain for the purpose of seeing whether the action will lie is this: Is there, within the first head, scandal, damage to fame? or is there, within the second head, danger of imprisonment? or is there, within the third head, damage to property? The last is not in question in this case. There is no pecuniary damage. Though the costs incurred by the plaintiff were probably larger than the 5l. 5s. which were allowed to him by the justices, it is well established that the difference between solicitor and client costs and party and party costs is not legal damage. Does the case fall within the second head, that is to say, is there damage to the plaintiff's person? The proceedings were taken under ss. 94-96 of the Public Health Act, 1875. If the summons had succeeded a fine might have been imposed, and if the fine had not been paid a warrant of distress might have been issued under the Summary Jurisdiction Acts, and in default of goods to satisfy the distress imprisonment might have followed. In that sense, and in no other sense, could the proceedings have resulted in imprisonment. It seems to me that that does not satisfy the second head. There are many proceedings which may result in imprisonment. [608] A judgment in an ordinary action of debt may eventually be followed by imprisonment under s. 5 of the Debtors Act, 1869, but it will not satisfy the second head of damage stated by Lord Holt, because the person is not imprisoned by virtue of the proceedings. Imprisonment is only an ultimate result which may follow upon non-compliance with the obligation to pay the money. For these reasons the case does not, in my opinion, fall within the second head.

It remains for consideration whether the case falls within the first head, "damage to his fame, as if the matter whereof he is accused be scandalous." It seems to me that it is necessary, as Bowen, L. J., said in *Quartz Hill Consol. Gold Min. Co. v. Eyre*, 11 Q. B. D. p. 689, for the plaintiff to show that damage to his fair fame is the necessary and natural consequence of the proceedings taken against him. It is said that this is a criminal proceeding. I agree that it is in a sense. It is a proceeding which may result in the imposition of a fine for failure to comply with a statutory obligation. In *Reg. v. Whitchurch*, 7 Q. B. D. 534, it was held that an order of justices under these sections of the Public Health Act, 1875, was made in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873. *Rayson v. South London Tramways Co.* [1893] 2 Q. B. 304, seems to me to be distinguishable from this case. There it was held that an action for malicious prosecution would lie. The imputation contained in the charge in that case was that the plaintiff was a common cheat, that he had

travelled in a tramcar with intent to avoid payment of his fare. That was, no doubt, a charge that the plaintiff had committed a breach of a statutory obligation contained in s. 51 of the Tramways Act, 1870, but the imputation was that he was attempting to cheat the tramway company. That case is no authority in support of the plaintiff's contention. The matter is in a sense criminal, but that does not conclude the question. I have to see whether the institution of these proceedings necessarily and naturally conveyed an imputation affecting the plaintiff's fair fame. There are many proceedings, such as proceedings for obstructing a highway, or for keeping pigs in an improper place, which are in the sense I [609] have above indicated criminal. But no one would say that a person's fair fame was affected because he was summoned for keeping a pig in an improper place, or for allowing a dog to wander about unmuzzled contrary to a muzzling order. There is no imputation against fair fame in such a case.

The complaint in the present case was that a certain house was not in such a state of repair as was necessary for the purpose of health and that notice had been served upon the plaintiff as the occupier thereof under s. 94 of the Public Health Act, 1875, requiring him to remedy the same. Sect. 94 provides that "on the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises." Therefore a notice of this kind may be served upon a mere occupier, a person who may be in no way responsible for the state of repair in which the premises are found. He may have gone into occupation the day or the week before, and he may have been properly served with the notice, because the person by whose act, default, or sufferance the nuisance arose or continued cannot be found. How does that affect his fair fame? There is no evidence that the proceedings, which originated in the letter written by the plaintiff's wife, affected his fair fame. It seems to me that in these circumstances the plaintiff has not succeeded in bringing this case within any one of the heads of damage specified by Lord Holt as being sufficient to support the action. For these reasons I think that the action cannot be maintained and that judgment must be entered for the defendants.

[His Lordship also said that in his opinion the findings of the jury upon the question of malice were against the weight of the evidence and were inconsistent findings, and that the damages were excessive, but these questions

became immaterial in view of his decision that the action was not maintainable.]

PHILLIMORE, L. J.—I agree. I assume that this was a prosecution in a criminal matter, but that, in my opinion, is not sufficient [610] to support an action for malicious prosecution. The three canons laid down by Lord Holt in *Savile v. Roberts*, 1 *Ld. Raym.* at p. 378, have been accepted ever since, and they were specially referred to with approval by this Court in *Quartz Hill Consol. Gold Min. Co. v. Eyre*, 11 *Q. B. D.* at pp. 683, 689. Those canons or conditions of such an action are, first, that there must be damage to a man's fame, as if the matter whereof he is accused be scandalous; secondly, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and, thirdly, damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. This last head of damage was held to apply in *Savile v. Roberts*, 1 *Ld. Raym.* 374, and the action was held to be maintainable. The only expenses in the present case are the difference between the costs allowed to the plaintiff by the justices and the additional costs incurred by him in defending the proceedings. So far, at any rate, as this Court is concerned, we are bound to hold—and I see no reason to dissent from this view—that those extra expenses are not legal damages. The next question is whether the plaintiff was put in danger to lose his liberty. In my opinion he was not. It is quite true that if upon the hearing of the summons an order had been made against him, not merely to cleanse the rooms, but to pay a penalty or costs, and he did not pay, and a warrant of distress was issued and no sufficient distress was found upon his premises, he might have been sent to prison. But that very remote consequence is not the danger to liberty to which Lord Holt referred in *Savile v. Roberts*, 1 *Ld. Raym.* at p. 378. Many civil actions even now, and most civil actions before the Debtors Act, 1869, entitled "An Act for the abolition of imprisonment for debt," &c., might result in the restraint of a man's liberty. That has never been considered as sufficient to support a suggestion that the man's liberty is put in peril within the head of damage stated by Lord Holt. Every case where an injunction is obtained against a person may lead to a motion for committal for contempt of Court and to the defendant being sent to prison. An analogy, as *Bowen, L. J.* said in *Quartz Hill Consol. Gold Min Co. v. Eyre*, 11 *Q. B. D.* at p. 692, [611] may be found in the law of slander. *Ogden v. Turner*, 6 *Mod.* 104, and *Hellwig v. Mitchell* [1910] 1 *K. B.* 609, show that, though an action of slander will lie with-

out proof of special damage where the words impute the commission of a crime, "crime" means a crime which will end in imprisonment and not a crime which will end in a fine, though that fine can, like any debt to the King, be enforced by restraint of the person. Therefore that head of damage is not satisfied in this case.

There remains the last head of damage, namely, that to a man's fame, as if the matter whereof he is accused be scandalous. Lord Holt said, 1 *Ld. Raym.* at p. 378, that "there is no scandal in the crime for which the plaintiff in the original action was indicted." The plaintiff there was indicted on two indictments for having on two separate days with a number of other persons riotously assembled and stopped with posts, fences, and bars a road which belonged to the prosecutor and which he used for carrying his tithes of grain and hay. I do not know what was proved on those indictments, but Lord Holt said summarily that there was no scandal in the crime for which the plaintiff was indicted. It seems to me that what one must look at is, not what might be proved in the course of a prosecution, but what is enough to support a conviction upon the information or indictment. If it will be enough to support a conviction upon the information or indictment that the person charged has done something which does not injure his fair fame, no scandal is involved in the prosecution. In the present case the only complaint is that the plaintiff, being the occupier of a house and having had a notice served upon him to strip the paper off the walls in certain rooms and to cleanse the rooms within twenty-one days, has not complied with the notice. It does not follow that he is responsible for the condition of the premises, or responsible for any appreciable length of time. Section 94 of the Public Health Act, 1875, says that the occupier, in the absence of the person by whose act, default, or sufferance the nuisance arose, may be served. It seems to me that it would be going too far to say that that kind of prosecution involves a scandal. In this connection I [612] may refer to *Byne v. Moore*, 5 *Taunt.* 187, 1 *E. C. L.* 69, and *Freeman v. Arkell*, 3 *Dowl. & R.* 669. In both those cases, no doubt, the grand jury ignored the bills, so that they did not ripen into indictments, but I do not think that that makes any difference. In some ways indeed it operates more favourably for the person complaining of malicious prosecution, because the antidote, of which Bowen, *L. J.* spoke, 11 *Q. B. D.* at pp. 689, 691, can never be applied inasmuch as the man is never put upon his defence, the bill having been ignored by the grand jury. Be that as it may, in those two cases the Courts said that the charges there, which were charges of assault, did not necessarily involve scandal. With regard to *Rayson v. South London Tramways*

*Co.* [1893] 2 *Q. B.* 304, I agree that Lord Esher, *M. R.* in the course of his judgment, with which the other members of the Court agreed, used general language which seems to eliminate the question of scandal altogether. We must, however, remember the point to which the arguments of the unsuccessful appellants were addressed and to which the Court addressed itself. It was not contended—it could not have been contended—that the proceedings did not involve damage to the fair fame of the plaintiff. It was a charge of cheating. The only point that could be put was that the proceedings were not criminal proceedings, and it was to that point that the arguments and the judgment were addressed. It may be unfortunate that it did not occur to some member of the Court that a caution should be inserted with regard to the special circumstances of the case. It is clear from the report that the question of scandal was not present to the minds of the Court, because it was not made a point of importance in that particular case. If it was a criminal prosecution, then it was a prosecution involving scandal. "Scandal," as the cases show, means something derogatory to the fair fame of the person charged; and to me guided by the decisions and applying one's common sense there seems to have been no imputation involving scandal on the plaintiff in the present case. The case of *Quartz Hill Consol. Gold Mining Co. v. Eyre*, 11 *Q. B. D.* 874, shows that there are certain forms of civil proceedings, though within very narrow limits, which may [613] give rise to an action for malicious prosecution, because, as the Court says, the bane comes before the antidote, and mischief may be done which it will be too late to overtake. I think that Sir Herbert Stephen is right in his book on *Malicious Prosecution*, p. 19, in treating an action for maliciously taking proceedings in bankruptcy and that class of action as not being strictly action for malicious prosecution, but closely analogous thereto. Upon the whole I come to the conclusion that this is not a case in which an action for malicious prosecution will lie. I cannot help thinking that the element of costs bulked largely in the action for malicious prosecution. If the subject when prosecuted by the Crown could have recovered his costs of defending himself I doubt whether the action would have been allowed to flourish. However that may be, the element of costs not coming in here and the element of imprisonment not coming in in any direct way, I do not think there is that element of scandal which is sufficient to support the action. There must therefore be judgment for the defendants.

[His Lordship also said that the verdict was unsatisfactory and the damages were excessive.]

PICKFORD, L. J.—I am of the same opinion. The only ground for the maintenance of this action which I think it is necessary to consider is whether the prosecution as a necessary and natural consequence would impair the fair fame of the plaintiff. Horridge, J. has held that it would, and I must say that, looking at the case of *Rayson v. South London Tramways Co.* [1893] 2 Q. B. 304, it would have been difficult for him to decide otherwise. I do not say that technically he might not have escaped from the reasoning of Lord Esher, M. R. in that case, inasmuch as the reasoning went far beyond what was necessary for the decision, but I doubt whether the learned judge, sitting as a Court of first instance, could very well have disregarded it. The reasoning there came to this, that if there is a prosecution for an act which is a breach of a statutory obligation, and therefore a misdemeanour at common law, and if no penalty were prescribed by the statute creating the offence, it would be punishable upon indictment as [614] a misdemeanor by fine or imprisonment; and that therefore the action for malicious prosecution was maintainable, presumably because it was a prosecution which reflected on the fair fame of the person prosecuted. That seems to me to have been Lord Esher's reasoning. I think that in this Court we are entitled to consider whether we approve of that reasoning. The decision there is quite right, that a prosecution of a man for attempting to avoid payment of his fare in a tramcar is a prosecution for an act which reflects upon that man's character. It is a prosecution in respect of a dishonest act. The decision therefore is right, but the statement that wherever there has been a breach of a statutory obligation a prosecution for that necessarily reflects upon the fair fame of the person prosecuted, because if no special penalty were provided by the Act he might be liable to imprisonment, is a proposition which, in my opinion, cannot be maintained. It seems to me that we have not to consider what facts might be proved in order to support the prosecution, but whether the charge of itself as a necessary and natural consequence impairs the fair fame of the person against whom it is made. It has been pointed out that everything punishable by a fine does not necessarily reflect upon the fair fame of the person prosecuted. There are many prosecutions which might be mentioned, such as a prosecution for not carrying a light on a bicycle, or a prosecution for keeping a pig in a wrong place, which cannot be said to reflect upon the fair fame of the person prosecuted, but it is possible that in any of those prosecutions evidence might be given which might raise an imputation against him. That is not what we have to look at. We have to look at the charge

itself. In the present case the charge is that the plaintiff was duly served with a notice from the urban sanitary authority requiring him as the occupier of certain premises within twenty-one days from the service of the notice to strip paper off the walls of certain rooms and to cleanse and distemper the ceilings and walls, and that he failed and neglected to comply with the said notice. That charge does not seem to me to contain any imputation against the fair fame of the plaintiff. As has been already pointed out, he was served as the occupier, and that does not necessarily mean that the condition of the premises was caused [615] by his act or default. He may have only just come into occupation. There may have been a strike of workmen or many other things which may have been the cause of his failure to comply with the notice. I do not know whether the prosecution thought that they could prove that the state of the premises was owing to his default or not. We have to look at the charge as stated in the summons, and it does not seem to me as a necessary and natural consequence to impute anything against the plaintiff's fair fame. For these reasons I think that this action cannot be maintained, and judgment must be entered for the defendants.

[His Lordship also thought, though it was not necessary to consider it, that the findings of the jury were so inconsistent that there must have been a new trial, and that the damages were excessive.]

Appeal allowed.

#### NOTE.

#### Institution of Proceeding to Abate Nuisance as Ground for Action for Malicious Prosecution.

The reported case holds that the malicious bringing of a quasi criminal proceeding for acts constituting a nuisance but involving no moral turpitude is not ground for an action for malicious prosecution. In so holding the court follows and applies the leading case of *Savile v. Roberts*, 1 Ld. Raym. (Eng.) 374, wherein Lord Holt laid down the rule that an action for malicious prosecution will lie for such a proceeding only as tends to injure the defendant therein in his reputation, person or property.

The rule in *Savile v. Roberts* has not been accepted generally in the United States, it being there held in the majority of jurisdictions that the malicious prosecution of any kind of proceeding, civil or criminal, will support an action. See 26 Cyc. *Malicious Prosecution*, p. 12; 19 Am. & Eng. Enc. of Law (2d ed.) p. 651; note to *McCormick Harvest-*

ing Mach. Co. v. Willan, 93 Am. St. Rep. 449. As is pointed out in the reported case, the English system of compensatory costs is deemed to be adequate in cases not attended by special damage.

Therefore while the reported case appears to be unique in respect to the precise facts involved, it is probable that it would not be followed in the United States outside the few jurisdictions which adhere to the English rule. In *Long v. Rogers*, 17 Ala. 540, it was said: "It matters not whether the charge be for a felony or misdemeanor, except as affecting the damages to which the party may be entitled. In prosecutions for the former (felonies) we know, most usually the party's loss of reputation forms not an inconsiderable circumstance before the jury in the estimation of the damages, whereas in cases of misdemeanor it may not be at all involved."

#### MIAMI COPPER COMPANY.

v.

#### STATE.

Arizona Supreme Court—June 22, 1915.

17 *Ariz.* 179; 149 *Pac.* 758.

#### Penalties — Joinder of Actions.

Under Civ. Code 1901, pars. 1280 and 1291, providing that the complaint may contain several different causes of action, and that only such causes of action may be joined as are capable of the same character of relief, actions *ex contractu*, not being joinable with actions *ex delicto*, and actions to recover for injuries to the person, to property, or to character not being joinable, where the state sues to recover the penalty assessed upon any electric light or power company, by Laws 1912, c. 50, that should permit any employee about its plant, to be on duty more than 8 hours in 24, under penalty of \$100 fine for each day's violation of the act, the statute providing that the suit for such penalty may be instituted in any court of the state having competent jurisdiction, the recovery sought being for 15 violations, separately stated in the complaint, the superior court has jurisdiction of the suit, since the several penalties sued for are grounded in the same right, the parties and the causes of action the same, and each capable of the same character of relief.

#### Courts — Jurisdiction — Exclusive or Concurrent.

Const. art. 6, § 9, provides that the number of justices of the peace shall be provided by law, and that their jurisdiction shall not trench on that of any court of record, except

that they shall have concurrent jurisdiction with the superior court where the amount of damage claimed does not exceed two hundred dollars. Article 6, § 6, provides that the superior court shall have original jurisdiction in all cases in which the demand or the value of the property amounts to \$200 exclusive of interest and costs. The state sued a corporation in the superior court to recover penalties aggregating \$1,500 for 15 violations of Laws 1912, c. 50, forbidding any corporation operating an electric light or power plant to permit any employee about its plant to be on duty more than eight hours a day. Held, that the superior court had jurisdiction, although the individual penalty assessed for each violation was within the jurisdictional limit of justice courts, since to exclude the jurisdiction of the superior court the grant of jurisdiction to another court must be exclusive and not merely concurrent.

#### Jury — Verdict by Less than Whole Number — Construction of Statute — Actions Included.

Under Civ. Code 1901, par. 1413, providing that in civil cases, except those cognizable at common law, 9 of the 12 jurors may return a verdict, in an action by the state for the penalty under Laws 1912, c. 50, forbidding any electric light or power concern to work the employees in its plant more than 8 hours in each 24, a verdict by 9 jurors is bad, the suit being one cognizable at common law.

[See note at end of this case.]

#### Same.

Although action is begun, and issue joined, before the adoption of a law authorizing nine jurors in a civil case to render a verdict, such verdict is valid, since there is no vested right in the modes of procedure.

[See note at end of this case.]

Appeal from Superior Court, Gila county: SHUTE, Judge.

Action to recover penalty. State, plaintiff, and Miami Copper Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Alderman & Elliott* for appellant.

*Wiley E. Jones* and *Norman J. Johnson* for appellee.

[180] FRANKLIN, J.—This action, being in the nature of an action of debt, was instituted by the state of Arizona in the superior court to recover a penalty under chapter 50, Laws of 1912, Regular Session. The act provides:

[181] "Section 1. That the business of conducting and operating an electric light plant, or any electric power plant, is hereby declared to be hazardous and dangerous to those employed therein.

"Sec. 2. That it shall be unlawful for any person, corporation or association operating



or managing any electric light plant, or any electric power plant, or both, within this state, to permit, or cause to be permitted, any operating engineer or fireman, or switch-board operator, or any attendant in its service, employed in or about such plants, to be on duty more than eight hours in any twenty-four consecutive hours; except in cases of emergency when life or property is in imminent danger.

"Sec. 3. That any person, corporation or association that shall violate section 2 of this act, shall pay a fine not to exceed one hundred dollars (\$100.00) for each violation of this act. Each day's violation of any of the provisions of this section shall constitute a separate offense.

"Sec. 4. That the fine, mentioned in section 3 of this act, shall be recovered by an action of debt, in the name of the state of Arizona, for the use of the state, who shall sue for it against such person, corporation or association violating this act, said suit to be instituted in any court of this state having competent jurisdiction.

"Sec. 5. That the said fine, when recovered as aforesaid, shall be paid without any deduction whatever into the general fund of the state of Arizona. . . ."

The statute directs that an action of debt in the name of the state, and for the use of the state, is the appropriate mode of proceeding to recover the prescribed penalty.

There are 15 different causes of action separately stated in the complaint, and in the aggregate the amount of money sought to be recovered is \$1,500. Each cause of action, separately stated, is grounded upon an alleged violation of the statute quoted, and the liability incurred for each day's violation of the statute is a fine not exceeding \$100.

The case went to the jury on June 19, 1913. The jury rendered its verdict in favor of the state in the sum of \$600, and upon such verdict the judgment of the court was accordingly entered.

[182] In submitting the case to the jury the court gave the following instruction:

"You are further instructed, gentlemen, that in this case the concurrence of three-fourths of your number shall be a sufficient number to return a verdict in the case. In case you should unanimously agree you should cause your foreman, who will be selected after you have retired, to sign that form of verdict which represents your conclusion. In case you should not agree unanimously, but nine of your number concur, those nine or more so concurring must sign the form of verdict to be agreed upon and return it into open court."

The verdict of the jury was not unanimous, but nine of such jurors did concur and returned the verdict against the defendant into

court in accordance with the instruction given, and upon the verdict so rendered judgment against the defendant was entered.

There are two questions litigated on this appeal. It is first objected that the penalty of the statute, taken singly, is below the jurisdiction of the superior court, and that it may not be cumulated in the same action so that the superior court may have jurisdiction. It is next claimed that, the case presented being cognizable at the common law, the verdict in such case must be concurred in by twelve jurors as at common law, else there can be no verdict.

Paragraph 1280 of the Revised Statutes of Arizona of 1901 provides: The complaint may contain several different causes of action, and the answer may contain several different defenses. And paragraph 1291 provides: Only such causes of action may be joined as are capable of the same character of relief. Actions *ex contractu* shall not be joined with actions *ex delicto*. In actions *ex delicto*, there shall not be joined actions to recover for injuries to the person, to property, or to character; but they shall be sued for separately.

Here, then, is statutory authority for joining several different causes of action in the same complaint, subject only to the qualification prescribed by paragraph 1291, and it is quite apparent that the causes of action set forth in this complaint do not come within any of the classes disqualified. The several penalties sought to be recovered grew out of an alleged violation of the same provision of the statute; the parties to the action are the same; the several causes of action are [183] grounded in the same right, and are each capable of the same character of relief. When the joinder of actions is permissible, it is said by Mr. Pomeroy, "In fact, the whole proceeding is the combining of several actions into one." Pomeroy on Code Remedies, sec. 336.

The joinder of different causes of action is the subject of statutory regulation. Under our statute there is no objection to any number of distinct penalties under the same provision of the statute being separately stated in the same complaint, thereby, as Mr. Pomeroy says, in such a proceeding combining the several causes of action into one. In other words, in this action there are not 15 suits each for the recovery of a penalty, but it is one suit comprising 15 penalties, which in the aggregate amount to \$1,500. In such a case it is not the penalty of the statute taken singly, which determines the jurisdiction of the superior court; but it is the cumulated penalty sought to be recovered in the one action that fixes the jurisdiction. The several penalties incurred may be sued for

in one action, and the court having jurisdiction of the aggregate sum is a court of competent jurisdiction in which such suit may be instituted within the meaning of the act. One penalty may be within the jurisdiction of an inferior court, but the remedy provided is ample to adopt it to those cases of sufficient magnitude wherein the grievances of the state are in the aggregate of sufficient extent to confer jurisdiction in the superior court. See *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Gibson v. Gault*, 33 Pa. St. 44; *Wolverton v. Lacey*, 30 Fed. Cas. No. 17,932; *Barkhamsted v. Parsons*, 3 Conn. 1; *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281.

But in another view the jurisdiction was rightly taken. The Constitutions or statutes of the different states usually provide that the jurisdiction of certain courts shall extend only to cases where the amount in controversy shall exceed or shall not exceed a certain sum, and the amount claimed by the plaintiff in good faith in the *ad damnum* clause of the complaint being the test usually employed to determine the court's jurisdiction in such a case.

By section 9 of article 6 of the Constitution it is granted:

"The number of justices of the peace to be elected in incorporated cities and towns, and in precincts, and the powers, [184] duties, and jurisdiction of justices of the peace, shall be provided by law; provided, that such jurisdiction . . . shall not trench upon the jurisdiction of any court of record, except that said justices shall have concurrent jurisdiction with the superior court in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damage claimed does not exceed two hundred dollars. . . ."

Section 6, article 6, of the Constitution, says:

"The superior court shall have original jurisdiction in all cases of equity and in all cases at law which involve the title to, or the possession of, real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, or the value of the property in controversy amounts to two hundred dollars exclusive of interest and costs, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate nuisance; of all matters of probate; of divorce and for annulment of marriage; and for such . . . cases and proceedings as are not otherwise provided for."

By this grant of power it is apparent that the legislature could in the exercise of its

authority vest in the courts of justices of the peace exclusive jurisdiction in cases in which the demand, or the value of the property in controversy, is less than \$200, exclusive of interest and costs. It is not sufficient under the constitutional sanction that the law-making power vest jurisdiction in such cases in some court other than the superior court, but to exclude the jurisdiction of the superior court the grant of jurisdiction to such other court must be exclusive. Justices of the peace have such jurisdiction only as may affirmatively be conferred on them by law. By paragraph 1280 of the Civil Code of 1913:

"They shall have jurisdiction to try and determine all civil actions when the amount involved, exclusive of interest and costs does not exceed two hundred dollars."

The jurisdiction thus conferred is, by the statute, not exclusive, and, by virtue of the constitutional provision conferring on the superior court original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have [185] been by law vested exclusively in some other court, it is plain that the jurisdiction of justices of the peace in such cases is concurrent with that of the superior court, until such time as the legislature shall take such jurisdiction from the superior court by affirmatively conferring it exclusively in the courts of justices of the peace.

Coming to the next point urged, we think the case presented is one cognizable at the common law, and, if this be correct, then there has been no verdict rendered upon which the judgment of the court could be entered, and the cause must therefore be reversed.

The Constitution provides that: "The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number of less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto." Constitution of Arizona, art. 2, sec. 23.

Pursuant to the authority conferred, the legislature at its second special session in 1913 enacted without qualification that: In all trials of civil cases in the superior courts where a jury of twelve persons shall be impaneled to try such cause, the concurrence of nine or more jurors shall be sufficient to render a verdict therein. This act was passed and approved April 1, 1913, but in the act it was provided that: "This act shall take effect and be in force from and after the 1st day of October, 1913," and the provision of the act referred to has been codified as paragraph 532, Civil Code of 1913. This provision, therefore, only governs in the

trials of causes on and after the date it went into effect, to wit, October 1, 1913. The cause at bar, however, was submitted to the jury on June 19, 1913. The statute in effect and controlling the verdict of a jury at that time is found in paragraph 1413 (section 204) of the Revised Statutes of Arizona of 1901, which provides: In all trials of civil cases, except cases cognizable at common law, in the courts of this territory (state) where a jury of twelve persons shall be impaneled to try such cause, the concurrence of three-fourths of such jury shall be sufficient to render a verdict therein.

This provision of the territorial statute was, by virtue of the Constitution, carried forward as the law of the state, and [186] remained in force until modified by the act which went into effect on October 1, 1913. It remains only to consider if the case is one cognizable at the common law, for if it is the point is clear that a verdict concurred in by a less number than twelve jurors is, at common law, no verdict at all; the result being a mistrial. No citation of authority is necessary in this behalf.

It must be conceded that the liability here created is of statutory origin. This statute creates a liability for an offense unknown to the common law. It gives a penalty and designates the mode and form of proceeding for its recovery. It may be admitted that this designation forms a part of the right and the liability, and all other modes of proceeding and jurisdiction not otherwise provided are excluded. 1 *Corpus Juris*, p. 993, sec. 109. The mode adopted is an action of debt instituted in a court of competent jurisdiction, the form of proceeding to be in the name of the state and for its use and benefit. To this extent it goes, and no further. Is an action of debt for the recovery of a statutory penalty, brought in the name of the state (sovereign) and for its use and benefit, a case cognizable at common law? We shall inquire about this.

Mr. Blackstone says: "From these express contracts the transition is easy to those that are only implied by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his nonperformance.

"Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake the

benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute [187] a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterward bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented, when real actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *cepias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 *Edw. III*, c. 17), but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgments in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive by harrassing the defendant with the costs of two actions instead of one.

"On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members) that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding), immediately create a debt in the eye of the law; and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it, for which the remedy is by action of debt.

"The same reason may with equal justice be applied to all penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party ag-

grieved, or else to any of the king's subjects [188] in general. Of the same sort is the forfeiture inflicted by the statute of Winchester (explained and enforced by several subsequent statutes) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for if they take him they stand excused. But otherwise the party robbed is entitled to prosecute them by a special action on the case for damages equivalent to his loss. And of the same nature is the action given by statute 9 Geo. I, c. 22, commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offenses enumerated and made felony by that act. But more usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same. And hence such actions are called 'popular' actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person '*qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur*' (who prosecutes this suit as well for the king, etc., as for himself). If the king, therefore, himself commences this suit, he shall have the whole forfeiture. But if anyone hath begun a *qui tam* or popular action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall, and prevent other actions; which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws, 4 Hen. VII, c. 20, which enacts that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*. A provision that seems borrowed from the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him." 2 Cooley's Blackstone, pp. 972, 973, 974.

Mr. Blackstone has countenance in Lord Mansfield. Of this man, Campbell, in his "Lives of the Chief Justices of [189] England," says he ranked as the first and most accomplished of common-law judges; and Wellsby, whose judgment is entitled to respect, made the observation that Lord Mansfield has done more for the jurisprudence of England than any legislator or judge or au-

thor who has ever made the improvement of it his object.

In *Rann v. Green*, 2 Cowp. (Eng.) 474, Lord Mansfield says:

"Here the action, which is an action of *assumpsit*, is brought in consequence of a right liquidated by means of the statute. The statute, therefore, is the only ground of action. Without it we have no authority to make the order we did; but when the order was made, the law raised an *assumpsit*. The defendant pleads *non assumpsit*. Is anything clearer, than that the plaintiff, upon the general issue pleaded, must prove his whole case? The first thing to be proved here is the statute."

See also *Atcheson v. Everitt*, 1 Cowp. (Eng.) 382, which was an action of debt upon the statute, 2 Geo. II, c. 24, sec. 7; *Rex v. Robinson*, 2 Burr. (Eng.) 800; *Stephens v. Watson*, 1 Salk. (Eng.) 45; and *Lee v. Clarke*, 2 East (Eng.) 333, judgment pronounced by Lord Ellenborough, C. J.

At common law debt would lie to recover money due upon simple contract, express or implied, whether verbal or written, and upon contracts under seal, or of record, and on statutes by a party aggrieved.

Chitty says: "Debt is a more extensive remedy for the recovery of money than *assumpsit*, or covenant; for it lies to recover money due upon legal liabilities, or upon simple contracts express or implied, whether verbal or written, and upon contracts under seal or of record, and on statutes, by a party aggrieved, or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty." 1 Chitty on Pleadings, 101.

Where a statute gives a forfeiture of a sum of money, or penalty, the action of debt lies, because the statute creates a direct debt, and a consequent duty. 1 Chitty on Pleadings, 104.

In the *Laws of England*, edited by the Earl of Halsbury (volume 1, part 7, *Forms of Action—Old Forms of Action*), it is said: Debt lay to recover definite sums due on records, [190] as judgments, recognizances of bail, or recognizances in the nature of a statute merchant; on specialties as bills or bonds, agreements to pay money, leases, mortgages, etc., on simple contracts, as for work done, services rendered, and generally, wherever *indebitatus assumpsit* would be appropriate: in *maleficio*, as against a sheriff for escape, or by common informers and persons aggrieved under penal statutes, even though the statutes did not expressly give a right of action for the penalty.

A liability imposed by statute is no greater than a common-law liability. In either case the duty to discharge it is the same. When, therefore, the statute creates a debt,

or gives to the party the right to demand from another a sum of money, the law raises an implied promise to pay it. Chief Baron Comyn says:

"Debt lies upon every contract, in deed or in law. As if an act of Parliament gives a penalty, and does not say to whom nor by what action it shall be recovered, an action of debt lies upon such statute by the party aggrieved." Comyn's Digest, title "Debt," A, 1.

"Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the state to obey the laws." Smith Thompson, J., in *Stearns v. U. S.* 2 Paine 301, 311, 22 Fed. Cas. No. 13,341.

In *Burnham v. Webster*, 5 Mass. 270, Chief Justice Parsons says:

"But if debt *qui tam* be sued against several, demanding a joint forfeiture, on a plea of *nil debet*, all the defendants ought to be found indebted, because the form of the action and plea is on a joint contract, although the debt arises from a tort."

The distinguishing feature of this action of debt is that it lies for the recovery of a sum certain, or reducible to a certainty without regard to the manner in which the obligation is incurred or evidenced. In *Stockwell v. U. S.* 13 Wall. 531, 20 U. S. (L. ed.) 491, it was said:

"Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. . . . It [191] is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained."

See also *Chaffee v. U. S.* 18 Wall. 516, 21 U. S. (L. ed.) 908; *Dollar Sav. Bank v. U. S.* 19 Wall. 227, 22 U. S. (L. ed.) 80; *U. S. v. Lyman*, 1 Mason 482, 26 Fed. Cas. No. 15,647; *Meredith v. U. S.* 13 Pet. 486, 10 U. S. (L. ed.) 258; *Bullard v. Bell*, 1 Mason 243, 4 Fed. Cas. No. 2,121; *Hepner v. U. S.* 213 U. S. 103, 16 Ann. Cas. 960, 53 U. S. (L. ed.) 720, 29 S. Ct. 474, 27 L.R.A. (N.S.) 739.

While it is, no doubt, true that the action, being based on a violation of the statute, sounds in tort (*Chaffee v. U. S.* 18 Wall. 516, 21 U. S. (L. ed.) 908), yet, as there stated, "debt lies for a statutory penalty, because the sum demanded is certain."

The mode in which penalties shall be enforced, whether at the suit of a private party or at the suit of the public, is a matter of legislative discretion, and where the penalty is given by statute, and there is no specified mode of recovery presented, an action of debt will lie. 30 Cyc. 1344, 1345.

Generally speaking, it is immaterial whether the obligation arose by contract or by operation of common or statute law, in what manner the obligation was incurred, or by what the obligation is evidenced, if it possesses the essential requisites of a foundation for this action debt will lie. 13 Cyc. 408.

At the common law, the action of debt is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise, which the law annexes to the liability. 18 Am. & Eng. Enc. of Law, 274.

In *U. S. v. Mundell*, 1 Hughes 415, 6 Cal. (Va.) 245, 27 Fed. Cas. No. 15,834, Iredell, Circuit Judge, says:

"The truth is, it is sometimes necessary to distinguish between actions of debt at common law and actions of debt upon a statute, for particular reasons not applicable to the mode of trial. For instance, it is necessary to show it to be 'an action on the statute,' because otherwise no cause of action will appear, a penalty in the case not existing at common law, and therefore creating no such contract. But when the cause of action is shown, the principles of common law pervade the whole of the trial."

[192] In short, while the statute in question creates a new liability unknown to the common law, when such liability does arise it is then ascertained that there is a debt on a liability created by the statute, and such a case is upon the principles of the common law cognizable at law in an action of debt on the liability thus created; or, as Mr. Blackstone puts it:

"Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." 3 Blackstone's Commentaries, 158.

The very pith of the matter before us is: Is this a case cognizable at the common law? In other words, is this such a case competent as a subject of judicial investigation and determination before its courts according to the principles of the common law? Upon authority the criterion of distinction between a case which is, and one which is not, cognizable at the common law, is the form of the proceeding, and not the particulars of the offense which occasions it. If the liability is created by statute, it is spoken of as a statutory liability; but, if it is created by the common law, it is designated a common-law liability. The liability, however created, though it may differ in extent is, in its essence, in the one case no greater than in the other, for when the cause of action is shown, the liability is recognized and enforced according to the principles of the common law. Of course, if the statute by which a penalty is imposed contemplated a redress or a recovery only by a proceeding unknown

to the common law, the case would then be one not cognizable at the common law, because the penalty and the designated mode and form of proceeding for its recovery form a part of the right and the liability. But in the absence of a statute expressly or impliedly excluding it, as in this case, the ground of complaint is the nonpayment of a debt. It is true that the action is based upon the statute, but it is primarily founded upon that implied contract, recognized by the common law, which every citizen enters into with the state to observe its laws. This distinction we are called upon to make in the classification of cases, while purely technical, is one of those cases wherein technicality is, by the statute law, made the very pith of the matter presented for decision—a condition that upon occasion will inevitably occur as an incident to the transition from one form of government to another. But while the [193] classification of cases is technical, the making of it in this case determines a most substantial right of the citizen. As we said in the case of *Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841:

"The right to a trial by jury in any case is a most substantial right, and where it has been given its observance should be rigidly enforced."

We are not under the least embarrassment in the present case to hold it one of a class which is cognizable at the common law, because our research has discovered not a single authority *per contra*. Since the early case of *Partridge against Strange* and others, in the time of Edward VI, reported in 1 Dyer 74 B, which was an action of debt declared upon the statute, 32 Henry VIII, c. 9, for the penalty prescribed by it, and which action was instituted as well for the plaintiff as for the king in the court of king's bench, which was the supreme court of the common law in England, such like cases have been cognizable in the courts according to the principles of the common law.

It follows, therefore, that the cause must be reversed and remanded for a new trial, because there has been no verdict which the law of this state recognizes and upon which judgment could be entered. Under the law as it existed when the verdict was received, a concurrence therein by a number less than twelve of the jurors was in fact no verdict, but resulted in a mistrial. Since the trial of this cause, however, the law has been changed in accordance with the sanction of the Constitution, and, upon the retrial, a concurrence of nine jurors will be competent to render a verdict in the case. Though action was begun and issues joined prior to the adoption of a law authorizing nine jurors in a civil case to render a verdict, a verdict so rendered is valid, since there is no vested

right in the modes of procedure. *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879; *Roefeldt v. St. Louis, etc. R. Co.* 180 Mo. 554, 79 S. W. 706.

Reversed and remanded, with directions to grant a new trial.

Ross, C. J., and Cunningham, J., concur.

#### NOTE.

#### Validity and Construction of Constitutional or Statutory Provision for Verdict by Less than Whole Number of Jurors.

Validity, 500.

Construction:

In General, 502.

Application to Pending Cause, 504.

Application to Action under Federal Employers' Liability Act, 504.

#### Validity.

That unanimity is one of the essentials of a common-law jury is well settled, and so in cases where a jury trial is a matter of right, the legislature has no power to enact laws permitting verdicts by less than the whole number of jurors, except when specifically authorized by constitutional warrant. *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 S. Ct. 618, 41 U. S. (L. ed.) 1079; *Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403; *Clough v. McKay*, 31 Colo. 300, 73 Pac. 30; *Manitou v. Croot*, 33 Colo. 426, 80 Pac. 1065; *Star Loan Co. v. Duffy Van, etc. Co.* 20 Colo. App. 250, 77 Pac. 1092; *Jacksonville, etc. R. Co. v. Adams*, 33 Fla. 608, 15 So. 257, 24 L.R.A. 272; *Kleinschmidt v. Dunphy*, 1 Mont. 118; *Aylesworth v. Reece*, 1 Mont. 200; *Opinion of Justices*, 41 N. H. 550; *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66; *Rock Springs First Nat. Bank v. Foster*, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L.R.A. 549. See also *State v. Barker*, 107 N. C. 913, 12 S. E. 115, 10 L.R.A. 50. In *Rock Springs First Nat. Bank v. Foster*, *supra*, it was said: "It is so well settled as to require no reference to authorities that, when the constitution secures to litigants the right of trial by jury, the legislature has no power to deny or impair such right. The courts have uniformly held also that the word 'jury' as used in our constitutions, when not otherwise modified, means a common-law jury composed of twelve men, whose verdict shall be unanimous." In *Jacksonville, etc. R. Co. v. Adams*, 33 Fla. 608, 15 So. 257, 24 L.R.A. 272, a statute prescribing the procedure for the condemnation of land under the power of eminent domain, which provided that a majority of the jury might

determine all matters before them, was held to be invalid as in violation of that section of the state constitution providing that compensation for land condemned must be ascertained by a jury of twelve, the court saying: "To permit the judgment of a smaller number to control is not to be reconciled to either the meaning of the language used or to the intent shown by it and the change which has been made. If the legislature can authorize a majority of the jury to ascertain the compensation or determine the matters before them, they can give the same power to less than a majority. A concession to the legislature of power to make the judgment of less than the entire twelve competent to answer the requirement of the constitution is a surrender of all protection from the prescription of the stated number, and renders this feature of our organic law a useless declaration."

However, it is also well settled that a state has the power, either by a direct constitutional provision or by a specific grant of legislative authority, to abrogate the right of trial by jury or to make such modifications of it as may be deemed expedient, and laws enacted under constitutional authority providing for majority verdicts are uniformly held to be valid. *Gibson v. Bellingham*, etc. R. Co. 213 Fed. 488; *King v. Camacho*, 3 Hawaii 385; *Hoskins v. Jackson*, 155 Ky. 638, 160 S. W. 174; *State v. Wooten*, 136 La. 560, 87 So. 366; *Winters v. Minneapolis*, etc. R. Co. 126 Minn. 260, 148 N. W. 106; *Gabbert v. Chicago*, etc. R. Co. 171 Mo. 84, 70 S. W. 891; *Smith v. Sovereign Camp Woodman of World*, 179 Mo. 119, 77 S. W. 862; *McClure v. Feldmann*, 184 Mo. 710, 84 S. W. 16; *Taussig v. St. Louis*, etc. R. Co. 186 Mo. 269, 85 S. W. 378; *Franklin v. St. Louis*, etc. R. Co. 188 Mo. 533, 87 S. W. 930; *Logan v. Field*, 192 Mo. 54, 90 S. W. 127; *Reed v. Mexico*, 101 Mo. App. 155, 76 S. W. 53; *Marshall v. Armstrong*, 105 Mo. App. 234, 79 S. W. 1161; *Elder v. Shoffstall*, 90 Ohio St. 265, 107 N. E. 539; *Pacific Mut. L. Ins. Co. v. Adams*, 27 Okla. 496, 112 Pac. 1026; *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969; *Bowen v. Davis*, 48 Tex. 101. See also *National Protective Legion v. Allphin*, 141 Ky. 777, 133 S. W. 788; *Pike County v. Sowards*, 147 Ky. 37, 143 S. W. 745; *State v. Sinegal*, 51 La. Ann. 932, 25 So. 957; *Shaw v. Goldman*, 183 Mo. 461, 81 S. W. 1223; *Cruger v. Hudson River R. Co.* 12 N. Y. 190. As was said in *Gibson v. Bellingham*, etc. R. Co. 213 Fed. 488: "It has been held by a long line of decisions that the seventh amendment does not apply to the states, and that a state is not inhibited by the federal constitution from providing for a jury of less than twelve men, or for a verdict that is not unanimous."

But since the Constitution of the United States is in force in all the territories, it has been held uniformly that an act of a territorial legislature providing for majority verdicts is in contravention of the seventh amendment providing that in all common-law suits where the amount involved exceeds twenty dollars the right of trial by jury shall be preserved. *American Pub. Co. v. Fisher*, 166 U. S. 464, 117 S. Ct. 618, 41 U. S. (L. ed.) 1079, reversing *American Pub. Co. v. Fisher*, 10 Utah 147, 37 Pac. 259; *Springville v. Thomas*, 166 U. S. 707, 17 S. Ct. 717, 41 U. S. (L. ed.) 1172, reversing *Hess v. White*, 9 Utah 61, 33 Pac. 243, 24 L.R.A. 277; *Carrall v. Byers*, 4 Ariz. 158, 36 Pac. 499; *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641; *Kleinschmidt v. Dunphy*, 1 Mont. 118; *Aylesworth v. Reece*, 1 Mont. 200; *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66; *Thomas v. Springville City*, 9 Utah 426, 35 Pac. 503; *Tucker v. Salt Lake City*, 10 Utah 173, 37 Pac. 261, and *Fred. W. Wolff Co. v. Salt Lake City Brewing Co.* 10 Utah 179, 37 Pac. 262; *Parsons v. Pratt*, 18 S. Ct. 944, 42 U. S. (L. ed.) 1214, reversing *Pratt v. Parsons*, 13 Utah 31, 43 Pac. 620. (*Compare Riley v. Salt Lake Rapid Transit Co.* 10 Utah 428, 37 Pac. 681; *Mackey v. Enzensperger*, 11 Utah 154, 39 Pac. 541; *Leedom v. Earls Furniture*, etc. Co. 12 Utah 172, 42 Pac. 208; *Smith v. Salt Lake City R. Co.* 13 Utah 33, 43 Pac. 919, and *Scott v. Provo City*, 14 Utah 31, 45 Pac. 1005, Utah decisions rendered prior to those of the Supreme Court of the United States, cited supra, reversing the Utah rule.) Construing an act of the territory of Utah providing for verdicts in certain cases by nine or more of the jurors the Supreme Court of the United States said in *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 S. Ct. 618, 41 U. S. (L. ed.) 1079: "Therefore, either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring."

But in *Hawaii v. Mankichi*, 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016, it was held that a conviction had during the period

between August, 1898, and June 14th, 1900, under a statute of the republic of Hawaii allowing a verdict by nine of the jury was legal although not in compliance with the provisions of the constitution of the United States. The decision was based on the construction of the resolution of 1898 annexing Hawaii which was held to secure to Hawaii its established legislation until Congress should pass an act organizing the territory of Hawaii, which was done in June, 1900.

Though not warranted by constitutional provision, statutes providing for majority verdicts have been upheld in so far as they applied to cases in which the parties were not entitled to a jury trial as a matter of right. Thus in so far as such an act relates to the trial of an issue of fact in cases in equity it has been held to be constitutional and valid. *Providence Gold Min. Co. v. Burke*, 6 Ariz. 323, 57 Pac. 641; *Kleinschmidt v. Dunphy*, 1 Mont. 118. In *Emig v. Clark County*, 5 Ohio Dec. 459, 5 Ohio N. P. 471, it was held that the necessity for the construction of drains not being a matter required to be tried by a jury the legislature could pass a law declaring the agreement of eight of the jurors sufficient to sustain a verdict without violating the constitutional guaranty of jury trial. See also *Thomas v. Clark County*, 5 Ohio Dec. 510, 5 Ohio N. P. 453.

### Construction.

#### IN GENERAL.

A constitutional amendment allowing nine of a jury to render a verdict "in a civil action" was held to be applicable to suits in equity in *Davis v. Forman*, 229 Mo. 27, 129 S. W. 213, wherein it was said: "Whilst in legal nomenclature it is more accurate to say 'suit in equity' and 'action at law,' yet under our Code of Civil Procedure, which was in force long before the constitutional amendment referred to was adopted, it is declared: 'There shall be in this state but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action.' The provision of the constitutional amendment applies therefore as well to a jury called by a chancellor as to one in the trial of an action at law." But in *King City v. Duncan*, 238 Mo. 513, 142 S. W. 246, the same amendment was held to be inapplicable to cases arising out of the violation of municipal ordinances as to which the right of trial by jury never existed.

Where the statute provides for a jury of twelve, three-fourths of whom may render a verdict, a verdict by less than nine is invalid.

*Marshall v. Armstrong*, 105 Mo. App. 234, 79 S. W. 1161. But where by agreement of the parties a jury of nine was accepted the verdict of seven was held to be good under a constitutional provision allowing a three-fourths verdict. *Lohnes v. Baker*, 156 Mo. App. 397, 137 S. W. 282. In *Oligschlager v. Stephenson*, 24 Okla. 760, 104 Pac. 345, it was contended that the constitutional provision allowing juries to return a verdict on agreement of three-fourths of their numbers was not applicable to a jury in the county court, because such a jury consisted of six and there could be no three-fourths agreement. Answering this contention, the court said: "We are convinced that the 'three-fourths' mentioned in the foregoing clause of the constitution was not intended to be an arbitrary number, but merely to indicate the least number of jurors sitting in a case that could return a valid verdict, whether the jury consisted of six or twelve members. The mere fact that it is impossible to secure the concurrence of three-fourths of six, the number of jurors in a civil case in a county court, does not, to our mind, indicate a purpose on the part of the constitutional convention and the people to make the provision applicable only to juries where twelve jurors sit. By this process of reasoning, a verdict returned by ten or eleven jurors in such a case would be invalid, while a verdict returned by nine jurors, which is exactly three-fourths of a jury of twelve, would be valid. We decline to give this provision such a narrow construction. It is more reasonable to presume that the intention was to fix the minimum number of jurors who were authorized to return a verdict, whether the jury consisted of six or twelve members, and not to fix a hard and fast inhibition against the return of a verdict by any other number greater than three-fourths and less than the whole panel. With three-fourths or more of the jurors sitting concurring in the verdict, it is difficult to see how the constitutional right to a trial by jury of the person against whom the verdict was returned could be invalid. We are convinced that it was not the intention of the members of the constitutional convention or the people when they adopted the constitution that the language 'three-fourths of the whole number of jurors concurring shall have power to render a verdict' should have relation only to juries consisting of twelve members." To the same effect see *Muldrow v. State*, 4 Okla. Crim. 324, 111 Pac. 656.

A constitutional provision permitting a verdict by nine of the twelve jurors in cases not capital has been held to be applicable to a second trial under an indictment for murder where the conviction on the first trial was for manslaughter as such a verdict re-



duced the offense to manslaughter though the second trial was held under the original indictment. *State v. Wooten*, 136 La. 560, 67 So. 366. But in *State v. Biagas*, 105 La. 503, 29 So. 971, it was held that a jury could not render a verdict of guilty of manslaughter under an indictment for murder by less than a unanimous verdict as such a verdict was also an acquittal of the charge of murder.

In *State v. Holtcamp*, 235 Mo. 232, 138 S. W. 521, the question at issue was whether the constitutional provision permitting verdicts by less than the total number of jurors in all civil cases included an insanity inquiry. In answer to the contention that the provision extended only to cases where the right to a jury existed at common law and did not apply to an insanity inquiry wherein the right to a jury trial was given by statute, the court said: "Section 28, article 2, of our constitution reads as follows: 'The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases in courts not of record may consist of less than twelve men as may be prescribed by law; and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases; and that in the trial by jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict. . . .' The language of this amendment is clear, and must be taken to mean just what it says. There is no limitation expressed or implied. It applies to all civil cases wherein there was at the time of its adoption a right to a trial by jury, whether the right was given by common law or by statute. Counsel argues that this section of the constitution applies only to the right of trial by jury given by the common law. Why this limitation? The constitution says 'the right of trial by jury as heretofore enjoyed,' etc. Does the word 'heretofore' apply only to common-law juries? We think not. 'Heretofore' means before and up to the time the constitution was adopted. So far as insanity proceedings are concerned, this right to a jury trial had existed at least fifty years before, and up to, the adoption of the present constitution." And in answer to the contention that an insanity inquiry was not a civil case, the court further said: "The insanity inquiry involves no question of public wrong. It is a proceeding to protect the private rights of the individual in his property and person. Such proceeding constitutes a civil case, and one within the constitutional amendment providing for a three-fourths verdict."

In *Kelly-Goodfellow Shoe Co. v. Sally*, 114 Mo. App. 222, 89 S. W. 889, it was held that the constitutional amendment allowing majority verdicts was self-executing and that

after its adoption and before the enactment of the statute providing that when a verdict of less than the whole number of jurors was rendered it must be signed by all concurring, a verdict signed by the foreman only was sufficient.

Under the Minnesota statute providing that in civil actions in a court of record a jury may after twelve hours of deliberation bring in a verdict with five-sixths concurring, it has been held that where a jury has been in retirement for a period well beyond the time prescribed by the statute, the law conclusively presumes that they have been in deliberation for the required length of time. *Hurlburt v. Leachman*, 126 Minn. 180, 148 N. W. 51; *Armstrong v. Great Northern R. Co.* 131 Minn. 236, 154 N. W. 1075. And the mere fact that the jury decided on their verdict immediately on retiring does not show that they did not deliberate twelve hours. *Daly v. Falk*, 131 Minn. 231, 154 N. W. 1081.

It is optional with the jury whether they shall return a verdict with only nine of their number concurring and the court cannot compel them to do so. Criticising an instruction which in effect told the jury that they must return a verdict as soon as nine of them agreed, the court in *Curtis, etc. Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125, said: "The objection urged against this instruction is that it compels the jury to return a verdict just as soon as nine or more concur; that the jury is thereby limited in time for giving the cause due deliberation. This instruction is based upon that part of section 27, Williams' Ann. Const. Okla., which reads as follows: 'In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. . . . In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein.' The intent of this provision of the constitution is not to deprive the jury of a reasonable time in which to consider its verdict, nor to give the court power to constitute nine of the number as the jury and the remaining three as an unnecessary surplussage, but its object is to provide that where, after due deliberation has been spent in an endeavor to reach a just verdict, they be unable to concur unanimously, then in order to prevent delay and mistrials and defeat of justice, three-fourths of their number concurring shall have power to render a verdict. Note the language of the constitution: 'Three-fourths of the whole number concurring shall have power to render a verdict.' This language clearly implies that the power is with the jury to say whether they will render a three-fourths verdict, and not with the court to peremptorily demand it."

In *Robertson v. McMeans*, 1 Manitoba 348, it was held that the act providing that in civil cases the jury must consist of twelve but the verdict of nine or more should be sufficient, applied to special as well as to common juries.

#### APPLICATION TO PENDING CAUSE.

It is generally held that constitutional or statutory provisions allowing verdicts by less than the whole number of jurors are not applicable to causes which are pending at the time such provisions take effect. *Pacific Mut. L. Ins. Co. v. Adams*, 27 Okla. 496, 112 Pac. 1026; *Choctaw Electric Co. v. Clark*, 28 Okla. 399, 114 Pac. 730; *Swift v. Coulter*, 28 Okla. 768, 115 Pac. 871; *Guthrie v. Pearson*, 29 Okla. 813, 120 Pac. 266; *Van Arsdale-Osborne Brokerage Co. v. Patterson*, 30 Okla. 113, 120 Pac. 933; *Kerfoot-Bell Co. v. Kerfoot*, 30 Okla. 19, 118 Pac. 367; *Spurrier Lumber Co. v. Dodson*, 30 Okla. 412, 120 Pac. 934; *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087; *Northern Guaranty Loan, etc. Co. v. McCurtain*, 31 Okla. 192, 120 Pac. 663; *Missouri, etc. R. Co. v. Smith*, 32 Okla. 841, 123 Pac. 1063; *Chicago, etc. R. Co. v. Beatty*, 34 Okla. 321, 118 Pac. 367, 126 Pac. 736, 42 L.R.A. (N.S.) 984; *McLeod v. Spencer*, 34 Okla. 647, 126 Pac. 753; *Metropolitan R. Co. v. Fonville*, 36 Okla. 76, 125 Pac. 1125; *Gosnell v. Prince*, 36 Okla. 445, 129 Pac. 27. Compare *Roefeldt v. St. Louis, etc. R. Co.* 180 Mo. 554, 79 S. W. 706, wherein it was said: "The only new idea in connection with that subject that is advanced in the brief of counsel in this case is, that as this action was begun, and the issues joined, prior to the adoption of the constitutional amendment, the cause could be tried only under the mode of procedure existing when the suit was brought or the issues were joined, and therefore the constitutional amendment authorizing nine of the jury to render a verdict does not apply to this case. No one has a vested right to have his cause tried by any particular mode of procedure. The state has the sovereign power to prescribe the mode of trying causes in its courts and to alter the same from time to time as it may see fit. If the mode is prescribed by an act of the general assembly it may be changed by an act of the general assembly; if it is prescribed by the constitution it may be changed by the power which makes the constitution." And see the reported case wherein the same rule is laid down. In *Girdner v. Bryan*, 94 Mo. App. 27, 67 S. W. 699, it was held that a constitutional amendment providing for majority verdicts was not applicable to a case tried after its adoption but before it became operative.

The foregoing rule, however, applies only to cases pending at the time the law becomes effective, and does not apply to a case brought after the law goes into effect, though the cause of action arose before. *Elder v. Shoffstall*, 90 Ohio St. 265, 107 N. E. 539; *Independent Cotton Oil Co. v. Beacham*, 31 Okla. 384, 120 Pac. 969; *Chicago, etc. R. Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926; *Midland Valley R. Co. v. Adkins*, 36 Okla. 15, 127 Pac. 867; *St. Louis, etc. R. Co. v. Wooten*, 37 Okla. 444, 132 Pac. 479; *Midland Valley R. Co. v. Larson*, 41 Okla. 360, 138 Pac. 175; In *Independent Cotton Oil Co. v. Beacham*, *supra*, the court said: "Counsel for defendant take the position that, as the injury was inflicted prior to statehood, the time the injury was inflicted plaintiff was not entitled to the benefit of said provision, although the constitution was adopted prior to the commencement of the action, for the reason that section 1 of the schedule preserved the status of all suits, rights, etc., arising prior to statehood as they existed under the territorial government. We cannot agree with counsel. The rule is that no person has a vested right in any particular mode of procedure, and if, before the trial of the cause, a new law of procedure goes into effect, it governs, unless the statute itself provides otherwise. There is nothing in the constitution nor the schedule indicating a purpose to restrict the power of the state to change modes of procedure as to causes of action arising prior to the admission thereof, except as to actions that were pending at that time."

#### APPLICATION TO ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

The cases are in accord in holding that constitutional provisions or statutory enactments of the states, permitting a verdict to be rendered by less than the whole number of jurors are applicable to actions in state courts under the Federal Employers' Liability Act. *Chesapeake, etc. R. Co. v. Carnahan*, 241 U. S. 241, 36 S. Ct. 594, *affirming* 118 Va. 46, 86 S. E. 863; *Gibson v. Bellingham*, *etc. R. Co.* 213 Fed. 488; *Chesapeake, etc. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185; *Louisville, etc. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151; *Louisville, etc. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744; *Winters v. Minneapolis, etc. R. Co.* 126 Minn. 260, 148 N. W. 106; *Bombolis v. Minneapolis, etc. R. Co.* 128 Minn. 112, 150 N. W. 385 (*affirmed* in *Minneapolis, etc. R. Co. v. Bombolis*), reported in full post, this volume, at page 505; *St. Louis, etc. R. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075 (*affirmed* 241 U. S. 223, 36 S. Ct. 602).

**MINNEAPOLIS AND ST. LOUIS  
RAILROAD COMPANY**

v.

**BOMBOLIS.**

United States Supreme Court—May 22, 1916.

241 U. S. 211; 36 S. Ct. 595.

**Jury — Majority Verdict — Action  
under Federal Statute.**

The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i. e., by a unanimous verdict, does not control the state courts, even when enforcing rights under a federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Fed. St. Ann. 1909 Supp. p. 584), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

[See note at end of this case.]

Error to Minnesota Supreme Court.

Action for death by wrongful act. George Bombolis, administrator, plaintiff, and Minneapolis and St. Louis Railroad Company, defendant. Judgment for plaintiff in District Court, Hennepin county. Judgment affirmed by Minnesota Supreme Court. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

*Frederick M. Miner* and *William H. Bremner* for plaintiff in error.

*George B. Leonard* for defendant in error.

[215] *WHITE, C. J.*—Counting upon the Employers' Liability Act of 1908 (c. 149, 35 Stat. 65; Fed. St. Ann. 1909 Supp. p. 584) as amended by the act of 1910 (c. 143, 36 Stat. 291; Fed. St. Ann. 1912 Supp. p. 335), the defendant in error sued in a state court to recover for the loss resulting from the death of Nanos, his intestate, alleged to have been occasioned by the negligence of the plaintiff in error while he, Nanos, was in its employ and engaged in interstate commerce. Whatever may have been the controversies in the trial court prior to the verdict of the jury in favor of the plaintiff and the contentions which were unsuccessfully urged in the court below to secure a reversal of the judgment entered thereon, on this writ of error they have all but one been abandoned and hence have all but one become negligible. As the one question here remaining was also involved in five other cases pending under the Employers' Liability Act on writs of error to the courts of last resort of Virginia, Kentucky and Oklahoma, those cases and this

were argued together. As the other cases however involve additional questions, we dispose separately of this case in order to decide in this the one question which is common to them all and thus enable the other cases, [216] if we deem it is necessary to do so, to be treated in separate opinions.

By the constitution and laws of Minnesota in civil causes after a case has been under submission to a jury for a period of twelve hours without a unanimous verdict, five-sixths of the jury are authorized to reach a verdict which is entitled to the legal effect of a unanimous verdict at common law. When in the trial of this case the court instructed the jury as to their right to render a verdict under such circumstances, the defendant company objected on the ground that as the cause of action against it arose under the Federal Employers' Liability Act—in other words, was Federal in character—the defendant was by the Seventh Amendment to the Constitution of the United States entitled to have its liability determined by a jury constituted and reaching its conclusion according to the course of the common law, and hence to apply the state statute would be repugnant to the Seventh Amendment. This objection which was overruled and excepted to was assigned as error in the court below, was there adversely disposed of (128 Minnesota 112), and the alleged resulting error concerning such action is the one question which we have said is now urged for reversal.

It has been so long and so conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (*American Pub. Co. v. Fisher*, 166 U. S. 464, 17 S. Ct. 618, 41 U. S. (L. ed.) 1079; *Springville v. Thomas*, 166 U. S. 707, 17 S. Ct. 717, 41 U. S. (L. ed.) 1172; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 S. Ct. 580, 43 L. S. (L. ed.) 873), that it is not now open in the slightest to question that if the requirements of that Amendment applied to the action of the State of Minnesota in adopting the statute concerning a less than unanimous verdict or controlled the state court in enforcing that statute in the trial which is under review, both the statute and the action of the court were void because of repugnancy to the Constitution of the United States. The one [217] question to be decided is therefore reduced to this: Did the Seventh Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the State as to what was necessary to constitute a verdict?

Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a)

That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron v. Baltimore*, 7 Pet. 243, 8 U. S. (L. ed.) 672; *Fox v. Ohio*, 5 How. 410, 434, 12 U. S. (L. ed.) 213; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 U. S. (L. ed.) 223; *Brown v. New Jersey*, 175 U. S. 172, 174, 20 S. Ct. 77, 44 U. S. (L. ed.) 119; *Twining v. New Jersey*, 211 U. S. 78, 93, 29 S. Ct. 14, 53 U. S. (L. ed.) 97. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552, 8 U. S. (L. ed.) 751; *Justices v. Murray*, 9 Wall. 274, 19 U. S. (L. ed.) 658; *Edwards v. Elliott*, 21 Wall. 532, 22 U. S. (L. ed.) 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 U. S. (L. ed.) 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 U. S. (L. ed.) 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was [218] this view of the contention which led the Supreme Court of Minnesota in this case and the courts of last resort of the other States in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice both state and National which had prevailed from the commencement. And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the Employers' Liability Act

and the Safety Appliance Act and in the large number of cases which have been tried in state courts growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the Seventh Amendment which was urged in this case and the cases which were argued with it.

Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the previous authoritative rulings on the subject and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. *Chesapeake, etc. R. Co. v. Carahan*, a Virginia case (118 Va. 46, 86 S. E. 863); *Chesapeake, etc. [219] R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736; 161 Ky. 655, 171 S. W. 185; *Louisville, etc. R. Co. v. Stewart*, 163 Ky. 823, 173 S. W. 757; *St. Louis, etc. R. Co. v. Brown*, an Oklahoma case (45 Okla. 143, 144 Pac. 1075). In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon.

1. It is true as pointed out in *Walker v. New Mexico, etc. R. Co.* 165 U. S. 593, 17 S. Ct. 421, 41 U. S. (L. ed.) 837, and in *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 S. Ct. 618, 41 U. S. (L. ed.) 1079, that the right to jury trial which the Seventh Amendment secures is a substantial one in that it exacts a substantial compliance with the common-law standard as to what constitutes a jury. But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and with which it is not concerned. It is also true, as pointed out in the cases just cited, that although territorial courts of the United States are not constitutional courts, nevertheless as they are courts created by Congress and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the Seventh Amendment are applicable in such courts. But this affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law, in the teeth of the express and settled doctrine that

the Amendment does not relate to proceedings in such courts.

2. The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of [220] such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

Indeed, the truth of this view and the profound error involved in the contention relied upon is aptly shown by the further propositions advanced in argument and based upon the premise insisted upon. Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes. It is [221] true that the argument does not squarely face the contention to which it reduces itself since it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts in enforcing the Federal right are to be treated as Federal courts and be subjected *pro hac vice* to the limitations of the Seventh Amendment. And of course if this principle were well founded, the converse would also be the case, and both Federal and

state courts would by fluctuating hybridization be bereft of all real, independent existence. That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering.

But here again the error of the proposition is completely demonstrated by previous adjudications. *Martin v. Hunter*, 1 Wheat. 304, 330, 4 U. S. (L. ed.) 97; *Houston v. Moore*, 5 Wheat. 1, 27, 28, 5 U. S. (L. ed.) 197; *Ex p. McNeil*, 13 Wall. 236, 243, 20 U. S. (L. ed.) 624; *Claffin v. Houseman*, 93 U. S. 130, 23 U. S. (L. ed.) 833; *Robertson v. Baldwin*, 165 U. S. 275, 17 S. Ct. 326, 41 U. S. (L. ed.) 715; *In re Second Employers' Liability Cases*, 223 U. S. 1, 55-59, 32 S. Ct. 169, 56 U. S. (L. ed.) 327. Moreover the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests, that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the State or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, State or nation, creating them. This principle was made the basis of the first Federal Judiciary Act and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative [222] enactment, state or national. In fact this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 U. S. (L. ed.) 327, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States exercising a jurisdiction conferred by Congress, whenever the duty was

cast upon them to enforce a Federal right. It is true in the Mondou case it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States. On the contrary the principle upon which the Mondou case rested, while not questioning the diverse governmental sources from [223] which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose.

*Affirmed.*

#### NOTE.

The reported case holds that the Seventh Amendment to the Federal Constitution has no application to a state court in enforcing the rights secured by the federal employers' liability act, and that such a court may give effect in the trial of an action under that statute to a constitutional or statutory provision in the state for a verdict by less than the whole number of jurors. The validity and construction of a statute providing for a majority verdict is discussed, with special reference to its application to an action under the federal employers' liability act, in the note to *Miami Copper Co. v. State*, reported ante, this volume, at page 494. The question is also referred to in connection with a discussion of the jurisdiction of an action under the act in the note to *Fish v. Chicago, etc. R. Co.* Ann. Cas. 1916B 147, and in connection with a treatment of what law governs such an action in the note to *Central Vermont R. Co. v. White*, Ann. Cas. 1916B 252.

#### NORMAN

v.

#### CHARLOTTE ELECTRIC RAILWAY COMPANY.

North Carolina Supreme Court—December 23, 1914.

167 N. Car. 533; 83 S. E. 835.

#### Street Railways — Collision with Automobile — Last Clear Chance.

On evidence in an action against a street railroad for personal injury to plaintiff while backing his automobile on its track, the question of the defendant's failure to avoid injury notwithstanding plaintiff's contributory negligence held for the jury.

[See note at end of this case.]

#### Relative Rights of Traveler and Street Railway.

A traveler has the same privilege to use the street that a street railroad has for operating its cars thereon, and, if employing a motive power increasing the speed of its cars so as to increase the danger of accidents, has a reciprocal duty to exercise a commensurate care and vigilance necessary to avoid injuries.

[See 25 Am. St. Rep. 475.]

#### Same.

A street car has a right of way superior to that of a wagon, and, whether going in the same direction ahead of the car or meeting it, the wagon must yield the track promptly on sight or notice of the approaching car, but is not a trespasser because on the track, and only becomes such if, after notice, it negligently remains there. Where a wagon and a car meet at right angles, the wagon has greater rights than between crossings; the road's superior right is not exclusive, and will not justify a needless interference with the public.

#### Collision between Street Car and Automobile — Negligence of Street Railway.

Where defendant's motorman sees plaintiff's automobile on the track in front of his car, and knows that plaintiff is forgetful of his duty, and not aware of the approach of the car in time to prevent a collision, and that a collision will occur if plaintiff does not leave the track, unless the car was itself stopped, he is bound, as soon as a collision becomes probable, to slow down and bring his car under control so that he could stop in time to prevent a collision, and, having the last clear chance of averting collision, his failure to do so is negligence.

#### Contributory Negligence.

The right of a traveler to drive a vehicle on or along a street railway track does not relieve him from the duty of looking for approaching cars having the right of way.

**Violation of Speed Ordinance by Street Railway.**

A street railroad's operation of a car at a speed in excess of a municipal ordinance is evidence of negligence which prevents an action for personal injury from collision from being taken from the jury.

[See Ann. Cas. 1913E 1100.]

**Last Clear Chance.**

A street railroad's liability, under the last clear chance rule, for injury to a traveler on its track does not depend upon the cessation of his contributory negligence, as its motor-man should be prepared to avoid a collision probable in view of his persistent neglect of his own safety, and, with reference to such rule, proximity in point of time and space is no part of "proximate cause," which is that which, in natural and continuous sequence, without any new and independent cause, produces the result, and without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that such a result was probable under all the circumstances as they existed and were known, or should by the exercise of due care have been known to him.

[See note at end of this case.]

Appeal from Superior Court, Mecklenburg county: ADAMS, Judge.

Action for damages. W. M. Norman, plaintiff, and Charlotte Electric Railway Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[534] On 27 March, 1913, the plaintiff was driving his automobile from the Seaboard Air Line Railway station at the north end of Tryon Street in the city of Charlotte, in a southerly direction along that street to Ninth Street, intending to turn into the latter street; but when he reached it, he found it blocked by a wagon and a rope across it. He reversed his car and backed out over the two street railway tracks, laid at that point on Tryon Street, and looked in the direction he was going, to see if there was anything in the way to prevent him from backing over to the other side of the street, where he expected to turn towards the south and proceed down Tryon Street towards Independence Square. On direct examination he testified: "No, I didn't see any street car coming. No, I [535] didn't hear any street car coming. I backed out between the second two wagons across both tracks and was in the act of going forward. I think I was moving forward at the time the street car struck me, trying to turn to go back up Tryon Street towards the Square. I never did discover the street car that hit me. I do not think they rang any bell or sounded any gong. I heard no noise. When the street car hit me I was knocked unconscious. Yes, my automobile had a top on it, and the top was up. I had a hole cut in the back of my head and my collar bone

was broken." And on cross-examination he testified: "I had backed out and I had to back off those street car tracks in order to let a wagon pass; then I was bound to turn on that track a little bit to get on the west side of the car track to come on back towards the Square. Yes, sir, I intended to get across the track at last and put myself on the west side where I had been before, and come on up here. Yes, that is what I intended to do. No, I did not hear any automobile or street car either. I think I listened. I am positive that I did. I heard none, and I saw none. No, sir, I did not look up towards the Square to see whether a car was coming before I backed on the track. No, I really do not know whether I was hit by a car coming from that way or from the other way. Yes, sir, I knew when I started to back that I had to cross both of those tracks, and I didn't look. I didn't look up this way very far. I looked back out of the window of the car back onto the street to see where I was backing. I did not look up towards the Square to see if a car was coming down. No, I didn't look straight towards the depot. No, I didn't look very far either way; just where I was looking. Yes, sir, it is right I looked where I backed and didn't look either up or down; that is a fact. I will stand by that, for it is right. No, I did not look either up or down the track. The first thing I knew I was hit, and that is all I know about it."

The ordinance of the city prohibited the speed for a street car to exceed 15 miles an hour at that place, and there was evidence that it was running at 25 miles an hour. The car was moving on the west track, and the motorman testified that he did not know that plaintiff was going to back as far as his track, as he had plenty of room to turn around before reaching it, and that when he got on the west track the car was about 30 feet or a little more from him, and it was too late to stop it. That he rang the bell and took all necessary precautions to prevent an accident; shut off the current and reversed the car. There was evidence, on the contrary, that the car was from 150 to 200 feet when plaintiff backed upon the west track; that the gong was not sounded and that it could be seen that plaintiff was not looking for a car in either direction. The plaintiff himself testified that he was backing his car with the top [536] up and that he was not looking in either direction for a car, and was not aware of any danger, and did not know the car was near him until he was struck by it.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant company, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the defendant's answer? Answer: "Yes."

3. Notwithstanding the contributory negligence of plaintiff, could defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff? Answer: "Yes."

4. What damage is plaintiff entitled to recover of defendant? Answer: "\$1,250."

Defendant, in due time, objected to the submission of the third issue. It moved to nonsuit the plaintiff, and requested that the court give the following instruction to the jury: "In order to answer the third issue 'Yes,' you must find from the evidence, and by the greater weight thereof, that although the plaintiff was guilty of negligence which contributed to bring about his injury, yet before he was injured, his (the plaintiff's) negligence ceased and culminated and that thereafter the defendant had a clear chance to avoid injuring the plaintiff by the exercise of due care; and unless you do so find, that is, unless you find that the plaintiff's negligence ceased before the injury, and the defendant thereafter had a clear chance to avoid injuring the plaintiff, and negligently failed to avail itself of such chance, you should answer the third issue 'No.'" The request was refused, and defendant excepted.

In regard to this (third) issue the court charged the jury: "(If you answer the second issue 'Yes,' and if you find that after the plaintiff had negligently gone upon the defendant's track he was in a position of peril from threatened contact with the car, and was apparently insensible to the approach of the car; and if you find that the motorman in charge of the car saw, or by the exercise of ordinary care would have seen, his perilous position and averted the injury by any means reasonably consistent with the safety of the street car and the passengers thereon, it was the duty of the motorman to make use of such means; give the proper signals, if reasonably necessary; lessen the speed of the car, and, if reasonably necessary and practicable, to stop the car in time to avoid the injury; and if you find, under these circumstances, that the motorman failed to perform this duty, you will then find that the defendant was negligent; and if you further find that plaintiff, in consequence, was injured, and that the defendant's negligence was the proximate cause of the injury, you will answer the third issue, 'Yes.' If you do not so find, you will answer it 'No.'"

[537] Defendant excepted to the part of the instruction which is inclosed in parentheses.

There was no other exception to the charge, except as to the definition given in connection with the instruction upon the third issue, as follows: "Now, what is proximate cause? Proximate cause of an event is that which, in natural and continuous sequence, unbroken by any new and independent cause, pro-

duces the event, and without which it would not have occurred. (Proximity in point of time or space is no part of this definition. Defendant excepted to the part of this instruction which is in parentheses.

Judgment was entered upon the verdict, and defendant appealed.

*Osborne, Cocke & Robinson* for appellant.  
*D. B. Smith, Cameron Morrison, and J. H. McLain* for appellee.

**WALKER, J. (after stating the facts).—**There was no error in denying the motion to nonsuit the plaintiff, and the exception to the submission of the third issue, which presents practically the same question, was properly overruled. Whatever may be the law in some of the other jurisdictions—and we concede that it seems to be radically and directly at variance with our rulings upon this question—the law here has been well settled for many years, and we do not feel at liberty to disturb it, after it has been so firmly imbedded in our jurisprudence. The law as declared by some of the courts would make this, in one view of the facts, a clear case of concurrent negligence, upon the ground that the omission of the plaintiff to look and listen and the failure of the motorman to exercise care by looking ahead and to take proper precautions for avoiding danger and preventing collisions, were concurrent, or, as sometimes called, simultaneous acts of negligence, both of them having an equal chance and a fair opportunity of preventing the collision and the consequent injury to the plaintiff and his automobile, and both being bound to the same degree of care. But with us this is not so, under the facts and circumstances of the case. There is, to begin with, no possible analogy between a case growing out of an injury caused by a street railway car to a person rightfully upon the public thoroughfare and a case involving an injury inflicted by a steam railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so because the citizen has the same privilege to use the street for travel that the street railway company has for propelling its cars thereon. The franchise to lay its rails upon the bed of the public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize, and respect the [538] right of every pedestrian or other traveler; and if by adopting a motive power which has increased the speed of its cars it has thereby increased, as common observation demonstrates, the risks and hazards of accidents to others, it



must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent. The right of the wagon, in certain particulars, is subordinate to that of the railway; the street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way; whether going in the same direction ahead of the car or in an opposite one to meet it, the driver of the wagon must yield the track promptly *on sight or notice of the approaching car*; but he is not a trespasser because upon the track; he only becomes one if, after notice, he negligently remains there. The company has the superior right to the use of its own tracks, as otherwise it could not use them at all. If a wagon and a car meet going in opposite directions, the wagon must turn out, because the car cannot. If going in the same direction, the wagon must also get off the track, because the car cannot go around the wagon, and the public convenience requires a car to travel at a greater speed than the ordinary vehicle. But this superior right is not exclusive, and will not justify the company in needlessly interfering with the convenience of the public, or excuse it from the consequences of its own negligence. Where the wagon and car meet at right angles, either can stop long enough for the other to pass without serious inconvenience, and as the wagon must cross the track in order to proceed, it is said that under such circumstances the rights of the wagon are somewhat greater than between crossings, with a corresponding obligation resting upon the railway company to exercise greater care on account of the greater probability of meeting vehicles and pedestrians, with the increased risk of accidents. But this rule cannot be extended to interfere with the right of the public to cross the track with reasonable care at any point that their convenience may suggest. The foregoing principles are supported by *Moore v. Charlotte Electric St. R. Co.* 128 N. C. 456, 39 S. E. 57, and have been epitomized by us from that case, so far as the questions there decided are presented here and are pertinent to this discussion.

If the motorman, W. N. Turner, saw the plaintiff's car on the western track in front of his car, which was on the same track, and also knew that plaintiff, being forgetful of his duty and inattentive to his surroundings, was not aware of the approach of the car, and, on that account, was making no effort to leave the track, and this knowledge came to him in time to prevent the collision, and he knew that a collision would occur if plaintiff did not leave the track in time to prevent it, unless the street car was itself stopped before reaching the automobile, it was his plain

duty, according to our decisions, as soon as a collision became [539] probable, to slow down and bring his car under control, so that he could stop, in order to prevent the catastrophe which would inevitably happen if he proceeded on his way and plaintiff did not move his automobile away from the track. If the motorman saw that the plaintiff had evidently not looked and listened, and had not heeded his signal, if he gave one, and was, therefore, unconscious of his danger and not likely to leave the track, it was incumbent on him to take reasonable precaution for his safety; and as he had the better opportunity of so acting as to prevent the collision, he is adjudged by the law, under the circumstances, to have had the last clear chance of averting the injury, and the defendant, therefore, is the responsible author of it. A person on foot or in a vehicle has no right to cross a street in front of an approaching street car and take the doubtful chance of his ability to cross in safety, if a prudent man would not do such a thing under similar circumstances; and if he does so, and is injured by his own carelessness, the fault is all his, and he cannot hold the company to any liability therefor. But the case we have is quite different, as here the plaintiff was seen by the conductor when backing, at a crossing, towards the western track on which the car was moving; he was oblivious of his dangerous surroundings, which might have been seen by the motorman if he was keeping a proper lookout, and he testified that he was doing so. It would seem to be just and humane to hold that, if such were the situation, and the jury afterwards found it to be so, the defendant should be held responsible, as having the superior chance to avoid the injury, though the plaintiff was also negligent, and grossly so. Such, anyhow, is our law.

In *Lassiter v. Raleigh, etc. R. Co.* 133 N. C. 244, 45 S. E. 570, the intestate, A. E. Lassiter, was on the track of the defendant, attending to his business of overseeing the shifting of cars, as an employee of the defendant. He was unconscious of the fact that a train was being backed towards him on the same track, by reason of the fact that his attention was fixed on what he was then doing. There was no one on the leading box car of the backing train to warn him of his danger. The Court first distinguishes the case from that of a pedestrian walking on a railroad track in front of an approaching engine or train, who is run over and injured, upon the ground that, being a trespasser, or even a licensee, he has no right to impede the reasonable use of the track by the company, and being apparently in possession of his faculties, the engineer may fairly presume, even to the last moment, when it is too late to save him, that he will step off the track and save himself. It then

proceeds to say: "In this case the intestate, according to the evidence of Thomason, was at a disadvantage; was not upon equal opportunities with the defendant to avoid the injury; for his manner and conduct showed that he was oblivious to his surroundings and was engrossed in the management of [540] his train and its hands. His actions showed that he did not hear the bell ringing. Now, if there had been on the backing box car a flagman, or watchman, he would have seen the intestate's obvious absorption in his work and heard the efforts of Thomason to give him warning. The condition of the intestate was as helpless as if he had been asleep or drunk on the track, and the defendant owed him at least as high a duty as if he had been asleep or drunk." And again, in the same case, it was said: "The evidence was competent and fit to have been submitted to the jury upon the question of the last clear chance of the defendant—that is, whether if both the plaintiff and the defendant had been negligent, the defendant could have prevented the death of the intestate by the use of means at hand or that reasonably ought to have been at hand. In *Pickett v. Wilmington*, etc. R. Co. 117 N. C. 616, the Court said: 'If it is a settled law of this State (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is the omission of a legal duty. If by the performance of that duty an accident might have been averted, notwithstanding the previous negligence of another, then under the doctrine of *Davies v. Mann*, 10 M. & W. (Eng.) 546, and *Gunter v. Wicker*, 85 N. C. 310, the breach of duty was the proximate cause of any injury growing out of such accident, and when it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results.'

A careful reading of the *Lassiter* case will show that the Court regarded the intestate as having been grossly negligent in leaving a safe place for the performance of his work, and taking, instead of it, a most dangerous one on the track. The decision was put squarely on the ground that the defendant had the last clear chance to avoid the natural and probable effect of his negligence by the exercise of proper care in having some one on the leading car to give warning of the approach of the train, or to have it stopped, if need be, by signaling the engineer of danger ahead, and intestate's position of danger was as apparent, although he was merely inattentive and unaware of the danger, "as if he had been asleep" or "drunk and down" on the track. The two cases are parallel. See also *Smith v. Atlanta*, etc. Air Line R. Co. 132 N. C. 819, 44 S. E. 663.

If the motorman saw that the plaintiff did not hear or heed his signal, if given, the latter's position was no less perilous than if he had been deaf and could not hear. He had no right to kill or injure plaintiff or to break up his automobile, even if he was careless, or even grossly negligent, provided he had a fair and reasonable opportunity to avoid it without injury to his passengers, and especially after seeing and appreciating the danger in going ahead with his car.

[541] The doctrine of *Lassiter's* case has been sustained by a long line of decisions in this Court. *Clark v. Wilmington*, etc. R. Co. 109 N. C. 444, 14 S. E. 43; *Deans v. Wilmington*, etc. R. Co. 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902; *Smith v. Norfolk*, etc. R. Co. 114 N. C. 734, 19 S. E. 863, 923, 25 L.R.A. 287; *Bullock v. Wilmington*, etc. R. Co. 105 N. C. 180, 10 S. E. 988.

*Nellis on Street Surface Railroads*, at p. 300 (ch. V. sec. 9), referring to the duty of a motorman with respect to travelers on the street, says: "Seeing a person driving along the road parallel with the track as though he had no intention of crossing it, he is not guilty of negligence because he did not anticipate that such person would suddenly turn across the track in the middle of a block. But if he sees the driver of a wagon in front of him does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempts to leave the track, it is his duty to bring his car under control, and even to stop, if necessary to avoid collision. He should stop his car at once upon seeing the wheels of a heavily loaded wagon in front of it slip on the track while the driver is attempting to get out of the way."

*Hicks v. Citizens R. Co.* 124 Mo. 115, 27 S. W. 542, 25 L.R.A. 508, first lays down the proposition that persons in wagons and other vehicles have the undoubted right to pass over or upon street car tracks without hindrance. Yet the right of a traveler to drive a vehicle upon or along a street railroad track does not absolve him from the duty of looking for approaching cars. The cars can only move upon the tracks, and are used for the convenience of the public, and are consequently entitled to the right of way as to all others. It is, therefore, the duty of a traveler to give way to approaching cars so as to cause no unnecessary hindrance. *Adolph v. Central Park*, etc. R. Co. 76 N. Y. 532; *North Hudson R. Co. v. Isley*, 49 N. J. L. 468, 10 Atl. 665; *Wood v. Detroit City St. R. Co.* 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259. The Court then proceeds to declare: "We are not able to say that the evidence shows conclusively that plaintiffs violated any of these rules, unless it was in driving upon the track without observing the cars, which must have been very near them. But that negligence was clearly not the proximate cause of the injury,

for plaintiffs not only got safely upon the track without injury, but they were seen by the servants of defendant, and, by their timely action, a collision was then averted. After that, the conduct of the plaintiff could not be declared negligent as a matter of law. Whether they could have left the track more expeditiously than they did, and whether doing so would have avoided the injury, were questions for the jury. It seems to me that there was very little evidence tending to show contributory negligence in the case; but we cannot say there was none. Defendant's gripman saw plaintiffs in their dangerous and exposed situation, and the chief question is whether, after that, he acted with due care towards them. *Hanlon v. Missouri Pac. R. Co.* 104 Mo. 389, 16 S. W. 233, and cases cited." The facts there were not substantially unlike those in the case at bar.

[542] The case of *Hanlon v. Missouri Pac. R. Co.* 104 Mo. 389, 16 S. W. 233, which was cited in the *Hicks* case, is so much in point and expresses our views so aptly that we are fully justified in quoting from it liberally. It states the contention of defendant in this case and conclusively answers it, and in perfect accordance with the reasons we have heretofore given, which, moreover, are sustained by our own cases. The Court there says: "It is insisted that, although the signals were not given, and if they had been given the injury have been averted, still the negligence of plaintiff himself, in not observing the common prudence of looking out for his own safety, concurred with that of defendant, and the injury resulted on account of the concurring negligence of both, and for that reason debarred plaintiff from recovery. It is well settled by authority, as well as enjoined by the common dictates of prudence, that one going upon the track of a railroad should observe all such precautions for his own safety as reason and prudence dictate; and if disaster comes upon him by reason of a failure to do so, he must bear the consequences. This rule has, however, a qualification which is founded upon principles of humanity and is universally recognized. This qualification enjoins upon the railroad company the duty of using all reasonable efforts to avoid injury to one who has negligently placed himself in a position of danger, if the peril is known, or, under certain circumstances, by reasonable care might have been known. A failure to observe this requirement renders the company liable, notwithstanding the previous negligence of the person injured. The rule and the qualification of it require precautions to be observed by both the railroad company and the traveler, when using a public highway in common. The precautions to be used by each must necessarily vary, with varying circumstances, and no positive rule can be laid

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down which can be made a test in every case. One rule for their mutual government is imperative, which is the duty and obligation for each to watch for the presence of the other, one to avoid being injured, the other to avoid causing injury. The railroad company must give some regard to the known imprudence of mankind, and not content itself with the mere obedience to the law requiring signals to be given; and the traveler must, in like manner, take precautions for his own safety, and not depend entirely upon the railroad company to protect him, or give him timely notice of danger," citing *Yancey v. Wabash, etc. R. Co.* 93 Mo. 436, 6 S. W. 272; *Rine v. Chicago, etc. R. Co.* 88 Mo. 396; *Kimes v. St. Louis, etc. R. Co.* 85 Mo. 611, and numerous other cases in support of the several principles announced.

There are other reasons for denying the motion to nonsuit or for the withdrawal of the third issue. There was evidence that the street car was being run at a greatly excessive speed, in violation of the city ordinance fixing the maximum at 15 miles per hour, whereas the speed of the car was 25 miles an hour. This was, at least, evidence of negligence, [543] as decided in *Davis v. Durham Traction Co.* 141 N. C. 134, 53 S. E. 617 and prevented the judge from taking the case away from the jury by a nonsuit or a directed verdict. This very question was settled against the street car company in that case. Justice Connor there said, at p. 140: "It is undoubtedly true that if a car is moving at a lawful—that is, not excessive—speed, and a person enters upon the track, the defendant is required to use ordinary care, give the signals, lower the speed, and, if it appears reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the defendant will not be liable for an injury sustained. If, however, the car is moving at an excessive speed—that is, a speed in excess of that prescribed by the city ordinance—and by reason of such excessive speed the signals cannot be given or the appliances used by the exercise of ordinary care, the defendant will be liable for an injury, and this for the reason that it has, by the excessive speed, brought about a condition which it cannot control. It was therefore proper for his Honor to modify the instruction by inserting the words, 'and the car was not running faster than 14 miles an hour.' This gave the defendant the benefit of the principle invoked, unless the jury found that the speed was excessive. This Court has held, in accordance with many others, that speed in excess of that prescribed by the ordinance is at least evidence of negligence, and his Honor so instructed the jury. *Edwards v. Atlantic Coast Line R. Co.* 129 N. C. 78." And again, at p. 142: "The duty

is imposed upon the managers of the car to move at a reasonably safe speed, the maximum of which in Durham is by ordinance fixed at 14 miles an hour; to equip the car with signals and means of controlling it—bringing it to a stop when necessary.” The decision clearly recognizes the principle that, as the car must run on the track or not at all, and the citizen on foot or in a vehicle of any kind can so easily and promptly change his course, and use for his purpose the spaces of the street between the tracks and the curb, he must, in the exercise of due care, give way to the car in order to prevent a collision; but the Court also says that this does not excuse the negligence of the street car company if it runs into the citizen or his vehicle and injures him or his property when, after seeing his perilous position, or when it could have been seen with the exercise of due care, it fails so to act in the control and management of the car as to cause him injury, provided it had time to prevent it by the exercise of such care; and upon this question the jury have the right to consider whether by the excessive speed or other previous negligent act it had deprived itself of the ability to save him or his property.

What was done by the plaintiff in the operation of his automobile and what by defendant in the running of its car were questions for the jury upon the vital issue as to who had the last clear chance to avoid the [544] final catastrophe. Plaintiff's negligence, which we admit was gross, did not forfeit his right to be treated by defendant with ordinary consideration and humanity. The motorman could not drive the car upon his automobile, smash it up and injure him, simply because he happened to be upon the track, all unconscious of his dangerous position.

It was for the jury to say, upon all of the evidence, whether the plaintiff saw the approaching car in time to clear the track, and whether the defendant's motorman had reasonable grounds to believe that he did, and that he would turn from the track before the car could reach him, or whether the motorman knew, or should have known, that he was not aware that the car was coming, and, therefore, was not likely to get out of the way. If they found the facts last stated, then it became the duty of the motorman to give proper signals and to so operate the car with due care as to prevent injuring him or his automobile; and in this view it had the last clear chance. We think that, in this respect, our view may be reconciled with the cases cited by defendant's counsel from courts in other jurisdictions.

The only instruction requested was not a correct one, and was, therefore, properly refused. The liability of defendant, under the

doctrine of the last clear chance, did not depend upon the “cessation or culmination of plaintiff's negligence.” What is meant by the quoted expression, which is used in the instruction, we suppose to be that plaintiff's negligence must have spent its force, or have become dormant or inactive. But this was not necessary to constitute the defendant's negligence the proximate cause of the injury. The very fact that the plaintiff, in the presence of danger, continued to be negligent, and in apparent ignorance of the danger with reference to the car, but increased the duty of the defendant's motorman to be on his guard and to adjust his conduct to that situation by lessening the speed of the car, bringing it under control and generally placing himself in a state of readiness to stop, should it be necessary to do so. He should have prepared for the natural and probable eventuality, in view of the plaintiff's persistent neglect of his own safety. This is the common sense and the justice of the case, when looked at from any angle of vision.

Nor do we think it was a vital error, if error at all, for the court to have said, as it did say, in defining proximate cause with reference to “the last clear chance,” that proximity in point of time and space is no part of the definition. He properly defined proximate cause as that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, and without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that such a result was probable under all the circumstances as they existed and were known or should, by the exercise of due care, have [545] been known to him. *Sh. and Redf. on Neg. secs. 25 and 28; Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 24 U. S. (L. ed.) 256; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 U. S. (L. ed.) 395; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 52, 19 U. S. (L. ed.) 65; *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885; *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 38, 50 S. E. 448, and *Ridge v. Norfolk Southern R. Co.* 167 N. C. 510, where the subject is fully discussed. In *Ætna F. Ins. Co. v. Boon*, supra, the Court thus defined it: “The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule.” And again, quoting from *Brady v. Northwestern Ins. Co.* 11

Mich. 425, it says: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." Phillips on Insurance, sec. 1097, referring to *Gordon v. Rimmington*, 1 Campb. (Eng.) 123, thus deals with the question: "The *maxim causa proxima spectatur* affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the injury." And in *Milwaukee, etc. R. Co. v. Kellogg*, supra, the Court says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the marketplace. 2 Blk. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury—a concatenated operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the [546] original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty."

We may, though, safely rest our decision of this case upon *Wheeler v. Gibbon*, 126 N. C. 811, 36 S. E. 277, where a man driving a buggy in the direction towards which a heavy rain was being driven by a high wind up Tryon Street (the same one mentioned in this case), and ran into Mr. Wheeler, the plaintiff, who was crossing with his umbrella over his head to protect him from the rain.

The present Chief Justice there said, and it fully covers this case: "Could the defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff, notwithstanding the negligence of the plaintiff? This was the crucial issue of fact, and was peculiarly for the consideration of the jury, for we cannot agree with the appellant that the court could instruct the jury that on such a state of facts, in law, the proximate cause of injury was due to the plaintiff. That is the very fact which the jury, not the court, must determine. The negligence may have been concurrent, or the last negligence may have been the plaintiff's, or notwithstanding the negligence of the plaintiff the defendant could, with the exercise of ordinary care, have prevented his horse striking, and his conveyance running over, the plaintiff. The jury, and they alone, were competent to determine the fact, for there was evidence for their consideration. The plaintiff was crossing, with his head tucked behind his umbrella. This was negligence. The defendant was driving rapidly, '10 miles an hour, or at top of his speed,' and with his oilcloth up in front of the buggy; and this was negligence. He was driving in the same direction with the storm, and was in a vehicle, and therefore could keep a better lookout. Then his horse and vehicle could do damage to a foot passenger—and did—while the foot passenger was not likely to run into him and do damage, and the defendant should have kept a lookout correspondingly careful to avoid injury. The jury under proper instructions have found that if the defendant, himself driving negligently, had used ordinary care, he could have seen the plaintiff negligently crossing the street in a pelting storm with his head hid behind his umbrella, in time to avoid running over him. This was a pure question of fact, and the Court cannot review it." But the defendant's negligence in our case was the active, efficient, and predominating cause of the injury, and also was the last in point of time, if it was guilty of any negligence, and the jury have found that it was, upon evidence that reasonably supports the verdict.

It follows that no error was committed in the trial of the case.

No error.

#### NOTE.

#### Application of Last Clear Chance Doctrine to Collision between Automobile and Street Car.

Applying the last clear chance doctrine to an action arising out of a collision between an automobile and a street car, it is generally held that a street railway company is liable in an action for damages growing out of a

collision between one of its cars, negligently operated, and an automobile, notwithstanding the contributory negligence of the driver of the machine, if the employees operating the street car know or ought to know the perilous position of the automobile and its occupants, and by the exercise of ordinary care could prevent the injury. *Joyner v. Interurban R. Co.* 172 In. 727, 154 N. W. 936; *King v. Grand Rapids R. Co.* 176 Mich. 645, 143 N. W. 36; *Flack v. Metropolitan St. R. Co.* 162 Mo. App. 650, 145 S. W. 110; *Bruening v. Metropolitan St. R. Co.* 181 Mo. App. 264, 168 S. W. 247; *Weck v. Reno Traction Co.* (Nev.) 149 Pac. 65; *Hirsch v. Cincinnati Traction Co.* 32 Ohio Cir. Ct. Rep. 686. See also *McFadden v. Metropolitan St. R. Co.* 161 Mo. App. 652, 143 S. W. 884. And see the reported case. Thus in *Joyner v. Interurban R. Co.* supra, there was evidence that while the plaintiff was seeking to avoid a collision by backing his machine from the track he stalled his engine and that the defendant's employees seeing the plaintiff's peril negligently failed to stop. The court said: "If one of them stopped and the other drove on and brought about a collision, then the latter was clearly negligent and is legally chargeable with the resulting damage, even though the one who stopped had, up to that point, been himself negligent. . . . If plaintiff's evidence was credible—and such the jury could properly find it—defendant's employees in charge of the car manifestly had the last clear chance to avoid the collision, after the failure of plaintiff's engine had left him helpless to get out of the way." In *King v. Grand Rapids R. Co.* 176 Mich. 645, 143 N. W. 36, it appeared that the plaintiff backed his car from a garage onto the defendant's track, that the engine of his car was continually running in readiness to start, that he failed to look in the direction from which the car approached for a period of thirty seconds, that the view along the track was unobstructed to the motorman for at least a distance of 340 feet, that no signal was sounded, and that the plaintiff was not aware of the approach of the car until it was within a few feet of his automobile. The court said: "The motorman must have seen, if he was properly attending to the work devolving upon him in operating the car, the dangerous situation of the plaintiff, and he could easily have stopped the car after discovering the same and thus avoided inflicting the injuries which resulted from the collision." In *Flack v. Metropolitan St. R. Co.* 162 Mo. App. 650, 145 S. W. 110, the injuries for which the action was brought were the result of a collision between one of the defendant's cars and an electric coupé in which the plaintiff unsuccessfully attempted to cross in front of a car which was then at a considerable distance, and proceeding at a speed

approximately four times that of the coupé. Relative to the duty of defendant's employee and as to the application of the last clear chance rule the court said: "The attempt to excuse him [the motorman] on the plea that he had a right to assume, as did plaintiff, that the coupé would clear the crossing, will not stand analysis. Seeing that the coupé first had obtained possession of the crossing at a time when the car under his control and could be checked to give the coupé a good clearance opportunity, the motorman was negligent in relying, as he did, on a hairbreadth calculation that omitted all consideration of fortuitous interruptions of the progress of the coupé. . . . The fault of the motorman lay in his unwarranted assumption that plaintiff would get out of the way when all of the appearances indicated that the coupé would be struck if the street car continued at its high speed. It was the duty of the motorman, as soon as he discovered the purpose of plaintiff to cross the track, so to control his car as not to endanger the safety of plaintiff and he had no right to play a game with death with plaintiff as the stake. The suggestion that the motorman had a right to assume that plaintiff would stop just before entering the zone of danger is overborne by the fact we have mentioned that the car was from seventy-five to one hundred feet away when the contrary intention became apparent. . . . The jury were entitled to believe that the motorman had ample opportunity to avoid the injury but recklessly disregarded it and negligently ran into plaintiff. . . . We readily concede the motorman was under no duty to stop his car or reduce its speed until it appeared that plaintiff was in danger and either could not or would not extricate himself, but in this case such appearance was manifest at a time when the motorman had a reasonable opportunity to prevent the injury; and to hold that he was under no duty to try to save plaintiff would be to repudiate in toto the humanitarian doctrine which now is so firmly imbedded in our jurisprudence that we could not dislodge it if we would."

It appeared in *Bruening v. Metropolitan St. R. Co.* 181 Mo. App. 264, 168 S. W. 247, that the plaintiff in starting out with his automobile from the curb of the street was compelled in order to go around certain wagons to pass over defendant's track. His brother, who was accompanying him looked back and saw a car at a distance of 500 ft. A collision quickly followed, no signal of the approach of the car being given. It was held that the court properly gave the following instruction: "That even if he [the plaintiff] was guilty of contributory negligence, yet if the defendant's motorman saw or might have seen him, in time to avoid the collision, it was his duty to

save him." See also *Bruening v. Metropolitan St. R. Co.* 180 Mo. App. 434, 168 S. W. 248. In *Weck v. Reno Traction Co.* (Nev.) 149 Pac. 65, the evidence showed that the plaintiff's automobile was struck by one of defendant's cars while he was endeavoring to pass around certain vehicles that obstructed the passage along the side of the track. The car was distant approximately 225 ft. and traveling at a speed of about 25 miles an hour when plaintiff first saw it. The court said: "While we cannot see that plaintiff was necessarily negligent in turning down Sierra street, yet if he was, but as soon as he discovered the street car coming down toward him at an excessive rate of speed exercised reasonably good judgment, situated as he was, in endeavoring to extricate himself from his dangerous position, his negligence must be said to have 'stopped;' and having stopped and 'not actively continuing until the moment of the accident,' and the defendant, either knowing of his danger, or by the exercise of such diligence as the law imposed upon it should have known of it, the proximate cause of the accident was the negligence of the defendant, and the last clear chance rule was applicable."

In *Hirsch v. Cincinnati Traction Co.* 32 Ohio Cir. Ct. Rep. 685, the evidence showed that the plaintiff's automobile had been running on the track for a distance of nearly a half mile; that the gong on the street car was sounded; that the motorman must, therefore, have been aware of the presence of the automobile on the track, and that the plaintiff heeded the warning by trying to get off the track, but was not given a reasonable time to do so. The court said: "Even though the failure to look back was negligence, it ceased to be a direct cause when the motorman became aware of the danger and did not exercise ordinary care to avoid a collision while the plaintiff was, in response to the warning, endeavoring with due care to get off the track."

In *McFadden v. Metropolitan St. R. Co.* 161 Mo. App. 652, 143 S. W. 884, it appeared that the plaintiff while riding in a sight-seeing bus was injured as a result of a collision with one of defendant's cars. The motorman was looking in a direction other than that in which the accident occurred until his car was too close to avoid the collision. While it was held that contributory negligence on the part of the chauffeur could not be imputed to the plaintiff, the court said: "And if it be true, as the testimony of plaintiff tends to show, that the motorman, had he been in the exercise of reasonable care, would have discovered the perilous position of plaintiff and prevented the injury, his failure to exercise such care would constitute negligence which, under the last chance rule, would entitle plaintiff to recover his damages even should the negligence of the chauffeur be imputed to him."

To warrant the application of the last clear chance doctrine to a collision between a street car and an automobile, it must appear that the motorman knew or in the exercise of due care should have known that the danger was imminent. Thus in *Underwood v. Oskaloosa Traction, etc. Co.* 157 Ia. 352, 137 N. W. 933, the application of the doctrine was denied. The evidence showed that with his machine under control the plaintiff was gazing to the rear out of mere curiosity when had he been looking to the front he could have avoided the accident. There was no evidence that the motorman was actually aware of the plaintiff's distraction. The court said: "There was no basis in the evidence for the application of the 'last clear chance' theory. The incongruity of its attempted application is illustrated by another feature of the case. The street car was also damaged in the collision, and a counter-claim was filed to recover such damages from the plaintiff. Now if the defendant could be made liable to the plaintiff notwithstanding plaintiff's negligence on the theory that the defendant's motorman, by exercise of reasonable diligence, ought to have discovered the plaintiff's negligence and peril, as set forth in the instructions to the jury, then, upon the same reasoning, appellant contends that the plaintiff should be held liable to the defendant for its damages because by the exercise of ordinary diligence he also could have discovered the defendant's peril. The logic is quite compelling, and would result in holding each party liable to the other for the respective damages sustained." So in *Lewis v. Metropolitan St. R. Co.* 181 Mo. App. 421, 168 S. W. 833, it appeared that the plaintiff was injured while riding in an automobile which her daughter, with two hours' driving experience, was steering. The collision occurred while attempting to cross in front of a slowly approaching car. As to the rights and duties of the parties the court said: "Plaintiff is not entitled to go to the jury unless there is evidence tending to show that after the motorman knew or ought to have known that the automobile was going into a place of danger, he had reasonable time to avoid the collision and negligently failed to do so. Until he had, or ought to have had, reasonable grounds to believe that the occupants of the automobile were oblivious to their danger and were going into it, he was under no obligation to stop or reduce the speed of his car. If the occupants of the automobile gave every indication to the motorman that they were aware of the approach of the car and of the danger therefrom, as the automobile approached the track, then the motorman had a perfect right to assume that the automobile would stop in a place of safety and would not enter into danger on the track, and, having the right to assume that, he was not required to stop or reduce

the speed of his car until the contrary became manifest. Now, unless the contrary manifested itself in time to enable him by the exercise of ordinary care to stop or reduce the speed of his car and thereby avoid the collision, with safety to his passengers, defendant cannot be held liable. And the burden is on plaintiff to show that the motor-man had time to avoid the collision after such manifestations."

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**AGAR ET AL.**

v.

**STREETER ET AL.**

Michigan Supreme Court—December 19,  
1914.

*183 Mich. 600; 150 N. W. 160.*

**Vendor and Purchaser — Option — Acceptance.**

An option to purchase real estate is made a contract mutual and binding on the parties by a tender of the money agreed on within the time limited.

**Deeds — By Husband and Wife — Effect on Wife of Covenants.**

Usually when a wife joins in the deed of her husband of his property, the covenants in the deed being in form the joint covenants of both of them, the covenants are not hers, but are his only; but, if it appears that the sole consideration for the deed was received by her and was by her husband so intended, the covenants will be treated as the joint covenants of husband and wife.

[See generally Ann. Cas. 1916A 797.]

**Husband and Wife — Separate Interest in Husband's Property — How Conveyed.**

While a wife may convey her separate interest in land as though unmarried if the deed she executes with her husband is a suitable instrument for release of dower or alienation of homestead, no purpose to affect her independent interest can be implied.

**Deeds — Grantor Not Named in Body.**

An option to purchase land owned by a husband and wife jointly, apparently made by the husband alone, but signed by the wife, is valid and binds the wife's interest.

[See note at end of this case.]

Appeal from Circuit Court, Tuscola county: BEACH, Judge.

Action for specific performance. Thomas Agar et al., plaintiffs, and Daniel W. Streeter et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

*H. H. Smith and Black & Black for appellants.*

*Brooker & Corkins for appellees.*

[601] OSTRANDER, J.—The bill is filed for specific performance of a contract for the sale of real estate. So far as the facts are concerned, the defense is predicated upon the denial of defendant Annie E. Streeter that she ever signed the instrument relied upon by complainants or was a party thereto. The lease and option relied upon describes the premises as a strip 40 feet wide and 8 rods long. It is so described in the bill. The decree, which recites that the trial court finds that defendant Annie E. Streeter signed the [602] lease and option understandingly and with the intention and purpose of uniting therein as one of the lessors and optioners, orders the defendants to execute and deliver to the complainants a sufficient conveyance of the premises described in the option and lease upon payment to them of the sum of \$449.70, which is the amount of the purchase price less the amount allowed to complainants as costs. The defendants appeal, insisting that the defendant Annie E. Streeter never signed the instrument, asserting also that it and what was done in respect to it is insufficient in law:

(a) Because the undisputed testimony shows that they owned but 33 feet by 8 rods and not 40 feet by 8 rods.

(b) Because the option and lease on its face purports to be made by Daniel W. Streeter alone.

(c) Because (and this is predicated upon the last-stated contention) the husband signed the lease in the forenoon and the wife in the afternoon, neither being present when the other executed the instrument, the contract appearing on its face to have been made by the husband alone and as his individual act; the wife could not join with him in a valid contract to sell the property by the simple act of signing her name thereto.

(d) Because the option was void under the statute of frauds because not accepted in writing.

I am satisfied, after reading the record and after an examination of the handwriting of the defendant Annie E. Streeter and of her alleged signature to the lease and option, that she signed the lease, and that the finding and conclusion of the trial court as to this fact must stand. The giving of the option was part of a single transaction agreed upon between the parties. The tender of the money within the time limited was sufficient to make the contract otherwise evidenced by the option mutual and binding upon both parties. I have no doubt that both defendants undertook [603] to do whatever was necessary to be done, and that complainants relied upon what defendants did



as securing to them what they had bargained for. The serious question is whether the instrument relied upon as giving an option is, for that purpose, legally effective. Assuming the bargain to have been that defendants were to convey to complainants certain property and give them a lease for five years of the strip of land in question and an option that the vendees might buy the strip at any time during the five years for \$500, for which the complainants paid \$4,000, the necessary legal evidence of the bargain must have been contemplated. A properly drawn and properly executed lease and option was a part of the necessary legal evidence of the bargain.

There are many decisions to be found which sustain the proposition that the estate of one who signs, seals, and acknowledges a deed, but is not described therein as grantor with apt words to indicate the estate and interest intended to be conveyed, does not pass by the deed, and it has been many times held that a joint deed executed by husband and wife, which omits the name of either as grantor, is inoperative as a conveyance of the interest of the one whose name is omitted. A considerable collection of cases has been made by counsel, and such a collection is to be found in a note to *Sterling v. Park*, 129 Ga. 309, 12 Ann. Cas. 201, 58 S. E. 828, 13 L.R.A.(N.S.) 298, 121 Am. St. Rep. 224, as reported in 12 Ann. Cas. 201, 203. See also 13 Cyc. p. 538; 21 Cyc. p. 1203. No analysis of these cases is attempted, although it may be remarked that a considerable number of them are based upon some statute requirement as to the form of the conveyance, others follow the early decision in *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56. In that case a wife signed and sealed a deed in which she joined with her husband for the purpose evidently of [604] releasing or barring her dower; she having no other interest. She was not otherwise mentioned in the deed. The conclusion that the deed was ineffectual to bar dower was rested upon the ground that a deed cannot bind a party signing and sealing it unless it contains words expressive of an intention to be bound.

The statute requisites of a deed in Michigan are that it be executed in the presence of two witnesses, who shall subscribe their names to the same as such. 3 Comp. Laws, § 8962; 4 How. Stat. (2d ed.) § 10824. But as between the parties deeds not witnessed are good. *Fulton v. Priddy*, 123 Mich. 298, 82 N. W. 65, 81 Am. St. Rep. 201; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576. As to lands owned by the husband, the wife joins in his deed for the purpose of releasing dower, and if the homestead is conveyed she is a necessary party to the deed because she has a peculiar interest in the premises by reason of the family relation and must

join with her husband in conveying it. In practice it is usual, in every case where a married man conveys real estate, to name his wife in the body of the deed, in which, usually she appears to have joined in making all of the covenants of the deed. Whether the purpose is to release the homestead interest, or to bar dower, the form of the deed is usually the same. The Constitution (article 14, § 2) provides that the alienation of the homestead by the owner, if a married man, shall not be valid "without the signature of the wife to the same." A married woman may bar her dower in any estate conveyed by her husband by joining in the deed of conveyance and acknowledging the same. 3 Comp. Laws, § 8930, 4 How. Stat. (2d ed.) § 10922; *Maynard v. Davis*, 127 Mich. 571, 86 N. W. 1051. It would not be entirely safe, however, to conclude that the signature and acknowledgment by the wife to a [605] deed in which she joined with her husband as grantor in conveying land owned by him amounted to no more than barring her dower. Where a wife joined with her husband in a warranty deed of his land and the sole consideration was paid to her, she was held jointly liable with her husband for a breach of the covenant against incumbrances. *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102. Decision was put upon the ground that she was contracting with respect to property to be held and owned as her separate estate. A married woman who held a recorded mortgage upon her husband's land, which they occupied as a homestead, joined with him in a second mortgage upon the land. In a foreclosure of the second mortgage, it was claimed that in joining with her husband in giving the mortgage the wife had subjected her own mortgage interest to the lien of the junior mortgage. It was held that the execution by the wife of her husband's deed of any sort implies that she executes it for the purposes for which the statute requires such execution in order to make the husband's deed effective; that if the intention is to affect any independent interest of her own it is reasonable to expect some special provision in the instrument showing specifically in what manner and how far her separate interests are intended to be affected. *Kitchell v. Mudgett*, 37 Mich. 81. A wife joined with her husband in giving a warranty deed of land in which he had a life estate, and the wife had a contingent interest as heir of her husband, created by the will of the husband's ancestor, by which the life estate was also created. It was said:

"In *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102, it was held that a married woman uniting with her husband in a warranty deed of his property is liable on the covenant when she obtains all the consideration, which, in that case, was a conveyance to

[606] her of other property. The record in the instant case does not disclose for what purpose the wife signed the deed, as she had no dower interest; the husband's interest being simply a life estate. The burden was upon the complainant to show for what purpose she joined in the instrument, and to prove it clearly, and to show that she had brought herself within the rule above set forth. *Mutual Ben. L. Ins. Co. v. Wayne County Savings Bank*, 68 Mich. 116, 35 N. W. 853. This complainant has failed to do, and it necessarily follows that the wife's signature to the instrument was a nullity, and did not bind her subsequently acquired estate." *Menard v. Campbell*, 180 Mich. 592, Ann. Cas. 1916A 802, 147 N. W. 556.

From these cases I deduce the following rules:

(1) Usually, when a wife joins in the deed of her husband of his property, the covenants in the deed being in form the joint covenants of both of them, the covenants are not hers but are his only.

(2) If, however, it is made to appear that the sole consideration for the deed was received by her and was by her husband so intended, the covenants will be treated as the joint covenants of husband and wife. The fact may be shown by evidence *aliunde* the deed.

(3) While a wife may convey her separate interest in land as though she were unmarried, if the deed she executes, with her husband, is a proper and suitable instrument for the release of her dower or for consenting to the alienation of the homestead—such an one as she would be expected to execute if she had no independent interest—no purpose to affect her independent interest can be implied.

It is perceived that as affecting the wife the declarations in the body of the instrument are usually of no significance. The significant thing is that she joins her husband in executing the deed.

Neither the husband nor the wife can alone alien an estate held by them by the entireties. A deed or mortgage of such an estate executed by either, alone, is a nullity, before and after the death of the nonconsenting [607] spouse. *Naylor v. Minock*, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595. At least, if the conveyance is to a third party. *Wilkinson v. Kneeland*, 125 Mich. 261, 264, 84 N. W. 142. A wife has no dower interest in such an estate, or in such interest as her husband has therein. To convey such an estate, one of them joins in the deed for the same reason that the other joins in it, and to accomplish the same purpose, namely, to alien the estate. Nothing can be accomplished except by joint action, and therefore they act jointly.

Defendants stand in the position of joint grantors, who must act jointly or not at all

if the estate or any interest in it is to be aliened. In the instrument relied upon as conveying an interest therein one is named as grantor; the other is not named. Both have signed it, and both signatures are witnessed by two witnesses. Following the reasoning of our own decisions, to some of which I have referred, the implication is, and it is the only reasonable one, that the wife, one of the joint owners, signed the deed in order to make the instrument effective. We are permitted to adopt, and I think should adopt, the rule that in such a case the failure to name the wife as grantor in the body of the deed or other instrument of conveyance is not fatal. I quote and approve the language and conclusion of the Georgia supreme court in *Sterling v. Park*, *supra*. After referring to a large number of authorities, it is said (page 312 of 129 Ga. [58 S. E. 829, 13 L.R.A.(N.S.) 303, 121 Am. St. Rep. 226, 12 Ann. Cas. 202]):

"Most of these decisions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment [608] and civilization of the sixteenth century, when such conditions do not exist in our own civilization. As was very pertinently said by Woodbury, J., in *Elliot v. Sleeper*, 2 N. H. 525, decided as early as 1823:

"Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded: for 'know,' says Perkins, § 36, 'that the name of the grantor is not put in the deed to any other intent but to make certainty by the grantor.' Bacon's Ab. 'Grant' C. This certainty is attained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention whatever be made of him in the body of it; because he can perform these acts for no other possible purpose than to make the deed his own. In a deed poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound, than in deeds indented."

"In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275; *Ingoldsby v. Juan*, 12 Cal. 564; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166. Text-writers now very generally discard as unsound the proposition that the grantor

should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument. 3 Washburn on Real Prop. 2120; 1 Devlin on Deeds, § 204.

"The requisites of a deed under the Code are that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or some one for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction. Civil Code, §§ 3599, 3602. We think that the deed under discussion measures up to these statutory essentials and is effective as a conveyance of the defendant [609] and her coremainderman, though their names are not mentioned in the body of the instrument. See in this connection, Ball v. Wallace, 32 Ga. 170."

See also Sloss-Sheffield Steel, etc. Co. v. Lollar, 170 Ala. 239, 54 So. 272; Barrett v. Cox, 112 Mich. 220, 70 N. W. 446.

It is probable that if the weight of authority depends upon the number of decisions, old and new, my conclusion is opposed to the weight of authority. See Cordano v. Wright, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C 1044, and cases cited in opinion. I conclude that the instrument creating the option was not, for that purpose, invalid.

It is singular that there should be a dispute, at least a failure to agree, about the width of the strip defendants own. Record evidence of title does not appear to have been produced by either party. Complainants can gain no title, through a deed from defendants, to land defendants do not own. The bill is framed according to no theory of an abatement of the purchase price to correspond with the quantity of land defendants own. The evidence upon the subject, aside from the oral statements of defendants, or one of them, is found in the lease and option in which defendants assert title to 40 feet. If the defendants own but 33 feet, there ought not to be two suits to adjust differences which should be settled in one. However, as the record stands, there appears to be no warrant for modifying the decree.

It is therefore affirmed, with costs to appellees.

McAlvay, C. J., and Brooke, Kuhn, Stone, Bird, Moore, and Steere, JJ., concurred.

#### NOTE.

#### Effect of Omission of Grantor's Name from Body of Deed.

The effect of the omission of a grantor's name from the body of a deed is treated in

the notes to Cordano v. Wright, Ann. Cas. 1912C 1044; Sterling v. Park, 12 Ann. Cas. 201; and King v. Rhew, 23 Am. St. Rep. 76. The present note is confined to a discussion of the more recent authorities.

The court in the reported case in holding that the omission of the name of the wife from the body of an instrument creating an option for the sale of realty is not fatal to its validity confessedly renders a decision contrary to the weight of authority. A similar view was expressed in Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420, wherein in holding that the appearance of the grantor's name in the warranty clause of a deed was sufficient to render it valid, it was said obiter: "There is a conflict in the decisions, English and earlier ones in this country holding that a deed of conveyance of real estate is void unless the name of the grantor appears in the granting clause, some of them going to the extent of saying that it is not sufficient if the habendum clause contains it, while other, and later, cases hold that the grantor's name in the body of the deed is not essential. . . . Learned authors favor the rule last mentioned and say that if the grantor signs it, though his name is not in the body of the deed, this is, at least, prima facie evidence of the validity of the instrument. But we are not called upon to express our opinion on this conflict, as the name of the grantor does appear in the body of this deed, not in the granting, but in the warranty clause. That, we think, makes the deed valid, certainly as against defendants, who are strangers to the title."

The rule established by the majority of cases that a deed omitting a grantor's name from the body thereof does not convey the interest of such grantor, although the deed is signed, sealed and acknowledged by him, has been sustained in a number of the later decisions. Swindall v. Ford, 184 Ala. 137, 63 So. 651; Jackson v. Craigen (Tex.) 167 S. W. 1101. See also Perlman v. Perlman, 178 Ill. App. 382; Parsons v. Justice, 163 Ky. 737, 174 S. W. 725; Le Blanc v. Jackson (Tex.) 161 S. W. 60. Thus, in Swindall v. Ford, supra, it appeared that the plaintiff claimed title through a deed executed among others by B. M. Ford who acknowledged the same and signed it together with his wife, neither of their names, however, appearing in the body thereof. The court said: "While the name of B. M. Ford is signed to the deed, and he acknowledged its execution before a justice of the peace, yet in the body of the deed it is recited to be the deed of W. B. Ford, J. B. Ford, S. E. Ford, and J. C. Ford and wife, and no mention is made therein of B. M. Ford and wife. Under the uniform rulings of this court, this deed was void as a conveyance of the in-

terest of B. M. Ford in the lands." In that case it was further held, however, that while the deed was void as a conveyance of a legal title, it was good and enforceable as a contract to convey. *Compare* as to the latter point, *Bowles v. Lowery*, 181 Ala. 603, 62 So. 107. In *Le Blanc v. Jackson*, 161 S. W. 60, where an appeal was denied for the want of a proper bond, it was said by way of dictum: "If, . . . the question had been properly presented, the contention of defendant . . . could not be sustained. The fact that Emerante Broussard is named as one of the grantors in the body of the deed and that her interest is to be conveyed, she being dead, would not distinguish this case from the general doctrine, which is well settled in this state, that a deed is not binding upon one who signs it but who is not named in the body of the deed as one of the grantors." The foregoing language was quoted with approval in *Jackson v. Craigen*, 167 S. W. 1101, wherein the same question was squarely before the court for decision. In sustaining the view as expressed in its earlier dictum the court said: "The writer is not prepared to agree to the proposition that the rule . . . is based upon the soundest reason, but that it is well settled in this state and is based upon the great weight of authority cannot be questioned." In *Parsons v. Justice*, 163 Ky. 737, 174 S. W. 725, an action to recover a certain undivided interest in land to which the defendant claimed title under a deed from Reuben Thacker, judgment was rendered for the defendant on the ground that the plaintiff's action was barred by the statute of limitations. But, as to the deed executed to Reuben Thacker under which the defendant claimed title the court said: "Inasmuch as Sarah Parsons and her husband were not mentioned in the body of the deed as grantors, the deed to Reuben Thacker, which they merely signed and acknowledged, was ineffectual, and vested no title in him." In *Perlman v. Perlman*, 178 Ill. App. 382, liquidated damages were sought to be recovered for the breach of a contract entered into for the exchange of realty. One of the defendants signed the contract individually and also as agent for his wife but she only was mentioned as the contracting party of the first part in the body of the agreement. It was held that no recovery could be had against the husband.

## BOARD OF TRUSTEES OF UNIVERSITY OF MISSISSIPPI

v.

WAUGH.

Mississippi Supreme Court—July 14, 1913.

105 Miss. 623; 62 So. 827.

### Schools — Prohibition of Secret Societies — Validity.

Under Laws 1912, c. 177, abolishing all secret orders, fraternities, etc., among students, and prohibiting their existence in the University of Mississippi and other educational institutions supported in whole or in part by the state, providing that no student in any such institution who is a member of any such order or fraternity shall be permitted to receive any honors, diplomas, or distinctions, or to compete for any prize, unless he shall agree in writing not to affiliate with such orders during his attendance at such school, or to contribute any dues or donations to such order, requiring trustees and faculties to enforce the provisions thereof, and providing that any member of any board of trustees or faculty, knowingly permitting any violation thereof, or failing or refusing to take proper steps for its enforcement, shall be removed by the Governor; the board of trustees of the University of Mississippi has power to require a student, as a condition precedent to his right to enter the university, to sign a pledge that he is not and will not become a member of any such order or fraternity, or aid, abet, or encourage the organization thereof, will not apply for nor accept any scholarship or medal, or in any way be the beneficiary of any self-help fund, or accept any position in the university, if he violates such pledge, and will make it his purpose and endeavor to avoid violating either the letter or spirit of that act.

[See note at end of this case.]

### Legislative Control of Schools.

The educational institutions of the state are under the control of the legislature, which may create, abolish, or regulate them, and the courts cannot supervise the wisdom of disciplinary regulations by the legislature.

### Constitutional Law — Validity of Statutes Generally.

All acts of the legislature are valid, unless they conflict with the state or federal Constitution.

### Presumption of Constitutionality.

All acts of the legislature are to be upheld by the court, unless it is plainly apparent that they conflict with the organic law, after solving all doubts in favor of their validity.

[See 6 R. C. L. tit. *Constitutional Law*, p. 97.]

**Schools — Prohibition of Secret Societies.**

In a suit to enjoin the board of trustees of a university from enforcing an order requiring applicants for admission to the University to sign a pledge not to become a member of or assist in the organization of any secret order or fraternity, allegations of the bill that the fraternity of which the complainant was a member had for its paramount purpose the enforcement and promotion of good morals and the highest possible attainment and standing in class, and good order and discipline in the student body of the different colleges with which it was connected, do not render the bill good against demurrer on the theory that, having been admitted by the demurrer, they show that the fraternity has a high moral purpose, since the court will take notice of the law prohibiting fraternities in educational institutions, and the bill therefore shows that complainant is seeking to disobey the law.

[See note at end of this case.]

**Statutes — Sufficiency of Title.**

The sufficiency of the title of a statute is a legislative and not a judicial question.

[See case, Ann. Cas. 1915A 1213.]

**Schools — Prohibition of Secret Societies.**

Laws 1912, c. 177, abolishing all secret orders and fraternities, etc., and prohibiting their existence in the University of Mississippi and other educational institutions supported in whole or in part by the state, and providing that no student in any such institution who is a member of any such order or fraternity shall be permitted to receive any honors, diplomas, or distinctions, or to contend for any prize, unless he shall sign a written agreement not to affiliate with such order, attend its meetings, or contribute any dues or donations while attending such institution, does not violate Const. Miss. 1890, § 1, providing for the distribution of the powers of the government into three distinct departments, section 2, prohibiting any person or collection of persons belonging to one of such departments from exercising any powers belonging to either of the others, nor is it discriminatory, within Const. U. S. Amend. 14, against applicants for admission to the University of Mississippi who are already affiliated with such a fraternity at other institutions, since the right to attend such university is not a material right, but is conferred by law, and one seeking the benefit of the law must submit to the conditions imposed thereby.

[See note at end of this case.]

Appeal from Chancery Court, Lafayette county: LAMB, Chancellor.

Action for injunction. W. P. Waugh, plaintiff, and Board of Trustees of University of Mississippi, defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

W. C. McLean for appellants.

A. F. Fox and W. G. Cavett for appellee.

[625] MAYES, J.—The legislature of 1912 passed an act entitled "An act to abolish and prohibit Greek letter fraternities and sororities and all secret orders among students in the University of Mississippi and in all other educational institutions supported, in whole or in part, by the state, providing penalties for any trustee, teacher, or other officer connected with the institution for failure or refusal to enforce the provisions of this act, providing penalty for any student who knowingly violates the provisions of this act," etc. See Chapter 177, p. 192, Laws of 1912. For purposes of decision we deem it unnecessary to set out the act in full. We shall content ourselves with setting out in this opinion only the particular sections of the act which are involved in this controversy. These sections are 1, 2, 3, and 4.

By section 1 it is provided that the fraternities and sororities, or Greek letter societies known as "Delta Kappa Epsilon," etc., and all other secret orders, chapters, fraternities, sororities, societies, and organizations, of whatever name, or without a name, of similar name and purpose, among students are hereby abolished and further prohibited to exist in the University of Mississippi and in all other educational institutions supported, in whole or in part, by the state. Section 2 provides that [626] no student in the University, or in any other educational institution supported, in whole or in part, by the state, who is a member of any of the orders, chapters, fraternities, sororities, societies and organizations hereby prohibited, shall be permitted to receive any class honors, diplomas or distinctions conferred by the institution of which he is a student, nor to compete nor contend for any prize or medal offered by his respective school, or by any association or individual. But any student who is a member of any of the orders, chapters, fraternities, sororities, societies or organizations aforesaid may, upon entrance to any of the aforesaid schools, file with the chancellor, president or superintendent, as the case may be, an agreement in writing that he will not, during his attendance at said school, affiliate with same, nor attend their meetings, nor in anywise contribute any dues or donations to them, and thereafter, so long as such agreement is complied with in good faith, such student shall not be subjected to the restrictions created by this section. Section 3 commands that the act shall be enforced by the trustees and faculties by such rules and punishments as they may prescribe. Section 4 provides that any member of the board of trustees or faculty or other officer connected with any educational in-

stitution supported, in whole or in part, by the state, who shall knowingly permit any violation of this act, and shall fail or refuse to take proper steps to enforce this act, shall be removed from such position by the Governor.

Let it be here noted that the enforcement of this act is imposed upon the trustees and faculties of the educational institutions of the state, and they are required to do it by such rules and punishments as they may prescribe. Let it further be noted that section 4 emphasizes the duty of the trustees and faculties to enforce the act by providing that, if they fail or refuse to take proper steps to enforce it, they shall be removed from their positions by the Governor. When the above act is read, it discloses the fact that in its passage the legislature [627] had two purposes in view. The primary purpose was to prohibit the existence of any secret society at the University of Mississippi, or any other educational institution supported by the state. Its second purpose is to prohibit any student in any of the above institutions continuing to hold membership in any secret society, or affiliating with same in any way, after admission to the educational institutions of the state, from receiving any class honors, diplomas, distinctions, etc., or for competing for any prize or medal at any of such institutions, unless the student will file with the chancellor, president, or superintendent an agreement that he will not during his attendance at any such school affiliate with any of the prohibited secret societies, nor attend any of their meetings, nor contribute in dues or donations while he is a student at any of the educational institutions above named.

The enforcement of the act is committed to the rules prescribed by the trustees and faculties, and it is made their imperative duty, under penalty of removal from office, to see that the act is enforced. In order to carry out the duty which the legislature imposed upon them of enforcing the act, the trustees, by an order placed upon their minutes at the September meeting in 1912, made it a condition precedent to the right of any student to enter the University that each student making an application for admission should be required to sign the following statement: "I hereby state and affirm upon my honor that I am not now pledged to become a member of any of the Greek letter fraternities, societies or sororities named in the Senate Bill 227 of the Laws of Mississippi, 1912, pages 192 and 193, chapter 177, and that I have not become a member of any of said fraternities, sororities or societies within the sixty days preceding the opening of the session of 1912-13. I further pledge and promise not to join any such organizations while I am a student of the University, and that I will not

aid or abet or encourage the organization or perpetuation of any such orders or societies while I am a student of the University. I further promise and pledge that I will not [628] apply for nor accept any scholarship or medal, or in any way be the beneficiary of any student's self-help fund, or accept any position in the University while I am a student therein, if I fail to keep or violate any of the provisions of the foregoing pledge. I furthermore promise and pledge to regard this obligation as binding between the sessions of 1912-13 and 1913-14, and that it shall be my purpose and constant endeavor to so act that no word or deed of mine could be even remotely construed as being violative to the letter and the spirit of what is known as the 'Anti-Fraternity Bill,' passed by the last legislature and approved by the Governor February 27, 1912."

When the order of the trustees is examined, it is readily seen that the pledge which the student is required to sign is nothing more than that he will comply with the act of the legislature while he is in the institution. If the statute is constitutional, it occurs to us that the trustees adopted the only practicable way they could of enforcing the act of the legislature. The act is a mere disciplinary regulation. It was the judgment of the legislature that all secret orders were detrimental to the welfare of the educational institutions of the state. These educational institutions are under the control of the legislature. It had the power to create and abolish them, and, having the power to create and abolish, it had the power to regulate; and when the legislature has passed a law disciplinary in its nature, controlling and regulating any subject which it considered to be inimical to the welfare of the institution, it is certainly not within the power of any court to supervise the wisdom of legislative acts and declare its acts unenforceable, merely because it might be the view of the court that the act was unwise and unnecessary. All acts of a legislature are valid unless they conflict with the Constitution of the state or United States, and the acts of the legislature are to be upheld by the courts, unless it is plainly apparent that they conflict with the organic law, after solving all doubts in favor of the validity of the law. Announcing [629] this rule of construction as our guide, a rule that has been repeatedly announced by this court, we proceed to discuss further the act of the legislature under review, and the order of the trustees passed in pursuance of the act.

It appears from the complaint that some time after the legislature passed the law, and after the board of trustees, in order to carry out the act of the legislature, had passed the above order requiring this pledge

to be taken, the complainant made application for admission to the University, and was declined admittance because he refused to sign the pledge which the trustees said he should sign before he could enter the University. When this was done complainant made application to the chancery court of Lafayette county for an injunction against the board of trustees of the University of Mississippi, asking that the court enjoin them from enforcing the order and require them to refrain from requiring him to sign the pledge incorporated in the application for admission to the University as a student, and prayed further that upon final hearing the act of the legislature in question be declared unconstitutional, as being in conflict with both the Constitution of the United States and the Constitution of the state of Mississippi, and that the order of the board be declared to be unreasonable, and *ultra vires*, etc. The application for the injunction sets out the fact that the University of Mississippi, was incorporated in 1844, and states many features of the incorporating act, which we deem unnecessary to rehearse here. The complaint then sets out the act of the legislature in full, and alleges that the complainant is now, and has been for several years, a member of what is known as the Kappa Sigma fraternity, and is affiliated and identified with the chapter at Millsaps College; that the Kappa Sigma fraternity is one of the fraternities embraced in the above-recited act. The complaint then sets out the order of the board of trustees, and alleges that in November, 1912, he applied to the chancellor of [630] the University for admission as a student, and that the chancellor presented him with the pledge required to be signed by students desiring to enter the University and requested him to sign as a prerequisite to admission as a student to the University; that complainant refused to do this, and the chancellor thereupon refused to admit him as a student in the University; and that the refusal was based alone upon the ground that complainant refused to sign the pledge. Complainant then alleges that he has never been a member of, nor has he affiliated with, or paid dues to, any chapter of any so-called Greek letter fraternity organized among the student body of the University. Complainant then alleges that he is affiliated with and pays dues to, the chapter of the Kappa Sigma fraternity at Millsaps College and alleges that if he was admitted as a student at the University it is not his intention or purpose to encourage the organization, continuance, or maintenance of any Greek letter fraternity in the University of Mississippi, or to affiliate with or pay dues to, or in any way support or encourage any such organization at the University, or be connected with any

sort of active work, or meeting with any fraternity in the University. He then alleges that the act of the legislature is in conflict with the Constitution of the state of Mississippi, and the Constitution of the United States; that it violates section 71 of the Constitution of the state, in that the title is not sufficient; that the act is further violative of sections 1 and 2 of the Constitution of the state of Mississippi, in that under the charter of the University and all statutes relating to it the government and discipline of the University, and the control of its students, is delegated to a board of trustees, and that such control is an executive and not a legislative function; that under section 2 of the Constitution of the state all power properly belongs to the board of trustees, and the legislature has no control over it; that as a citizen of the United States and the state of Mississippi, within the jurisdiction of the state, under the fourteenth amendment [631] to the Constitution of the United States, he is entitled to the protection of life, liberty, and property, and the pursuit of happiness, and entitled to the equal protection of the law, and that the above act of the legislature and the regulations of the board of trustees of the University of Mississippi, refusing him admission to the University, deprives him of his property, property rights, and liberty, and denies him the equal protection of the law. Complainant then proceeds to allege that the fraternity of which he is a member has for its paramount purpose the enforcement and promotion of good morals, the highest possible attainment and standing in class, good order and discipline in the student body of the different colleges with which it is connected, and that section 2 of the act of the legislature is unreasonable, in that it assumes extraterritorial jurisdiction, in prohibiting any member of any fraternity not connected with the University from receiving any class honors, diplomas, distinctions, etc., conferred by the University, and because it prohibits any student of the University from affiliating with or paying dues to, any chapter whatever, wherever situated, although entirely disconnected with the University.

This bill was demurred to on many grounds, but we see no occasion to go beyond the first. The first ground of the demurrer challenges the fact that there is any equity on the face of the bill. We think this challenge brings into review, at once, the whole of this case. Counsel for appellee stress the fact that the demurrer admits all the allegations of the bill, and call the court's attention to the allegation wherein the high moral purposes of the order to which complainant belongs is set out, and argues that, whatever the general result may be, this case is bound

to be affirmed, because with these admissions an institution cannot drive out of its halls, even before an act of the legislature, an order that is fruitful of so much good as is claimed for the order to which complainant belongs. But let it also be kept in mind that [632] the court takes judicial knowledge of the law, and reads into every alleged complaint the law of the land, and where the thing complained of, and against which relief is sought, is a thing which the law prohibits the complainant from doing, the court will not grant relief merely because complainant alleges that, if allowed to do the thing which the law says he must not, a great moral good will be accomplished. The allegation of fact amounts to nothing, when it merely shows that a complainant is seeking to disobey the law, no matter how strong the allegation that a great good will be accomplished if allowed to violate the law. We think this ends any discussion as to any admission of fact made by the demurrer.

In answer to that portion of the argument made by counsel for appellee that the act is void because the title is bad, we need only cite the case of *Jackson v. State*, 102 Miss. 663, Ann. Cas. 1915A 1213, 59 So. 873, holding that the sufficiency of the title is a legislative and not a judicial question.

A further contention of appellee is that the act of the legislature violates sections 1 and 2 of the Constitution. We fail to see how the act of the legislature violates either section above-named. Section 1 of the Constitution merely provides for the distribution of the powers of government into three distinct departments, and section 2 prohibits any person, or collection or persons, being one or belonging to one of these departments of government, from exercising any powers properly belonging to either of the others. We do not see how either of these sections is invaded by this act. The legislature did nothing but pass a law for the regulation of the educational institutions of the state, and why it may not do so is something that a reading of the sections of the Constitution above referred to does not disclose to us. The trustees are mere instruments to carry out the will of the legislature in regard to the educational institutions of the state. Both the institutions and the trustees are under the absolute control of the legislature. The legislature [633] has the undoubted power to pass a law prohibiting Greek letter fraternities from being organized or carried on at any educational institution in the state. The legislature has the right to say that any student desiring to enter any educational institution of the state shall renounce his allegiance to any Greek letter fraternity, while he is a student in the state institution. The law requires the trustees of the educa-

tional institutions of the state to see that this act is enforced, and in order to do this they have a right to exact of any student who desires to enter, as a condition precedent to his entry, that he will promise to obey the statute law of the state, and this is all that the trustees have required. If complainant desires to enter the University, all he has to do is to promise obedience to the law of the state and the doors of the University will be open to him.

But complainant says that by requiring him to sign a pledge to obey the law of the state while he is a student in the educational institutions of the state, and to renounce his allegiance to, and affiliation with, secret societies at other institutions, he is denied a right guaranteed to him by the fourteenth amendment to the Constitution of the United States. We fail to see any force in this contention. The fourteenth amendment to the Constitution of the United States was never intended to act as an accomplice to any young man who wanted to take advantage of the gratuitous advantages offered the youths to obtain an education, and yet refuse to obey and submit to the disciplinary regulations enacted by the legislature for the welfare of the institutions of learning. The right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right. The act in question is not class legislation. It is quite the reverse, and seeks to destroy the possibility of the existence of any class at the educational institutions. No state or federal Constitution is violated by this [634] act in any way. Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the state. If it be true that the board of trustees, or the legislature, have extended the operation of the rule beyond what would seem to be the necessities, they have done it in order to effectuate the purpose of the legislature in prohibiting the existence of Greek letter fraternities at any of the educational institutions in the state. The trustees, and the legislature, both have the right to say that any student who desires to enter the University shall not only promise not to affiliate with any Greek letter fraternity while there, but that he shall not encourage the organization of any Greek letter fraternity elsewhere, by paying dues, etc., while a member of that institution. If this were not true, there might be organized at the University, although the dues were paid elsewhere, as complete a Greek letter fraternity,



save the meetings, as if it were organized at the institution. Young men attending the educational institutions of the state, if allowed to hold their memberships in fraternities at other institutions while attending state institutions, could as effectually carry on their fraternity relation as if an organization existed at the particular place. The legislature knew this, and to make the law effective prohibited all affiliation with secret societies while a student at a state institution.

In the case of Purity Extract, etc. Co. v. Lynch, 100 Miss. 650, 56 So. 316, the supreme court of this state and of the United States held that the legislature might, in order to make a police regulation effective, press the act beyond the seeming necessities in order to effectuate its purpose. The case of *Hobbs v. Germany*, 94 Miss. 469, 49 So. 515, 22 L.R.A. (N.S.) 983, is not a parallel case to this. The trustees in that case were not acting under the power conferred upon them by an act of the legislature. They were not trying to break up any secret orders; but the trustees of the *public schools*, to which a child has a constitutional right to attend between [635] certain ages, undertook to say that after the child had reached its home it should not be controlled by its own parents, but that they would establish rules that would reach into the fireside and control the child around the hearthstone of its own parents. This court said this could not be done. Many decisions are cited by appellee, but we refuse to follow any decisions that would hold this act unconstitutional.

We can see nothing in the act which is violative of any section of the Constitution. Whether the act was a wise one, or an unwise one was a question for the legislature to determine. The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts.

The decree of the court below is reversed, the demurrer sustained, and the bill dismissed.

Dismissed.

#### NOTE.

#### Validity of Statutory or Other Prohibition against Secret Societies among Students.

##### *Prohibition by Statute.*

The reported case upholds the validity of a statute prohibiting membership in any

Greek letter fraternity by any student in the state university or any other educational institution supported in whole or in part by the state. On appeal to the United States Supreme Court the judgment of the court in the reported case was affirmed. *Waugh v. Mississippi University*, 237 U. S. 589, 35 S. Ct. 720, 59 U. S. (L. ed.) 1131. In that court the constitutionality of the statute was challenged on the ground that it violated the due process and equal protection provisions of the Fourteenth Amendment or the United States Constitution. In sustaining the decision of the state court, the court said: "The . . . contention of complainant has various elements. It assails the statute as an obstruction to his pursuit of happiness, a deprivation of his property and property rights and of the privileges and immunities guaranteed by the Constitution of the United States. Counsel have considered these elements separately and built upon them elaborate and somewhat fervid arguments, but, after all, they depend upon one proposition: whether the right to attend the University of Mississippi is an absolute or conditional right. It may be put more narrowly—whether under the constitution and laws of Mississippi the public educational institutions of the state are so far under the control of the legislature that it may impose what the supreme court of the state calls 'disciplinary regulations.' To this proposition we are confined and we are not concerned in its consideration with what the laws of other states permit or prohibit. Its solution might be rested upon the decision of the supreme court of the state. That court said: 'The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts.' This being the power of the legislature under the constitution and laws of the state over its institutions maintained by public funds, what is urged against its exercise to which the Constitution of the United States gives its sanction and supports by its prohibition? It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the university was established by the state and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of

the students and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state and annul its regulations upon disputable considerations of their wisdom or necessity. . . . This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its university, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the Fourteenth Amendment."

In *Bradford v. Board of Education*, 18 Cal. App. 19, 121 Pac. 929, the court sustained a California statute entitled "An act to prevent the formation and prohibit the existence of secret, oath-bound fraternities in the public schools." The statute contained the following provisions: "Section 1. From and after the passage of this act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this state, to join or become a member of any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, or other kindred organizations not directly associated with the public schools of the state. Section 2. Boards of school trustees and boards of education shall have full power and authority to enforce the provisions of this act and to make and enforce all rules and regulations needful for the government and discipline of the schools under their charge. They are hereby required to enforce the provisions of this act by suspending, or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any or all such rules or regulations." It further appeared that pursuant to the provisions of the act, Doris Bradford, who was petitioning for a writ of mandate to compel the board of education to admit her as a pupil, was suspended from the Girls' High School of San Francisco, because subsequent to the passage of the act and while a student at that school she had joined and become a member of a

secret, oath-bound sorority existing in the school. It was the petitioner's contention that the act was void in that it contravened section 21 of article I of the constitution which provided that no citizen or class of citizens should be granted "privileges or immunities which upon the same terms shall not be granted to all citizens," and also that part of section 25 of article IV which provided that the legislature should not pass local or special laws "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." In holding that the constitutional provisions were not violated by the act the court said: "It is argued by counsel that this contravention of constitutional provisions arises because the act grants an immunity to certain pupils in the public schools of the state, viz., those in the normal schools, in that only the elementary and secondary schools come within the provisions of the act; that it grants a special privilege to such pupils by allowing them to join fraternities, sororities and secret clubs while other students in the public schools are punished for doing the same thing; that it grants a privilege and immunity to certain fraternities, viz., the order of the Native Sons of the Golden West, the Native Daughters of the Golden West, the Foresters of America, and other kindred organizations not directly associated with the public schools, because pupils in said schools may join such societies and not come within the inhibition of the act. . . . 'A law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. . . . If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation. . . . The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts, every presumption is in favor of the legislative act. When upon the facts legitimately before a court it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the legislature in creating that class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly

appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination.' Applying this construction to the act under consideration, it is quite apparent to us that the younger and more immature pupils of the public schools may quite properly form a class and be made the subject of this character of legislation. Normal schools and colleges are attended by students who are preparing for the serious affairs of life; and being older in years and with wider experience are better fortified to withstand any possible hurtful influence attendant upon membership in secret societies and clubs than the younger pupils attending elementary and secondary schools, who are less experienced and more impressionable. We have no doubt that there is a sufficient difference between these last-mentioned schools and the normal to constitute a proper basis for classification, and that the statute applies equally to all of the particular class mentioned. Neither does the exception in the statute of the order of the Native Sons of the Golden West and similar fraternal societies constitute, in our opinion, an invalid discrimination. The act itself requires that they be not 'directly associated with the public schools of the state.' It is clear that the legislature intended to discountenance only secret societies in the elementary and secondary schools which are formed almost entirely of the pupils of such schools, and which, in the opinion of the legislature, were calculated to diminish the efficiency of the educational system of the state and exert a harmful influence upon the younger pupils of its schools as such. No such deleterious effect has been or could be attributed to the occasional membership of such pupils in the fraternal orders excepted in the statute, and such exception, therefore, cannot be said to be arbitrary or invalid. We hold, therefore, that the act is general in its character and not special, and does not contravene the provisions of the constitution referred to." It was further contended that the act was unconstitutional because in contravention of the provisions of the Fourteenth Amendment to the United States Constitution. In disposing of this point the court said: "Finally, we are unable to perceive that the statute is, as claimed by appellant, repugnant to the Fourteenth Amendment to the Federal Constitution, because it deprives a citizen of the right to attend a public school of the state. The part of the constitutional provision relied upon by appellant reads: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It has been held that rights and privileges granted to citizens which depend solely upon the laws of a state are not with-

in this constitutional inhibition. . . . The system of public schools of this state is a state institution, and is subject to the exclusive control of the constitutional authorities of the state. It is, of course, true that the right of attending a public school is capable of enforcement at law, but it is not such a right as is guaranteed by the above-quoted provision of the Federal Constitution. 'The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and, therefore, so far as the "privilege and immunities" clause of the Fourteenth Amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state.'"

#### *Prohibition by Rule.*

The validity of a rule prohibiting secret societies was first passed on in *People v. Wheaton College*, 40 Ill. 186. It appeared therein that Wheaton College rested solely on private endowments, deriving no aid whatever from the state. A rule had been adopted forbidding the students to become members of secret societies. One Pratt, a student in the college, in violation of the rule, joined the secret society known as the Good Templars, and was suspended from the privileges of the institution. This society was not a Greek letter fraternity, as is apparent from its name, but rather a secret benevolent order existing independently of the college and founded for the purpose of promoting the cause of temperance. The court sustained the suspension of Pratt saying that they found nothing unreasonable in the rule itself and that a discretionary power having been given to the trustees and faculty to regulate the discipline of the college in such manner as they deemed proper, so long as their rules violated neither divine nor human law they had no more authority to interfere than they had to control the domestic discipline of a father in his family, and added: "A person in his capacity as a citizen may have the right to do many things which a student of Wheaton College cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry, or to walk the streets at midnight, or to board at a public hotel, and yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a citizen, as such, can attend church on Sunday or not, as he may think proper, but it could hardly be contended that a college would not have the right to make attendance upon religious services a condition of remaining within its walls. The son of the relator has an undoubted legal right to join either Wheaton College or the Good Templars, and they have

both an undoubted right to expel him if he refuses to abide by such regulations as they establish, not inconsistent with law or good morals."

In several cases rules have been sustained which deprived students belonging to secret societies of the athletic and honorary privileges incident to attendance. Thus in *Wilson v. Board of Education*, 233 Ill. 464, 13 Ann. Cas. 330, 84 N. E. 697, 15 L.R.A. (N.S.) 1136, the court was called on to determine the validity of anti-fraternity regulations adopted by the board of education of the city of Chicago. It was the prayer of the complainants that the court declare void and enjoin the board of education from enforcing the adopted rule which contained the following provisions: "That the principals and teachers of the high schools be instructed to deny any secret societies which may now exist in their schools all public recognition, including the privilege of meeting in the school buildings; that such organizations be forbidden to use the school name; that no student who is known to be a member of a fraternity or sorority, or other so-called secret society, be permitted to represent the school in any literary or athletic contest or in any other public capacity; that the attention of parents of the pupils who are to attend the public high schools be called to the fact that the board of education, the superintendent and teachers of the high schools unanimously condemn all such secret societies." The court in sustaining the validity of the rule expressed its views as follows: "The power of the board of education to control and manage the schools and to adopt rules and regulations necessary for that purpose is ample and full. The rules and by-laws necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred. Acting reasonably within the powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order and discipline of the schools and the rules required to produce these conditions. It was the judgment . . . of the board of education that membership in secret societies known as Greek letter fraternities or sororities was detrimental to the best interests of the schools. Whether this judgment was sound and well founded is not subject to review by the courts. The only question for determination is whether the rule adopted to prevent or remedy the supposed evil was a reasonable exercise of the power and discretion of the board. . . . The rule denied to pupils who were members of secret societies no priv-

ilege allowed to pupils not members, except the privilege of representing the schools in literary or athletic contests or in any other public capacity. They were not denied membership in associations of pupils of the schools for literary, social, musical or athletic exercises, and were not prohibited from receiving the same benefits from those organizations that pupils not members of secret societies received. They were only prohibited from representing the schools, as members of those associations, in public contests and capacities. This was not a denial of any natural right and neither was it an unlawful discrimination. . . . Pupils attending the schools may decide for themselves whether they prefer membership in the secret societies, with the disqualification from representing their schools in literary or athletic contests or other public capacities, or whether they prefer these latter privileges to membership in said societies. It is for the board of education, within the reasonable exercise of its power and discretion, to say what is best for the successful management and conduct of the schools, and not for the courts." See also *Favorite v. Board of Education*, 235 Ill. 314, 85 N. E. 402.

Regulations permitting all the privileges of the classroom of a high school but denying participation in athletic, literary, military, musical or class organization as a penalty for secret society affiliations were sustained in *Wayland v. Hughes*, 43 Wash. 441, 86 Pac. 642, 7 L.R.A. (N.S.) 352. The rules as they appeared from the findings of the trial court were as follows: "That all students who were then members of any high school secret society, or pledged to become such, who would promise that, so long as they remained students of said high school, they would not become members, or give any promise or pledge to become such, or solicit any other student to give any promise or pledge to become a member of any high school fraternity or secret society, and in good faith kept such promise—such students would be restored to the privileges of such school; otherwise all students who thereafter should become members of, or in any way pledge or bind themselves to join, any high school fraternity or secret society, or should initiate or pledge any other students, or in any way encourage or foster the fraternity spirit in the high school, should be denied all the privileges of the high school except those of the classroom." It was the plaintiff's principal contention in seeking to restrain the enforcement of the regulations that they were in excess of lawful authority. The court said: "The evidence . . . overwhelmingly establishes the fact that such fraternities do have a marked influence on the school, tending to destroy good order,

discipline and scholarship. This being true, the board is authorized, and it is its duty, to take such reasonable and appropriate action by the adoption of rules as will result in preventing these influences. Such authority is granted by § 2339 and . . . § 2362 Bal. Code. . . . It would be difficult to confer a broader discretionary power than that conferred by these sections. Manifestly it was the intention of the legislature that the management and control of school affairs should be left entirely to the discretion of the board itself, and not to the judicial determination of any court. These powers have been properly and legally conferred upon the board, and unless it arbitrarily exceeds its authority, which it has not done here, the courts cannot interfere with its action."

The only case wherein a decision favorable to the so-called "Greek fraternities" has been rendered is that of *State v. White*, 82 Ind. 278, 42 Am. Rep. 496. In that case it appeared that the faculty of Purdue University, which was controlled and supported by the state, passed the following regulation: "No student is permitted to join or be connected as a member or otherwise with any so-called Greek or other college secret society; and as a condition of admission to the university, or promotion therein, each student is required to give a written pledge that he or she will observe this regulation. A violation of this regulation and pledge forfeits the right of any student to class promotion at the end of the year, and to an honorable dismissal." One Hawley, in seeking admission, when requested, refused to sign a pledge relative to Greek letter fraternities worded substantially as follows: "I do hereby state upon my honor that in the month of April last, when I applied for and received an honorable dismissal from Purdue University, I was not a member of any so-called Greek fraternity, or other college secret society, and at the time I connected myself with a chapter of the Sigma Chi fraternity I did not intend returning to Purdue University. I do solemnly promise that I will disconnect myself as an active member of the Sigma Chi fraternity during my connection with Purdue University." In an action for mandamus it was the conclusion of the court that so much of the regulation adopted by the faculty as might be construed to impose disabilities on persons already members of the Greek fraternities, and as required a pledge as a condition of admission was unreasonable, and hence inoperative and void, and that the pledge tendered was one which the faculty had no legal right to demand as a condition of admission. The court recognized, however, the existence of a distinction between those cases where regulations were made in regard to admission and those cases where regulations were made for

the student's conduct after his admission, saying on that subject: "The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution, is quite another thing. The first rests upon well-established rules, either prescribed by law or sanctioned by usage, from which the right to admission is to be determined. The latter rests largely in the discretion of the officers in charge, the regulations prescribed for that purpose being subject to modification or change from time to time as supposed emergencies may arise. . . . It is clearly within the power of the trustees, and of the faculty when acting presumably, or otherwise, in their behalf, to absolutely prohibit any connection between the Greek fraternities and the university. The trustees have also the undoubted authority to prohibit the attendance of students upon the meetings of such Greek fraternities, or from having any other active connection with such organizations, so long as such students remain under the control of the university, whenever such attendance upon the meetings of, or other active connection with, such fraternities tends in any material degree to interfere with the proper relations of students to the university. As to the propriety of such and similar inhibitions and restrictions, the trustees, aided by the experience of the faculty, ought, and are presumed to be, the better judges, and, as to all such matters, within reasonable limits, the power of the trustees is plenary and complete. . . . But the possession of this great power over a student after he has entered the university does not justify the imposition of either degrading or extraordinary terms as a condition of admission into it. Nor does it justify anything which may be construed as an invidious discrimination against an applicant on account of his previous membership in any one of the Greek fraternities, conceding their character, object and aims to be what they were averred to be in the complaint."

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STATE

v.

CORCORAN.

Washington Supreme Court—October 8, 1914.

82 Wash. 44; 148 Pac. 453.

**Burglary — Proof of Other Offenses.**

In a prosecution for a burglary by an employee of a harness company, who was given

a key to the building, evidence that on prior trips he carried away other articles, that he padded an inventory of the stock, and that articles secreted around his work bench were removed, is admissible to show a general scheme, notwithstanding the rule that evidence of other distinct criminal acts cannot be introduced to prove accused guilty of an independent crime.

[See 16 Ann. Cas. 669.]

#### Unauthorized Entry by Employee.

Where an employee of a harness company was given a key to the building so that he might open up in the morning, but was not given permission to enter the building before or after hours, his entry out of hours by means of the key constitutes a breaking, and when it is accompanied by larceny of goods in the building, the employee is guilty of burglary.

[See note at end of this case.]

Appeal from Superior Court, Spokane county: HUNEKE, Judge.

Criminal action. John Corcoran convicted of burglary in second degree and appeals. The facts are stated in the opinion. **AFFIRMED.**

*W. C. Donovan and Geo. H. Armitage* for appellant.

*Geo. H. Crandell, F. M. Goodwin and D. B. Heil* for respondent.

[45] MOUNT, J.—The defendant was convicted upon a charge of burglary in the second degree. He appeals from a judgment pronounced upon the verdict of a jury. His counsel assigns several errors, which are argued under two heads, to the effect that the court erred in permitting certain evidence offered on behalf of the state, and in denying a motion to dismiss at the close of the state's evidence, in refusing to direct a verdict at the close of all the evidence, and in denying the appellant's motion for a new trial.

It appears that the appellant was employed by the Pierce Harness Company, from about May, 1912, to July, 1913, as a cutter in the harness shop conducted by that company, in Spokane. At the time the appellant was employed by Mr. Muffett, manager of the harness company, a key was given to the appellant which permitted him to enter the store and harness shop. At the time the key was given to him, it was stated that he was to open up at about seven o'clock in the morning. Thereafter, in January, 1913, an invoice of the [46] stock on hand was made by the harness company. At that time, the stock of goods in the basement of the building, and the stock about the work bench of the appellant, was inventoried by the appellant. Sometime thereafter, Mr. Muffett discovered that articles of finished harness were

hidden away around the work bench of the appellant. These hidden articles were marked, and left there by Mr. Muffett. They afterwards disappeared, or their hiding places were changed. Thereafter, Mr. Muffett employed men to watch the store for two or three hours before opening time in the morning, and for three or four hours after closing time in the evening. Evidence was offered on the part of the state to the effect that the inventory made by the appellant was padded; that is, that a greater amount of goods were reported on hand than were actually there. Evidence on the part of the state was also admitted to the effect that the appellant was seen upon different occasions to enter the store at five o'clock in the morning, remain there for a time, then leave and return to the store at the regular opening time; that he did the same thing upon certain evenings after closing time; and that, upon one occasion, on the night of May 9, 1913, the appellant was seen to go into the store, stay in there for about an hour, take some chamois skins in his pocket, and go out. Upon another occasion, on May 24, 1913, at about five o'clock in the morning, he went into the store by the use of his key, remained there for a while, took a gunny sack filled with something into the alley, had a conversation in the alley with some person unknown, and returned to the store with the gunny sack. Thereafter, and about July 1, Mr. Muffett confronted the appellant, and accused him of taking goods from the store. Mr. Muffett testifies that the appellant admitted having done so. The appellant, however, denied that he took goods from the store upon these occasions, or at any other time.

It is argued by the appellant that it was error for the court to permit evidence relating to the padding of the invoice, or [47] to the taking of the chamois skins on May 9, 1913, or of finding the secreted articles in and about the work bench of the appellant. It is contended that this was error because it permitted the state to prove an independent crime, and thereby prejudice the jury against the appellant. There can be no doubt that, as a general rule, evidence of other distinct criminal acts cannot be introduced to prove a defendant guilty of an independent crime charged against him. This court has frequently so held. But there are exceptions to this rule. The exceptions are well stated in the case of *Collier v. State*, 106 Miss. 613, 64 So. 373, where it was said:

"Upon the trial of an indictment, a previous crime committed by defendant can be proved only: (a) Where it is connected with the one charged in the indictment, and sheds light upon the motive of the defendant; or (b) where it forms a part of a chain of facts so intimately connected that the whole must

be heard in order to interpret its several parts; or (c) in cases of conspiracy, uttering forged instruments or counterfeit coin, and receiving stolen goods, for the sole purpose of showing a criminal intention."

This court has held to the same effect. In *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042, it was said:

"It is a well-established rule that it is not competent to show the commission by the defendant of other distinct crimes for the purpose of proving that he is guilty of the crime charged; but, for the purpose of construing the actions or of ascertaining the intent of the defendant in the commission of the acts proven, other independent culpable acts are sometimes admissible in evidence. . . . We think it was competent to show that in the general scheme he adopted in keeping his accounts with his employer, the result was the appropriation by him of the funds of the employer; not for the purpose of prejudicing a jury against him by proving the commission of independent crimes, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged."

And in *State v. Dana*, 59 Wash. 30, 109 Pac. 191, we said:

[48] "Of course, if the offered testimony was relevant to the issues in this case, the fact that it tended to show the commission of another and different crime would not exclude it."

And in *State v. Leroy*, 61 Wash. 405, 112 Pac. 635, we said:

"Testimony otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime."

It is true, the statute provides at Rem. & Bal. Code, § 2580 (P. C. 135, § 653), that every person who shall unlawfully break and enter any building where property is kept for use, sale or deposit shall be deemed to have broken and entered with intent to commit a crime therein, but this does not prevent the state from showing the intent of the person breaking and entering. The effect of the evidence which was introduced was to show a course of conduct on the part of the appellant. The padding of the inventory, the concealment of goods which were afterwards taken away, the fact that the appellant entered the store when no one else was present, and out of hours, and took articles from the store, tended to show the intent of the appellant upon entering the store at unusual hours, and upon the occasion charged. We are clearly of the opinion that, for the purpose of showing intent, the course of conduct of the appellant was properly in evidence in this case, and falls within the exception to the rule rather than within the rule.

It is next strenuously argued by the appellant that the court should have granted the motion for a directed verdict at the close of the state's evidence, and at the close of all of the evidence. This argument is based upon the fact that the appellant was furnished with a key to the premises, and therefore had a right to enter the building whenever he saw fit, and that there could be no breaking, and therefore no burglary, when the entry was with the consent of the owner of the building, or upon his invitation, express or implied. There can be no doubt that, if the furnishing of the key to the [49] building by the prosecuting witness authorized the appellant to enter the store at any time of the day or night, then there could be no unlawful breaking or entering. The evidence upon this point was sufficient to take the case to the jury. The prosecuting witness testified that he furnished a key to the appellant, but told him at the time that he was to open the store in the morning. It was stated that the opening time in the morning was about seven o'clock. The closing time was in the evening about six o'clock. The authority of appellant to enter the store, according to this evidence, was the usual hours of work. There was some testimony offered on behalf of the appellant to the effect that the prosecuting witness knew that the defendant had entered the store on different occasions after the time, and no objections were made thereto, but these were special occasions when appellant worked overtime, so that the question of whether or not appellant's authority to enter the store before the regular hours for opening, or after the hours for closing, was a question for the jury to determine under the evidence in the case. The court very properly instructed the jury upon this point, as follows:

"If one having the right to do so goes into a building, that would not be breaking and entering, no matter what his object was in going into the building. One's right to enter a building may be general or limited. If general, then he may go into the building at any time or for any purpose and the entry would not be wrongful; but if the right is limited, then an entry would be wrongful unless made for a purpose for which he had been given the right. It will be your duty to determine from the evidence in this case whether the right which the defendant had in going into the building was general or limited. If you find that the defendant's right to enter was general, that is, not restricted to purposes of his employment, then he could not be found guilty of burglary, no matter what his object may have been in going into the building. In order to prove the defendant guilty as charged in the information it will be necessary for the state to show that the entry was wrongful, by the evidence, and beyond a [50] rea-

sonable doubt, and to show that it was wrongful the state must show that the defendant's right to enter the building was not a general and unrestricted right, but one that was limited; and they must further show that the defendant entered the store on May 24, for some purpose other than that for which he had a right to enter."

The instructions were not excepted to, and are apparently conceded by the appellant to have been proper. This was the principal question in the case. If the appellant had the right to enter the store by the use of his key at any time in the day or night, that is, had an unrestricted and unlimited right of entrance, he could not be guilty of the crime of burglary, even though he carried away the goods from the store. In such event, the crime would be larceny, and not burglary. But if his right to enter was limited to the usual hours of employment, and after hours of employment, he used the key for the purpose of entering the store with intent to unlawfully take articles therefrom, he was clearly guilty of burglary. 6 Cyc. 180, and cases there cited.

We are satisfied from the whole record that the evidence offered was admissible in this case, and that there was sufficient to take the case to the jury, and that the court did not err in denying the motions made by the appellant.

The judgment is therefore affirmed.

Crow, C. J., Fullerton, Parker, and Morris, JJ., concur.

#### NOTE.

##### Unauthorized Entry of Premises by Employee of Owner as Burglarious Entry.

The general rule seems to be that though an employee or servant ordinarily has the right of entry on premises of employer, yet it with felonious intent he exceeds his rights, either with respect to the time of entry or to the room or house entered he is guilty of a burglarious entry. *Rex v. Gray*, 1 Stra. (Eng.) 481; *Edmond's Case*, Hutton 20; *U. S. v. Bowen*, 4 Cranch (C. C.) 604, 24 Fed. Cas. No. 14,620; *Pointer v. State*, 148 Ala. 676, mem. 41 So. 929; *Colbert v. State*, 91 Ga. 705, 17 S. E. 840. And see the reported case. Thus where a general caretaker, who lived on the premises, entered the closed but unlocked room of his employer while the employer was absent, and appropriated various articles, the entry was held to be a burglarious one. *Hild v. State*, 67 Ala. 39.

And though an employee has the right to enter at the time and place in question, if he enters with a formed intent to commit a crime he is guilty of burglary. *Lowder v.*

*State*, 63 Ala. 143, 35 Am. Rep. 9; *State v. Howard*, 64 S. C. 344, 42 S. E. 173, 92 Am. St. Rep. 804, 58 L.R.A. 685. In the case last cited it was said: "A servant's right to enter his master's dwelling depends upon the purpose with which he enters. If he enters pursuant to the trust of his employment, being rightfully in, if he then conceives the felonious purpose and attempts to carry it out without breaking any inner door, it is not burglary, for there is no breaking and entering with felonious intent; but if, being out of the dwelling, he does that which would constitute a breaking and entering, in a stranger, and does it with the intent to steal or commit a felony or if, being in without breaking, he breaks an inner door with such purpose, then he commits burglary, for the entrance for such purpose is in violation of his trust and employment. It is true, that one cannot commit burglary of his own dwelling house, since burglary is the breaking and entering in the night of the dwelling house of another, with intent to commit a felony therein. But a servant who is permitted to lodge in the same room with the master and owner of the dwelling has no such interest in the dwelling house as to make it in any proper sense his dwelling." But it was said obiter in *Lowder v. State*, supra, that if a servant enters lawfully, the subsequent formation and execution of a felonious intent will not relate back to make the original entry a burglurious one.

It is a burglurious entry if an employee with felonious intent obtains admission to his employer's premises. *Young v. Com.* 126 Ky. 474, 15 Ann. Cas. 1022, 104 S. W. 266, 31 Ky. L. Rep. 842, 128 Am. St. Rep. 326. In that case it appeared that an employee who had the right of entry returned from a leave and by deception obtained the key to the house ostensibly to get his clothes, but in reality for the purpose of gaining admittance in order to commit a felony therein. The court said: "The law regards force and fraud with equal abhorrence; and whether the tenant's possession is invaded by one means or the other for the purpose of stealing from his home is all one in the eye of the law. Conceding that appellant had the right to enter the house in question to take away his own clothes, and had he entered under such circumstances and then formed and executed the intention to steal the landlord's clothes he would not have been guilty under the statute, our case comes down to a narrower state of facts; for, appellant having gone away under arrangement with his landlord, his relation as cotenant of the house had ceased for the time being. Though he had the right, notwithstanding, to remove his clothes from the house, he had not the right to enter the house for that purpose, except by the consent of



[1916] 2 A. C. 15.

the landlord. When, therefore, he simulated that he desired the key for that purpose, but in reality for the purpose of stealing from the house, he resorted to a trick that was a fraud upon the landlord, and one that gave him no right of entry, and therefore no protection."

In *Texas* it is provided by statute that to constitute burglary by a domestic servant there must be an "actual breaking." *Jackson v. State*, 43 Tex. Crim. 260, 64 S. W. 864. Thus in a case wherein it appeared that a porter who was authorized to be in and about a railroad station broke open the drawer in a public telephone booth in the station and stole the money therefrom, it was held that since the booth was open to all and since the porter was an employee there was no burglarious entry. *Love v. State*, 52 Tex. Crim. 84, 105 S. W. 791. But where a servant enters with felonious intent premises to which his employment gives him no right of entry, he is as to those premises a stranger and the statute is inapplicable. Thus a person employed to watch a room in a dwelling, who enters the separate storeroom of his employer for felonious purposes, is such a "stranger" with reference to the storeroom, as to charge him with a burglarious entry, though there is but a constructive breaking. *Van Walker v. State*, 33 Tex. Crim. 359, 26 S. W. 507. And a like rule has been applied where it appeared that a porter employed in a hotel entered a saloon under the same roof but separate therefrom, and wherein he had no duty, *Jackson v. State*, 43 Tex. Crim. 260, 64 S. W. 864; and where it appeared that a servant employed to work outside entered the house. *Waterhouse v. State*, 21 Tex. App. 663, 2 S. W. 889; *Morrow v. State* (Tex.) 25 S. W. 284. Likewise if the employee is one of two or more who conspire to enter and burglarize the employer's home and in pursuance of the conspiracy the employee aids his confederates by a constructive breaking, he may be charged with a burglarious entry. *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573; *Alexander v. State*, 48 Tex. Crim. 531, 89 S. W. 642, 122 Am. St. Rep. 771.

## LONDON ASSOCIATION FOR PROTECTION OF TRADE

v.

## GREENLANDS, LIMITED.

England—House of Lords—January 31, 1916.

[1916] 2 A. C. 15.

### Libel and Slander — Privilege — Credit Report.

The secretary of an unincorporated association of tradesmen organized for the exchange of credit information among its members acts in answering an inquiry by a member as the confidential agent of the individual member and a qualified privilege attaches to his report.

[See note at end of this case.]

[15] Appeal from a decision of the Court of Appeal [1913] 3 K. B. 507.

The facts are fully stated in the judgment of the Lord Chancellor [16] and in the report of the case before the Court of Appeal, but the following summary may be useful.

The appellants the London Association for Protection of Trade were an unincorporated mutual association of traders established in 1842 and consisting at the present time of some 6000 members. The only qualification for membership was the payment of an annual subscription of 1l. 1s. for town members, 1l. 5s. for country members, and 1l. 10s. for foreign members. One of the objects of the association was the making of private inquiries as to the means, respectability, and trustworthiness of individuals and firms. Every member of the association was annually supplied with ten inquiry forms, each of which upon being filled up by him entitled him to receive information from the association as to any particular individual, firm, or company in the United Kingdom. If a member required more than ten inquiries in the course of the year he paid for them at the rate of 1s. each. The form of application for membership contained the following condition: "Every member undertakes to treat the information supplied by the association in strict confidence, and as for his exclusive use, and not to divulge it to any person upon any pretext whatever." The inquiry forms contained a similar condition. The association published a weekly gazette, and subscribers to the gazette were at liberty to make use of the inquiry department on payment of 1s. 6d. for single inquiries or 10s. 6d. for a book of ten prepaid inquiry forms. The association did

not carry on business for profit. The appellant Hadwen was the secretary of the association.

The respondents were a limited company carrying on business as drapers and house furnisners in Hereford.

In March, 1910, Shand Kydd, who carried on business as a manufacturer and designer of wall-paper decorations in Kentish Town, and who was a member of the association, sent a request to the association on one of the inquiry forms for information as to the credit of the respondents, to whom he had sold goods for 2*l.* 5*s.* The appellant Hadwen applied for information to one Wilmshurst, a commercial agent and debt collector of Hereford, who was in the habit of answering inquiries for the association at 6*d.* apiece. The request for information contained the prohibition against divulging the information to be acquired. In answer to this inquiry [17] Wilmshurst supplied information which falsely reflected on the respondents' credit by misstating the nature and effect of the debentures to which the respondents' business was subject. This information was edited and slightly altered by the appellant Hadwen and on April 2, 1910, was handed on by him in good faith to Kydd.

The respondents thereafter commenced an action against Wilmshurst and the appellants for libel in respect of the report communicated to Kydd. The appellants by their defence pleaded that the libel was published on a privileged occasion and without malice. The action was tried before Lord Alverstone, C.J. and a special jury. The jury returned a verdict of 750*l.* against Wilmshurst, against whom they found express malice, and 1000*l.* against the appellants, and judgment was entered accordingly. The appellants applied to the Court of Appeal for judgment on the ground that the libel was published on a privileged occasion and without express malice, or, alternatively, for a new trial on the ground of excessive damages. Wilmshurst did not appeal. The Court of Appeal (Vaughan Williams, L.J. and Hamilton, L.J., Bray, J. dissenting) refused to enter judgment for the appellants, but granted a new trial.

The appellants now applied to this House to alter the order of the Court of Appeal by directing judgment to be entered in their favour.

In the course of the argument before the House the respondents, upon an intimation from their Lordships that in the circumstances the action could not be maintained against an unincorporated association, consented, for the purpose of facilitating the determination of the question of privilege, to have the judgment obtained by them against the association set aside.

*Sir Robert Finlay, K. C., Leslie Scott, K. C., and Heber Hart, K. C.* for appellants.

*Dickens, K. C., Clavell Salter, K. C.* and *Hugh Fraser* for respondents.

*Hutchison & Cuff*, solicitors for appellants.

*Ford, Lloyd & Co.,* for *Houchen, Greenland & Co.,* Attleborough, solicitors for respondents.

[20] LORD BUCKMASTER, L.C.—My Lords, this case affords the unedifying spectacle of litigation conducted with such disregard of the rules of procedure that extrication from the resulting tangle has been all but hopeless.

The plaintiffs, who are a limited company, instituted proceedings in respect of a libel. They added three defendants to their writ—an unincorporated association known as the London Association for the Protection of Trade, a man called Hadwen, who was the secretary of the association, and a man called Wilmshurst—and sued them all as jointly responsible for the wrong done by the publication of an untruthful report sent by the defendant Hadwen to a Mr. Shand Kydd.

The association consisted of some 6200 members; it was unincorporated and consequently could not be made a defendant to the action in any capacity whatever. As an entity it could neither publish nor authorize the publication of a libel; and this appears to have been recognized before your Lordships' House, as the plaintiffs have consented to strike out the association from the action. Wilmshurst, again, was no member of the association. He supplied information at certain prices, and he had not, in fact, published the libel which was the subject of the suit.

[21] At the hearing no amendment whatever was attempted of the proceedings; and two judgments, separate in form and different in amount, were entered against Wilmshurst on the one hand and the association and Hadwen on the other for the one libel, judgment being entered against Wilmshurst, who was found guilty of malice, for 750*l.*, and against the other defendants, who were held not to have been malicious, for 1000*l.*; and it certainly appears as though the judgment against Wilmshurst was due to his having published a libel which was not the subject of the suit.

In these circumstances the association and Hadwen appealed to the Court of Appeal and served Wilmshurst. They asked that judgment should be given in their favour on the grounds that it had been wrongly entered and that the occasion of the publication was privileged; or, alternatively, a new trial, because the damages were excessive and were wrongly found against the separate defendants. The latter relief was accorded to them, and they have appealed to this House, asking for the larger measure, which was denied.

The argument before your Lordships was entirely directed to the question of privilege, but before this could be decided it became plain that it was necessary to remove the confusion caused by the circumstances to which I have referred. Accordingly the plaintiffs agreed to having the judgment against the association set aside, and then, to avoid the result of the remaining defendant, Hadwen, pleading the existence of the judgment against Wilmshurst as a complete defence in any new trial, they asked, at the suggestion of your Lordships, that Wilmshurst might be brought before this House to show cause why the judgment against him should not be set aside.

He duly appeared and raised no objection, but as the majority of your Lordships are of opinion that the judgment against Hadwen cannot stand, the reason for setting aside the judgment against Wilmshurst is removed, and that judgment, which has never been the subject of appeal, may remain.

The principles that regulate an action for defamation of character are well known; nor do I think advantage would arise from any attempt to restate or recapitulate the conditions which have been so often the subject of consideration in all the Courts.

[22] There is, indeed, danger of confusion if new words are used to define or explain that which is already well established and clear. In the present case, although much discussion has arisen about many of the authorities in which these principles are increased, there has not, except in the case of *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, been any real controversy either as to their validity or their meaning.

The question here is whether certain words, published under circumstances which I will shortly detail, were published on a privileged occasion. If they were, judgment ought to have been entered for the appellants, since the late Lord Chief Justice, who tried the case, held that against them there was no evidence of malice, and from that decision no appeal has been brought. If they were not, the action must go back to be retried.

A privileged occasion such as that said to exist in the present case is an occasion when the publication complained of was, to use the words of Parke, B. in *Toogood v. Spyring*, 1 C. M. & R. 181, 193, "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." And the learned judge continues with these important words: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied, and, with the exception of the case of *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, none of the facts upon which those authorities depend are in close relation to those of the present case. Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances [23] of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred.

Again, it is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter, in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained, but in this investigation it is important to keep distinct matter which would be solely evidence of malice, and matter which would show that the occasion itself was outside the area of protection.

The facts of this case are these:

The London Association for the Protection of Trade is an unincorporate body regulated by certain rules. Its objects, as defined in the prospectus, are as follows:—

(1.) The making of private inquiries as to the means, respectability, and trustworthiness of individuals and firms.

(2.) The collection of debts.

(3.) The detection and exposure of swindlers.

(4.) The issue of gazettes, containing authentic particulars of bills of sale, county court judgments, bankruptcies, and other preferential securities; also lists of creditors in bankruptcies.

(5.) To afford gratuitous legal advice to members on all matters connected with their trading operations.

(6.) To aid in amending the laws affecting trade and commerce, and to suggest proper remedies for what may appear injurious to traders generally.

(7.) To forward a monthly report to members, containing information of frauds and attempts at swindling, which may be proceeding at the time.

(8.) To keep a register of the names of known swindlers, and also of persons whose addresses are required by members of the association.

According to the rules, members are enrolled after their names have been approved by a committee of management. There is no considerable body of evidence as to whether or not this rule is strictly obeyed, but it appears that a firm known as Whitmore's Trading Company, Limited, were treated as entitled to the rights of a member before, in fact, they had filled up the necessary application form, and consequently before their name could have been submitted to the committee for approval.

[24] For the present purpose the only branch of the association's business to which it is necessary to refer is that associated with the inquiry department. This department is open to all members, whether they be town, country, or foreign members, and whether they have subscribed upon the footing of obtaining all the full benefits of the society, or only subscribe to the gazette. In each case single inquiries are made by the association for 1s. 6d. apiece, or a book of ten prepared inquiry checks are furnished for 10s. 6d. The operations of the society are very widespread, and in their prospectus they announce that by their affiliation with the Association of Trade Protection Society of the United Kingdom the members have at their service an organization extending throughout the whole of the kingdom and to all parts of the world. It is a strict condition of membership that all information supplied is supplied in strict confidence and for the exclusive use of the member who seeks it, and he is bound not to divulge it to any person upon any pretext whatever. This condition is imposed by the application for membership, and by the rules it is provided that any member who divulges any such information shall be deemed ineligible to continue a member and shall forfeit his subscription.

The society does not distribute any profit, nor does it trade with the object of making a profit, but in fact it has a considerable surplus on the year's accounts, and its property consists of assets to the value of upwards of 11,000*l*.

It appears that a Mr. Shand Kydd, who trades at 73, Highgate Road, Kentish Town, was a member of the association. He is a designer of wall-paper decorations, and he was anxious to obtain information as to the credit of a firm known as Greenlands & Co., Limited, who carried on business at Hereford as house furnishers and drapers. He accordingly applied on March 30, 1910, to the association, asking if Greenlands & Co. were safe for 20*l*. to 30*l*., and also for their length of credit and general information. This application was made upon a form which the association issue for that purpose, and that again contained the statement that the information was given in strict confidence and was not to

be divulged. The association had at Hereford an agent of the name of Wilmshurst. He had acted as their agent since 1895, and he carried on business as an accountant and auditor and fire loss assessor at Broad Street, Hereford. It [25] appears that he furnished information from time to time to the association for a payment of 6*d*. in respect of each inquiry, but although he had been bankrupt in 1890, it was stated by the secretary of the association in evidence, and was not challenged in cross-examination, that the association had never had any reason to doubt the good faith of his answers.

In answer to the request of the secretary, he furnished a statement which was slightly altered by the secretary and by him published to Mr. Shand Kydd. It is this publication that is the subject of the present proceedings, and it is set out in full in paragraph 3 of the statement of claim. The grave and essential feature of the libel is this: It states that there are heavy debentures charged on the assets of the company to the amount of 36,100*l*., but that for the credit asked they might be taken as a fair trade risk. This statement was inaccurate in a very material respect. The sum of 36,100*l*. was not in fact charged upon the assets of the company, but two sums of 18,100*l* and 18,000*l*., the former secured by specific mortgage and the other by mortgage debentures, were charged upon the real and leasehold property which the company owns. The whole of the stock in trade of the company, their book debts, their goodwill, and all their floating assets were entirely free from any mortgage whatever, and constituted a large and valuable property.

The evidence, which is uncontradicted, establishes that this company was in an exceptionally strong financial position, and had carried on a large and very successful business for some time past. The obvious innuendo, therefore, of the libel and the actual statement of fact that it made were both inaccurate, and the only question that arises is whether the circumstances under which it was published constitute a privileged occasion, and thus throw upon the plaintiff the burden of proving that the publication was maliciously made.

In my opinion they do. A trader is clearly entitled to make inquiries about the commercial credit of a person with whom he proposes to trade. He need not make those inquiries himself. He may constitute an agent to make them on his behalf. He need not inquire of any person of whom he has personal knowledge, or with whom he has had trade relations. If the inquiry be honestly and prudently made, it is impossible to fix exact limits within which it must be confined. The extended character of trade, the modern [26] combination of many businesses of a

different nature under one control, the innumerable and far-reaching branches by which modern enterprise is extended, are all considerations which must be borne in mind in considering how far and by what means inquiry as to a new customer can be properly made. This, of course, is not the only consideration; there is at the same time the essential need of safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed.

The present case is an illustration of both sides of the question. Mr. Shand Kydd was in London, and desired to enter into trade relations with a company in Hereford. It would, I think, have been a perfectly reasonable occasion for inquiries honestly made in Hereford as to the standing of this concern, and those inquiries might have been made on Mr. Shand Kydd's behalf by a proper agent appointed for the purpose, and in such circumstances, whatever considerations might attach to the communication to such agent, his answer to his principal would clearly have been made on a privileged occasion.

I cannot help thinking that in these circumstances the fact that Mr. Shand Kydd made the inquiry through the means afforded by his membership of a large group of traders who had associated themselves together for the purpose of providing an agent through whom such inquiries were to be made cannot of itself take away the privilege that would have existed if the association had never intervened. It is said, however, that the case of *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, is a clear expression of opinion that such a means of obtaining knowledge is not permitted. I do not think that *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, affects the consideration of this case, beyond showing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no. In that case an association was conducted for profit by certain people, themselves wholly unconnected with trade. They acquired from all sources information about traders, and carried on the business of disseminating this information for reward to the various subscribers to their agency. It was decided that such a communication was not made in discharge [27] either of a public or a private duty, and was not warranted by any reasonable occasion or exigency. That decision leaves untouched the wider question as to whether groups of people, however large, may not combine together in order to provide the necessary information for carrying on business. They can themselves

control, through their committee, the person by whom the inquiries are made and the method by which such inquiries are conducted, and they obviously have an interest in not receiving inaccurate and misleading statements, for no man in trade is desirous to avoid entering into a profitable trade transaction; his only interest is to render himself secure by the disclosure of trustworthy information. To some extent the same thing might be urged on behalf of the defendant in the case of *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146. It may be said that the success of the business of the defendant in that case depended upon his news being accurate. The essential difference lies in this—that, accurate or no, no single one of the persons who inquired through him could possibly influence in any way the means by which his inquiries were set on foot. Nor could he have fairly been regarded as the agent of the person to whom he sold the information he acquired.

There are further circumstances in the present case upon which the respondents place great reliance. The fact that the answers to the inquiries were obtained upon payment of a trivial sum of money; the fact that the information was capable of being corrected by reference to the Register of Companies, and that this was not done—these facts, it is suggested, show that the method of carrying on business is of such a character that it cannot be to the public good to obtain information by these means. To my mind the first of these considerations applies to determining the question whether the publication of the libel by Wilmshurst to Hadwen was made on a privileged occasion, and it is not this libel which is sued on, and the latter is relevant only on the question of malice. For these reasons I think that the learned judge, when once he held there was no evidence of malice on the part of Hadwen, should have held that as against him the action had failed.

**EARL LOREBURN.**—My Lords, the parties in this case desire a decision upon the evidence as it stands, unsatisfactory though it [28] be, whether or not the occasion on which this libel was published ought to be regarded as privileged.

The law was established long ago in *Toogood v. Spyring*, 1 C. M. & R. 181, and its application was illustrated in the case before the Privy Council of *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146. That case is of equal authority with our own, and I think it shows that considerations of public policy must influence a Court in deciding these questions of privilege.

I agree that the defendant association ought to be struck out of the record, for the reasons already stated. As to the defendant

Wilmshurst, it would be necessary to discharge the judgment against him if a judgment against Hadwen were to be entered, for they were sued as joint tortfeasors. But unless it is necessary in order to remove an impediment in the way of proceeding against Hadwen, I am ill disposed to interfere. For Wilmshurst has not appealed against the judgment, and there is no doubt that he acted maliciously.

As regards the defendant Hadwen no malice has been proved. Accordingly he must succeed if the occasion was privileged, and that depends on one question. In publishing this libel was he acting as agent of the association, or was he merely an agent for Mr. Shand Kydd, on whose behalf he made inquiry and to whom he reported? That remits us to the facts, and no question was put to the jury upon this point.

If this gentleman was the agent of the association to inquire for each member who might invoke his services, then, upon the evidence as it now stands, I do not think the occasion would be privileged. For I think we should look at who and what are the persons to whom and by whom the libellous communication is made, and to the manner in which they conducted themselves, before admitting the privilege claimed.

It is right that proper facilities should be given for ascertaining the financial position of traders. But we must remember that private reputation and credit are at stake, and I cannot think that privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practicable. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point [29] whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice is disproved. The Court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege. The facts here were imperfectly presented at the trial, and therefore I may easily be at fault in coming to a conclusion. I do not think on those facts there was a privileged occasion if Mr. Hadwen is to be regarded as acting in the capacity of agent for the association as a whole. I will not review the facts, but I do not think the methods of this association, consisting as it does of 6000 persons, are salutary or deserve protection. But if he is to be regarded as confidential agent of Mr. Kydd alone when he wrote the libel sued on, then I do think the occasion privileged. And that is the view your Lordships take of his agency

on these imperfect materials. It ought to have been left to the jury to say whose agent Mr. Hadwen was. That being so, Hadwen succeeds. I must express my strong feeling that Messrs. Greenlands have been cruelly defamed, and that they may have lost a remedy to which they were entitled, by a miscarriage at the hearing more difficult to repair than any I have met with in my former experience. I believe they have acted wisely in seeking a final decision even on imperfect materials, so as to end this litigation; and though the decision will be adverse to them, they have at least had the satisfaction of amply vindicating their good fame, which has been so unjustly assailed.

**LORD ATKINSON.**—My Lords, the suit out of which this appeal has arisen was wrongly framed, was unsatisfactorily conducted, and has led to illegal if not indeed absurd results.

Two individuals, Arthur Wilmshurst and J. H. Hadwen, together with an association of persons, neither forming a partnership nor an incorporated company, were sued as joint tortfeasors, and were, therefore, as all tortfeasors are, jointly and severally liable for the tort charge if proved against them.

The main and real tort sued for was the publication, on or about April 2, 1910, to one Shand Kydd of a libel contained in a letter [30] addressed to him, in the words set out in the third paragraph of the statement of claim. The defendants other than Wilmshurst filed a joint defence. The plaintiffs did not proceed under Order XVI. r. 9, to sue one or more of the members of the association on behalf of themselves and their brother members. They sued the association in its trade name, the London Association for the Protection of Trade, as if it were a legal entity. The very object of this r. 9 was to facilitate the bringing of actions against unincorporated aggregates of persons. But in order to take advantage of it, the fact that the plaintiff or defendant sues or is sued on behalf of himself and others must be stated in the title to the action: *In re Tottenham* [1896] 1 Ch. 628; *Worraker v. Pryer* (1876) 2 Ch. D. 109.

By their defence the appellants admitted the publication on April 4, 1910, of the main libel complained of, pleaded as to the innuendo that they did not publish the libel on the defamatory sense alleged, and that it was published on a privileged occasion without malice.

It was proved at the trial that the defendant Wilmshurst, who had been made a bankrupt in 1890 (whether he was still undischarged or not did not appear), was the local correspondent of the association at Hereford, where the plaintiffs carried on their business, that the association had for many years

employed him as such to furnish reports in reply to inquiries addressed to the secretary of the association, J. H. Hadwen, by members of that body touching the solvency of persons with whom presumably the inquirers desired to deal, that Wilmshurst's remuneration was 6d. per report. No question was asked or evidence given as to whether it was the practice of Hadwen or any official or member of the association to make any effort to verify the truth of Wilmshurst's reports. In the present case it was proved that a request was lodged with the secretary by one Shand Kydd on March 30, 1910, asking "if the plaintiffs were safe for, say, 20l.—30l., their mode of payment, length of credit, and general information."

On the following day a letter was written by Hadwen to Wilmshurst asking for information touching the credit, standing, and character of the plaintiffs, and stating that "his reply, to be of real service, should be sent if possible by return of post." The [31] reply was, apparently, sent on the following day, April 1. And after some unimportant alterations had been made in it was communicated by Hadwen to Shand Kydd by letter bearing date April 4, 1910. This is the main libel complained of. The other libels were replies to what were styled "trick" applications, which were sent in designedly for purposes which are immaterial.

The jury found that Wilmshurst was actuated by actual malice, and returned a verdict against him for malicious libel for 750l., and against the society and Hadwen for 1000l.

The late Lord Chief Justice had told the jury that there was no evidence of malice against the defendants other than Wilmshurst, but that they might when they came to assess damages take into consideration whether the former were lax in their conduct in publishing the libel. Upon these findings the Lord Chief Justice entered judgment against the society and Hadwen for 1000l. and costs, and against Wilmshurst for 750l. and costs. In the course of the discussion, Sir E. Clarke, who appeared for the plaintiffs, said: "My Lord, I ought to mention, so as to avoid any difficulty hereafter, that your Lordship has said there is no evidence of express malice against the society and Hadwen. I agree, if that were taken alone, but the point that the malice has been found against Wilmshurst affects them;" and the Lord Chief Justice replied: "I indicated that, and I mentioned the case in which I think I am right in saying Dunn was the name of the agent. The defendants were held liable for the libel published by their malicious agent."

The findings of the jury must, I think, mean that the publication of the letter of April 2, 1910, to Kydd was the joint act of

the three defendants, the association being treated as a legal entity suable at law, which again must mean that Wilmshurst sent his report to Hadwen with the knowledge and intention that it would be communicated to the inquirer. If so, each of the three defendants was a joint tortfeasor, and being that they were jointly and severally responsible for the wrong done, and for the entire damage sustained: Co. Litt. 232a; 1 Wms. Saunders (1845 ed.) 291 (f).

The verdict, accordingly, against each and all of them should have been a verdict for the entire amount of the damage sustained. Each of the joint wrong-doers must be presumed to have known the wrongful nature of their joint act. There cannot be any contribution [32] between them: *Adamson v. Jarvis* (1827) 4 Bing. 66, 13 E. C. L. 343; *Palmer v. Wick Steam Shipping Co.* [1894] A. C. 318, 324. The release of one would operate as the release of all. The payment by one of the damages would discharge them all. Nay, even the recovery of judgment against one would be a bar to any action against the others for the same cause, although the judgment remained unsatisfied,—*Rex v. Hoare* (1844) 13 M. & W. 494 and *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547—because the cause of action transit in rem judicatam.

Now, applying those well-known principles and rules of law to the facts of the present case, how does the matter stand? The damages to which the plaintiffs are found to be entitled amount apparently to 1750l. Each of the wrong-doers is at law liable to the full amount of these damages, but the jury have apportioned the damages between the defendants according, I presume, to their own notions of their relative culpability; and yet the defendant who was actuated by express malice is only mulcted in the sum of 750l., while Hadwen, who was not found to have been actuated by express malice at all, is mulcted in the sum of 1000l. This can only be explained by the fact that the jury acted in the belief that the society would pay the amount of the verdict against themselves and their secretary. Well, then, even if Wilmshurst pays, is Hadwen discharged, or if Hadwen pays is Wilmshurst discharged, or, according to the decision in *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547, is the judgment against Wilmshurst per se a discharge even protanto of the judgment against Hadwen, or is the judgment per se against the latter, without satisfaction, a discharge of the judgment against Wilmshurst? And again, if the verdict against the association and Hadwen be set aside on the ground that the libel was, as to them, a privileged communication, are the plaintiffs only to have a verdict against the malicious libeller Wilmshurst for

less than half the damages they are found to be entitled to?

I put these questions to show the absurdities to which the course taken at the trial necessarily leads. In my view the jury had no power, authority, or jurisdiction whatever to apportion between joint wrong-doers, as they have done, the damages which they found the plaintiffs had sustained. This is a matter of want of jurisdiction [33] which no consent can cure, and I doubt much if the Lord Chief Justice had any jurisdiction to enter up, as he has done, judgment on such a verdict, a verdict which, on its face, is contrary to law and found without authority. I think he should have told the jury that each joint wrong-doer was liable for the entire of the damage sustained by the victim of the joint wrong, and have refused to receive such a verdict.

In my view, therefore, this verdict and the judgment entered upon it cannot be allowed to stand. They must, I think, be set aside as wholly illegal and improper.

It is agreed upon both sides that the association must be struck out from the pleadings. They cannot be sued as a legal entity in the manner they have been sued; but it is deemed desirable that the question should be determined by the House whether or not the judge at the trial should have ruled on the evidence then before him that the occasion upon which the libel complained of was published, namely, on April 2, 1910, was a privileged occasion. And I proceed to deal with that question.

I shall not attempt to hazard a new definition or description of a privileged occasion. I do not think that the statements as to what constitutes a privileged occasion made by Park, B. in *Toogood v. Spyring*, 1 C. M. & R. 181, 193, by Erle, C.J. in *Whiteley v. Adams*, 15 C. B. (N. S.) 392, 414, 109 E. C. L. 392, 414, by Lord Campbell in *Harrison v. Bush*, 5 El. & Bl. 344, 85 E. C. L. 344, and by Lindley, L.J., as he then was, in *Stuart v. Bell* [1891] 2 Q. B. 341, 347, can be improved upon.

Parke, B., speaking of privileged communications, said: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." In an earlier portion of the passage, however, he had said that the law considers such a publication as malicious unless it is fairly made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.

These are, apparently, the tests by which, in the learned judge's opinion, it may be determined whether defamatory matter has been published under circumstances which rebut implied malice. In the latter part of

the passage he gives the reason why a publication which [34] fulfils these tests is protected, and that reason is "the common convenience and protection of society." But Parke, B. never meant, I think, to lay it down that implied malice is to be taken to be rebutted where those tests have not been fulfilled, although the common interest and protection of society might be served by the publication of the defamatory matter in question.

Erle, C.J. in *Whiteley v. Adams*, 15 C. B. N. S. 414, 80 E. C. L. 414, laid down what are the tests in these words: "If the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the party writing or uttering them, he is bound to hold that the action fails." Later on he says 15 C. B. N. S. 418, 80 E. C. L. 418: "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification," but that it was clearly a question for the judge to decide. Later on he points out that the law as to privileged communication was much more restricted formerly than in modern times, and says: "The rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest."

It was in this connection that the Chief Justice used the words quoted by Lord Macnaghten in *Macintosh v. Dun* [1908] A. C. 390, 399, 12 Ann. Cas. 146.

In *Harrison v. Bush*, 5 El. & Bl. 344, 348, 349, 85 E. C. L. 344, 348, 349, Lord Campbell described what I have styled the "test" to the same effect, but in somewhat different language; he said "a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged. if made to a person having a corresponding interest or duty," although it contains defamatory matter. Later on he said, "'Duty,' in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation." He said nothing whatever about the "general interest of society," because his apparent [35] object was to lay down the "canon" itself, and not to justify it by showing its foundation.

In *Stuart v. Bell* [1891] 2 Q. B. 346. Lindley, L.J., as he was then, no doubt used the following words: "The reason for holding



any occasion privileged is common convenience and welfare of society" (quoting Parke, B.'s words), "and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not."

But further on he approved of and adopted Erle, C.J.'s statement of the law, as to what is necessary to make an occasion privileged.

Blackburn, J., in *Davies v. Snead*, L. R. 5 Q. B. 608, 611, said where a person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, then, if he, bona fide and without malice, does tell them, it is a privileged communication. But this is only another way of saying that where a social or moral duty rests upon a person to tell a thing, and he does tell it, under the circumstances mentioned, it is a privileged communication.

In my view, therefore, it is not enough that the judge should be satisfied in any given case that the publication of the defamatory matter is of service to "the common convenience and welfare of society," irrespective of the tests so laid down, of which this "common convenience and welfare of society" is the foundation and justification. He must, in addition, be of opinion that these tests have been satisfied before he can rule the occasion privileged. I think this is entirely consistent with the passage in Lord Macnaghten's judgment in *Macintosh v. Dun* [1908] A. C. 390, 399, 12 Ann. Cas. 146, touching the protection of defamatory communications.

It was decided as long ago, I think, as *Bromage v. Prosser*, 4 B. & C. 247, 10 E. C. L. 247, and many times since, that if one person makes an inquiry of another touching the position or character of a third; and the person inquired of makes a reply which he bona fide believes to be true, and also bona fide believes that the inquirer desires the information, not merely to gratify idle curiosity, but for some purpose in which he, the inquirer, has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion. [36] This will be so, I think, whether either of the beliefs so formed by the person inquired of be reasonable or not—*Clark v. Molyneux*, 3 Q. B. D. 237—and also whether the inquirer, in fact, desired the information for the purpose mentioned. It will be sufficient if the other person honestly believed he does so require it: *Waller v. Loch*, 7 Q. B. D. 619.

Now, if the person inquired of can himself reply with this protection, it necessarily follows that he can deliver his reply through the mouth of an agent duly accredited by him in that behalf, but if he does so the privilege which the agent's publication will have will be that which his principal would have had

if he had replied himself. Nothing less and nothing more, since, presumably, he only gives indirectly the information which he bona fide believes to be true. If the agent should contribute anything from himself, that would alter matters entirely. So likewise may the inquirer make his inquiry through an agent, otherwise no incorporated company or municipal corporation could ever make an inquiry touching the character of a servant they were about to employ, since they can only act through and by agents. But if this latter agent should publish the information he receives by repeating it to his principal and be sued in respect of that publication, the privilege, if any, protecting him is his own. He must, I think, defend himself on the ground that, being employed as a confidential agent to obtain information for his principal, he was under a legal, moral, or social duty to his principal to repeat truly what he had been informed of.

I suppose the evidence of Hadwen may be taken to amount to a statement that he bona fide believed in the accuracy of the information conveyed by him to Shand Kydd, in reply to the latter's request or inquiry, and also bona fide believed that Shand Kydd made the inquiry for the purpose of obtaining the information on a matter in which he had a lawful interest, namely, the conduct of his own trade.

It therefore becomes necessary, in the first instance, to determine what was the precise relation in which Hadwen stood to Shand Kydd when he repeated this libel to him.

(1.) Was he the confidential agent employed by Kydd to obtain information in which he, Kydd, was interested in his trade touching the solvency of a contemplated customer; or

[37] (2.) Were the association as a body the confidential agents of Shand Kydd, employed by him for the same purpose, Hadwen being only a servant, aiding his employers, the association, in their work; or

(3.) Were the association as a body trading for gain in the characters of other people, and ready to sell their wares for money to any customer who asked for them, their sole motive being to gain pecuniary profit for themselves, Hadwen being, as it were their principal shopman who took the orders of the customers and delivered the goods?

If they were this last, then they were in the same position as the defendant in *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, and the occasion of the publication of the libel sued on would not be privileged. But I do not think the association was in that position. It was not incorporated. It was not a legal partnership, and was not created or worked solely from motives of pecuniary gain. It was formed by men, I think, for the protection in

trade, or business, of each of its members. Neither do I think the association as a body were the agents to make this inquiry.

By rule No. 2 of the rules of the association the business of the association was carried on by the committee of management. But, the association not being either a firm or an incorporated company, I do not see how it could be such an agent. And it would appear to me that the true condition of things was this, that members associated themselves together to appoint an officer, with certain machinery at his disposal, whom each member was entitled to employ as that member's own confidential agent, to obtain for him information beneficial to him in the conduct of his trade or business, the secretary, when requested to obtain the information desired, becoming pro hac vice the confidential agent of the member who asked him to procure it.

If that be the true condition of things, as in my opinion it is, then Hadwen was Kydd's confidential agent to obtain this information touching the plaintiffs' position, and, being so, he disclosed it to his principal Kydd, if not in discharge of a legal duty, certainly in discharge of a moral one.

The occasion of the publication sued on was therefore, in my [38] opinion, a privileged occasion, and I think the Lord Chief Justice at the trial should have so ruled.

**LORD PARKER OF WADDINGTON.**—My Lords, the irregularities which characterized the pleadings in the present case and the unusual course taken (apparently without objection from anybody) by the trial judge have, in my opinion, considerably obscured the real issue. In some cases no doubt a waiver of technical points may be conducive to substantial justice being done between the parties. In others, again, it may be dangerous if only because the dividing line between technicality and substance is not always clearly defined. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to a disregard of the principle involved.

The plaintiffs in the present case ask for damages for a libel said to be contained in a report dated April 2, 1910, and to have been communicated by all the defendants to one Shand Kydd. In other words, it is an action in which the defendants are sued as joint tortfeasors. There are three defendants, namely, (1.) Arthur Wilmshurst, (2.) the London Association for the Protection of Trade, and (3.) J. H. Hadwen. The actual communication complained of was made by Hadwen only, but he is the secretary of the association, and it is sought to make the association liable as his principal. With regard to Wilmshurst, he had supplied Hadwen with the information contained in the report,

and the suggestion is that he supplied this information with a view to its communication to Shand Kydd, and is therefore also liable.

The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It appears, however, that the officials of the association were not anxious to raise what might be considered a technical point, and an appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and all other members of the association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and all other members of the association without an order of the Court authorizing him so to do. [39] It may be said that this, too, was a technical matter. In my opinion, however, it was a matter of substance. Had Sir Samuel Scott applied to the Court for leave to defend on behalf of himself and all other members of the association, the Court would have had to inquire whether the case was within Order XVI. r. 9, of the Rules of the Supreme Court; in other words, whether the members of the association have a common interest within the meaning of that rule. Upon such an inquiry the nature and constitution of the association would have been of great materiality. For example, did it carry on business for gain? If so, it would be illegal, and no order recognizing its existence could be properly made. On the other hand, if it did not carry on business for gain, the question would at once arise as to the applicability of what may be referred to as the club cases. To use the words of the 8th edition of Lindley on Partnership, p. 14, "If liabilities are to be fastened on" any members of such an association "it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association." In view of such cases it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule. Moreover, when the appearance was entered Shand Kydd was a member of the association, and, he being the person to whom the communication complained of was made, might very well contend that he could not be held liable for a communication made to himself. Lastly, if an order could have been made at all it

must have been confined to authorizing Sir Samuel Scott to defend on behalf of himself and those who were members of the association at the date of the alleged libel. Those who had become members since that date could not be liable at all.

My Lords, it is obvious that these difficulties were questions of substance, and not mere technical matters which could be waived if the parties so elected. Indeed, during the hearing before your Lordships the plaintiffs were so oppressed by them that they consented [40] to have the judgment, so far as the association was concerned, entirely set aside, and to proceed upon the footing that the association had never been made a defendant. This is all very well, but I cannot help thinking that if the proper course had been taken in the first instance the question of privilege which your Lordships are asked to deal with would have been formulated on quite different lines.

My Lords, there is equal cause for regret when we come to consider the course taken by the trial judge. Nothing can be clearer than that in an action for a joint tort each of the joint tortfeasors is liable for the whole damage and that there is no contribution between them. Further, a judgment against one of them precludes subsequent proceedings against the other or others. Nevertheless the learned judge appears to have asked the jury to assess the damage separately—(1.) against Wilmshurst, whom they found guilty of malice, and (2.) against Hadwen and the association, as to whom he ruled that there was no evidence of malice. The jury found 750*l.* damages against Wilmshurst and 1000*l.* damages against Hadwen and the association, but it is not clear whether they assessed the total damage at 1750*l.* and apportioned it, which they could not properly do, or whether they meant that the total damage was 1000*l.*, of which Wilmshurst, though guilty of malice, was, for some reason or other, responsible for only 750*l.* I think it not improbable that the jury were influenced in their verdict by the fact that the association admitted liability for the action of the secretary and were in possession of ample funds to satisfy the damages. The curious thing is that there appears to have been little or no evidence on which Wilmshurst could be made liable for the libel sued on at all. The information contained in Hadwen's report had been communicated by him in writing to Hadwen, and I rather gather that the learned judge thought he must be liable for this communication if not for the communication sued on, and that the fact that he was not sued on it might be disregarded as a technicality. This would account not only for the jury being asked to assess the damages separately, but for the separate judgments which after the verdict

he directed to be entered (1.) against Wilmshurst, and (2.) against the association and Hadwen.

My Lords, the association and its secretary appealed to the Court of Appeal, making both plaintiffs and Wilmshurst respondents. In [41] their notice of appeal they asked, first, to have the verdict and judgment set aside as against them and judgment entered in their favour; failing this they asked, secondly, to have the verdict and judgment set aside either wholly or as against them, with a new trial either generally or between themselves and the plaintiffs. One of the grounds stated in the notice of appeal was that, there being no evidence of malice on their part, the communication complained of was, so far as they were concerned, a privileged communication. Another was that separate judgments ought not to have been entered. A third was that the damage found against them was excessive. The decision of the Court of Appeal turned on the first and third grounds. The Court, holding that there was no privilege, but that the damages were excessive, directed a new trial between the plaintiffs and the appellants only, leaving the judgment against Wilmshurst still standing. It is difficult, however, to see how the appellants could be made liable for anything on a new trial. The judgment against Wilmshurst would be a complete defense unless, indeed, the appellants are somehow estopped from relying on it, and I do not see how such estoppel arises.

My Lords, Hadwen and the association have now appealed to your Lordships' House. They ask your Lordships to decide the question of privilege. But if your Lordships are against them on the question of privilege, they say that they are quite content with the order of the Court of Appeal for a new trial as between themselves and the plaintiffs. They have not, therefore, made Wilmshurst a respondent to the appeal. I can hardly think it would be right to allow the case to go for a new trial as between the plaintiffs and the appellants, unless, indeed, the latter undertake not to reply on the judgment against Wilmshurst as a defence to the action, and if such an undertaking be given, I think the plaintiffs should also undertake that if they obtain judgment against the appellants on such new trial they will not enforce it to the extent of anything recovered on the judgment against Wilmshurst. I doubt, however, whether such a course, which would leave a palpable error still appearing on the face of the record, is one which your Lordships can be recommended to adopt. If there is to be a new trial as between the plaintiffs and Hadwen the judgment against Wilmshurst ought to be first discharged. There is a difficulty as to directing [42] a new trial generally,

at any rate, without the consent of Wilms-hurst. Further, if there be a new trial as between the plaintiffs and Hadwen only, it is possible, if not probable, that any plea of privilege will be framed on different lines and supported by different evidence, and this would seem to make it undesirable for your Lordships to deal with the question of privilege on the present occasion. Both parties, however, desire your Lordships to deal with the question of privilege on the evidence as it stands, and it would be most unfortunate if the parties were obliged to recommence afresh a litigation which must already have involved them in considerable cost. I think, therefore, that under the peculiar circumstances of the case your Lordships will be justified in so far departing from the usual practice of the House as to deal with the question of privilege.

My Lords, having regard to the way in which business is carried on in this country, occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another. A person asked for information under such circumstances may be said to be under a social duty to communicate it, and it is in the interests of society generally that he should be able to do so without fear of an action for libel. It is therefore a principle of law that a person asked for information affecting the credit of another is justified in giving it, provided (1.) that he bona fide believes in the truth of the information which he gives; (2.) that he bona fide believes that the person making the inquiry has an interest which justifies it; and (3.), if *Macintosh v. Dun* [1908] A. C. 390, 12 Ann. Cas. 146, is to be considered good law, that he is not actuated by motives of private gain or other motives, excluding the possibility of the communication being made under a sense of social duty. Under such circumstances the implication of malice arising out of a false statement to the discredit of another is displaced and the communication is privileged.

My Lords, if a person may himself legitimately inquire as to the credit of another, it must necessarily follow that he is justified in making the inquiry through an agent confidentially employed for that purpose, and if a person asked for information may himself give it, he may give it through an agent whom he employs for that purpose. There is, however, this difference between the two cases. [43] If a confidential agent be employed to make inquiries, he is under a legal duty to communicate the result of his inquiries to his principal, and this duty is the basis of a distinct privilege arising out of the relationship between principal and confidential agent. On the other hand, if the person from whom information is asked communicate it through

an agent, the privilege of the agent is the privilege of his principal. The question therefore arises whether Hadwen was in the position of an agent confidentially employed by Shand Kydd to make inquiries on his behalf, or whether Hadwen was in a position either (1.) of a person of whom an inquiry is made, or (2.) of the agent of such last-mentioned person for the purpose of communicating the information. For the reasons hereinbefore appearing I do not think he can be held to be the agent of the association for the purpose of making the communication, and there is no evidence that any member of the association (unless it be Shand Kydd himself) made himself responsible in any way for what Hadwen did. Either, therefore, Hadwen was in the position of the person from whom the inquiry was made, or he was the confidential agent of Shand Kydd to make the inquiry and communicate the result. In the former case, there being no malice alleged, your Lordships are bound to assume that he bona fide believed in the truth of the information he gave, and also that he bona fide believed, as indeed appears from the form of inquiry made by Shand Kydd, that the latter had a legitimate interest in asking for the information. It is not alleged that Hadwen acted from motives of private gain or from any motive which is inconsistent with his having acted under a sense of social duty. To establish this it would be necessary to prove that the association was a mere sham, and that the secretary was carrying on the business of inquiring into and selling information as to the financial position of traders, the members of the association being purchasers of the information, and the real object being to secure subscriptions sufficient to pay the secretary's salary. It appears to me quite impossible for your Lordships to come to this conclusion on the evidence before you, and it follows that, on the supposition that the secretary was in the position of a person from whom inquiry was legitimately made, he was entitled to privilege.

On the other hand, if—and this I think is the true inference from the facts—the secretary was in the position of a confidential agent [44] employed by Shand Kydd to make inquiries on his behalf, his report was a fortiori a privileged document, unless in making it he were guilty of actual malice, which was neither alleged nor proved. If a trader is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services. Again, if a single trader is justified in making an inquiry through an agent, there is no reason why two or more traders so justified should not combine to pay a common agent to make, on be-

half of each as occasion arises, such inquiry as may be necessary. A common agent so paid and making an inquiry at the request of any particular trader would not be the agent for that purpose of all the traders who joined in providing his salary, but only of that particular trader at whose instance the inquiry was made, just as if two persons employ a common chauffeur to drive the motor of each as required, such chauffeur would not be the agent of the one while employed in driving the car of the other. In my opinion, in making the inquiry on which the report was based and the report itself, the true inference is that Hadwen acted as confidential agent of Shand Kydd, and that the report was, therefore, a privileged communication.

In my opinion, therefore, the proper course will be to allow the appeal and enter judgment for Hadwen; and the appellant Hadwen, having obtained a decision in his favour on the only point he raised upon the appeal, is entitled to his costs here and below.

Order of the Court of Appeal, so far as complained of, reversed and judgment entered for the appellant Hadwen. The respondents to pay to the said appellant the costs incurred by him in the Courts below and also in respect of the appeal to this House.

#### NOTE.

In the reported case it appeared that a member of an unincorporated association of persons engaged in trade, organized for the collection and exchange of credit information, made a credit inquiry of the secretary of the association and received a reply defamatory of the person inquired about. In an action against the association the court holds that the secretary was the agent not of the association but of the member making the inquiry and that a qualified privilege therefore attached to the secretary's statement. In so holding the court distinguishes *Macintosh v. Dun* [1908] A. C. [390] 12 Ann. Cas. 146, wherein it was held that no privilege attaches to the report of a mercantile agency. The cases discussing privilege in respect to reports of mercantile agencies are collated in the notes to *Macintosh v. Dun*, supra, as reported in 12 Ann. Cas. 146 and *Holmes v. Clisby*, 104 Am. St. Rep. 103, 145. For a discussion of communications by or between creditors as privileged, see the note to *Smith v. Agee*, Ann. Cas. 1915B 129.

#### MAYNARD ET AL.

v.

#### LANGE.

Oregon Supreme Court—July 21, 1914.

71 Oregon 560; 143 Pac. 648.

#### Mechanics' Liens — Waiver — Agreement to Protect against Liens.

A contractor's bond, to indemnify the owner against any lien or claim for which the owner might become liable and which is chargeable to the contractors, to pay all indebtedness incurred by the contractors in carrying out the contract, and to complete the contract free from mechanics' liens, does not operate as a waiver of lien of the contractors themselves.

[See Ann. Cas. 1913E 562.]

#### Effect of Failure to Comply with Plans and Specifications.

Under L. O. L. §§ 725, 726, providing that the evidence shall correspond with the substance of the material allegations and each party shall prove his own affirmative allegations, where the contract alleged in a suit to foreclose a contractor's lien provided for drainage from exterior moisture and seepage, which was omitted, and for an even and sufficient drainage to all floor drains and traps, while the floor as fashioned would not completely drain to the outlets, the lien will not be enforced, but the contractors will be remitted to their remedy at law.

[See note at end of this case.]

Appeal from Circuit Court, Multnomah county: DAVIS, Judge.

Action to foreclose contractor's lien. W. W. Maynard et al., plaintiffs, and George W. Lange, defendant. Judgment for defendant. Plaintiffs appeal. **AFFIRMED.**

[561] This is a suit by W. W. Maynard and J. E. Souvignier, partners, doing business as Maynard & Souvignier, against George W. Lange, to foreclose a contractor's lien.

The plaintiffs, called for convenience the contractors, agreed in writing with the defendant, the owner, to erect for him a residence on certain real property in Multnomah County, Oregon, according to plans and specifications made part of the contract. A dispute having arisen as to whether the work was completed as stipulated, they filed a claim of lien as contractors for \$889.38, as the balance alleged to be due them upon a true statement of their claim. They aver generally that they performed their contract, except where changed by the owner and architect as the work progressed. They also specify the changes agreed upon and the prices stipulated for the same.

The defendant traverses the allegation of performance of the contract, either according to its terms or as substituted by himself or his architect, and sets forth in his answer affirmatively the various particulars in which he contends the performance of the contract by the plaintiffs was wanting. The defendant also relies upon the admitted fact that while the work was in progress a bond was given by the plaintiff Souvignier, with another as surety, conditioned that:

"If the contractors shall indemnify and save harmless the owner from and against all or any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractors, and if they shall duly and promptly pay and discharge all indebtedness that may be incurred by the contractors in carrying out the said contract, and complete the same free from mechanics' liens, . . . [562] then this bond shall be void; otherwise to be and remain in full force and virtue."

The reply traverses the new matter of the answer in sundry other particulars. At the trial the defendant objected to any testimony being introduced, for the reason that the bond mentioned operated as a waiver of any lien on the part of the contractors. The court sustained the objection; but, under the rule allowing testimony in equity cases to be taken subject to the objections, the court by consent of the parties referred the cause to a court reporter, as referee, who took the testimony for the plaintiffs, which appears in the record before us. A final decree was entered dismissing the suit, from which the plaintiffs appeal.

*Lewis & Lewis* for appellants.

*Boothe & Richardson* for respondent.

BURNETT, J. (*after stating the facts*).—

1. The first question for consideration is the effect to be given to the bond in question. We remember that the lien is claimed in favor of the contractors themselves, and not for any mechanic, materialman, laborer or other person besides contractors, mentioned in the statute. There are three stipulations in the bond: (1) That the contractors "shall indemnify and save harmless the owner from and against all or any lien or claim for which, if established, the owner of the said premises might become liable, and which is [563] chargeable to the contractors;" (2) "and if they shall duly and promptly pay and discharge all indebtedness that may be incurred by the contractors in carrying out the said contract;" (3) "and complete the same free from mechanics' liens." No question is made

about violation of the first two stipulations mentioned. The defendant rests his case on the condition that the contractors should complete the work free from mechanics' liens. In *Gray v. Jones*, 47 Ore. 40, 81 Pac. 813, the stipulation of the contract for building was, among other things, as follows:

"The party of the first part will save the party of the second part free and harmless from the payment of any and all liens which may be enforced on account of any material furnished or labor performed on said building and premises, or any part of either thereof; and the said party of the second part further covenants and agrees that he will not allow any laborer's mechanic's, materialman's or any lien or liens to be filed against the said building and premises, or or any part of either thereof, and, further, that the said building and premises and every part of either thereof shall be at all times free from any and all liens."

This stipulation was against "any and all liens," without discrimination between the claim of the original contractor and that of any subcontractor, mechanic or laborer, and it was properly held that this constituted a waiver on the part of the contractor of any lien in his own favor. Having promised to keep the building and premises always free from "any and all liens" without distinction, he could not be heard to claim a lien for himself.

The statute, however, differentiates between the original contractor, mechanic, artisan, materialman and laborer. It is a duty of the former to file his claim of lien in 60 days, and of all other parties to file their [564] claim within 30 days, after the completion of the work. The contractor is not in the same classification with other persons named in the statute. The distinction between the original contractor and a mechanic is pointed out in the following authorities: *Savannah*, etc. R. Co. v. *Callahan*, 49 Ga. 506; *Winder v. Caldwell*, 14 How. (U. S.) 434, 14 U. S. (L. ed.) 487; *New Orleans v. Pohlmann*, 45 La. Ann. 219, 12 So. 116; *Theobalds v. Conner*, 42 La. Ann. 787, 7 So. 689; *Krakaner v. Locke*, 6 Tex. Civ. App. 446, 25 S. W. 700; *Parks v. Locke* (Tex.) 25 S. W. 702. In the light of these precedents, we hold that the bond mentioned did not stipulate against the claim of lien in favor of the contractors themselves, and hence cannot operate against them as a waiver.

2. We are therefore remitted to the duty of trying the case *de novo* on the testimony reported in the record. The principal issue in the case is upon the allegation of plaintiffs that they duly performed the contract as modified by the changes made from time to time as the work progressed which aver-

ment is traversed by the answer. The defendant charges, among other things, that:

"The plaintiffs neglected and failed to provide any drainage from exterior moisture and seepage, with soil drains under the walls, or to place therein any drains whatever."

This is explicitly provided for in the specifications made part of the contract, and the plaintiffs themselves admit that it was overlooked and not installed. It is also required that the contractors shall "lay a cement floor over entire basement area, . . . with an even and sufficient drainage to all floor drains and traps." The testimony of the plaintiffs shows that the basement floor is so fashioned that it will not completely [565] drain to the outlets. Other defects noted are clearly disclosed by the testimony before us, but these are sufficient for illustration. The specifications further provide:

"The contractor shall make no changes, alterations or substitutions to these specifications, or to the blueprints and drawings, nor to the building during its construction without permission of the architect in writing, approved of by the owner in writing, and duly acknowledged by the contractor in writing over his own signature."

No pretense is made that the omission of the drain tile, or the manner in which the basement floor was constructed, was authorized by the architect or the owner. Having alleged performance of the contract, and it having been denied by the defendant, it was incumbent upon the plaintiffs to prove the allegation as laid, under the statutes that "evidence shall correspond with the substance of the material allegations" and "each party shall prove his own affirmative allegations." Sections 725 and 726, L. O. L.; *Hannan v. Greenfield*, 36 Ore. 97, 58 Pac. 888; *Young v. Stickney*, 46 Ore. 101, 79 Pac. 345; *Richardson v. Investment Co.* 66 Ore. 353, 133 Pac. 773.

The conclusion is that the plaintiffs cannot prevail in this suit to foreclose their lien, but must be remitted to such action at law, either on the contract or upon the *quantum meruit*, as they may think proper in the premises.

The decree of the Circuit Court is affirmed. Affirmed.

C. J. McBride and Bean and Eakin, JJ. concur.

#### NOTE.

#### Failure to Comply with Contract as Defense to Claim for Mechanic's Lien.

Introductory, 549

General Rule, 550

Application of Rule, 550

Limitation of Rule, 553

#### Introductory.

This note deals with the cases which pass on the failure by a lien claimant to comply with the terms of his contract as constituting a defense to the enforcement of a mechanic's lien. As to the effect of a default by a contractor on the lien of a subcontractor, materialman or workman, see the note to *Tice v. Moore*, 17 Ann. Cas. 113.

#### General Rule.

It is a general rule that the failure of a mechanic's lien claimant to comply with his contract is a defense to the assertion of the lien. *Biles v. Schultz*, 191 Ala. 671, 67 So. 981; *Harris v. Graham*, 86 Ark. 570, 111 S. W. 984, 126 Am. St. Rep. 1110; *Schindler v. Green*, (Cal.) 82 Pac. 341, *rehearing denied* 82 Pac. 631; *Vance v. Meesser*, 176 Ill. App. 554; *Apseloff v. Hyman*, etc. 162 Ky. 541, 172 S. W. 946; *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323, *reversing* 108 App. Div. 355, 95 N. Y. S. 1126; *Pippy v. Winslow*, 62 Ore. 219, 125 Pac. 298. And see the cases cited, *infra*, in the subdivision *Application of Rule*.

Thus in *Pippy v. Winslow*, *supra*, the court stated the rule as follows: "Where the contractor fails to perform a considerable part of the work required by the contract, his failure, irrespective of whether his intentions were good or bad, constitutes a bar to his enforcement of a lien for the work performed. If the defects show that the contractor performed the work in a slovenly and improper manner, not conforming substantially with the plans and specifications and thereby defeating the intentions of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien. The wilful omission, though in an unimportant respect, will preclude the assertion of a lien by him. The spirit of the contract should be faithfully observed though the letter thereof fail." So in *Harris v. Graham*, 86 Ark. 570, 111 S. W. 984, 126 Am. St. Rep. 1110, it was said: "Where there has been a lack of substantial performance of a contract by a contractor, he cannot establish a lien upon the property." Similarly in *Schindler v. Green* (Cal.) 82 Pac. 341 (*rehearing denied* 82 Pac. 631), an action to foreclose a mechanic's lien it appeared that a contract was entered into by plaintiff with the daughters of the defendants. The work consisted of doing the carpenter work in making certain alterations. There were no regular plans and specifications, or specifications as to where the doors or windows should be placed, but the contract provided that the new structure should be built uniformly with the old, to which it was to be an addition.

The greatest fault found with plaintiff's work was in the manner in which the windows were placed in the front of the building. There was no dispute as to the fact that the lower windows were not immediately under the ones above and there was no reason given by any of the witnesses tending to show why they should not or could not have been so placed. Holding that the evidence showed that to place the windows as the plaintiff did was unworkmanlike, and modifying a judgment for the plaintiff, the court said: "We do not think the evidence supports the finding 'that the failure of plaintiff to place said windows in the basement in a direct line underneath the two windows of the upper portion of said house is a trivial imperfection.' Under the provisions of the last clause of section 1187, Code Civ. Proc. a trivial imperfection in the work will not prevent a lien; but under the peculiar circumstances in this case, and where the court is compelled to find, as it did, that the work complained of was not done in a workmanlike manner, we do not think it can be said the defect is of a trivial nature to the owner. It is true the defect was small but the building was a small one, and the addition made by plaintiff was a small structure. Whether or not the defect is a 'trivial imperfection' in any case depends upon the facts and circumstances of each particular case. . . . The defendants were just as much entitled to have their little structure, their home, completed according to the contract, and in a workmanlike manner, as the man who builds a palatial residence is to have first-class work done thereon, and in principle we can see no difference. It was a serious matter with the defendants, and they begged the plaintiff to make the change, which cost but \$7.50 to make; but he refused, and declared he could do better in a lawsuit. The plaintiff had not complied with his contract. The findings do not support the judgment so far as the same fixes a lien upon said premises." Likewise in *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323, reversing 108 App. Div. 355, 95 N. Y. S. 1126, the action was brought to foreclose a mechanic's lien filed by the contractor to secure the payment of a balance alleged to be due on the contract price for erecting a dwelling house for the defendant. The trial court directed judgment for the plaintiff, the assignees of the contractor, for the entire amount claimed. Reversing the judgment because there was no evidence to support the finding that the contract was substantially performed, the court said: "The contract was not substantially performed in all respects and there is no evidence to support the finding of the trial court that it was. There is no substantial performance when no attempt is made to comply

with certain express requirements of the specifications and no excuse or explanation is given for the failure. A contract is not substantially performed by substituting for that which is expressly required, materials, methods or workmanship which, in the opinion of the contractor and his experts, are 'just as good,' unless the substitution relates to a matter of minor importance, is made in good faith and for sufficient reasons, and there is an adequate allowance for the difference. The owner has a right to what the contractor agreed to give him, and unless he has it or when the failure is neither wilful nor substantial, is fully compensated for the omission, there is no substantial performance and there can be no recovery. It is not sufficient for the contractor to build a house, but he must build the house contracted for and substantially comply with the specifications as to the method of construction, materials and workmanship before he is entitled to payment." In *Vance v. Messer*, 176 Ill. App. 554, a bill in chancery to enforce a mechanic's lien, the decree of the chancellor that the appellants had not constructed the concrete work of the building in accordance with the plans and specifications of good material and in a workmanlike manner, or, as recited in the contract, "so as to make a first class job," was affirmed, the court saying: "From the evidence in this case we find the appellants did not make the excavations provided for, but laid the foundation upon the surface of the ground, and that in the construction of the walls of the building they did not use a proportionately proper mixture of sand, gravel and cement; that they placed in the walls 'green' blocks, some of which were taken fresh from the moulds on boards and laid in the walls; that the walls of the building were not straight and plumb, but there was a variation and leaning of the walls of from one to two and one-half inches; that the width of the building at the top was four and one-half inches greater than at the first floor; that the building was not anchored; that the flues were constructed in a different manner and were smaller than provided in the contract; that the cross walls and cement floors provided for in the contract were not constructed at all, and that the foundation was not protected in the winter of 1900 by appellants, as provided in the contract, and that the building in settling left large cracks in all of the walls, except the front, some of which extended from the foundation to the roof. Many of these facts were controverted, but the evidence largely preponderates in favor of the above findings from this record."

#### *Application of Rule.*

The failure of a building contractor to comply with the plans and specifications of



the contract is a bar to the enforcement by him of a mechanic's lien. *Klaub v. Vokoun*, 169 Ill. App. 434; *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Frohlich v. Klein*, 160 Mich. 142, 125 N. W. 14, 16 Detroit Leg. N. 1114; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Smith v. Ruggiero*, 52 App. Div. 382, 65 N. Y. S. 89, *affirmed* 173 N. Y. 614, 66 N. E. 1116; *Witt v. Gilmour*, 172 App. Div. 110, 158 N. Y. S. 41; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 120 Wis. 1, 97 N. W. 515. See also *Ruddy v. McDonald*, 244 Ill. 494, 91 N. E. 651, *modifying judgment* 149 Ill. App. 111; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. Thus in *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* supra, in an action to enforce a lien for supplying a steam boiler to the defendant, it was held that furnishing a boiler with about 82 per cent of the capacity of a previous one instead of 150 per cent, the increase of capacity being the vital and essential part of the contract, was not a substantial performance of the contract. In *Anderson v. Peterreit*, 86 Hun 600, 33 N. Y. S. 741, an action brought to foreclose a mechanic's lien, it appeared that the plaintiff's testator entered into a written contract with the defendant to erect for him a dwelling house according to certain plans and specifications. The testimony introduced by the defendant showed defects which ran through the whole work. Foundations were of less size than specified, and constructed of inferior material. Timbers in the frame of the building and in the partitions were smaller than called for by the specifications. The chimneys were out of plumb, floors and ceilings out of level, walls uneven and corners not square. Doors, windows, and blinds were defective and of poor material and generally defective work was the rule, and not compliance with the contract. And in one important particular the plans and specifications were departed from to such an extent as to preclude the conclusions of performance. The specifications provided that the contractor should put footings of heavy rough stone under all foundation walls, piers, posts, and chimneys, to be not less than six inches thick and to project not less than six inches on all sides of walls and piers. The referee found that there were footing courses under the walls and chimneys, but that they did not extend six inches beyond the walls, and it appeared that the stones used were not as thick as called for by the specifications. Reversing a judgment for the plaintiff, the court said: "There was no difficulty in complying with this provision of the contract, and the contractor's act in departing from it was wilful, and it cannot be legally justified without absolutely setting aside the rule which requires performance of

the contract as a condition of a recovery of the stipulated compensation. The case is not one of substantial performance, but one where the builder substitutes his own judgment of what is necessary in place of the stipulation of the contract. The case in this respect was one of a failure to perform, and the omission is fatal to the plaintiff's right to recover."

Faulty or unskilful workmanship is a defense to a claim of a building contractor for a mechanic's lien. *Ark.-Mo. Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *Vance v. Messer*, 176 Ill. App. 554; *Keys v. Garben*, 149 Ia. 394, 128 N. W. 337; *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *McNeal v. Clement*, 2 Thomp. & C. (N. Y.) 363; *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323, *reversing* 108 App. Div. 355, 95 N. Y. S. 1126; *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 581, 79 N. E. 325, *reversing* 108 App. Div. 355, 95 N. Y. S. 1126; *Anderson v. Peterreit*, 86 Hun 600, 33 N. Y. S. 741; *Smith v. Ruggiero*, 52 App. Div. 382, 65 N. Y. S. 89, *affirmed* 173 N. Y. 614, 66 N. E. 1116; *Witt v. Gilmour*, 172 App. Div. 110, 158 N. Y. S. 41; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Braseth v. State Bank*, 12 N. D. 486, 98 N. W. 79. And see the reported case. See also *Ruddy v. McDonald*, 244 Ill. 494, 91 N. E. 651, *modifying judgment* 149 Ill. App. 111; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449. Thus in *Keys v. Garben*, supra, it appeared that the defendant was the owner of a house and that the plaintiff entered into a verbal contract with him to repair it. By the terms of the contract the plaintiff was to raise the house and level the floors, which had sagged. He furnished certain material, and did labor on the building for which the defendant refused to pay. Reversing a decree for the plaintiff in a suit in equity for the establishment and foreclosure of a mechanic's lien it was held that the defendant had showed affirmatively no benefit, and that the final result was, if anything, a disadvantage to the building. The court said: "The preponderance of the testimony shows that plaintiff did not comply with the terms of his contract. Indeed, we are constrained to hold that he did not even substantially comply with it, but, on the contrary, for some reason not disclosed, did the work in an imperfect, unworkmanlike, careless, and negligent manner, and conferred no real benefit upon defendant's property. The great preponderance of the testimony shows that the property is not in as good condition as when the plaintiff commenced his work."

The use by a contractor of poor or defective material is a bar to the enforcement by him of a mechanic's lien. *Frohlich v. Klein*,

160 Mich. 142, 125 N. W. 14, 16 Detroit Leg. N. 1114; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Braseth v. State Bank*, 12 N. D. 486, 98 N. W. 79; *McNeal v. Clement*, 2 Thomp. & C. (N. Y.) 363; *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323, *reversing* 108 App. Div. 355, 95 N. Y. S. 1126; *Easthampton Lumber, etc. Co. v. Worthington*, 186 N. Y. 581, 79 N. E. 325, *reversing* 108 App. Div. 355, 95 N. Y. S. 1126; *Anderson v. Petereit*, 86 Hun 600, 33 N. Y. S. 741; *Nesbit v. Braker*, 104 App. Div. 393, 93 N. Y. S. 856; *Wollreich v. Fettretch*, 51 Hun 640 mem. 4 N. Y. S. 326. See also *Ruddy v. McDonald*, 244 Ill. 494, 91 N. E. 651, *modifying judgment* 149 Ill. App. 111; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449.

Failure to comply with a stipulation of the contract that the work shall meet with the approval of the owner or of a person agreed on is a defense to a claim for a mechanic's lien. *Ark.-Mo. Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Brydon v. Lutes*, 9 Manitoba 463. See also *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449. See, as to the conclusiveness of an architect's certificate the note to *Mercantile Trust Co. v. Hensey*, 10 Ann. Cas. 572. *Compare Federal Trust Co. v. Gringes*, 76 N. J. Eq. 495, 74 Atl. 652. Thus in *Brydon v. Lutes*, *supra*, suit was brought to enforce a lien claimed by the plaintiffs for the price of the work and materials supplied in the erection of a dwelling house for the defendant, under a contract in writing. The plaintiffs agreed to supply all material and labor necessary to complete the dwelling in every respect according to the full meaning of the plans and specifications, the labor to be performed in the most workmanlike manner and in strict accordance with the full meaning of the plans and specifications to the satisfaction of the proprietor. The plaintiffs erected a dwelling in general accordance with the plans and specifications, but departed from them in a number of particulars. The defendant, being dissatisfied with the work in some respects, refused to pay the remainder of the contract price. It was held that the plaintiff could not recover anything until the building was completed in accordance with the contract. The court said: "Under the contract all work and material must be in full accordance with the intent and meaning of the plans and specifications to the satisfaction of the proprietor. Now were the work and material, at the time this suit was begun, to the satisfaction of the proprietor? It is quite clear they were not, and I think no one can say, after reading all the evidence, that the defendant in declining to be satisfied, acted otherwise than bona fide and not capriciously. . . . It

is not a question whether the work has been done substantially in accordance with the contract; but was it done to the satisfaction of the defendant? Was it done so that she should have been satisfied and so that her refusal to be satisfied was unreasonable and capricious. . . . But the agreement provides for the payment of \$400, as the work progresses. What is meant by the expression, 'as the work progresses?' It is capable of bearing and probably should bear the construction that that amount should be paid on what are known as progressive estimates, that as work was done up to or exceeding that amount, payment to the extent of \$400 should be made. No doubt work was done and material supplied to an amount exceeding that sum, while only \$290 was paid. The plaintiffs were then entitled to take proceedings to enforce payment of the difference, \$110. Had they done so, I cannot say what the defendant would have done, but to the bill claiming that the work has been completed and claiming \$1,110, an answer has been filed in which it is alleged that no part of the contract price was to be paid until the plaintiffs had erected the house in accordance with the contract and specifications."

An omission to complete the work to the extent required by the contract is a bar to the enforcement of a mechanic's lien. *Klaub v. Vokoun*, 169 Ill. App. 434; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Anderson v. Petereit*, 86 Hun 600, 33 N. Y. S. 741; *Fox v. Davidson*, 36 App. Div. 159, 55 N. Y. S. 524; *Paturzo v. Shuldiner*, 125 App. Div. 636, 110 N. Y. S. 137. See also *Wollreich v. Fettretch*, 51 Hun 640 mem. 4 N. Y. S. 326; *Malbon v. Birney*, 11 Wis. 107. And see the reported case. Thus in *Fox v. Davidson*, *supra*, an action to foreclose a lien, wherein it appeared that the plaintiff left undone over one-twentieth of the work and that he did not overlook the work but simply neglected it, the court said that there could be no recovery. So in *Paturzo v. Shuldiner*, 125 App. Div. 636, 110 N. Y. S. 137, an action to foreclose a mechanic's lien, it appeared that the contract was not completed to the extent of the work agreed on or in the stipulated time. Reversing a judgment for the plaintiff, the court said: "The judgment should have been for the defendant. The first cause of action is based on a contract for the building of a house by the plaintiff at Coney Island in the borough of Brooklyn for the defendant for \$3,250. the first payment to be \$1,000 when the building was erected and the brown mortar on. the second \$500 when the trim was completed. and the final payment \$1,750 upon the completion of the work; payments to be made on the architect's certificate. The complaint

alleges that the plaintiff completed the contract except certain work of the value of \$250, and that there is due him under the contract \$2,000—the \$250 being deducted. But it then alleges that 'the plaintiff duly fulfilled and performed all the conditions' of the contract, but was prevented from completing the same 'within the time therein specified' on account of certain extra work done by him at the defendant's request, and also because the defendant did not make the payments as agreed. It is impossible to reconcile these allegations. They show that not only was the contract not completed in the contract time, but that it was also not completed to the extent of work of the value of \$250. No excuse for this latter non-performance is alleged; and hence no cause of action is alleged."

*Limitation of Rule.*

Where the lien claimant has substantially, though not fully, complied with his contract, the failure fully to perform is not a bar to the enforcement of the mechanic's lien but warrants a deduction from the claim of the amount necessary to complete the work in accordance with the contract. *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. 1134; *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Gier v. Daiber*, 148 Mich. 190, 111 N. W. 773, 14 Detroit Leg. N. 183; *McGowan v. Gate City Malt Co.* 89 Neb. 10, 130 N. W. 965; *Holl v. Long*, 34 Misc. 1, 68 N. Y. S. 522; *Edmunds v. Welling*, 57 Ore. 103, 110 Pac. 533; *M. J. Walsh Co. v. Nelson*, 63 Ore. 84, 126 Pac. 606; *Zanello v. Portland Cent. Heating Co.* 70 Ore. 69, 139 Pac. 572; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243, 29 W. N. C. 274; *Murphy v. Williams* (Tex.) 116 S. W. 412, modified 103 Tex. 155, 124 S. W. 900; *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822. And see the reported case. See also *Ark.-Mo. Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *Millsap v. Ball*, 30 Neb. 728, 46 N. W. 1125; *Grove-Wharton Const. Co. v. Clarke*, 86 Neb. 831, 126 N. W. 651; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Wollreich v. Fettlech*, 51 Hun 640 mem. 4 N. Y. S. 326; *Derr v. Kearney*, 46 Misc. 148, 93 N. Y. S. 1099; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. Thus in *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. 1134, an action to enforce a mechanic's lien, it was held that a builder may establish a lien without showing complete performance of his contract. The court said: "If he has acted in good faith in an effort to perform it, and has substantially, although not fully, performed it, he may recover the contract price, less such deduction as should be made on account of the errors or omis-

sions in doing the work." And in *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822, the court stated the rule as follows: "It certainly is true in law if there be a substantially completed, though not perfectly completed, contract, the claim may be filed, and the defendant may recoup or abate from the contract the value of the failure. He can claim damages for noncompletion. He has no right to forfeit all that the builder has done. If in an action at common law the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the noncompletion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good." So in *McGowan v. Gate City Malt Co.* 89 Neb. 10, 130 N. W. 965, it was said: "Reversing, to some extent, the order of the presentation of the subjects by defendants in their brief, we notice the contention that plaintiffs' action cannot be maintained upon the contract until there is a performance of its conditions by them. This contention is, in a general way, correct. That one cannot maintain an action on a contract without a prior substantial compliance on his part is the well-settled law, but this principle must have a reasonable application. If there is a substantial performance the action thereon may be maintained, but without prejudice to any set-off or counterclaim which may be presented by the defendant in the action. This is a reasonable and just rule, and is the well-settled law of this state."

In *Beha v. Ottenberg*, 6 Mackey (D. C.) 348, a bill in equity was brought to enforce a mechanic's lien against the premises of the defendant for work done and material furnished under a written contract. The defendant admitted the contract but denied a compliance on the part of the complainant therewith, and averred that the materials used were poor and that the work was done in an unskillful and improper manner, causing the building to settle and the walls to crack and become defective. It was admitted on the hearing that the evidence showed that the work was not performed strictly in accordance with the terms of the contract and that the materials were not all of the required quality. The bill was dismissed on the ground that the plaintiff, having failed to perform his contract fully, was not entitled to the lien given by the statute. Remanding the case with direction that issues should be made up to determine what, if anything, the plaintiff was entitled to recover, the court said: "We think the statute gives the lien as security for the payment of whatever the party may be entitled to recover on his contract."

If the failure to fully perform his contract would disentitle him to recover anything at all, of course there would be no lien, and the bill should be dismissed. Upon that point the Supreme Court of the United States has held, and such must be the rule with us, that where there appears to have been a bona fide intention to comply with the contract, but for some reason or other not involving a fraudulent purpose there has been a partial failure, there may be a recovery of the contract price, less the amount required to put the work in that condition which the contract calls for."

### GUARANTEED INVESTMENT COMPANY

v.

VAN METRE ET AL.

Wisconsin Supreme Court—October 6, 1914.

158 Wis. 262; 149 N. W. 30.

#### New Trial — Statutory Right in Ejectment.

Statutory right to a second trial in ejectment is not waived by a stipulation at the trial, on which judgment was entered, that plaintiff's tax titles were good as to certain of the tracts and invalid as to the remainder; it being oral, and therefore, under circuit court rule 5, § 3 (108 N. W. x), not obligatory on another trial.

[See note at end of this case.]

#### Same.

Defendant in ejectment does not waive his right to a second trial by accepting a quitclaim to the tracts adjudged to him; there having been, in the negotiations leading up to it, no reference to those adjudged to plaintiff.

[See note at end of this case.]

#### Same.

The court can, even after expiration of the year given by statute for filing undertaking and paying costs for a second trial in ejectment, extend the time therefor.

[See note at end of this case.]

#### Same.

Default of defendants in ejectment, in not filing an undertaking and paying costs within the year provided by statute as to new trial, having occurred through the mistake of counsel in taking an order for new trial providing for such filing and payment within a time extending beyond the year, may be relieved against in the discretion of the court.

[See note at end of this case.]

#### Same.

The technical error, in the order granting defendants in ejectment a new trial, that the

costs be paid "to the clerk," whereas the provision of St. 1913, § 3092, that they "be paid" means paid to plaintiff, not having been objected to below, will not avail on appeal.

[See note at end of this case.]

Appeal from Circuit Court, Oneida county: REID, Judge.

Action of ejectment. Guaranteed Investment Company, plaintiff, and E. Van Metre et al., defendants. From judgment rendered, plaintiff appeals. **AFFIRMED.**

[262] Ejectment for twelve parcels of land. The action is by a tax-title holder against the original owners. At the trial it was orally stipulated that the plaintiff's tax titles were good as to six parcels and invalid as to the remaining six. On this stipulation, without the introduction of any evidence on [263] the subject of title, the court entered an order for judgment March 27, 1912, fixing the amount of taxes and interest due the plaintiff on the six invalid tax titles and requiring the defendants to pay said sums as a condition of judgment in their favor, and providing that in case of default in such payment within ninety days the plaintiff should have judgment for the entire twelve parcels, but in case of the payment being made the plaintiff should recover the six parcels covered by the valid tax deeds and the defendants have judgment for the remaining six parcels. July 19, 1912, on a showing that the sum fixed to redeem the taxes had not been paid, judgment was entered for the plaintiff for the entire twelve parcels. As matter of fact the redemption moneys had been seasonably deposited in court without the knowledge of the parties by a mortgagee of the lands, and on this fact appearing on April 4, 1913, the judgment was amended as of its date so as to conform to the original order awarding six parcels to the plaintiff and six to the defendants. Immediately thereafter the defendants applied to the plaintiff to quitclaim to them the six parcels awarded to the defendants, and the plaintiff consented to do so on payment of \$104.80 in addition to the amount paid into court, which sum represented tax liens and interest which had not been brought to the attention of the court when the order for judgment was made. This arrangement was carried out, the deed made and the moneys paid, but nothing was said about the other six parcels. On July 12, 1913, the defendants obtained an order under sec. 3092, Stats. 1913, granting a new trial on condition that they pay to the clerk of the court the taxed costs of the action with interest within thirty days, and file the necessary undertaking within sixty days. The costs were paid into court and the undertaking filed within the time limited by the

order but after the expiration of a year from the rendition of the original judgment. Plaintiff then moved to set aside the order granting a new trial because the [264] costs were not paid nor the undertaking filed within the year and because the right to a second trial had been waived by the acts of the defendants. Simultaneously defendants, on showing that their counsel had advised them that such an order as that of July 12, 1913, would be valid, and that defendants might pay the costs and give the undertaking accordingly, and have a new trial, and that defendants were misled thereby, moved the court to extend the time beyond one year for paying the costs and giving the undertaking and to permit the costs to be paid and an undertaking to be filed as of the date when the acts were in fact done and to allow in other respects the order of July 12, 1913, stand. The court entered an order extending the time for paying the costs and filing the undertaking for sixty days from July 12, 1913, and further that so much of the order of July 12, 1913, as vacated that part of the judgment favorable to the plaintiff and granted a new trial of the issues determined thereby be allowed to stand, and so much of the order as vacated that part of the judgment favorable to the defendants and granted a new trial of the issues thereby determined be vacated. From this order the plaintiff appeals.

*L. A. Doolittle* for appellant.  
*Miller & Reeve* for respondents.

[265] WINSLOW, C. J.—Five questions are presented, viz.: (1) Was the defendants' right to a new trial under sec. 3092, Stats. waived by the oral stipulation made on the trial? (2) Was such right waived by the accepting of a quitclaim deed from the plaintiff of the six parcels adjudged to them? (3) Had the court power in its discretion to extend the time for paying the costs and filing the undertaking after the time given by the statute had expired? (4) If such discretionary power existed, was it abused? and (5) Was the payment of the costs into court a sufficient payment? These questions will be answered in their order as stated.

1. The right to a second trial in ejectment has been called an absolute right, and it is not to be denied except upon a clear showing of waiver. It can be waived by express agreement (*Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445), but it is not to be construed as waived by a mere stipulation of facts, even though it be in writing. *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546, 51 N. W. 1016. The stipulation here was oral and hence not obligatory upon another trial. Circuit Court Rule V, sec. 3. We do not consider that it amounts to a waiver.

2. In the negotiations leading up to the quitclaim deed there was no suggestion by defendants that they relinquished any claim to the other six parcels, or that they proposed to waive any legal right which they had to further contest the plaintiff's title thereto. The giving of the deed seems simply to have removed those six parcels from the field of controversy by mutual consent without express or implied suggestion that the question as to the title to the other six parcels was to be in any way affected. It was certainly competent for the parties to do this, and there is no suggestion [266] even now that the plaintiff can show good title to those parcels. We find no waiver here.

3. There can be no doubt of the power of the court, even after the expiration of the year, to extend the time for the filing of the undertaking and payment of costs. *Dickinson v. Smith*, 139 Wis. 1, 120 N. W. 406.

4. The affidavits filed by the defendants showed that the error in the order of July 12, 1913, by which the payment of costs and filing of the undertaking were authorized after the expiration of the year was due to a mistake of counsel who advised their clients to that effect. Defaults occurring through the mistakes or ignorance of counsel may be relieved against. *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. Rep. 164; *Wisconsin Marine, etc. Ins. Co. Bank v. Mann*, 100 Wis. 596, 76 N. W. 777. We cannot say that there was any abuse of discretion.

5. The original order vacating the judgment and ordering a new trial provided that the taxed costs in the action should be paid "to the clerk." This was doubtless erroneous. Sec. 3092 requires that the costs "be paid," and this means paid to the plaintiff. However, when the plaintiff moved to set aside the order this technical error was not made a ground of objection and the trial judge makes no mention of it in his carefully prepared opinion. Evidently the payment to the clerk, or "into court," as it is termed in the order appealed from, was not relied on as a defect. Of course the money could have been obtained by the plaintiff at any time from the clerk by simply applying for it. Under these circumstances the contention now made does not seem substantial.

BY THE COURT.—Order affirmed.

VINJE, J. (*dissenting*).—I am unable to concur in the conclusion that an oral stipulation made in open court and upon which a judgment is based is by force of sec. 3 of Circuit Court Rule V. not obligatory upon another trial. The [267] rule referred to was not intended to apply to oral stipulations made in open court during the trial, taken down by the reporter and acted upon by the court, for it is well settled that statutes or

rules of court requiring stipulations to be in writing, in order to bind the parties, do not apply to stipulations made in open court. *Lewis v. Wilson*, 151 U. S. 551, 14 S. Ct. 419, 38 U. S. (L. ed.) 267; *Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396; *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Caldwell v. McWilliams*, 65 Ga. 99; *Welch v. Bennett*, 39 Ind. 136; *Carpenter v. Pirner*, 107 N. Y. S. 875; *Staples v. Parker*, 41 Barb. (N. Y.) 648; *Corning v. Cooper*, 7 Paige (N. Y.) 587; 36 Cyc. 1282; 44 Cent. Dig. 3054. Such stipulations, unless contrary to law or public policy, are binding, and may even be enforced by the court on its own motion, since it is in a sense a party thereto.

I am further of the opinion that when in an ejectment case it is stipulated that plaintiff's tax title is good as to some of the parcels in dispute and invalid as to the remainder there is no room for argument as to how judgment shall go, and therefore the ground of the decision in *Hewitt v. Wisconsin River Land Co.* 81 Wis. 546, 51 N. W. 1016, does not apply to this case. Such stipulations as to title, unless a party is relieved therefrom, ought to be construed to be an effectual waiver of the right to a second trial, especially where, as here, the parties have subsequent to judgment acted upon it, and plaintiff has thereby lost its right to stand upon the title it has when the action was begun. Speaking of an oral stipulation made in open court in *Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396, the court says:

"The present plaintiff comes into court relying on a judgment obtained in consequence of the order of the court which was procured by the agreement in question, and he cannot repudiate the agreement while he takes the benefit of its consequences."

Much less should the defendants here be heard to question [268] the validity of the judgment obtained by reason of the stipulation entered into, since by means of it, through the quitclaim deed, they have shorn the plaintiff of the means of contesting that part of the judgment favorable to the defendants.

Marshall and Barnes, JJ. We concur in the foregoing dissenting opinion of Mr. Justice Vinje.

#### NOTE.

##### Statutory Right to New Trial in Ejectment.

This note reviews the recent cases concerning the statutory right to a new trial in actions of ejectment, and is supplemental to the note to *Clairview Park Imp. Co. v. Wayne Circuit Judge*, Ann. Cas. 1914C 734.

In addition to the reported case, apparently the only recent cases on this subject are those which arose in Indiana, prior to the statute (Acts 1913, p. 673) by which the statutory right to a new trial was eliminated, and applications for a new trial in ejectment were required to be made "under the same restrictions, and on the same grounds as are provided for in other civil actions."

In *Gilchrist v. Hatch*, 183 Ind. 371, 106 N. E. 694, reversing (Ind.) 100 N. E. 473, the court explained the classes of action to which the statute applied as follows: "Prior to the Act of 1913 (Acts 1913, p. 673, sec. 1110 Burns 1914) there were three classes of cases in which a new trial as of right might be demanded under sec. 1110 Burns 1908, sec. 1064 R. S. 1881: (1) In a suit to recover possession of real estate; (2) in an action to quiet title to real estate, and (3) in a partition proceeding wherein the title to the property was in question. It had been held, however, that where two or more substantive causes of action proceeded to judgment in the same cause, one entitling the losing party to a new trial as of right and the other not, the statute would not apply and a motion for a new trial without cause should be denied. *Bennett v. Closson* (1894) 138 Ind. 542; *Wilson v. Brookshire* (1890) 126 Ind. 497, 9 L.R.A. 792. Appellants take the position that appellee's complaint does not proceed on the theory of an action to recover possession, or to quiet title or to have land partitioned and the title determined. In fact, it is urged that the essential thing sought by the complaint and made the basic and primal cause of action, was the rescission and avoidance of the written contract entered into by appellee and appellant Griffith. In this connection, we are not unmindful of those cases which hold that in actions brought merely to enforce or cancel a lien on realty or a contract in relation thereto, no new trial as of right was permitted by the statute. *Studabaker v. Alexander* (1913) 179 Ind. 189, 100 N. E. 10, and cases there cited. But in this case, however, although the transaction between appellee and Griffith, and the contract itself, are set out in detail for the purpose of showing the deception which, it is alleged, was practiced on appellee, yet none of the parties sought to establish any rights under the contract or asked to be relieved from performing any of its covenants. The whole theory of the pleading is that of a suit to annul a deed which was obtained by fraud and to reinvest and quiet title in the grantor. In such an action the losing party was entitled to a new trial as of right. *Tomlinson v. Tomlinson* (1904) 162 Ind. 530, 534; *Warburton v. Crouch* (1886) 108 Ind. 83; *Physio-Medical College v. Wilkinson* (1883) 89 Ind. 23. . . . The

facts pleaded in the case at bar are sufficient to show the existence in each party to the controversy of a claim adverse to that of the other side and there can be no doubt that the ultimate issue was that of title."

Under the statutes repealed by the Act of 1913 where the title to land, or a claim to a lien or interest therein, was asserted, and the plaintiff sought to remove that interest and thus to clear his own title, the losing party was entitled to a new trial as of right, no matter what form the issues assumed, although if the sole object of the suit was to enforce a lien the rule was different. *Follette v. Anderson*, 56 Ind. App. 524, 105 N. E. 793. But where two or more substantive causes of action proceeded to judgment in the same case, one cause falling under the class in which a new trial as of right could be granted, and the other not falling under this class, the latter controlled, and the new trial as of right was denied. *Tuell v. Homann* (Ind.) 108 N. E. 596; *Frankel v. Voss* (Ind.) 109 N. E. 55; *Donlon v. Maley* (Ind.) 110 N. E. 92; *Trook v. Trook* (Ind.) 110 N. E. 1004. See also *Nesbit v. English*, 58 Ind. App. 10, 107 N. E. 552. See also *Gates v. Sweet*, 58 Ind. App. 689, 108 N. E. 881. And where the question of title to the land was only incidental to the main question involved in the action, a new trial as of right would not be granted. *Hensler v. Fountain Park Co.* 57 Ind. App. 100, 106 N. E. 384; *Nesbit v. English*, 58 Ind. App. 10, 107 N. E. 552; *Gates v. Sweet*, 58 Ind. App. 689, 108 N. E. 881. In *Gates v. Sweet*, supra, the court said: "The first paragraph of complaint, in addition to alleging facts disclosing the right to possession of appellant as against the appellee, likewise discloses that waste was committed on the premises by appellee, and for which he seeks damages. Waste is a well-recognized common-law action, and one that was frequently resorted to as a remedy by the owner of the fee as against that class of tenants that came within the common-law doctrine of waste. Notwithstanding that waste is a substantive cause of action, the general tenor of the first paragraph of the complaint may be regarded as one for the possession of real estate; however, the conclusion we have reached as to the second paragraph makes it unnecessary to extend our discussion as to the first paragraph of complaint. The second paragraph of complaint alleges ownership and right to possession of the premises in appellant, and that he has been deprived of the possession to his damage in the sum of \$500, and proceeds no further in this behalf. It then avers that appellant is the owner and entitled to harvest the growing crops on the premises, and appel-

lee will appropriate the same to his own use and prevent appellant from harvesting the crops to his irreparable injury, unless appellee be restrained by the court. The insolvency of appellee is alleged, and if he is permitted to appropriate the crops to his own use, appellant will be without a remedy. The prayer is that appellee be enjoined from harvesting and appropriating to his own use the growing crops and pasture, and the enjoined from molesting, interfering with, or preventing appellant from harvesting and caring for his crops on the premises. There is no specific prayer for possession. . . . Taking into consideration the entire scope of the second paragraph of complaint, it discloses that the title and right of possession were but incidental to the main relief sought, which was that appellee be prevented by injunctive relief from appropriating the crops to his own use, and from interfering with appellant while harvesting the same. If this is the correct construction to be given this paragraph of complaint, then the court did not err in refusing a new trial as of right as to the entire cause of action."

In *Trook v. Trook* (Ind.) 110 N. E. 1004 it was held that where a new trial as of right was improperly allowed, the order allowing it could thereafter be vacated; and that in case of a change of venue, the court to which the cause was brought had authority to inquire into the correctness of an order made before the cause reached that court.

In *Warner v. Reed* (Ind.) 113 N. E. 386 it was held that the granting of a new trial before the rendition of the judgment in the first trial was an irregularity which could be waived.

In *Warner v. Reed* (Ind.) 113 N. E. 386 it was held that a motion made after the second trial, to vacate both the order of a new trial and the verdict of the jury, was too late. In that case the court said: "If appellant felt aggrieved by the ruling granting appellee a new trial as of right, and 'considered that such order was improperly granted,' it was his duty under the facts disclosed by the record as hereinafter indicated, in the first instance and 'at the first opportunity presented, to challenge such order for any and all reasons' and demand that it be vacated."

The fact that on the first trial the defendant asked and was granted leave to open and close, has been held not to affect the defendant's right to a new trial. *Follette v. Anderson*, 56 Ind. App. 524, 105 N. E. 793.

In *Warner v. Reed* (Ind.) 113 N. E. 386, the overruling of a motion for a new trial as a matter of right was held not to be a proper ground for a new trial for cause.

**PALMER**

v.

**CITY OF CEDAR RAPIDS.**

Iowa Supreme Court—April 14, 1914.

165 Iowa 595; 146 N. W. 827.

**Municipal Corporations — Notice of Claim — Injury to Wife or Child.**

Acts 22d Gen. Assem. c. 25, § 1, enacted in 1888, provided that, in cases of personal injury from defective streets, etc., no suit shall be brought against a municipal corporation after 6 months from the time of injury, unless written notice specifying the place and circumstances of the injury shall be served upon it within 90 days after the injury, which provision was, in different language, carried into Code 1897, § 3447, which provides that an action may be brought within the times herein limited after they accrue, and not afterwards; subdivision 1, those actions "founded on" injury to the person on account of defective streets within 3 months, unless written notice specifying the time, place, and circumstances of the injury be served upon the municipality within 60 days from the happening of the injury; subdivision 3, those "founded on" injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statutory penalty, within two years. Held, that section 3447, subd. 1, was applicable to an action for damages for the loss of the services, etc., of plaintiff's minor son by injuries from a defective sidewalk, so that an action could not be maintained, if notice of injury was not given as required thereby; the words "founded on" meaning to serve as a base or basis for, and not necessarily contemplating a direct injury to the person suing.

[See note at end of this case.]

**Purpose of Requirement of Notice.**

The purpose of the notice required by Code 1897, § 3447, subd. 1, requiring actions founded on injuries to the person because of defects in sidewalks to be brought within three months, unless written notice of the time and place of injury be served within 60 days from the injury, is to inform the city authorities of the location of the defect and the circumstances attending the accident, so as to enable them to investigate the city's liability while the facts are fresh, and ascertain the character of the defect and injuries while witnesses are obtainable.

[See generally 16 Ann. Cas. 172.]

**Statutes — Construction — Statutes in Pari Materia.**

It is the court's duty in interpreting related statutes to give effect to both of them, if possible, rather than to destroy one of them.

[See generally Ann. Cas. 1915A 186.]

Appeal from District Court, Linn county:  
SMITH, Judge.

Action for damages. Ren Palmer, plaintiff, and City of Cedar Rapids, Iowa, defendant Judgment for defendant. Plaintiff appeals The facts are stated in the opinion. **AR FIRMED.**

*Rickel & Dennis* for appellant.

*Barnes & Chamberlain* for appellee.

[596] *DEEMER, J.*—According to the allegations of the petition, plaintiff's minor son was injured by a fall upon one of the sidewalks in defendant city which, it was claimed, the city negligently failed to manage, maintain, and keep in repair. The accident occurred on January 8, 1910, and this action was not commenced until January 31, 1911. The damages asked were for loss of the services of the minor, and for costs and expenses incurred in furnishing nurses, medical attendance, and medicines.

The demurrer was upon the ground that, as plaintiff served no notice upon the city within three months after the accident occurred, the action is barred. Plaintiff's cause of action is not for injuries to his person; but it is founded upon an injury to his minor son, and for damages because of the loss of the services of the child, and of expenses incurred, due to the injury received by him.

The Code of 1873 provided that actions founded on injuries to the person should be brought within two years after the cause thereof accrued. The section 2,529.

[597] In the year 1888 the Legislature passed an act entitled "An act limiting the time of making claims and bringing suits against municipal corporations including cities organized under special charters." This act provided that:

Section 1. In all cases of personal injury resulting from defective streets or sidewalks or from any cause originating in the neglect or failure of any municipal corporation, or its officers to perform their duties in constructing or maintaining streets and sidewalks, no suit shall be brought against the corporation after six months from the time of the injury unless written notice specifying the place and circumstances of the injury shall have been served upon such municipal corporation within ninety days after the injury.

Sec. 2. All the provisions of this act shall be applicable to all cities in this state now organized under special charters. (Acts 22d G. A. chapter 25.)

This act found its way into McClain's Code as sections 633 and 634, under title 4, chapter 10, relating to cities and incorporated towns. The act is now found in somewhat different language in chapter 2 of title 18 of the Code



of 1897, "relating to procedure in courts of original jurisdiction," and as it now stands reads as follows:

Section 3447. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1. In Actions for Injuries from Defects in Roads or Streets—Notice. Those founded on injury to the person on account of defective roads, bridges, streets or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury. . . .

3. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within five years from the time the same is filed in the clerk's office for probate and notice thereof is given. . . .

[598] This change was made by the Code commission, and from its report we quote the following: "Two new subdivisions are inserted; the first covering the provisions of 22d G. A. chapter 25 (McC. section 633), extended so as to apply to counties as well as cities and towns, and the second to cover Code, section 486 (McC. section 665), which seems more appropriate here than in the place where it has been found heretofore. In subdivision 3 are inserted words extending the meaning of the term 'injuries' as used, and a clause is added to cover actions to set aside a will which have not heretofore apparently been covered by any of the Code provisions." Report of Code Commission, page 98.

Paragraphs 1 and 4 of section 2,529 of the Code of 1873 (section 3,734 of McClain's Code), from which paragraph 3 of section 3,447 of the present Code was borrowed, read as follows:

1. Actions founded on injuries to the person or reputation, . . . Whether based on contract or tort, or for a statute penalty, within two years:

4. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

Plaintiff's action was not commenced until more than one year after the cause thereof accrued, and he gave no notice to the city at any time, of his claim, etc., until he served the original notice in this case, which was more than a year after the accident happened. The demurrer is based upon the thought that the action is barred under paragraph 1 of

section 3447 of the Code. Plaintiff contends, however, that, as the action was for injuries to his relative rights, it is governed by paragraph 3 of section 3447, and that it was not barred until two years after the cause thereof accrued.

The object of the section with reference to notice is [599] well understood. It is to apprise the city authorities of the location of the defect and the circumstances attending the accident with such reasonable certainty as will enable them, not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing and of the character of the injuries sustained while witnesses are at hand. *Giles v. Shenandoah*, 111 Ia. 83, 82 N. W. 466.

The necessity and desirability of such a notice is just as important whether the injuries are to the absolute or relative rights of the plaintiff. But it is insisted that the statute must be given a reasonable interpretation, and all of its provisions taken together, and that, when so done, it is manifest that paragraph 1 has no reference whatever to injuries to relative rights, although founded on injuries to the person. Had there been no change in the statute after its original enactment, there would be much force in this position for, as it originally passed, what is now paragraph 1 read, "in all cases of personal injuries," etc., and the ultimate time limit seems to have been two years. As the statute now reads, the ultimate limit is two years, if notice is served within sixty days after the happening of the accident, and, if no notice be served within the sixty days, the action must be commenced within three months; and the statute is broadened so as to cover actions "founded on injury to the person," instead of "all cases of personal injury."

Appellant says that we have heretofore read paragraph 1 of section 3,447 out of the statute of limitations, in *Cushing v. Winterset*, 144 Ia. 280, 122 N. W. 915, and in a sense this is true; but we had no authority to nor did we repeal the statute. In that case the holding was that the right to bring suit was not extended to a minor or an insane person in virtue of the provisions of section 3453 of the Code. Whether found in its proper place or not, this provision of the law must be given force and effect.

The first point to be decided, then, is whether plaintiff's [600] cause of action is founded on an injury to the person, rather than an action for injury to the person. The words "founded on" mean "to serve as a base or basis for," and do not necessarily import a direct injury to the person bringing the suit. Again, the propriety or necessity for such a notice is as great whether the action be for

direct injuries or be to relative rights based upon an injury to the person of another, and the mischief aimed at in the statute is as great in one case as the other.

Appellant contends, however, that, as paragraph 3 of the present statute is made to apply to injuries to relative rights, and paragraph 1 is not so extended, in construing the two together it should be held that paragraph 1 relates only to direct injuries to the person, and not to relative rights. Of course these paragraphs must be construed together, and, if they related to the same kind of injuries appellant's argument would be of great force. The difficulty lies in the proposition that both provisions relate to the same kind of injuries, which is manifestly incorrect. Paragraph 1 relates to injuries on account of defective roads, bridges, streets, or sidewalks, where a county or city is sought to be held liable, and paragraph 3 to injuries to the person or reputation in general, whether based on contract or tort, or for a statutory penalty, including relative rights. If the action be founded on injury to the person, one paragraph is as broad as the other, save that one is made to apply to a particular kind of wrong, and the other is unlimited. If the minor were bringing suit in his own name, it is very clear that his action would be governed by paragraph 1 of the section, rather than by paragraph 3, and the same rule should be adopted where the action is brought by a parent because of personal injuries to a minor child, due to a defective street, sidewalk, or highway. This is the only theory upon which these statutes may be reconciled, and it is our duty in interpreting them to give both force and effect, if this can be done, rather than to set aside or destroy one or [601] the other. These are cardinal rules of construction, for which no authorities need be cited.

Appellant relies upon *Wysocki v. Wisconsin Lakes Ice, etc. Co.* 125 Wis. 638, 104 N. W. 707, and *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L.R.A. 475, 80 Am. St. Rep. 17. These are both Wisconsin cases, and the statute in that state reads, "no action to recover damages for injury to the person;" while ours reads, "those (actions) founded on injury to the person." The Wisconsin cases proceed along the lines argued by appellant's counsel; but the language of the two statutes is so different that we do not think the Wisconsin rule is applicable here. That the foundation of plaintiff's right of action was injury to the son is so clear that no authority need be cited in support of the proposition. But see *Sherman v. Western Stage Co.* 22 Ia. 556; *Emmert v. Grill*, 39 Ia. 690.

As plaintiff gave no notice as required by paragraph 1 of the statute quoted, and did

not bring his suit until more than a year after the accident happened, we think his petition was demurrable, and that the trial court was right in its holding.

The judgment must therefore be and it is Affirmed.

Ladd, C. J., and Gaynor and Withrow, JJ., concurring.

#### NOTE.

##### **Notice to Municipality as Prerequisite to Action for Injury to Wife or Child of Plaintiff.**

The holding of the reported case, that notice to a municipality is a prerequisite to the bringing of an action by a person for an injury sustained by his wife or child, is supported by the decisions in two New York cases. *Kellogg v. New York*, 15 App. Div. 326, 44 N. Y. S. 39, 4 N. Y. Annot. Cas. 182; *White v. New York*, 15 App. Div. 440, 44 N. Y. S. 454. In the reported case the court construes and applies a statute requiring such a notice in case of an action "founded on injury to the person" from a defective street or highway. The court holds that the notice is essential whether the injuries are to the absolute or to the relative rights of the plaintiff; that is, whether the action is for a direct injury to the plaintiff, or for an injury to the person of another, as the words "founded on," as used therein, mean "to serve as a base or basis therefor," and so do not necessarily import a direct injury to the person suing.

Likewise, in *Kellogg v. New York*, 15 App. Div. 326, 44 N. Y. S. 39, 4 N. Y. Annot. Cas. 182, an action by a husband to recover damages for the loss of the services of his wife, occasioned by injuries received by her, which were alleged to have been caused by the defendant, and also to recover for the expenses incurred for medicines, medical attendance, care and nursing of the wife rendered necessary by the injuries so caused, it appeared that a New York statute (Laws 1886, c. 572, § 1) provided as follows: "No action against the mayor, aldermen and commonalty . . . for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor, aldermen and commonalty . . . shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action, and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation, or other proper law officer thereof, within six months after such cause of action shall have accrued." The court held that a compliance with the provisions of the statute

in question as to the service of the notice, was a condition precedent to the right to bring the action, and that in the absence of such a notice the action could not be maintained; nor could the commencement of the suit be regarded as notice. To the same effect was the holding in *White v. New York*, 15 App. Div. 440, 44 N. Y. S. 454, which was an action by the plaintiff to recover damages for injury to the health of his wife and children, which he alleged to have been caused by an accumulation of surface water, the result of negligence on the part of the defendant.

However, in *Calabrese v. Chicago Heights*, 189 Ill. App. 534, an action under an Illinois statute (Hurd's R. S. 1912, c. 70, § 7; J. & A. par. 6190) providing that a person intending to sue a city for personal injuries, must file a notice with respect to the accident, it was held that the statute applied only to the case of a person about to bring an action for injuries to his own person, and therefore did not apply to a case where a father was about to bring suit to recover damages which he had sustained through the loss of the services of his minor son and for expenses incurred in curing the son of personal injuries received by him on account of a defective sidewalk.

## ALDERSON

v.

## KAHLE.

West Virginia Supreme Court of Appeals—  
February 13, 1914.

73 W. Va. 690; 80 S. E. 1109.

### Libel and Slander — Pleading.

It suffices, in a common-law count for defamation to charge in appropriate terms and connection, the use of such words as "thief" and "robber," and it is not necessary to charge accusation of the commission of a specific offense.

### Defenses — Statutory Action.

The common-law defenses of privilege in actions for defamation are available in actions for statutory slander.

### Privilege — Altercation over Property Rights.

A communication made in the course of an altercation concerning personal or property rights and bearing some reasonable relation to the subject-matter of the controversy, is privileged, and it should be left  
Ann. Cas. 1916E.—36.

to the jury to say whether the defendant has abused his privilege.

[See Ann. Cas. 1916E —; 104 Am. St. Rep. 143.]

### Words Used in Qualified Sense — Question for Jury.

The sense in which actionable words were used, when the utterance thereof has been attended by facts and circumstances indicating their use in a qualified sense, so as to make them convey, to those who heard them, a meaning different from the one ordinarily accorded them, is a question for jury determination.

### Instructions — Mitigation of Damages.

Instructions given in an action for slander so drawn as to limit the effect of mitigating circumstances to the inquiry as to the existence of actual malice, deprive the defendant of the benefit of the consideration of such facts by the jury in the ascertainment of the amount of the damages and are erroneous.

### Intoxication as Mitigation.

In such cases, intoxication of the defendant at the time of his use of the slanderous words is a mitigating circumstance, proper for the consideration of the jury in estimating the damages.

[See note at end of this case.]

### Provocation as Mitigation.

Provocation by the plaintiff, inducing the utterance of the slanderous words, is a mitigating circumstance also.

(Syllabus by court.)

Error to Circuit Court, Nicholas county.

Action for slander. F. N. Alderson, plaintiff, and L. N. Kahle, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

*Morrison & Riele* and *G. G. Duff* for plaintiff in error.

*Craig & Wolverton*, *Brown & Eddy*, *A. N. Breckenridge*, *James G. Bunting* and *R. S. Spilman* for defendant in error.

[691] **POFFENBARGER, J.**—The declaration in this action, charging the utterance of slanderous and insulting words by the defendant, consists of two counts, in the first of which the words spoken are treated as actionable at common law and in the other as actionable under the statute. There was a demurrer to the first count only and the court overruled it.

The plaintiff is an attorney at law in good standing and repute and the defendant a physician and the owner of a boarding house. The latter had instituted a criminal proceeding against a certain woman, charging her with having absconded from said boarding house after having obtained credit and accommodation thereat, with intent to defraud

defendant out of the sum of \$25.00. She employed the plaintiff as her attorney in the matter, and, on the day fixed for her trial before a justice of the peace and at the office of the justice, there was an interview between plaintiff and defendant in the course of which the latter denounced the former as being "a Nicholas County robber," "a West Virginia cur," "a Nicholas County cur and thief," and "a thieving cur" and charged that he was "trying to help" the woman "to rob" him:

The words "thief" and "robber" are clearly actionable at common law, for they import guilt of criminal offense. *Bourland v. Eidson*, 8 Grat. (Va.) 27; *Cheatwood v. Mayo*, 5 Munf. (Va.) 16; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320; *Line v. Spies*, 139 Mich. 484, 102 N. W. 993; *Dallin v. Mayer*, 122 App. Div. 676, 107 N. Y. S. 316. It is not necessary to charge a specific offense. *Odgers, Lib. and Slan.* pp. 47, 48. It suffices to charge the utterance of a general word or words, importing guilt of a punishable offense. In a declaration in a civil action, the high degree of certainty, characteristic of [692] indictments, is not required, and the gravamen of the action for slander is not the alleged offense. As the count charges the use of the words complained of here in connection with professional acts of the plaintiff, and consequent loss of business and impairment of professional standing are averred, it states a common law cause of action, even though the epithets applied should not be regarded as actionable when used under other circumstances. *Moseley v. Moss*, 6 Grat. (Va.) 534; *Hoyle v. Young*, 1 Wash. (Va.) 150, 1 Am. Dec. 446. Obviously the demurrer was properly overruled.

In its rulings upon prayers for instructions, the trial court refused to submit to the jury an inquiry as to whether the occasion on which the words complained of were used, brought the defendant within the immunity of privilege as to them, and gave instructions so framed as to bar such inquiry. They were not privileged as having been used in the course of judicial procedure.

The altercation took place outside of the justice's office, when there was no trial in progress. Some or all of the denunciations were repeated after the parties went into the office, but they related to the quarrel which originated outside and not to any procedure in the action. There was in fact no trial that day, the justice having postponed it, because, in his opinion, the mental condition of the parties suggested the wisdom of a continuance.

Two other grounds of privilege are suggested, defense of property or an interest of the defendant in the subject matter of the interview and defense of his character or personal feelings, both of which rights are recog-

nized by law. *Odgers, Libel and Slander* 289, 291; *Newell Def. L. and S.*, secs. 108-110, pp. 509, 510. Formerly, these defenses to statutory slander, insulting words, were not permitted nor could the defendant justify by plea and proof of the truth of the charges made by him. *Brooks v. Calloway*, 12 Leigh (Va.) 466. Such was the judicially declared effect of the provision, saying no plea, exception or demurrer should be sustained, to preclude a jury from passing upon the words charged in the declaration. But, in 1849, the statute was amended by the elimination of the word "plea" and "exception" and the insertion of a provision for a plea of justification, and these [693] alterations have restored, or conferred, the common law defense of privilege. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803. The right incident to a privilege of this kind does not extend so far, however, as to authorize the set off of one independent calumny against another. A communication, to be privileged on the ground of defense of self or property or interest, must have been made under an honest belief of its truth, and it must bear some reasonable and fair relation to the right invaded and intended to be protected. If the purpose is to protect a property or other interest, the communication must not extend to something wholly foreign to the subject matter of the controversy. If it is made in defense of character, the retort must be in the nature of an answer to the attack made, *Newell, Def. L. & S.*, sec. 110, p. 510, sec. 120 p. 519. "This case must be distinguished from those in which the party pleading the excuse of "privilege" is guilty of making use of the occasion to utter charges of a character foreign to its legitimate purpose. As, for instance, if this defendant had, in addition to his statements in relation to the supposed theft, gone on to incriminate the plaintiff generally, or to accuse her of unchastity, it would have been the duty of the court, in an action for uttering such charges, to instruct the jury that as to such words, not appropriate to the legitimate objects of the occasion, it furnished the defendant no excuse whatever." *Wells, J., in Brow v. Hathaway* 13 Allen (Mass.) 239. "But even in rebutting an accusation, the defendant must not intrude unnecessarily into the private life of his assailant, or make counter charges against his character, unconnected with his original charge against the defendant." *Odgers, Lib. and Slan.* p. 202.

The defendant is not necessarily held to accountability for the use of the words in their technical or even ordinary meaning. All the surrounding circumstances go in as evidence, not only to enable the jury to ascertain whether the language used was spoken maliciously and properly to assess the damages, but also to determine in what sense they

were used. "The defendant may plead the circumstances showing that the words were not used by him in their ordinary significance. . . . He is allowed thus to give evidence of all the surrounding circumstances, in order to place the jury so far [694] as possible in the position of by-standers, so they may judge how the words would be understood on the particular occasion." Newell, Def. Lib. and Slan. sec. 6, p. 274. "People not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which in ordinary circumstances and apart from their surroundings they would convey, but extravagantly and in manner which would be understood by those who hear or read them as not conveying the grave imputation by a mere consideration of the words themselves." Lord Herschell in *Australian Newspaper Co. v. Bennett* [1894] App. Cas. (Eng.) 287, 288; Odgers, Lib. and Slan. p. 121.

Under these principles, it was competent for the jury to find, if they thought the evidence justified them in doing so, that the defendant used the words "robber," "thief" and "cur" merely by way of denunciation of the plaintiff's conduct in and about the defense of the prosecution of the woman, conducted by the defendant, and without actual malice or intent to cast upon the plaintiff any imputation of crime, and for the sole purpose of protecting his interest in the litigation and repelling the charge of drunkenness made against him. In *Chaffin v. Lynch*, cited, the defendant, in the course of a controversy conducted a newspaper on a question of veracity, called the plaintiff a "scoundrel" and said he "would be unprincipled enough to deny" the act he had been accused of "when charged with it," and the court held the communication was privileged, and left it to the jury to say whether the defendant had abused his privilege, and had acted with malice, and not honestly, and in the protection of his own interest. In the declaration and proof are found circumstances indicating the use of the words in a qualified sense. The plaintiff charges the defendant with having accused him of "trying to help" the woman "to rob" him, and then uttering the denunciatory words, "robber," "thief" and "cur." And the defendant and his wife testify to insults given by the plaintiff in the same connection.

In view of the facts thus disclosed, the court erred in refusing to give the following instruction: "The court instructs the jury, that the real question for you to determine first in this case is was the words or epithets spoken by the defendant [695] honestly and in good faith, upon probable cause, he believing at the time the plaintiff was trying to take advantage of him in the cause then pending before the Justice's court, and was

the act done for a laudable purpose, to protect himself and his property, and if you think from the preponderance of the credible evidence in the case that it was so done, then your verdict should be for the defendant." The others on the same subject were properly refused. They were all abstract in form and some of them assumed as true facts in issue.

Two instructions given at the instance of the plaintiff were erroneous and prejudicial in that they precluded the jury from allowing certain circumstances, disclosed by the evidence, to mitigate the damages, or, if they did not deny this right, they were equivocal as to whether they could have such effect and, therefore, misleading. The justice said, in his testimony, he thought Kahle was under the influence of whiskey on the occasion of his use of the words complained of. There was also evidence that the plaintiff, in the course of the altercation, declared the defendant was drunk and crazy and called upon by-standers to take him away. In view of this evidence, the court instructed the jury that the intoxication of the defendant, if any "should not be considered even in mitigation of damages unless" they believed "the defendant was so badly intoxicated as to have lost control of his reason, or as to negative malice." So framed, the instruction permitted consideration of the circumstance as matter of complete exoneration from actual malice, and forbade its consideration as matter of mitigation, affecting, not the question of liability for actual malice, but only the quantum of damages; for it told the jury they should not consider it at all, unless it was so intense as to have caused loss of control of reason or to have negatived malice, in either of which cases there could have been no liability beyond the consequences of legal malice. In effect, the instruction says the circumstance cannot mitigate the damages unless it wholly prevents recovery on one of the grounds of liability. Plainly it means drunkenness of the defendant at the time of a slanderous utterance is not a mitigating circumstance at all. The other one is very similar and is condemned by the same process of reasoning. It told the jury heat of passion on the occasion of the use of the [696] words provoked by quarrelsome and insulting words of the plaintiff was "no defense or justification for the defendant for using such words," but could be "considered only upon the question of actual malice." This is too narrow, since it limits consideration of the circumstance and its effect to one purpose only, and denies it force and effect in the determination of the amount of the damages. The manifest tendency of the instruction, if not its design, was to deny the circumstance any mitigating effect, in case of liability for an act malicious

in fact as contradistinguished from one malicious in law.

Actual malice on the part of the defendant does not preclude his right of mitigation by proof of circumstances inducing the utterance of the slanderous words or other wrongful act. "If the malice of the defendant is to be punished by the imposition of additional damages or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct and not to make allowance for the infirmities of men when smarting under the sting of gross and immediate provocation." Dixon, C. J., in *Morely v. Dunbar*, 24 Wis. 183; *Wilson v. Young*, 31 Wis. 574; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468. Generally mitigating circumstances are not allowed to reduce the actual damages, but they may reduce without wholly defeating, the exemplary or vindictive damages. *Sutherland on Damages*, secs. 149 to 167.

Intoxication of the defendant at the time of the utterance of the slanderous words is a mitigating circumstance. *Sutherland on Damages*, sec. 153; 18 Am. & Eng. Enc. of Law (2d ed.) 1007; *Howell v. Howell*, 32 N. C. 84; *Gates v. Meredith*, 7 Ind. 440; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676. But one case asserts the contrary, *Mix v. McCoy*, 22 Mo. App. 488, not a court of last resort. Provocation is also a mitigating circumstance. *Sutherland on Damages*, sec. 152; Cyc. 518; 18 Am. & Eng. Enc. of Law (2d ed.) 1007, 1108; *Newell, Defamation*, p. 515.

Two instructions, requested by the defendant and refused by the court, were designed to direct the jury to the subject [697] of mitigation in general terms; and the court, after some modifications thereof, gave them. As requested, the first one would have told the jury the defendant had the right to prove and explain all the facts and circumstances surrounding the speaking of the words and to show and explain them in mitigation of damages. The court altered it so as to make it say the jury might consider the facts and circumstances for the purpose of disproving malice and as bearing on the quantum of damages. The second one, as offered, would have authorized the jury, in estimating the damages, to consider all the attendant facts in mitigation of the damages and also the degree of malice on the part of the defendant. This the court altered only to the extent of the insertion of the phrase "if any" after the phrase "mitigation of damages." The modi-

fications were clearly not prejudicial. On the contrary, they wrought a decided improvement as to both form and substance.

But neither these two instructions as given nor the others have corrected the error in the two given at the instance of the plaintiff, already noted. They abstract or withhold from the operation of the last two discussed, relating to mitigation, the principal mitigating circumstances disclosed by the evidence. If not, then all four of them would be contradictory and misleading.

The principle of mitigation is not denied by the Virginia cases. On the contrary, it is expressly asserted and approved in *Bourland v. Eidson*, 8 Grat. (Va.) 27. It is also declared in *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757. There are in these and other decisions enlightening discussions as to the right to prove, under the plea of not guilty, as matter working mitigation, facts tending to establish the truth of the words spoken, and subsequent self-serving declarations, but this case involves no question of that kind.

For the errors noted, the judgment will be reversed, the verdict set aside and the case remanded for a new trial.

Reversed and remanded for new trial.

Robinson, J., does not concur.

#### NOTE.

#### Intoxication as Justification or Mitigation of Slander.

Intoxication at the time of the speaking of defamatory words is no defense to an action for slander based thereon. *Kendrick v. Hopkins*, Cary (Eng.) 93; *McKee v. Ingalls*, 5 Ill. 30; *Reed v. Harper*, 25 Ia. 87, 95 Am. Dec. 774; *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171; "Qui peccat ebrius, luat sobrius." *Kendrick v. Hopkins*, supra. In *Reed v. Harper*, supra, it was said: "The only point insisted on in argument is, that the court should have instructed the jury that if they believed from the evidence, that the defendant was so intoxicated at the time he spoke the words that he did not know what he was about, the plaintiff could not recover. The court did not so instruct, but did instruct the jury, that it is no sufficient cause to defeat the action if it appears that the defendant was drunk when he uttered the words, if he did utter them; but in considering the amount of the verdict, it was their duty to consider all the facts and circumstances attending and surrounding the speaking of the words. In this the court did not err. Drunkenness will not excuse a slander."

By the weight of authority the fact that a person was intoxicated at the time of speak-

ing defamatory words is admissible to mitigate the damages in an action for slander. *Howell v. Howell*, 32 N. C. 84. See also *Iseley v. Lovejoy*, 8 Blackf. (Ind.) 462. And see the reported case. In *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171, it was said that drunkenness "may perhaps be a matter of mitigation." In *Gates v. Meredith*, 7 Ind. 440, evidence that the defendant in an action for slander had by continued dissipation become reduced to a besotted condition was held to be admissible. The court said: "On the trial the defendant offered to prove, 'that at the time of the speaking of the words complained of, the defendant's mind was so besotted by a long course of dissipation, and his character so depraved, that no one who knew him would pay any attention to what he might utter, or give any credence whatever to any slanderous charge he might make;' but the court refused to permit the proof. 'To besot' is to stupefy, to make dull or senseless, to make to dote; and 'to dote' is to be delirious, silly, or insane. These are some of the meanings. See Webster. The law is now settled, as the general rule, that mental incompetency intentionally and knowingly to perform an act, though produced by a course of intemperance, exempts from legal responsibility for such act. This rule is made to apply to contracts and to crimes. Taylor's Med. Jur. 653. It must apply in cases of slander. Slander must be malicious. An idiot or lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of one 'who knows better.' Greenleaf goes farther. He says (vol. 3, s. 6) 'so where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered.' We think the evidence might have been given under the general denial of the complaint, touching the questions of malice and damages." In *Howell v. Howell*, 32 N. C. 84, the court, holding the fact of intoxication to be admissible in mitigation, added by way of qualification that a repetition of the defamatory words by the defendant when he is sober avoids the effect of the intoxication as a mitigation of the previous utterance thereof. The court said: "So, if one, being drunk, speaks slanderous words and does not repeat them, when sober, his being drunk is a circumstance to mitigate the damages, because it tends to rebut the presumption of 'malice,' and the words of a drunken man are not usually attended to, and, therefore, are not much calculated to injure. But when the slanderous words are spoken on many occasions, public and private, when the defendant is sober as well as when he is drunk, on some

of the occasions, when the words are spoken, instead of tending to rebut the idea of 'malice,' this tends to show that the defendant's heart is boiling over with malice, and cannot in any point of view be allowed as a reason for abating the damages which the jury would otherwise think proper to give."

However, in *Mix v. McCoy*, 22 Mo. App. 488, it was held that intoxication is not admissible in mitigation of slander. The court said: "If, then, the law does not mitigate, extenuate, or excuse, in a cause involving murder, where every benefit is given to the accused, we cannot give it that effect in a civil action, where the defendant has not the vantage ground given him in a criminal proceeding. If drunkenness is not of sufficient efficacy to save one's life it surely should not shield his money. All motives of policy for excluding it, in the one case, will apply with equal force to the other. Under our statute this defendant might have been indicted for the utterance of these words, and in such case it would not be pretended that 'the drunken condition' of defendant could be received in evidence. I can see no reason why the same rule will not exclude it in the present action." In a later case from the same jurisdiction, *Israel v. Israel*, 109 Mo. App. 360, 84 S. W. 453, a decision was rendered apparently inconsistent in principle with that last cited, though the fact of intoxication was not involved. In that case it was said: "If the slanderous language is spoken under excitement and passion, that fact may be given in evidence to mitigate the damages, as going to show want of actual malice on the part of the speaker and that his conduct does not deserve more punishment than may result from making the injured party whole."

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WATSON

v.

ADAMS.

WATSON

v.

FRANKLIN.

Alabama Supreme Court—January 22, 1914.

187 Ala. 490; 65 So. 528.

**Indemnity Insurance — Proof that Defendant Is Indemnified.**

The admission on cross-examination of defendant, whose chauffeur is alleged to have

negligently run down plaintiff, of testimony tending to show that counsel appearing for defendant represents an indemnity insurance company is error, as defendant's liability is not affected by the fact that he is indemnified nor does it affect his credibility.

[See note at end of this case.]

**Same.**

Error in the admission on defendant's cross-examination of testimony tending to show that defendant was indemnified against liability by an insurance company is highly prejudicial.

[See note at end of this case.]

**Harmless Error — Cure by Instruction — Duty of Requesting.**

Care and caution is to be exercised in the delicate, difficult, and important matter of removing the prejudicial effect of evidence improperly admitted, the burden of which rests upon the party causing its admission, and no duty rests upon the other party in that connection after seasonably and properly reserving his exception to its admission.

**Error Not Cured — General Remark by Court.**

Prejudicial error in the admission of evidence that counsel appearing for defendant represented an indemnity insurance company is not cured by plaintiff's counsel stating, at the close of the evidence, that he wanted defendant's testimony (on cross-examination) that certain counsel appearing for him represented an indemnity insurance company, excluded, upon which the court said, "That will not be before you for consideration," as the exclusion attempted was too general and indefinite, the difficulty of eradicating the unfavorable and erroneous impression naturally caused thereby demanding a more definite and comprehensive pointing out of the matter to be excluded, and the court's statement was not sufficient in direct, positive, and unequivocal instruction to eradicate such impression, which should have been eliminated by an affirmative instruction to entirely disregard the whole matter for all purposes, especially in view of the fact that the attempted exclusion was made some time after the admission of the evidence, during which time an impression might have been made on the jury, which the court's statement failed to condemn and remove.

**Failure to Object to Insufficient Withdrawal of Evidence.**

The insufficiency of an attempt to exclude evidence, erroneously admitted, so as to remove its prejudicial effect, is not waived by the excepting party's failure to deny its sufficiency, upon the party causing the admission of the evidence stating that, if the other was not satisfied with the exclusion, he would have the questions and answers read by the stenographer, since, the burden of removing the prejudicial effect being on the party causing the admission, the excepting party could not be required to affirm or deny the sufficiency of the attempted exclusion, and his mere silence did not amount to an affirmation.

**Evidence — Weight — Circumstantial Evidence.**

Circumstantial evidence is accepted with great caution.

**Instructions — Use of Word "Alibi" in Civil Case.**

An instruction in a civil action against the owner of an automobile, whose chauffeur was alleged to have negligently run down plaintiff, that if defendant's plea of "alibi" was false that was a discrediting circumstance is erroneous, as the use of the term "alibi" and the rule stated is not appropriate in a civil action; the inducement to avert the imposition of damages not being the equivalent of the reason for making a false alibi in a criminal case, where the offender's life or liberty is affected, a discrediting circumstance.

**Death by Wrongful Act — Nature of Action.**

An action under the Homicide Act (Code 1907, § 2486), authorizing actions for damages for any wrongful act, omission, or negligence causing the death of another, is a civil, not a penal or quasi criminal, action, though the damages are punitive.

Appeals from Circuit Court, Jefferson county: CROWE, Judge.

Actions by Fannie Allen Adams, administratrix, plaintiff, against T. J. Watson, defendant, and by John P. Franklin, plaintiff, against T. J. Watson, defendant. Separate judgments for plaintiffs on joint trial. Defendant appeals. The facts are stated in the opinion. REVERSED.

R. H. Thach, J. T. Stokeley and Frank L. Ward for appellant.

Percy, Benders & Burr and Howard & Sinit for appellees.

[492] McCLELLAN, J.—These appeals, from a joint, single trial and separate judgments, for the plaintiffs, present identical matter for review, though each appeal, with its assignments, is properly brought up on a separate transcript. The appeals are therefore considered together.

Between 12 midnight and 1 a. m. of January 14, 1912, George B. Adams and John P. Franklin were struck by a rapidly moving automobile; Adams being killed and Franklin seriously injured. The place of the occurrence [493] was in Twelfth street, out several feet from the sidewalk, in the city of Birmingham. At and about the point where the collision took place, it appears that the street was an important and frequently, if not almost constantly, used (night and day) thoroughfare in that city. The complaints ascribed the injury to these men, in the first counts, to negligent operation of the automobile, and in the second, to wanton or willful misconduct.



The pleas were the general issue. It is manifest from the evidence that every material issue made by the pleadings was for the jury's consideration and determination. This conclusion is not, as it could not well be, questioned on the record here.

The single, controlling question litigated by the parties was the identity—the ownership—of the automobile which killed Adams and injured Franklin. This issue was strenuously, and with every indication of diligence and of skill of able counsel, contested on the trial, and is projected here in earnest arguments upon the impropriety vel non of the court's action in overruling the motion for new trial, particularly on the ground assailing the verdict's justification in the evidence. The view prevailing here on questions other than that just mentioned renders it as unnecessary, as it is undesirable that an elaborate discussion of the evidence should be undertaken. However, it is both proper and necessary, in view of the considerations to be hereafter stated, that it be said that the conflicting evidence upon the issue of identity of the agency of injury, with the burden resting upon the plaintiff to establish, to the requisite decree, appellant's automobile as the guilty agent, makes this an instance typical of the wisdom and judicial necessity for calling upon 12 practical, sensible, impartial, oath-bound men, in the jury box, to justly resolve the issue, that justice may be the more certainly done. In [494] this instance, what is the truth depends, under this evidence, upon the weight and credibility the triers of the fact give to the testimony of many witnesses on each side of the issue line.

During the cross-examination of the defendant (appellant), the bill of exceptions recites (omitting seasonable objections and motion that raised the questions to be hereafter discussed):

"Thereupon the plaintiff's counsel asked the witness the following question: 'Do you know who did employ Mr. Ward to defend him; do you know who Mr. Ward is representing now in this case?' To which question the defendant's counsel objected. Thereupon plaintiff's counsel asked the witness the following question: 'Is he representing you; are you paying him to handle this case and get up the evidence?' Defendant's counsel objected to the question as calling for irrelevant, immaterial, and incompetent testimony, which objection the court overruled, remarking, 'He has a right to know who he represents,' and, to the action of the court in overruling said objection, the defendant then and there, in open court, duly, separately and severally excepted. Answering, the witness testified: 'I suppose he is representing me; I am not paying Mr. Ward. I didn't employ him in the case.' Thereupon plaintiff's coun-

sel asked the witness the following question: 'Who did employ him in this case?' . . . Answering the question, the witness testified: 'I don't know.' Thereupon the plaintiff's counsel asked the witness the following question: 'Don't you know that the Aetna Insurance Company does?' 'No, I do not.' Defendant's counsel after answer had been made objected to the question as calling for irrelevant, immaterial, and incompetent testimony. The court remarked: 'He says he don't know.' Thereupon plaintiff's counsel asked the witness the following question: 'Do you know who Mr. Stokeley is [495] representing?' The defendant objected to the question on the ground that the record shows who he is representing. Thereupon the plaintiff's counsel asked the witness the following question: 'Are you employing Mr. Stokeley in the sense of paying his fee in this case?' . . . Thereupon plaintiff's attorney asked witness the following question: 'All right, Mr. Watson, do you know who he is representing in the case?' And the witness, answering, said: 'Do you mean am I paying him to represent me?' And plaintiff's attorney replied: 'No, sir; I am not paying him to represent me.' . . . Thereupon the plaintiff's counsel asked the witness the following question: 'Do you know whether or not he is representing the Aetna Insurance Company?' . . . In answer to said question the witness stated 'Do I know he is representing the Aetna Ins. Co.?' Thereupon, in reply, plaintiff's counsel asked the witness: 'Yes, sir.' Answering said question the witness testified: 'I suppose he is; I could not swear who he represents. I suppose he is employed by that concern to represent them. I am under the impression he is.' Witness was then asked: 'You don't know whether he is or not.' And replied: 'I would not swear to it.'"

The attorneys appearing as representing the defendant were Joseph T. Stokeley, Frank L. Ward, and Robert H. Thach. On redirect examination, the defendant testified that he employed Mr. Thach, and that Mr. Thach represented him (defendant), and that Messrs. Stokeley and Ward were attorneys of record representing the defendant.

Upon the conclusion of the introduction of evidence, the bill of exceptions recites these matters, including, with that under consideration, other matter important as bearing upon other questions to be later treated:

"Thereupon the following proceedings took place: Mr. [496] Burr stated: There are two or three exceptions that Mr. Stokeley took that I want to consent that that evidence be excluded so there cannot be any possible question about it. The first is the statement made by Mr. Daly in reference to a conversation which he had with Mr. Kinney. Your honor

will remember that over his objection I was allowed to prove the statement that Kinney made in Shipman's presence, and I am willing for that to go out. The Court: Give me a statement of the effect. Mr. Burr: The effect of it was that Mr. Daly testified that Kinney identified this car in Shipman's presence. The Court: Gentlemen, don't consider that part of the testimony. Mr. Stokeley: He stated they were there at the same time, Kinney and Shipman. Mr. Burr: It is Daly's reference to the conversation that I am excluding. Mr. Stokeley: Your honor permitted him, over my objection, to testify to a conversation with a man named Kinney. The Court: All right, gentlemen, that is not before you. Mr. Burr: The testimony of Mr. Watson in reference that he supposed that Mr. Stokeley and Mr. Ward were representing an insurance company, I want that excluded, and what he said in reference to his employment of these gentlemen. The Court: That will not be before you for consideration. Mr. Burr: And also that portion of the conversation of Mr. Kinney in my office, we will let that go out too. The Court: All right, gentlemen, don't consider that. Mr. Stokeley: This question of Mr. Burr's that we objected to, we withdraw that objection to Mr. Adams about his advice and the witness afterward answered. Mr. Burr: That is out too. The Court: That is out too. Mr. Burr: Brookins was asked some questions in reference to these photographs (referring to photographs in evidence), some of them answered and some objections were sustained, too. If they want Mr. Brookins to re-examine him on that, I am willing for them [497] to do it. Mr. Stokeley: How long will it take to get him here? Mr. Burr: The witness stated he could not tell from these photographs, and they are all in evidence now. Mr. Stokeley: I wanted to show by him that from the pictures he could not identify the car at all. This witness undertook to identify this as being Mr. Watson's car; what I asked him was whether or not the different pictures I showed him was Mr. Watson's car. I wanted to ask him if he could pick out Mr. Watson's car. Mr. Burr: At that time it was not shown that either one was a picture of Mr. Watson's car. Mr. Stokeley: We will look that up to-night and have him here in the morning if we need him. The Court: I will allow you to put him on. If he comes in, I will interrupt the argument long enough for you to interrogate him. Defendant's attorney did not call said witness to again take the stand. Thereupon attorney for plaintiff made the following statement: In reference to the objections which we have admitted, we think it is clear, and the jury understands what has just been excluded, but, if the attorneys for defendant are not satisfied with the suffi-

ciency of the exclusion, we desire the stenographer to turn to his notes and have it read by question and answer?"

It is manifest that the quoted cross-examination of the defendant had for its object the introduction to the jury's consideration of wholly illegal evidence, to the effect that an indemnifying insurance company was defending, in defendant's name, against liability for the wrongful death of Adams and for the wrongful injury of Franklin. This fact, if so, was entirely outside of the issues made by the pleadings. The legal accountability of defendant for the death of Adams and the injury of Franklin depended upon wrongful act or omission of defendant's servants. Whether defendant was [498] indemnified against the legal consequences of wrongful conduct (if so) of one for whose misconduct (if so) he was legally responsible could not, in the nature of things, tend in any degree to show wrongful conduct, by his servant, proximately causing the tragedy disclosed by the evidence. It was equally as irrelevant for the purpose of affecting the credibility of the defendant as a witness in his own behalf. These conclusions are too clearly correct to require any elaboration. In this connection pertinent reference may be made to the near, though conversely presented, analogy to be found in our recent case of *Long v. Kansas City, etc. R. Co.* 170 Ala. 635, 641, 642, 54 So. 62, where it was ruled that the fact that the plaintiff had been paid by an insurance company the value of property destroyed by fire communicated thereto by defendant's locomotive was a matter of no concern whatever to the defendant, and incapable of affording it any degree of protection or immunity from the legal consequences of its wrong in destroying plaintiff's property.

There was therefore affirmative, highly prejudicial error in the allowance of testimony to show, or tending to show, that defendant was indemnified in the premises, in any degree or fashion, by an insurance company. So the main contention for appellee, in this connection, is that the errors indicated were rendered innocuous by the withdrawal of the offending matter (quoted before); such retraction or elimination thereof as evidence being effected as shown by the pertinent part of the recitals last quoted from the bill of exceptions.

In *Smith v. State*, 107 Ala. 144, 18 So. 308, it was said, and so in harmony with many earlier decisions:

"Courts have been perplexed in laying down satisfactory rules, where illegal evidence calculated to prejudice the defendant has been received, and subsequently [499] excluded, but it may be regarded as settled in this state that the admission of illegal evidence, which is subsequently excluded and the jury in-

structed to disregard such evidence, cures the error, and vitiates the exception reserved to its admission."

This rule was recently again approved in *Western Union Tel. Co. v. Rowell*, 166 Ala. 651, 51 So. 880. Consistent with the reason of the rule, and in consequence of obvious necessity, the burden and obligation to subsequently remove, to *wholly neutralize*, the prejudicial effect wrought by the admission, over the adversary's seasonable and apt objection, of such illegal matter is upon the party inducing the admission of such illegal matter as evidence in the cause. He it is who must become the actor—the movant—in purging the record not only of error so wrought but also in eradicating from the minds of the jury the prejudice which the illegally admitted matter has probably or naturally effected. It was pertinently said in *Childs v. State*, 55 Ala. 30, in disapproval of the practice under consideration:

"... It may be difficult, sometimes, for jurors to prevent evidence that has been improperly before them from having some influence in shaping the verdict they must render."

And in consequence we may add the obligation of court and counsel to exhaust every reasonable means for the removal of all reasonably possible prejudice from the minds of the jury enhances as the subject of the illegal admission is apparently susceptible of subtle and sinister effect upon the discharge by the jury of the grave and supremely important duty committed to the jury.

In *Jordan v. State*, 79 Ala. 12, it was also pertinently said of the subsequent exclusion of the improperly received matter:

[500] "But, in such case, the court should endeavor, as far as *practicable*, to remove any unfavorable and erroneous impression which such evidence may have made, and should *clearly and explicitly* instruct the jury to disregard it altogether." (Italics supplied.)

In the case of *Carlisle v. Hunley*, 15 Ala. 625, 626, this was the observation made by the court:

"Every one familiar with the practice knows how difficult it is to eradicate from the mind of the jury an injurious impression thus created (*McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280), by permitting illegal proof to be submitted to them, and, in such case, nothing short of a direct and unequivocal charge to them, to disregard the illegal proof, would be likely to erase the impression."

In the case of *Jackson v. State*, 94 Ala. 89, 10 So. 511, this was set down by Chief Justice Stone:

"It is certainly much the safer and better practice to exclude illegal testimony when first objected to. This because of the difficulty of eradicating from the minds of the

jury the impression such testimony is liable to make."

In the case of *Green v. State*, 96 Ala. 32, 11 So. 479, touching the practice under view, it was said:

"*This court regards with caution* the practice of admitting illegal evidence and afterwards excluding it. It has frequently declared that the practice cannot be encouraged. . . ." (Italics supplied.)

There are other deliverances made here that likewise conclude in expression of this court's long maintained and wisely chosen attitude of care and caution, suggested by the delicacy, difficulty, and importance of the matter, in such circumstances.

The obligation being to cure error already committed to the objector's prejudice, manifestly there is no [501] duty upon him to take further action after seasonably and properly reserving an exception to the adverse ruling of the court on his objection. He may stand upon his exception; and if the error committed is not cured as we have stated, his seasonably and proper exception will avail on appeal without other action on the objector's part. But of course he may waive the error, and its injurious effect—a consideration that will be later adverted to.

Were the errors in respect of the insurance, improperly admitted during the cross-examination of defendant, cured by what was subsequent said and done? The last quotation from the bill discloses all the bill shows in this connection.

Without cumbering the opinion with a repetition of the defendant's examination by counsel for plaintiffs, it will suffice to state the conclusions of obvious evidential effects to be necessarily drawn therefrom. The witness was the defendant. He, before all others, must ever be presumed to know who are *his* engaged counsel, representing him on the trial. To draw from him, as a witness, the statements in effect that he did not engage named counsel appearing of record in behalf of the defendant; that he is not paying named counsel of record for service in the litigation; that he does not know who did employ named counsel of record for the defense; that he does not know that the "Aetna Insurance Company" was employing such counsel; that he (witness) supposes, though he cannot swear it, one of such counsel is representing the "Aetna Insurance Company" in the cause; that he (witness) is under the "impression he (named counsel of record for defendant) is" representing that "concern"—naturally and reasonably tended to establish or give support to these, among other possible matters of fact: (a) That the insurance company [502] named had a vital interest in the defeat of plaintiffs' causes of action; (b) that that interest was in the nature of an indemnity

to defendant; (c) that defendant's interest in the contest was at most co-ordinate with, and perhaps subordinate to, that of the insurance company; (d) that the dominating direction and control of the defense, though in defendant's name, was with counsel furnished and engaged by an insurance company.

Now, what was the court's invitation to subsequently exclude in this connection, and what did the court's statement to the jury effect? We quote:

"Mr. Burr stated: There are two or three exceptions that Mr. Stokeley took that I want to consent that that evidence be excluded so there cannot be any possible question about it. . . . Mr. Burr: The testimony of Mr. Watson in reference that he supposed that Mr. Stokeley and Mr. Ward were representing an insurance company. I want that excluded, and what he said in reference to his employment of these gentlemen. The Court: 'That will not be before you for consideration.'"

In view of the manifest evidential effect of Watson's examination, on the cross, on this subject, we are clear to the point that what was said and done, by counsel and by the court, fell far short of full, due effort to eradicate from the minds of the jury the "unfavorable and erroneous impression," necessarily made thereby. Aside from the very near perfunctory manner and method by which the exclusion was undertaken, there was a marked indefiniteness and generality in respect of the matter desired to be excluded in this connection. This is apparent when reference is had to the recitals of the bill which we have quoted before. The difficulty, at best, of eradicating the "unfavorable and erroneous" impression naturally to follow what is shown to have occurred [503] demanded a more definite, and at the same time a more comprehensive, pointing out the matter desired to be excluded, to cure error. This conclusion of fact is further supported by the subsequent proffer of counsel (for plaintiffs), after affirming that the jury understood what had been excluded, that:

"If the attorneys for defendant are not satisfied with the sufficiency of the exclusion, we desire the stenographer to turn to his notes and have it read by question and answer."

And the statement of the court, "If we assume that *you* therein referred to the jury, and that the jury so understood the reference," was not sufficient in direct, positive, and unequivocal instruction to effect the eradication from the jury's minds of the impression naturally made by the cross-examination of Watson on this subject. The court simply said, "That will not be before you for consideration." The court, if it would have eliminated even obviously invited unfavorable

impressions made by the examination quoted before, should have affirmatively instructed the jury to entirely disregard the whole matter and to not consider not only the fact of the nonemployment of counsel by defendant or of their employment by the insurance company but also to not consider *for any purpose* the matter drawn out in this connection. When it is remembered that this effort to exclude was not made until after all the evidence had been submitted to the jury—some time after the admission of this illegal matter to the jury—the inefficiency of the little more than casual statement of the court is emphasized. The court did not undertake, except by a pronoun adoption of what counsel had just said, to draw to the particular attention of the jury that which was to be excluded. As always and inevitably, evidence admitted and submitted to a jury [504] is a factor, in an active sense, at once upon its submission. The theory (if it prevails) that juries will not or do not consider evidence until they retire to consider of and to make up their verdicts is not to be recognized in such circumstances. Our cases, quoted before, refuted the theory, and so are in harmony with the common experience. So, when the court merely said "that will not be before you for consideration," there was a manifest omission to condemn and remove any impression that might reasonably have been accepted by the jury, or any of the jury, during the consideration that preceded the court's impositive, indefinite statement (assumed to be) addressed to, and so understood by, this jury.

It is in effect insisted that the stated proffer of counsel for plaintiffs to counsel for defendant to have the questions and answers read by the stenographer, if defendant's counsel were not satisfied with the sufficiency of the exclusion attempted, was a waiver in the premises. The burden was not, as has been stated, on the defendant to contribute to the curing of the errors and the eradication of the prejudicial effects resulting therefrom. It was not given the court or counsel to require the exceptor to affirm or to deny the sufficiency of the exclusion attempted. That the exceptor's counsel made no response to the proffer of plaintiff's counsel could not operate as an affirmation in the premises. It does not appear that any response was made to the proffer of plaintiffs' counsel. If defendant's counsel had conceded the sufficiency of the attempted exclusion or had objected to further effort to effect a sufficient exclusion, there would have been a complete waiver in the premises. Such does not appear to have been the circumstances.

Prejudicial error, that was not cured, affects the judgments.

[505] The following special charge, requested by the defendant, was given to the jury:

"The evidence in this case is entirely circumstantial, and circumstantial evidence is accepted with great caution, and if you find that all of the circumstances tending to show that defendant's car collided with the plaintiff, Franklin, and the deceased, Adams, have been fully explained, to your reasonable satisfaction, and you are satisfied from the evidence of the truth of such explanation, then it would be your duty to return a verdict for the defendant."

The bill of exceptions there recites these occurrences:

"Immediately after reading said written charges, the court stated to the jury: 'I also charge you that the proof of alibi is also accepted with great caution.' Thereupon the defendant, in open court, after all of the charge had been completed, duly excepted to that part of the charge of the court, viz.: 'I also charge you that the proof of alibi is also accepted with great caution.' Thereupon the court stated to the jury: 'I want to withdraw what I said as to the question of alibi, and charge you on that subject as follows: If you believe from the evidence in this case that the plea of an alibi was not interposed in good faith, or that the evidence to sustain it is simulated, false, and fraudulent, then this is a discrediting circumstance to which you may look in connection with all the other evidence in determining your verdict.' The defendant thereupon, in open court, duly excepted to the foregoing part of the court's oral charge last quoted, as follows: 'If you believe from the evidence in this case that the plea of an alibi was not interposed in good faith, or that the evidence to sustain it is simulated, false, and fraudulent, then this is a discrediting circumstance to which you may look in connection [506] with all the other evidence in determining your verdict.'"

While the complaint in the case of Adams, who was killed, is drawn under the Homicide Act (Code, § 2486), and the recoverable damage is punitive only, yet the action is civil, not penal or quasi criminal. *Southern R. Co. v. Bush*, 122 Ala. 470, 488, 489, 26 So. 168. The term "alibi" is of the criminal parlance only. It has no place in civil proceedings of this nature. If John Belt was on trial for criminal conduct, in respect of the death of Adams or the injury of Franklin, and sought to show his presence elsewhere at the time of their injury, the term "alibi" would have appropriate place in the proceeding. Here the action is civil. It would fix liability upon the defendant under the doctrine of respondeat superior. It is not pretended that Watson, the defendant, had any hand in the tragedy. It is by imputation only that he is asserted to be responsible and in consequence liable. The special charge quoted was

correctly given to the jury. But the court fell into affirmative error in its effort to cure what the court evidently thought was of at least doubtful propriety in charging, as it did, with respect to the great caution with which proof of an alibi is accepted. The effort to correct, if indeed it did not amplify the unwisdom of the first voluntary statement, took the form of appropriating approved language in *Tatum v. State*, 131 Ala. 35, 31 So. 369. Whether that language, and the proposition it announced, is in accord with *Albritton v. State*, 94 Ala. 76, 10 So. 426, and *Beaver v. State*, 103 Ala. 36, 15 So. 616—a matter of doubt at least to the author of 5 *Mayfield's Digest* (see page 22)—need not now be considered, though upon proper occasion it may well be inquired into. It will suffice to point out that the inducement possible or probable of operation in a civil suit, [507] to avert the imposition of damages, is not the equivalent of the reason why a detected false, perjurious, fraudulent alibi in a criminal's defense is said, in *Tatum v. State*, supra, to import against the defendant *discrediting* circumstance. In the latter proceeding there is the great natural call to prevent the infliction of personal punishment by defeating the adjudication of criminal guilt. In the former, the civil action, there is no effort to impose servitude or to deny freedom or to exact the life of the offender. Great as the love of money may be in some human beings, it cannot be presumed that to be held liable for damages is, to the ordinary man, the equivalent of the impending, unless diverted, exaction of his freedom or his life as the law's penalty for its violation. This action of the court also affects the judgments with error.

There are other questions argued by the respective counsel in their briefs. The conclusion prevailing here renders it unnecessary to treat them. Doubtless all questionable testimony will be avoided on the retrial to which the causes are remanded.

Both judgments are reversed; and both causes are remanded.

Reversed and remanded.

Anderson, C. J. and Somerville and de Graffenried, JJ., concur.

Rehearing withdrawn June 4, 1914.

#### NOTE.

The reported case holds that in an action to recover for personal injuries caused by the negligence of the defendant's chauffeur it is prejudicial error to receive evidence that the attorney appearing for the defendant represents an indemnity or casualty insurance company. The admissibility of evidence and the propriety of comment on the fact that a defendant other than a master in an action for

negligence is insured against liability is discussed in the note to *Akin v. Lee*, Ann. Cas. 1914A 947.

### LALOR

v.

### CITY OF NEW YORK.

New York Court of Appeals—May 20, 1913.

208 N. Y. 431; 102 N. E. 558.

#### Appeal — Review of Dismissal for Insufficiency of Evidence.

The court of appeals, in reviewing a judgment of the appellate division reversing a judgment dismissing the complaint at the close of plaintiff's evidence, will give plaintiff the advantage of all the facts properly presented and every favorable inference deducible therefrom.

#### Streets and Highways — What Constitutes Negligence — Slight Depression in Street.

A city was not negligent in permitting a circular hole in the middle of a street about as large as a barrel head, which was four inches deep at the deepest part and extended from the edge of the street crossing.

[See 20 Ann. Cas. 798.]

#### Evidence — Relative Weight of Measurement and Estimate.

Opinion testimony as to a witness' estimation from observation of the depth of a hole in the street is so conjectural as not to raise a substantial conflict, where there is other positive evidence by one who accurately measured the hole that it was of a different depth, so that the first-mentioned testimony does not make the question one for the jury.

[See note at end of this case.]

*Lalor v. New York*, 147 N. Y. App. Div. 649, reversed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action for damages. Mary Lalor, plaintiff, and City of New York, defendant. Judgment for defendant at Trial Term of Supreme Court. Judgment reversed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. REVERSED.

Archibald R. Watson, James D. Bell and Jesse W. Johnson for appellant.

A. L. Pincoffs and Frederick S. Martyn for respondent.

[433] COLLIN, J.—The action is to recover the damages for personal injuries sustained by the respondent through stepping into a hole in the asphalt pavement of Manhattan avenue at the corner of Huron street in the borough of Brooklyn. The judgment of the trial court dismissing the complaint at the close of respondent's evidence was reversed by the Appellate Division. We are to determine whether or not the evidence presented an issue of fact; in reviewing it we must give the respondent the advantage of all the facts properly presented, and of every favorable inference that can reasonably be drawn. (*Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474; *Pinder v. Brooklyn Heights R. Co.* 173 N. Y. 519, 66 N. E. 405.)

A witness for the respondent testified that the hole was circular, about as large as the head of a barrel was about midway of the street and extended from the edge of the crossing which the respondent was using at the time she was injured. He testified further that he measured with exactness the depth of the hole in a manner which he described, and its depth at its deepest part was four inches. The condition of the hole at the time of the measurement and at the time of the accident was the same. There are no circumstances revealed by the evidence which lessen or mitigate the effect of our decisions as authority that as matter of law the existence of the hole, as described by the witness, did not charge the defendant with negligence. *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944; *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401; *Butler v. Oxford*, 186 N. Y. 444, 79 N. E. 712; *Terry v. Perry*, 199 N. Y. 79, 20 Ann. Cas. 796, 92 N. E. 91, 35 L.R.A. (N.S.) 666.

The respondent asserts that there was a conflict between the testimony of the witness referred to and the testimony of other witnesses in her behalf necessitating a submission to the jury. At the opening of the trial the respondent testified that after the accident she, looking back, glanced at the hole and guessed and estimated that it was eight inches deep. She was followed upon the witness stand [434] by a woman who was with her at the happening of the accident and who testified that she guessed it was about nine inches deep. Next as a witness came a man who testified that in his "estimation the hole was about six or seven inches deep at the deepest point." Then a woman, who also was with the respondent when she was injured, testified that the hole was from four to six inches deep. She was followed by a man who testified that the hole was, in his opinion, five or six inches deep. No one of these witnesses had measured its depth. The witness who testified that he ascertained by an

actual and accurate measurement that the depth of the hole was four inches was the next and the last witness upon the stand. The testimony in regard to the location and diameter of the hole was consistent and harmonious.

There was not a substantial and real conflict in the evidence adduced by the respondent. The testimony that the depth of the hole as actually and accurately measured was four inches, if true, wholly deprived the estimates and conjectures concerning it of credibility. The demonstrated fact would utterly destroy their probative or evidentiary value and between it and them no conflict could exist. That testimony was produced by the respondent through a disinterested witness whom she presented to the court as worthy of credit. It is positive, precise, direct and credible upon its face and in connection with the other testimony. The testimony inconsistent with it is slight, conjectural and indefinite and, as against the former, it raised no real conflict and could not be adopted by the jury. *Terry v. Perry*, 199 N. Y. 79, 20 Ann. Cas. 796, 92 N. E. 91, 35 L.R.A.(N.S.) 666; *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292.

The judgment of the Appellate Division should be reversed and that of the Trial Term reinstated, with costs in both courts to the defendant.

Cullen, Ch. J., Gray, Werner, Hiscock, Cuddeback and Miller, JJ., concur.

Judgment reversed, etc.

#### NOTE.

#### Comparative Weight of Estimate and Actual Measurement.

It is generally agreed that proof of an actual measurement is so far superior to an estimate of the distance that no issue for the jury is raised by a conflict between the two. *Good v. Dodge*, 16 Pittsb. Leg. J. 84, 3 Pittsb. 557, 10 Fed. Cas. No. 5,531; *Mann v. Phoenix Brick, etc. Co.* 151 Mo. App. 586, 132 S. W. 19; *Truesdell v. Erie R. Co.* 114 App. Div. 34, 99 N. Y. S. 694; *Colligan v. New York*, 155 App. Div. 475, 140 N. Y. S. 271; *McIntyre v. Pittsburgh*, 238 Pa. St. 524, 86 Atl. 300; *Burroughs v. Milwaukee*, 110 Wis. 478, 86 N. W. 159; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *Konkel v. Pella*, 122 Wis. 143, 99 N. W. 453; *Busse v. State*, 129 Wis. 171, 108 N. W. 64; *Wanta v. Milwaukee Electric R. etc. Co.* 148 Wis. 295, 134 N. W. 133; *Milwaukee Trust Co. v. Milwaukee*, 151 Wis. 224, 138 N. W. 707. And see the reported case. *Compare Tennessee Cent. R. Co. v. Walker*, 155 Ky. 768, 160 S. W. 494; *Louisville v. Dahl*, 170 Ky. 281, 185 S. W. 1127. In *McIntyre v. Pittsburgh*,

supra, it was said: "While she and some of the witnesses who testified in her behalf, found fault with the width of the tread of the steps, yet none of them had measured it, and none of them knew with any degree of accuracy what the width was. They merely guessed at it when they said six or seven inches. And over against these guesses was the clear and positive testimony of the contractor who built the steps, and of the assistant city engineer and the inspector of highways and several other witnesses who knew whereof they affirmed, and spoke from actual knowledge derived from measurements; and these men all said that the steps were broad, being twelve inches in the tread, with an overlap from the step above of not more than an inch. If this was true, the steps were admittedly all that could be desired in that respect. The width of the tread was important from the plaintiff's standpoint, for unless she could show that it was too narrow for safety, her case must fail. She brought nothing more than conjecture upon the part of her witnesses to sustain the point, and as against actual measurements, these guesses did not amount to a scintilla of evidence. Where a matter of measurement is important, the 'guesses' or 'belief' of a witness cannot be accepted as against the sworn statements of competent witnesses who give the results of actual measurements." So in *Mann v. Phoenix Brick, etc. Co.* 151 Mo. App. 586, 132 S. W. 19, the court said: "It is true that he said he estimated that the new wire furnished him only added, when doubled, twenty-five feet to the old one. But he stated that it was a mere guess and that he had never measured it. Now it was clearly shown that he was furnished with a new spool of wire, containing 155 feet, and it was further shown that it was measured by others after it had been doubled and that it was seventy-seven and one-half feet long. It thus appears that he was furnished two and one-half feet more wire than what he stated to defendant would be sufficient, for, as already stated, his request was for seventy-five or one hundred feet. A mere guess should not be allowed control over an uncontradicted measurement. [Moore on Facts, secs. 414, 415.]" In *Wanta v. Milwaukee Electric R. etc. Co.* 148 Wis. 295, 134 N. W. 133, while the foregoing rule was recognized, it was held that the testimony of a witness who had measured with a stick the depth of a hole in a street was not an estimate though he had lost his memorandum of the measurement and testified from his memory thereof and though his testimony was opposed by proof of a measurement by an engineer.

In several cases the court in disregarding an estimate because it was opposed by proof of actual measurement appears to have pro-

ceeded on the theory that the party proffering the estimate was in fault in failing to produce the best evidence within his power. *Perkins v. Delaware Tp.* 113 Mich. 377, 71 N. W. 643; *Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 64; *Jones v. Detroit*, 171 Mich. 608, 137 N. W. 513; *Ryan v. Manhattan R. Co.* 121 N. Y. 126, 23 N. E. 1131; *Rothchild v. Central R. Co.* 163 Pa. St. 49, 29 Atl 702. In *Perkins v. Delaware Tp.* supra, the court said: "The evidence on the part of the plaintiff that the bridge sagged on the east side is as follows: Plaintiff's son testified that the bridge at the northeast corner 'sagged down a little'; another witness, that he observed that the east side was eight inches lower than the west side; another estimated that it was from four to six inches lower. . . . The highway commissioner made a measurement, and testified that at the north end there was an incline to the east of one inch. There is nothing in the record to impeach this actual measurement, and it must stand as true. The practice of permitting juries to base their verdicts upon guesses or estimates of distances or conditions which are susceptible of actual measurement is to be condemned. It is the duty of the plaintiff who seeks to recover damages for negligence to place before the jury the actual conditions when it is within his power to do so." On that theory it was held in *Cone v. Detroit* (Mich.) 157 N. W. 417, that a plaintiff was entitled to go to the jury on proof of an estimate though it was opposed to proof of actual measurement where it appeared that he was unable to procure a measurement. The court said: "It is strenuously argued by plaintiff's counsel that the testimony of plaintiff's witnesses did amount to actual measurements. Be that as it may, we are of the opinion that the instant case does not come within the rule announced in *Perkins v. Delaware Tp.* 113 Mich. 377, 71 N. W. 643; *Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 64; and *Jones v. Detroit*, 171 Mich. 608, 137 N. W. 513. In the opinion in the *Perkins* Case, it is said: 'It is the duty of the plaintiff who seeks to recover damages for negligence to place before the jury the actual condition when it is within his power to do so.' In the instant case the accident happened on Saturday afternoon, and the man was killed. Within a few days thereafter, according to the unquestioned testimony in the case (some witnesses saying as early as Monday of the following week), repairs were made and the faulty condition of the highway remedied. We do not think the burden should be placed on a plaintiff such as the widow of this deceased person to make an attempt to find the actual condition immediately upon the death of her husband, when he still remained unburied, in order to

be prepared to show the actual condition. It is true that, if this condition existed for some time, and no effort was made by the plaintiff to ascertain what the actual conditions were, it could be claimed that the rule in the *Delaware* case should be applied. But, in our opinion, the situation here presented is not within that rule, and the rule should not be enlarged by placing such a burden on a plaintiff under the circumstances disclosed in this record."

In *Louisville v. Dahl* (Ky.) 185 S. W. 1127, it was held, contrary to the view taken in other jurisdictions, that the relative weight of an estimate and an actual measurement is for the jury. In that case it was said: "It may be conceded that actual measurements of distances are entitled to more weight than mere estimates, and that for this reason some of the courts hold that testimony based on mere estimates or opinions is so conjectural and indefinite as to raise no real conflict with testimony based on actual measurements made by reliable witnesses, and may therefore be disregarded. . . . In this state, however, both the credibility of the witness and the weight of his testimony are for the jury. We are not at liberty to disregard his testimony on the ground that it is highly improbable or is at variance with other testimony of a more convincing character."

## NORTHERN PACIFIC RAILWAY COMPANY

v.

## RICHLAND COUNTY.

North Dakota Supreme Court—June 29,  
1914.

28 N. Dak. 172; 148 N. W. 545.

### Taxation — Property Subject to Special Assessment — Railroad Right of Way.

A railroad right of way, if actually benefited, may be assessed for a local drain, which is constructed under the provisions of chapter 23, Rev. Codes 1905, and this irrespective of the fact whether the fee is in the railroad company or not.

[See note at end of this case.]

### Courts — Formulation of Public Policy.

A supreme court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command but merely to construe; and where the people



have spoken, either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions and conclusions.

**Taxation — Property Subject to Special Assessment — Railroad Right of Way.**

Chapter 23, Rev. Codes 1905, which provides for the assessment of railroad rights of way for the benefits conferred by the construction of local drains, does not violate the provisions of the Fourteenth Amendment to the Federal Constitution, nor the so-called commerce clause (section 8, art. 1) of that instrument, even though it is sought to be applied to interstate lines.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Richland county: ALLEN, Judge.

Action to determine adverse claims in and to railroad right of way. Northern Pacific Railway Company, plaintiff, and Richland County, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[173] This action was brought by the Northern Pacific Railway Company against Richland county, for the purpose of determining adverse interests in and to an easement or right of way of the plaintiff company, the claim of the plaintiff being for a franchise or right of way as opposed to an ownership in fee. The answer admits the ownership of the franchise or easement, but asserts a lien arising from a levy for benefits assessed against the property for and on account of the construction of a drain under chapter 23, Rev. Codes 1905.

Judgment was rendered in the district court, decreeing a lien in favor of the defendant to the amount of \$3,180.70, and an appeal has been taken to this court upon the judgment roll merely and for the sole purpose of testing the legality of the proceedings.

*Watson & Young and Purcell & Divet* for appellant.

*C. J. Kachelhoffer, Gustav Schuler, W. S. Lauder and John L. Koeppler* for respondent.

[178] **BRUCE, J.** (*after stating the facts*). —The objection of the appellant goes directly to the jurisdiction of the drainage board to make any assessment, or at any rate to create any lien, against the right of way of the defendant company. It is that the alleged lien is void for the reason that special assessments for a local improvement of the kind in question cannot be made against a right of way or easement of a railroad company, and especially of one which is interstate in its character. It is argued that any sale which must neces-

sarily be had to enforce such a lien would be the sale of a fragmentary portion of the road-bed, which would not only disrupt the road and prevent the public service which the company was created to furnish, but would and could furnish to the purchaser no right or interest, as the land could only be used as a railway right of way, and without legislative sanction and permission no such right of user exists. It is claimed that such a proceeding would [179] violate both the Federal Constitution and the 14th Amendment thereto, and is not contemplated by chapter 23, Rev. Codes 1905. It is claimed that chapter 23 only contemplates the taxation of property in which the fee exists in the person sought to be charged.

The portions of the statute which appear to be pertinent are as follows: Section 1818: "Water courses, ditches and drains for the drainage of sloughs and other lowlands may be established, constructed and maintained in the several counties of this state whenever the same shall be conducive to the public health, convenience or welfare under the provisions of this chapter. The word 'drain' when used in this chapter shall be deemed to include any natural water course opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for such purpose." Section 1821: "A petition for the construction of a drain may be made in writing to the board of drain commissioners. If among the leading purposes of the proposed drain are benefits to the health, convenience or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities, to satisfy the board of drain commissioners that there is a public demand for such drain. If the chief purpose of such drain is the drainage of agricultural, meadow, grazing or other lands, the petition shall be signed by at least six or more freeholders whose property shall be affected by the proposed drain." Section 1826: "Upon acquiring the right of way, if the assessment of benefits has not already been made under the provisions of § 1824, the board of drain commissioners shall assess the per cent of the cost of constructing and maintaining such drain, and of providing the right of way therefor, which any county, township, city, village or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be

*drained only by the construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided."* Section 1831: "The board of drain commissioners shall make a list showing the amount [180] which each municipality and lot or track of land benefited by the drain for which the tax is levied is liable to pay on account of procuring the right of way or the construction of any drain, or both according to the per cent which by § 1826 it is required to fix and determine, a copy of which shall be served on the clerk or auditor of each municipality against which taxes are to be assessed. Such list shall thereupon be filed in the office of the county auditor of the county in which the municipalities and lands benefited by the drain are situated, and the auditor shall thereupon extend upon the tax lists as a special tax as provided by law the several amounts shown by the drain commissioners' list, specifying in such tax lists the particular drain for the construction or procurement of the right of way of which the special tax is assessed, which special tax shall be collected and enforced in the same manner as other taxes. When such special tax is for the right of way the same shall when collected be paid by the county treasurer into court for the benefit of the owners of the right of way. And the common council, or other proper taxing authorities of each city, or other municipality, against which such assessment is made as aforesaid, shall include in the first general tax levy thereafter made in said city or municipality, the amount so assessed against it, by the board of drain commissioners, and the same shall be extended upon the tax lists of the county for the current year by the county auditor against all the taxable property in such city or municipality in the same manner and with the same effect as other taxes are extended." Section 1832: "The drain taxes shall be collected by the county treasurer and all moneys so collected shall be credited to the drain fund to which they belong and the county treasurer shall be the treasurer of such drain funds. Payment of all expenses and costs of locating and constructing any drain shall be made by the board of drain commissioners issuing warrants in such amounts and to such persons as by such board may be found due. All warrants drawn by such board in payment for the right of way or construction of any drain shall be payable from the proper drain fund and shall be receivable for the taxes levied for the right of way or construction of such drain by the treasurer. All such warrants after presentation to the county treasurer for payment, if not paid for want of funds, shall be registered by the county treasurer and thereafter shall bear interest at the

rate of 7 per cent per annum." Section 1837: "Drains may be laid along, within the [181] limits of or across any public road, and when so laid out and constructed or when any road shall thereafter be constructed along or across any drain it shall be the duty of the board of county commissioners, or township supervisors, as the case may be, to keep the same open and free from all obstructions. A drain may be laid along any railroad when necessary, but not to the injury of such road, and when it shall be necessary to run a drain across a railroad it shall be the duty of such railroad company, when notified by the board of drain commissioners to do so, to make the necessary opening through said road and to build and keep in repair suitable culverts or bridges."

There is much to be said in support of the contention of appellants. Railroads are quasi public institutions. They have the right to make a reasonable profit on the investment which they represent. The state, on the other hand, has the power to regulate rates when that profit becomes excessive. It is clear that no profit can be made until the operating and fixed charges are met, and the higher the operating and fixed charges, the higher the rates will be that must be charged in order to make a fair return upon the investment. Special assessments, in fact all taxes, must indirectly increase the cost of operation and raise the point from which the profit begins, as well as the point at which the state is entitled to regulate the charges. They must, in fact, mean higher rates to the public. The first question is, Can local improvements which are for the immediate benefit of the locality merely, and the cost of which can be assessed upon adjacent property merely upon the theory of actual benefit, be imposed, when the cost thereof must ultimately be borne by the people as a whole? The second is, Can such taxes be made a lien upon a right of way, the sale of which may seriously interrupt the operation of the road?

The answer to the first question, to our mind, revolves entirely around the question of benefits. Local and general taxes may be imposed upon railway property because they both help to develop and to assure governmental and police protection to the territory through which the link of the road runs, and because the link is a part of a continuous whole and its police protection is necessary to that whole. Such taxes are valid even when levied upon the property of railroads which are interstate in their nature. A distinction, in fact, is drawn between a tax upon property which is used in interstate commerce or the instrumentality [182] of commerce, which is valid, and a tax upon the act of interstate commerce which is not. 7 Cyc. 478, 480; Cleveland, etc. R. Co. v.

Backus, 154 U. S. 439, 38 U. S. (L. ed.) 1041, 4 Int. Com. Rep. 677, 14 S. Ct. 1122, 133 Ind. 513, 18 L.R.A. 729, 33 N. E. 421; State Freight Tax Case, 15 Wall. 232, 21 U. S. (L. ed.) 146; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 U. S. (L. ed.) 683, 17 S. Ct. 305. The same rule applies to local drainage assessments. If they are in fact of any benefit to the railroad, and this is conceded by the record in the case at bar, in other words, if they tend to make the track and roadbed more secure, or, in extreme cases, to prevent the loss of health to passengers and employees incident to miasmatic swamps, they benefit the railroad as a whole and the state as a whole. We are not inclined to hold with the appellants that the only measure of benefits is an increased selling price, and as a purchaser can hardly be had for a link in a railroad right of way, and that as such sale should, if possible, be avoided, that no benefits can accrue. The railroad in fact, though not always holding a fee, has a beneficial use extending at its almost unlimited option over a long period of years, and an increase in the value of the use or a decrease in the cost of operation and maintenance are certainly benefits.

Even without a legislative expression upon the subject, there is much authority in support of the validity of an assessment such as that before us. See Louisville, etc. R. Co. v. Barber Asphalt Pav. Co. 116 Ky. 856, 76 S. W. 1097, 197 U. S. 430, 49 U. S. (L. ed.) 819, 25 S. Ct. 466; Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A. (N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Illinois Cent. R. Co. v. East Lake Fork Special Drain. Dist. Com'rs, 129 Ill. 417, 21 N. E. 925; Drainage Com'rs of Dist. No. 3 v. Illinois Cent. R. Co. 158 Ill. 353, 41 N. E. 1073; State v. Passaic, 54 N. J. L. 340, 23 Atl. 945; Northern Pac. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A. (N.S.) 286, 97 Pac. 1099.

The law in fact is summed up by Judge Elliott in his work on Railroads in § 7866, as follows: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently [183] similar cases. The latest authorities, . . . however, recognize what we believe to be the true rule, and that is, . . . where the right of way receives a benefit from the improvement for which the assessment is levied, and *there is no statute exempting* the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment."

It is not indeed for us to establish the public policy in this matter. It has been announced by the legislature, and the action of that body, in the absence of some constitutional prohibition, must be conclusive upon us. This is not a case where the court is called upon to construe or to enforce some private contract, concerning which no public policy has been announced. It is a case in which it is asked to set aside a statute which itself expresses the public policy of the state, merely because its conception of what a sound public policy may be differs from that of the legislative body. This it cannot do. In the announcing of the rules of public policy, indeed, the courts are the third and weakest link in the governmental triumvirate. Public policy, in short, is public policy. Its highest expression is to be found in a constitutional provision which expresses the will of the sovereign people, and which, being voted upon by the whole public, announces a policy which is truly public, both in its origin and in its expression. Where there is no constitutional provision upon the subject, the next highest expression is that offered by a statute which expresses the public will or policy as construed by the legislative representatives of the people, whose determination, in the absence of a constitutional prohibition, must of necessity be controlling. The third factor in the chain is the supreme court. It, however, has no power to command or to create, but merely to construe. It, in short, announces and can announce no public policy of its own, but merely what it believes to be the policy of the people as a whole, and where the people have spoken it must be controlled by their decisions.

That the public has spoken in the case before us admits of no questioning. Section 1826, of the Code of 1905, is indeed capable of but one construction. It expressly provides that "upon acquiring the right of way, if the assessment of benefits has not already been made under the provisions of § 1824, the board of drain commissioners shall assess the per cent of the cost of constructing and maintaining such drain, [184] and of providing the right of way therefor, which any county, township, city, village or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, and *which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided.*"

It is idle for counsel to argue that the legislature could only have intended depot or

similar lands, the sale of which would not interfere with the operation of trains, for the act is not only clearly a rural as opposed to an urban or city and village act (see *Stoltze v. Sheridan*, 28 N. D. 194, 148 N. W. 1), but nine depots out of every ten are constructed within the limits of the original right of way, and must often be moved if additional tracks are to be laid.

Nor does the fact that a sale of the right of way would perhaps be necessary as a last resort, nullify the statute. The uninterrupted performance by the railroad company of the public functions for which it was created may indeed be of great importance to the state and to the community; but the legislature may nevertheless deem that the collection of its taxes and a universal obedience to the supremacy of the law may be of more importance still. 37 Cyc. 842; *St. Louis, etc. R. Co. v. Miller County*, 67 Ark. 498, 55 S. W. 926.

There can, indeed, also be little difference between levying upon a right of way and levying upon a locomotive engine, which latter act is often done and generally held to be permissible. Both acts might equally interfere with and cripple the operation of the road.

In the case of *Heman Constr. Co. v. Wabash R. Co.* 206 Mo. 172, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630, the matter and contention was disposed of in the following language: "What we do hold is that, under the charter and ordinance, the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced. . . . As a general rule, 'where there is a right there is [185] a remedy,' . . . and this case we think forms no exception to the rule." See also *Metropolitan R. Co. v. Macfarland*, 20 App. Cas. (D. C.) 421; *McLean County v. Bloomington*, 106 Ill. 209. The situation, indeed, is not as serious as counsel for appellant would have us believe. If the assessment is a valid one and benefits are in fact conferred (and the company has all of the remedies and means of contesting invalid and illegal assessments that has any other property owner), it is its duty to pay the same without putting the county to the necessity of selling the land. Its paramount duty is to operate its line. The state's paramount duty is to enforce its laws and its judgments.

We have next to determine whether the act violates the provisions of either the 14th Amendment to the Federal Constitution or the 3d, or so-called Commerce Clause, of § 8

of article 1 of that instrument, when it is sought to be applied to interstate lines.

The first point was suggested but not argued by counsel for appellant, and needs no consideration here. It is sufficient to say that the state, in the main, can establish its own due process of law, and that if the state has the right to levy the assessment at all, and the legislature intended that it should be levied, there is in the act no violation of property rights nor of the day in court and equal protection of the laws which the 14th Amendment guarantees. The argument of counsel indeed is based not upon any theory of private property, but of public rights only. He insists that the railroad company has no fee in the land, but merely a right to pass thereover in the performance of a public service; and it is on the premise that a levy upon and sale of a section of the right of way would interfere with this public service that his whole argument is based.

We are not unmindful of the cases as cited by counsel for appellant. In none of them, however, was there a statute similar to our own and in which the legislative intention was clearly expressed that railroads should be subject to their operation. They were cases, indeed, in which the courts were left to infer what the legislative policy in relation to railway property might be, and this by a construction of general words merely. So, too, most of them were cases of assessments for pavements, sidewalks, or sanitary sewers which could not possibly benefit the right of way or render the operation of the road any safer or easier. See *Mt. Pleasant v. Baltimore*, etc. R. Co. 138 Pa. St. 365, 11 L.R.A. [186] 520, 20 Atl. 1052; *Chicago*, etc. R. Co. v. *Ottumwa*, 112 Ia. 300, 51 L.R.A. 763, 83 N. W. 1074; *Boston v. Boston*, etc. R. Co. 170 Mass. 955, 49 N. E. 95; *Detroit*, etc. R. Co. v. *Grand Rapids*, 106 Mich. 13, 28 L.R.A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; *South Park Com'rs v. Chicago*, etc. R. Co. 107 Ill. 105; *Chicago*, etc. R. Co. v. *Milwaukee*, 89 Wis. 506, 28 L.R.A. 249, 62 N. W. 417; *State v. District Ct.* 31 Minn. 354, 17 N. W. 954; *Seattle v. Seattle Electric Co.* 48 Wash. 599, 15 L.R.A.(N.S.) 486, 94 Pac. 194; *Koons v. Lucas*, 52 Ia. 177, 3 N. W. 84; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004.

A surface-water drain, indeed, which like the one in the case at bar, drains swamp lands along a right of way, is materially different from a sidewalk or pavement or a sanitary house sewer. The first may benefit the right of way by preventing its erosion. The others cannot possibly be of any advantage to it, except as they add to the general health and prosperity of the localities through which the road passes. In the case at bar the trial court found that the right of way was "in

fact materially and substantially benefited" by the drain, and no appeal was taken from this determination but on questions of law and of law alone. The question of benefits, therefore, is answered in the affirmative, and is established.

We fully agree with the supreme court of Massachusetts that a tax for local improvements upon a public-service corporation will usually be ultimately borne by the people of the whole state in the form of increased tariffs and charges, and that in the absence of a clear intimation in the statutes to the contrary, no such burden should be deemed to have been intended to be imposed. *Boston v. Boston*, etc. R. Co. 170 Mass. 95, 49 N. E. 95. Where, however, the legislature has clearly spoken upon the subject, as it seems to have in the statute here under consideration, we cannot hold that the legislature did not assume the risk, and did not have the right to do so. The words of the statute, "by reason of the benefits of such drain to the public health, convenience, or welfare, and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained [187] thereby, or can be drained only by the construction of other and connecting drains," are so sweeping and comprehensive that we cannot ignore them. Even without a legislative expression upon the subject, there is much authority in support of the validity of an assessment such as that before us. See *Louisville*, etc. R. Co. v. *Barber Asphalt Pav.* Co. 116 Ky. 856, 76 S. W. 1097, 197 U. S. 430, 49 U. S. (L. ed.) 819, 25 S. Ct. 466; *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 12 L.R.A. (N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; *Baltimore*, etc. R. Co. v. *Ketring*, 122 Ind. 5, 23 N. E. 527; *Lake Erie*, etc. R. Co. v. *Cluggish*, 143 Ind. 347, 42 N. E. 743; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Illinois Cent. R. Co. v. East Lake Fork Special Drain. Dist. Com'rs*, 129 Ill. 417, 21 N. E. 925; *Drainage Com'rs of Dist. No. 3 v. Illinois Cent. R. Co.* 158 Ill. 353; 41 N. E. 1073; *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Northern Pac. R. Co. v. Pierce County*, 51 Wash. 12, 23 L.R.A. (N.S.) 286, 97 Pac. 1099; *Griswold v. Minneapolis*, etc. R. Co. 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 37 U. S. (L. ed.) 132, 13 S. Ct. 293; *Wabash Eastern R. Co. v. East Lake Fork Special Drain. Dist. Com'rs*, 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781.

The judgment of the District Court is affirmed.

## NOTE.

## Assessment of Railroad Right of Way for Street Improvement.

Introductory, 579.

View that Right of Way Is Assessable in All Cases, 579.

View that Right of Way Is Assessable if Benefited, 581.

View that Right of Way Is Not Assessable, 585.

## Introductory.

The earlier cases discussing the assessability of a railroad right of way for a street improvement, are collated in the notes to *Southern California R. Co. v. Workman*, 2 Ann. Cas. 583; *Heman Constr. Co. v. Wabash R. Co.* 12 Ann. Cas. 630, and *Northern Pac. R. Co. v. Seattle*, 123 Am. St. Rep. 955. This note reviews the recent cases on the subject.

## View that Right of Way Is Assessable in All Cases.

As stated in the previous notes, there is a diversity of opinion as to the assessability of a railroad right of way for street improvements. In some jurisdictions it is held that the right of way of a railroad corporation is subject to assessment like other property, and that such property is conclusively presumed to be benefited by the improvement of a street on which it abuts. *Figg v. Louisville*, etc. R. Co. 116 Ky. 135, 75 S. W. 269, 25 Ky. L. Rep. 350; *Missouri*, etc. R. Co. v. *Tulsa*, 45 Okla. 382, 145 Pac. 398; *Seattle v. Seattle*, etc. R. Co. 50 Wash. 132, 96 Pac. 958; *Chicago*, etc. R. Co. v. *Milwaukee*, 148 Wis. 39, 133 N. W. 1120; *Superior v. Lake Superior Terminal*, etc. R. Co. 152 Wis. 389, 140 N. W. 26. And see *Chicago*, etc. R. Co. v. *Janesville*, 137 Wis. 7, 118 N. W. 182, 28 L.R.A. (N.S.) 1124. Thus in *Figg v. Louisville*, etc. R. Co. *supra*, the court said: "It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. . . . It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be suggested that it was not subject to the special tax

for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. . . . On the second question we quote from *Preston v. Rudd*, 84 Ky. 156, 7 Ky. L. Rep. 806, which reads as follows: 'Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement. The principle is that the territory is benefited, that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise, but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of improvement, although in his particular case his property may not be benefited. . . .' Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot, in the meaning of the statutes, and to thus appropriate it cannot change its character." In *Chicago, etc. R. Co. v. Milwaukee*, 148 Wis. 39, 133 N. W. 1120, wherein it appeared that a right of way was assessed for street improvements under a statute (Laws 1903, c. 425, p. 688) providing that the property of all corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals," the court said: "Such a declaration, interpreted in the light of judicial decisions and recent legislative enactments, can mean only what its plain language imports, namely, that every species of real property owned by corporations shall pay its proportionate share of special assessments for local improvements in the same manner and to the same extent as the property of individuals, irrespective of the particular use to which such real property may be put." And in *Missouri, etc. R. Co. v. Tulsa*, 45 Okla. 382, 145 Pac. 398, it was held, following the ruling in the case of *Louisville, etc. R. Co. v. Barber Asphalt Pav. Co.* 197 U. S. 430, 25 S. Ct. 466, 49 U. S. (L. ed.) 819, that lots within the taxing district, abutting on a street improvement and included in a right of way, were conclusively presumed to have been benefited by the improvement and therefore were liable to assessment.

In *Seattle v. Seattle, etc. R. Co.* 50 Wash. 132, 96 Pac. 958, the court followed North-

ern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 Pac. 244, 123 Am. St. Rep. 955, 12 L.R.A. (N.S.) 121, in which the same facts and conditions were present, saying: "The appellant contends, however, that the Northern Pacific case is not in point here, because the assessment district there involved was created by ordinance of the city of Seattle, and the court deemed the legislative declarations of benefits conclusive upon it. The court did no doubt consider the effect to be given to such legislative declaration, but the decision was not rested exclusively upon that ground, for in answer to the contention the appellant now makes, the court said: 'The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that, unless it can be affirmatively shown that some special benefit does result, no assessment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improvement of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee, and that its easement is not subject to special assessment. Although the appellant may not hold the fee-simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is therefore for all practical purposes the substantial owner. The fee, subject to its use and easement, is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value.' Furthermore, if any presumption is to be indulged in favor of a legislative declaration of benefits, the like presumption will attach to any assessment district created by legislative authority. Here the assessment district was established by three commissioners appointed by the superior court, pursuant to legislative authority. These commissioners acted in an administrative or legislative capacity in forming the assessment district and the usual presumption attaches to their acts in that re-

gard. We do not think, therefore, that the case can be distinguished on this ground." But in the case of *In re Seattle*, 66 Wash. 277, 119 Pac. 798, it was held that, inasmuch as the right of way and franchise of a railroad company in a street is a mere easement, it is not assessable for benefits resulting from the erection of a bridge over a canal which crossed the street. The court said: "The principles announced in the later case of *Seattle v. Seattle Electric Co.* 48 Wash. 599, 94 Pac. 194, 15 L.R.A.(N.S.) 486, are applicable here. Speaking of the franchise of the Seattle Electric Co. we then said: 'The respondent's right in the street is in no sense a lot, block, tract or parcel of land. It does not own the fee of the street over which its tracks are laid and its cars operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders, to whom it will revert when the interests of the public therein cease from any cause, and dominion and control over it is vested in the public authorities in whom it will remain as long as the street retains its public character. The respondent's rights therein are such and only such as these public authorities have conferred, and are, roughly speaking, the right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track for the purpose of carrying passengers and freight for hire. This does not constitute either a lot, block, tract or parcel of land, nor does it constitute an interest in land as that term is ordinarily understood; it is an easement only, and as such is not assessable under a power to assess lots, blocks, tracts and parcels of land.' From statements above made, it appears that the city in granting the franchise imposed conditions upon the railway company which would compel it to make a substantial cash contribution towards defraying the expense of this improvement. Manifestly it did so in contemplation of the fact that the right of way and franchise in the street could not be assessed."

In *Northern Pac. R. Co. v. Pierce County*, 51 Wash. 12, 97 Pac. 1099, 23 L.R.A.(N.S.) 286, it was held that railroad property in a drainage district, though exempt from any assessment on the ground that no benefit would accrue to it by reason of the construction of a ditch, was liable for the preliminary expenses of the proposed improvement, which was not, however, carried out. The court said: "The essential complaint is only that the proceedings for the purpose of raising money to pay the preliminary expenses of the proposed improvement which failed were illegal, and that its land should not be taxed because it had been determined that they

would not have been benefited by the improvement if it had been carried out. It is possible that an investigation to determine the benefits flowing from a proposed improvement might develop the fact that none of the lands in the district would be benefited by the improvement. In such case every owner could put forth the same objection to the payment of his share of the preliminary expenses as does the appellant here, and for the same reason. The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were necessarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated, a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement."

It has been stated as a reason for the presumption of benefits that railroad property is to be considered, not with reference to its present use, but with reference to its adaptability for other and general uses in the future. *Chicago, etc. R. Co. v. Milwaukee*, 148 Wis. 39, 133 N. W. 1120; *Superior v. Lake Superior Terminal, etc. R. Co.* 152 Wis. 389, 140 N. W. 26.

#### *View that Right of Way Is Assessable if Benefited.*

The majority of the recent decisions hold that the liability of a railroad right of way to assessment for a street improvement depends on whether it is benefited by the improvement, it being liable in that case and not otherwise. *River Forest v. Chicago, etc. R. Co.* 197 Ill. 344, 64 N. E. 364; *Kankakee v. Illinois Cent. R. Co.* 257 Ill. 298, 100 N. E. 996; *Lincoln v. Chicago, etc. R. Co.* 262 Ill. 11, 104 N. E. 277; *Lincoln v. Chicago, etc. R. Co.* 283 Ill. 114, 104 N. E. 1022; *Marion, etc. Traction Co. v. Simmons*, 180 Ind. 289, 102 N. E. 132; *Chicago, etc. R. Co. v. Hamilton County*, 171 Ia. 741, 153 N. W. 110; *Chicago, etc. R. Co. v. Council Bluffs (Ia.)* 157 N. W. 947; *Atchison, etc. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877, *affirmed* 58 Kan. 818 mem. 51 Pac. 290; *Gilsonite Constr. Co. v. St. Louis, etc. R. Co.* 240 Mo. 650, 144 S. W. 1086; *New York Bay R. Co. v. Newark*, 77 N. J. L. 270, 72 Atl. 455; *New York Bay R. Co. v. Newark*, 82 N. J. L. 591, 83 Atl. 962, *reversing* 80 N. J. L. 146, 76 Atl. 327; *Matter of East One Hundred and Thirty-Sixth St.* 127 App. Div. 672, 111 N. Y. S. 916; *New York, etc. R. Co. v. Port Chester*, 149 App. Div. 893, 131 N. Y. S. 883, *affirmed*

210 N. Y. 600, 104 N. E. 1135. And see *Hoffman v. Hoffman*, 49 Ind. App. 664, 97 N. E. 1015; *People v. Waldorf*, 168 App. Div. 473, 153 N. Y. S. 1072; *Forest v. Atlantic Coast Line R. Co.* 159 N. C. 547, 75 S. E. 796. And see the reported case.

In *Kankakee v. Illinois Cent. R. Co.* 257 Ill. 298, 100 N. E. 996, in holding that a railroad right of way was liable to assessment for a local improvement consisting of the paving of certain streets, the court said: "There was some testimony on behalf of appellee to the effect that the proposed improvement would result in benefits to the appellant by increasing its business, and other benefits were testified to, based upon the use this property might be put to in the future, and it is insisted that this testimony does not afford sufficient ground to sustain the judgment. Where the land is restricted by law to a particular use, the true measure of benefits is the increased value for the special use to which it is by statute restricted. . . . This judgment is, however, amply sustained by the testimony in the record that, considering the special use to which it is restricted, this property will be benefited in the amount assessed against it. . . . It is insisted, as a matter of law, that the property here involved will not be specially benefited in any amount by the proposed improvement, for the reason that, being railroad right of way and appellant being required by statute to make special use of it, its market value cannot be affected by this or any proposed improvements in adjacent streets. This question should have been raised by legal objections, but it is argued on both sides as though properly before us. In *Illinois Cent. R. Co. v. Kankakee*, 164 Ill. 608, this same section of appellant's right of way was assessed for the paving of East avenue from Court to Hickory street, and in answer to this same objection there made we said that it was settled by repeated decisions of this court that a railroad right of way relatively situated is assessable for special benefits arising from local street improvements. Whether this portion of the right of way which is used for station grounds and the other purposes above mentioned was benefited to the amount assessed, or whether it was assessed out of proportion to other property specially benefited, were questions of fact for the court to determine under all the evidence. . . . From a careful consideration of all the evidence we are unable to say that the court was wrong in holding that the property was benefited and that the assessment was fair and equitable."

In *Lehigh Valley R. Co. v. Jersey City*, 81 N. J. L. 290, 80 Atl. 228, wherein it appeared that a railroad company's right of way was on a high trestle running through

a district of swamps or marsh land, and a sewer was put through this land to drain it, it was held that the right of way was not benefited thereby and therefore should not have been assessed. The court said: "The railroad company claims that it should not be assessed at all, and we think that as to its right of way strip, this claim is well founded. Its railroad runs on a high trestle resting on stone or concrete piers built in the marsh, and by dumping from the trestle an embankment may be gradually substituted. In any case, the question of drainage is quite immaterial to the railroad company. If the trestle stood in a pond it would make no difference to it. There is manifestly no benefit to this property for the purposes for which it is used." And in *New York Bay R. Co. v. Newark*, 82 N. J. L. 591, 83 Atl. 962, reversing 80 N. J. L. 146, 76 Atl. 327, the court said: "The legal rule to be applied in all cases where such state of facts exists and the matter for determination is the assessment of the right of way of a railroad company; and hence is equally applicable to assessments for local improvements with this practical difference, viz., that the determination that lands are used for railroad purposes which in the case of general taxation removes them altogether from local assessment, in the case of local improvements permits such lands to be assessed to the extent of the actual benefit conferred upon them for their present use, i. e., for railroad purposes. The practical effect therefore of the rule in question is to eliminate enhancement of the market value of the land included in a railroad right of way either as a ground for its assessment for local improvements or as a basis for the estimation of benefits. . . . The sound reason upon which this rule rests is that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose and hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course if such land is actually put to an alien use the rule in question does not apply. There is nothing, however, to prevent the land while so devoted to its public use from receiving from a public improvement actual benefit for such public use, and hence to the extent that such land is thus benefited the right of way of a railroad company may be assessed for such an improvement. The rule, therefore, with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value, but only for actual benefit to such



land for the public uses for which it was acquired."

The benefit to be conferred on the property by the construction of the improvement must be an actual, real benefit, and not one arising on conjecture. Nothing should be allowed for imaginative or speculative benefits, or such remote or inappreciable benefits as the imagination can conjure up, which may or may not occur in the future. *River Forest v. Chicago*, etc. R. Co. 197 Ill. 344, 64 N. E. 364; *Lincoln v. Chicago*, etc. R. Co. 262 Ill. 11, 104 N. E. 277; *Chicago*, etc. R. Co. v. *Hamilton County*, 141 Ia. 380, 118 N. W. 380; *New York*, etc. R. Co. v. *Port Chester*, 149 App. Div. 893, 134 N. Y. S. 883, *affirmed* 210 N. Y. 600, 104 N. E. 1135. So, in *New York*, etc. R. Co. v. *Port Chester*, 149 App. Div. 893, 134 N. Y. S. 883, *affirmed* 210 N. Y. 600, 104 N. E. 1135, the court said: "It is difficult to see how such property can be benefited by the improvement of a village street passing under it. The only benefit that the learned corporation counsel specifically claims will inure to the railroad company from these improvements is an increase in its business following the increase in business and population resulting to the village from the improvement of its streets. This alleged benefit is too conjectural, fanciful and remote for consideration, and it seems highly improbable that the legislature intended to tax the right of way on any such assumption. The corporation counsel's reasoning, if valid, would logically permit the taxation of any railroad right of way running through any village or city for general street improvements therein, howsoever far from its right of way. Moreover, such a rule confuses the appellant's business growth with the value of its real estate."

Where the property is restricted by statute or grant to a particular use, and cannot be legally applied to any other use, and is at the time of the improvement devoted to that particular use, the true measure of the benefit which the improvement will confer is the increased value for the restricted use, in the absence of proof reasonably tending to show that the property in question, having regard to present conditions and the existing business and wants of the public, is about to be devoted to other uses. *River Forest v. Chicago*, etc. R. Co. 197 Ill. 344, 64 N. E. 364; *Lincoln v. Chicago*, etc. R. Co. 262 Ill. 11, 104 N. E. 277; *Lincoln v. Chicago*, etc. R. Co. 263 Ill. 114, 104 N. E. 1022. And it has been held that land acquired for a right of way and held for that public use under legislative authority is regarded, for the purposes of assessment for benefits, as permanently devoted to public use; therefore, actual benefit to the property for its present use is the proper basis of assessment, and not the general or special enhancement of its market

value. *New York Bay R. Co. v. Newark*, 77 N. J. L. 270, 72 Atl. 455; *New York Bay R. Co. v. Newark*, 82 N. J. L. 591, 83 Atl. 962, *reversing* 80 N. J. L. 146, 76 Atl. 327.

If on account of a local improvement, a right of way receives benefits throughout any specific portion of it, it is not improper to tax the whole right of way and not divide it, though it may not, in fact, be benefited throughout its whole width, provided the benefits assessed do not exceed the benefits to the whole of the portion so assessed. *Cache River Drainage Dist. v. Chicago*, etc. R. Co. 255 Ill. 398, 99 N. E. 635; *Kankakee v. Illinois Cent. R. Co.* 257 Ill. 298, 100 N. E. 996; *Kankakee v. Illinois Cent. R. Co.* 263 Ill. 589, 105 N. E. 731.

Where the land is devoted to ordinary business uses, it may be taxed for a local improvement in the amount of the enhanced value of the property, notwithstanding the grant of the property restricts the use of the land to railroad purposes. *Lincoln v. Chicago*, etc. R. Co. 262 Ill. 11, 104 N. E. 277; *Kankakee v. Illinois Cent. R. Co.* 263 Ill. 589, 105 N. E. 731. In *Georgia R. etc. Co. v. Decatur*, 137 Ga. 537, 73 S. E. 830, 40 L.R.A. (N.S.) 935, it appeared that the railroad land which abutted on the improvement was 116 feet wide and located between two streets. Although it was stated in the affidavit of illegality that its present use was for the maintenance of the roadbed and that future needs of the company would probably require all of it for additional tracks, it did not appear that the railroad company might not put it to some accessorial use, such as leasing it for warehouse and business purposes. The court said: "The railroad company does not present a case of confiscation; its contention is but an inference drawn that it will derive no benefit from the improvement. It may be that from the present use to which the property is put no special benefit may result; but as all of the abutting property is not actually required for the support of the roadbed and may be used for warehouse or other business purposes, we cannot say that no special benefit will ensue."

In *Chicago*, etc. R. Co. v. *Wright County Drainage Dist. No. 43* (Ia.) 154 N. W. 888, it was held that, under the presumption of benefits derived from a local improvement constructed by statutory authority, after due notice to the property owner, and under the inhibition of evidence to the effect that no benefits have been received [Code sec. 1947; Code Supp. 1913, sec. 1989a (121)] the fact that a railroad right of way was benefited by the construction of ditches in the drainage district was conclusively settled by the action of the board of supervisors in including it within the territory of the drainage district

after due notice and opportunity to be heard had been given the owner.

In *Oak Park v. Swigert*, 262 Ill. 614, 104 N. E. 1033, it appeared that the property claimed to have been omitted from assessment was referred to as a team track on the right of way of a railroad company, which right of way passed through the village in an easterly and westerly direction, and adjoined on the north a street which was paved with a good brick pavement. The team track had an opening into that street opposite the north end, one of the avenues to be paved. The theory of the objectors was, and testimony was offered to that effect, that this part of the right of way on which the team track was located would be benefited because there were a number of vacant lots on the streets which it was proposed to pave by this ordinance, and as all kinds of building material were unloaded from the cars of the railway company into wagons using this team track, it would facilitate the business of the railway company and those using this track to have the paved streets over which to travel in making delivery of building material as buildings were erected along the line of the proposed improvement. A number of witnesses testified on behalf of appellant that the railway property would not be benefited by this improvement. The court said: "We are of the opinion that the benefit, if any, which the railway property would receive by reason of this improvement was such as would be enjoyed by the public at large and that it was not liable for any special assessment."

In *Atchison, etc. R. Co. v. Chanute*, 90 Kan. 428, 133 Pac. 576, wherein it appeared that a railway company, under authority of the city, paid for the improvement of one-half of a street adjoining its right of way and station grounds, and soon thereafter the city improved the rest of the same street and by ordinance assessed half of the additional cost on the plaintiff railroad company's right of way, it was held that the company was not liable for the additional cost. The court said: "While it is doubtless true that the railway company was greatly benefited by the improvement it paid for, in being able to furnish its patrons with better conveniences for reaching its station and freight platforms, it appears that the portion paved by the company is open to the public as a street, and it must not be forgotten that the patrons of the railway are the public." But in *Atchison, etc. R. Co. v. Chanute*, 95 Kan. 161, 147 Pac. 836, it was said: "It would hardly be just to exempt railway property in the heart of the business district from its share of the burden of these special improvements. Logically its property never can and never will be subdivided into blocks and lots. Yet the railway is usually the most important busi-

ness institution in its neighborhood, and the paving of the streets surrounding the 'blocks, lots and pieces of ground' within which it transacts its business is as much to its advantage as to that of any other taxpayer."

In a few cases courts which maintain that the right to assess a railroad right of way for a street improvement depends on the question of benefit have held under statutes applicable to the particular case that the property was not assessable, irrespective of benefits. In *Patterson v. Chicago, etc. R. Co.* 99 Minn. 454, 109 N. W. 993, wherein it appeared that a railroad company had duly accepted the provisions of the Minnesota statute (Sp. Laws 1873, p. 302, c. 111) relating to the payment of a gross earnings tax, in consideration of which the property of all railroads accepting the provisions of the law was exempted from all taxation and from all assessments, it was held that its right of way was thereby exempted from an assessment levied thereon for the benefits accruing to it by reason of the construction of a public ditch. The court said: "The argument urged would be entitled to serious consideration, if the question were a new one. The meaning of the term 'assessments,' as used in statutes providing for the payment of a gross earnings tax by railway companies in lieu of all other taxation and all assessments, has been conclusively settled adversely to appellants' claim by the decisions of this court, which have become rules of property. It is the settled law of this state, as evidenced by such decisions, that the word 'assessments,' as used in statutes providing for a gross earnings tax, means a burden not included in the word 'taxes,' and that they exempt the property, used for railroad purposes, of railway companies paying the gross earnings tax, not only from all general or ordinary taxes, but from all local, special, or extraordinary assessments or charges. . . . An assessment made upon land for special benefits accruing to it from the construction of a public ditch is a lien on the land. Such charge or burden is an assessment for a local improvement which the county laying out the ditch is authorized to levy upon property, not exempt, for the benefits accruing thereto by the construction of the ditch. . . . The burden attempted to be placed upon the right of way of the respondent by the proceedings to lay out the ditch in this case is essentially a local and special assessment, within the meaning of the statute providing for the payment of a gross earnings tax, as construed by the decisions of this court." In *New York Cent. etc. R. Co. v. Buffalo*, 218 N. Y. 259, 112 N. E. 721, reversing 157 App. Div. 900, 141 N. Y. S. 1133, which affirmed 76 Misc. 655, 135 N. Y. S. 196, it was held that, under section 288 of the Buffalo city charter,

making it the duty of "the owner or occupant of any premises in the city" whenever such work shall be ordered by a resolution of the common council "to lay and relay sidewalks in front of such premises," and at all times to keep and maintain the same in good order and repair. "In case any such work shall not be done within the time specified in such notice . . . said commissioner of public works may cause such work to be done, and the expense thereof shall be a charge and lien upon such premises," and requiring that the assessment therein provided for shall be laid "upon the lands and premises in front of which the work is done, according to the lineal frontage," railroad tracks running through a cut in a street were not assessable. The court said: "The plain import of section 288 of the Buffalo charter so far as the laying down of a new sidewalk is concerned is that the common council may impose this obligation only upon the owners or occupants of property who actually own or possess land fronting upon the street in which the new sidewalk is to be constructed. It seems to us a forced and wholly unwarrantable interpretation of the term 'premises' to apply it to railroad tracks which merely constitute the tangible part of a railroad company's special franchise to occupy a city street. Ownership of the street is not in the railroad company; nor does the railroad company exclusively occupy any portion thereof except that which lies directly under the rails. These tracks do not seem to us to be premises within the true meaning and purport of the statute; yet it is these tracks, and these alone, which are the subject of the assessment in question here. The provision is applicable to cases of the ordinary owner or occupant of land on the side of a public street in front of whose land a new sidewalk is to be constructed, and not at all to the grantee of a special franchise enjoying simply an easement in the middle of the street. The requirement that the assessment shall be laid upon the land and premises in front of which the work is done according to the lineal frontage further confirms the view that such a condition of things as exists in the present case does not fall within the scope of the charter provision. Railroad tracks cannot fairly be said to have any 'frontage.' The learned judge who heard the case at special term declared that the railroad company was the exclusive occupant of the lands bounded by the retaining wall of the cut, and that this piece of real estate constituted definite premises, accurately described; but the mere fact that it is not convenient for the public to

travel through that part of the Terrace occupied by the cut does not make the railroad company the exclusive occupant thereof in a legal sense and as a matter of right. As we have pointed out, the assessment in question is not laid upon any land in the cut, but applies solely to the tracks of the railroad company. This expressly appears in the findings. For these reasons, without passing upon any of the other questions in the case, we have reached the conclusion that the tracks of the plaintiff could not lawfully be assessed for the expense of constructing the so-called sidewalks along the open cut in the Terrace."

*View that Right of Way Is Not Assessable.*

There is a third class of decisions, in which it is held that the right of way of a railroad corporation is not property which is liable to assessment for local or street improvements. *South Fork Borough v. Pennsylvania R. Co.* 251 Pa. St. 261, 96 Atl. 710.

So, it has been held that the roadbed of a public railroad was not "real estate" within the meaning of the Pennsylvania Act of 1901 (Act of June 4, 1901, § 5, P. L. 364) providing that "all real estate, by whomsoever owned and for whatsoever purpose used, shall be subject to all tax claims and municipal claims herein provided for," and was not subject to assessment for local taxation and municipal claims. *Philadelphia v. Philadelphia*, etc. R. Co. 38 Pa. Super. Ct. 529; *Philadelphia v. Fairhill R. Co.* 41 Pa. Super. Ct. 245.

In California, the right of way of a railroad corporation is not liable for assessment and sale on account of work having reference to the improvement of streets already laid out and established. (St. 1885, p. 147.) *Southern California R. Co. v. Workman*, 146 Cal. 80, 2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79; *Schaffer v. Smith*, 169 Cal. 764, 147 Pac. 976. But under a later statute (St. 1903, p. 376) it has been held that such a right of way was assessable and could be sold subject to the easement for the purpose of paying a portion of the expenses of laying out, or extending, or widening, or straightening of public streets. *San Pedro, etc. R. Co. v. Pillsbury*, 23 Cal. App. 675, 139 Pac. 669, 671. And while the right of way itself cannot be assessed, the land itself is land fronting on the street within the meaning of the street work act and is subject to assessment, but the easement held for right of way purposes should be excluded from such assessment. *Schaffer v. Smith*, 169 Cal. 764, 147 Pac. 976.

**SKARDA**

v.

**STATE.**

Arkansas Supreme Court—April 19, 1915.

118 Ark. 176; 175 S. W. 1190.

**Banks — Receiving Deposit When Insolvent — Indictment Sufficient.**

An indictment against a bank cashier for accepting deposits knowing the bank was insolvent, alleging a deposit of \$55 of gold, silver, and paper money, but not stating that it circulated as money or was of value, charges an offense under Kirby's Dig. § 1814, forbidding an insolvent bank to receive on deposit any money, bank bills, or notes or United States treasury notes, gold, or silver certificates or currency or other notes, bills, or drafts circulating as money or currency.

**Same.**

An indictment against a bank cashier for accepting deposits, knowing the bank was insolvent, need not, in terms, allege that defendant received the money as cashier, when it otherwise appeared from the indictment.

**Proof of Authority of Bank Officer.**

In the prosecution of a bank cashier for accepting deposits, knowing the bank was insolvent, an allegation that he was cashier when the deposit was made is sustained by proof that he had been elected cashier and remained in the bank ostensibly as such, notwithstanding that his assistant was actually in charge.

**Proof of Insolvency of Bank.**

To sustain the conviction of a bank cashier for accepting deposits, knowing the bank was insolvent, the state must show the insolvency, and that the officer had knowledge thereof, and it is proper to show the nature of the bank's assets and liabilities, although such proof tends to show the commission of the offense by the receipt of other deposits.

[See 3 R. C. L. tit. *Banks* p. 493.]**Same.**

In the prosecution of a bank cashier for accepting deposits knowing the bank was insolvent, a complaint for the appointment of a receiver, introduced to show insolvency, is inadmissible as hearsay.

**What Constitutes Deposit — Check on Same Bank.**

Where the holder of a check drawn on a bank by a depositor presented it to the bank and demanded and was paid a part thereof in cash, receiving a deposit slip showing a deposit to his credit for the balance, the transaction constitutes a receipt of the deposit within Kirby's Dig. § 1814, forbidding an insolvent bank to receive deposits.

[See note at end of this case.]

**Variance as to Deposit.**

That an indictment of a bank cashier for accepting deposits, knowing the bank was in-

solvent, alleged the deposit of money, while the proof showed a deposit of a check, constitutes no variance.

**Same.**

An indictment against a bank cashier for accepting deposits, knowing the bank was insolvent, alleging a deposit of money, sufficiently describes the deposit of a check drawn upon the bank by a depositor.

**When Bank Is Insolvent.**

Under Kirby's Dig. § 1814, forbidding an insolvent bank to receive deposits, a bank is insolvent if, under ordinary circumstances, it is unable to raise the money to pay its debts or deposits as they become due and are presented for payment in the ordinary course of business.

[See Ann. Cas. 1916C 85.]

**Same.**

In determining whether a bank is insolvent under Kirby's Dig. § 1814, forbidding insolvent banks to accept deposits, the capital stock and surplus must be considered as resources and not as liabilities.

**Evidence of Insolvency.**

In the prosecution of a bank cashier for accepting deposits knowing the bank was insolvent, evidence by the receiver as to whether certain overdrafts were collectible is erroneously excluded.

Appeal from Circuit Court, Prairie county: LANEFORD, Judge.

Criminal action. Joe Skarda convicted of accepting money for deposit in insolvent bank, and appeals. The facts are stated in the opinion. REVERSED.

*J. G. & O. B. Thweatt and Manning, Emerson & Morris* for appellant.

*Wm. L. Moose and Jno. P. Streepey* for appellee.

[178] SMITH, J.—Appellant was convicted for accepting money for deposit in a bank of which he was the cashier when he knew the bank was insolvent.

The prosecution was had under section 1814 of Kirby's Digest, which reads as follows:

"No bank shall accept or receive on deposit, with or without interest, any money, bank bills or notes, or United States treasury notes, gold or silver certificates, or currency, or other notes, bills or drafts, circulating as money or currency, when such bank is insolvent; and any officer, director, cashier, manager, member, party or managing [179] party of any bank who shall knowingly violate the provisions of this section, . . . shall be guilty of a felony. . . ."

The indictment alleged that on the 17th day of March, 1913 (appellant), then and there being the cashier of the Bluff City Bank, of DeValls Bluff, Ark., said bank being a corporation organized and doing a

banking business under the laws of the State of Arkansas, did unlawfully, wilfully, knowingly and feloniously accept and receive on deposit in said bank, the Bluff City Bank, of and from Joe Janet, fifty-five dollars, gold, silver and paper money, said money being then and there accepted and received on deposit in said bank by said defendant, Joe Skarda, the said Bluff City Bank, being then and there insolvent, and the said Joe Skarda being then and there the cashier of said bank, well knowing at the time he so accepted and received on deposit said money as aforesaid that said Bluff City Bank was then and there insolvent. . . ."

The record is a voluminous one, and many questions are discussed in the appellant's brief, but all of the questions which it will be necessary to consider may be arranged under the following topics:

1. Does the indictment charge an offense?
2. Is there a variance between the indictment and the proof?
3. Was error committed in the admission or rejection of testimony?
4. Did the court err in giving or refusing instructions?

(1) It is first insisted that the indictment does not charge the commission of a public offense, in that it does not allege that the money deposited circulated in this jurisdiction as money, and fails to allege that the money so deposited was of any value.

In reply to this it may be said that the indictment does allege the deposit of \$55 gold, and silver and paper money; and such deposit is within the protection of the statute if it is of any value. Fifty-five dollars of gold, silver and paper money, whether current in this jurisdiction [180] or not, necessarily have some value. *Morris v. State*, 102 Ark. 513, 145 S. W. 213. And if an officer of an insolvent bank knowingly receives such money on deposit he cannot defend by showing that the money so received was not current in this country. Nearly all of the States now have laws more or less similar to our statute on this subject, and the courts of all the States, in construing their respective statutes, say they are designed for the protection of depositors, and our own court has said that a special deposit, as well as a general one, is within the protection of this statute. *State v. Smith*, 91 Ark. 1, 120 S. W. 156.

(2) It is also urged that the indictment is defective in that it fails to allege that appellant received the money as cashier. Support for this position is found in the case of *State v. Winstandley*, 154 Ind. 443, 57 N. E. 109. In that case an indictment very similar to the one in the present case was held insufficient for the reason stated. But a contrary view has already been taken

by this court in the cases of *Morris v. State*, supra, and *Davey v. State*, 99 Ark. 547, 139 S. W. 629. In the *Morris* case, supra, it was said:

"A corporation can only act through its agents. The allegations of the indictment were sufficient to charge that the bank had received and accepted the deposit while insolvent, and that the appellant, who was president of the bank, and who acted for it in receiving and accepting the money on deposit, knew at the time the bank was insolvent, and therefore violated the provisions of the statute in thus accepting the money on deposit.

"It was unnecessary for the indictment to charge in specific terms that appellant was an officer of the bank. He was designated in the indictment as president of the bank, which was sufficient to show that he was an officer of the bank. The allegations of the indictment were amply sufficient to show that the bank, through its duly constituted agent, accepted and received the deposit, being at the time insolvent, and that the appellant, being at the time president, and therefore an officer of the bank, and knowing of its insolvency, accepted and received the deposit. [181] Everything necessary to constitute the offense charged was stated."

The indictment here was substantially in the form of the indictment which was approved in the two cases last cited.

This question was recently before the Supreme Court of the State of Mississippi, and that court refused to follow the *Indiana* case. *State v. Taylor*, 106 Miss. 850, 64 So. 740.

(3) Appellant also insists that the proof fails to show that he was the cashier of the bank at the time the alleged deposit was made, and he says that, upon the contrary, the proof shows that he was not the cashier at that time, and that there was therefore a failure of proof to sustain a material allegation of the indictment. The proof on the part of the defense was that appellant had been cashier of the bank for a number of years, but had been superseded by his assistant. Yet there was proof from which the jury no doubt found, and which was sufficient to sustain the finding, that appellant continued to remain in the bank and to discharge, ostensibly, his customary duties there. This change in the cashier appears to have been made at the direction of the managing officer of one of the defunct bank's correspondents, and while after the change was made, there was a limitation upon the authority which appellant had previously exercised, at least, so far as the defunct bank's dealings with this correspondent bank were concerned, yet, as has been said, appellant continued in the performance of his former duties.

Upon this question the court gave the following instruction:

"You are instructed that one who has been elected and made cashier of a bank and remains in the bank and holds himself out to the public as cashier of the bank and is held out by the bank as its cashier for the purpose of receiving deposits is under the law under which this defendant is being tried the cashier of the bank."

We think no error was committed in giving this instruction.

[182] It is insisted that the proof failed to show the bank was insolvent at the time it closed its doors; and the contention is also made that incompetent evidence was admitted upon the question of the bank's insolvency and of appellant's knowledge of that fact.

(4) The evidence is very voluminous and conflicting, and we shall not undertake to state the evidence in regard to the various transactions relating to these questions. We shall merely state the general principles which should govern trial courts upon such issues. To sustain the conviction the State must not only show that the bank is insolvent, but must further show that the officer receiving the deposit has knowledge of that fact. It would be very unusual if these facts could be established by proof of a single transaction. It is almost certain that these facts can be established only by an examination into the affairs generally of the bank. It is, therefore, competent and proper for the State to show the nature and value of the bank's assets, and likewise the character and extent of the bank's liabilities; and it is further competent and necessary for the State's proof to show the receipt of a deposit after knowledge of insolvency. The proof of this knowledge is frequently an inference to be drawn from circumstances, and the official charged with this crime cannot complain of the proof of circumstances which impute to him knowledge of the bank's insolvency, even though such proof tends to show the commission of this offense by the receipt of deposits other than those alleged in the indictment. *State v. Welty*, 65 Wash. 244, 118 Pac. 9, and cases there cited. But the proof should be limited to the purposes stated, and the State should not be permitted to prove any facts or circumstances from which the guilt of the accused might be inferred, unless such facts and circumstances also tend to show the bank's insolvency and the officer's knowledge of that fact.

(5) The State was permitted to offer in evidence, over appellant's objection, the complaint filed at the instance of appellant's successor as the cashier of the defunct bank, in which the appointment of a receiver was [183] asked. From this complaint it was

fairly inferable that the bank was not only insolvent at the time it closed its doors, but had been for some time prior thereto.

We think the court erred in the admission of this complaint in evidence. Appellant was not responsible for the recitals of fact contained in this complaint, and it was incompetent as hearsay evidence.

(6) It is also urged that the evidence does not show that Janet became a depositor of the defunct bank. But this question was submitted to the jury under proper instructions, and we think the proof is sufficient to support a finding that he was in fact a depositor. Appellant testified that Janet presented at the bank one morning, before it had opened for business, a check for the sum of \$70, and that Janet was told at the time that the vault was not open and there was not enough money out of the vault to cash the check, but that there happened to be \$15 in a drawer, which was given him, and he was given a deposit slip to show that \$55 was still due him, and was told to return for the remainder when the bank opened. Such a transaction does not constitute a deposit within the meaning of the law; but this was not the transaction had according to the proof upon the part of the State. That proof was to the effect that Janet took a check drawn on the defunct bank by one of its depositors for the sum of \$70, and demanded, and was paid, \$15, and received from the bank the usual deposit slip showing the deposit to his credit of the sum of \$55, this fact being shown by the receipt of the check, less the credit.

It is next earnestly insisted that if the State's proof is sufficient to establish the fact that a deposit was made by Janet, it further shows a variance between the indictment and the proof, in that the indictment alleges the deposit of \$55 in money, whereas the proof shows the deposit of a check. Counsel rely upon the opinion in the case of *Morris v. State*, supra, to sustain their position that there is a variance between the indictment and the proof. The facts in that case were that the indictment [184] alleged the deposit of \$100, while the proof showed the deposit of \$11 in money and the balance in checks. Objection was made to the introduction of testimony tending to show that the deposit consisted of checks, instead of currency; but the court said the contention was not sound as the proof was sufficient to show that \$11 in currency were received and checks representing the balance of the amount alleged were received, as the offense under the statute was complete by knowingly receiving any amount of money and that it was not, therefore, necessary to prove the receipt of the full amount alleged. The court was not there called upon to decide, and did not de-

cide, whether the proof would have been sufficient if the deposit had consisted entirely of checks.

Appellant further insists that the case of *State v. Smith*, 91 Ark. 1, 120 S. W. 156, is authority for his position that the indictment in the present case is defective. The indictment in that case alleged that the deposit consisted of a check, but it was not there alleged that the check was endorsed by the payee, nor that it was an obligation circulating as money. Discussing this question, it was there said:

"It is not altogether clear what the legislature meant by the words 'other notes, bills or drafts, circulating as money, or currency.' Literally construed, there are no 'notes, bills or drafts' which circulate as money or currency except United States treasury notes and national bank notes, and it is obvious that the legislature did not refer to these in using this language, for they are especially mentioned in the statute. If any meaning at all be given to this language, it must be held to refer to notes, bills or drafts (other than United States treasury notes and national bank notes) which pass from hand to hand; that is to say, such as are payable to bearer or are properly endorsed by the payee, so that the legal title may pass by delivery.

"Now, applying this test, the allegations of the indictment do not sufficiently describe the check so as to bring it within the terms of the statute. It is not alleged, [185] either in general terms that it was a 'note or draft circulating as money or currency,' or that the check which was drawn payable to Miss Bobbie Yocum was ever endorsed by her so that the legal title might pass by delivery.

"It is contended on behalf of the State that the allegation of the indictment to the effect that the check was accepted by the defendant in lieu of money was equivalent to an allegation that it was a draft circulating as money. We do not think so. The meaning of the two statements is altogether different. One is descriptive of the written instrument, and the other refers entirely to the manner of acceptance of the paper. It may as well be said that an allegation of acceptance on deposit of a horse or bale of cotton in lieu of money would bring it within the statute."

(7) But no such defect is found in the indictment in the present case. The indictment is good, for it alleges the deposit of money, while the indictment in the *Smith* case, supra, alleged the deposit was a check without alleging that it circulated as money. The indictment there was disposed of on demurrer, and it was held void for the reasons stated.

A somewhat similar question was raised in the recent case of *Cunningham v. State*, 115 Ark. 302, 171 S. W. 885. The facts in

that case were that a check was drawn by the collector of Sebastian County in favor of the treasurer of that county. The treasurer sent the check to the bank and received from it a receipt signed by Cunningham as cashier. The bank was insolvent at the time and closed its doors soon afterward. It was contended that this transaction was not within the terms of the statute under which the prosecution in the present case is had. But it was there said:

"The word 'draft,' as used in the section of the statute above quoted, is a general term and includes checks as well as other orders drawn for the payment of money. *State v. Warner*, 60 Kan. 94, 55 Pac. 342.

"When the cashier in the instant case received the check he charged the account of Norris with the amount [186] of the check and credited Harris with the amount thereof. It is claimed by counsel for the defendant that because no new money came into the bank that there was no violation of the statute. The money was in the bank, or was supposed to be there, and the transaction was considered and treated as though the cashier had actually paid over the money to Harris, and that Harris had immediately redeposited it in the same bank. The transaction was not essentially different from what it would have been had the whole amount of the check been received from other sources and then deposited in the bank. *State v. Shove*, 96 Wis. 1, 70 N. W. 312, 37 L.R.A. 142, 65 Am. St. Rep. 17.

"In Third Ruling Case Law, section 123, page 496, the author says: 'The deposit need not be a deposit of money, and although a portion of the money for which the certificate of deposit is issued by a bank consists of that represented by a prior certificate of deposit against the same bank and surrendered at the time that the last deposit is made, the last deposit and the certificate thereof must be treated as if the whole amount had been deposited in cash.'"

"Therefore, we are of the opinion that the contention of counsel for defendant is not well taken."

Attention is called to the fact that the indictment in the case of *State v. Smith*, supra, did not allege the deposit of a check drawn on the bank in which the deposit was made, and in this respect the case is distinguishable from the case of *Cunningham v. State*, supra.

The case of *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110, 131 Am. St. Rep. 1022, 20 L.R.A. (N.S.) 444, was a prosecution under an indictment, the second count of which alleged the deposit of a check. The statute under which the indictment was drawn made it unlawful for an officer of an insolvent bank to receive money or paper circulating as money after knowledge of the bank's insolvency. It was

there contended that the receipt of a check did not come within the inhibition of the statute; but, in disposing of this question, the Supreme Court of Wisconsin said:

[187] "The fact that the deposit relied upon in the second count in the indictment was a check does not militate against its satisfying the call of section 4541, Stat. 1898, for a deposit of money. True, the check, as it went over the counter, was not money, but it was treated as such between the bank and its customer. It was taken as the equivalent of money at the face value. The money equivalent was placed to the credit of the depositor the same in all respects, as if legal tender money had been passed over the counter. The relation of debtor and creditor, as between the bank and the depositor, with the characterization of liability on the one side and expectancy on the other as to payment on demand at any time within the banking hours, was created. In short, the transaction, in practical effect, was the same as if the bank had passed to its customer \$1,000 for the check, and he had immediately passed the same back for deposit and received credit therefor."

A case very similar to the present case, and one in which the question now under consideration was raised and thoroughly considered, was that of *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106. There the indictment alleged that one Paul had deposited with George Y. Salmon and Harvey W. Salmon, the owners of a private banking institution known as the "Salmon & Salmon Bank," "a certain deposit of money, to wit, two hundred dollars, of the value of two hundred dollars, the money and property of one James Paul." The proof disclosed the fact to be that Paul presented to the bank a check for about \$315 or \$320 and was paid about \$115 or \$120 in money from the bank and was given a deposit slip for \$200, which was the difference between the amount of the check and the amount he had received. Various objections to the introduction of this evidence were offered, and, among others, of course, that the proof was not responsive to the allegation of the indictment and that the proof of the deposit of a check could not support the charge of the deposit of money. The opinion in that case is very lengthy and [188] thoroughly well considered, and among other things it was there said:

"It is insisted by learned counsel for appellant that there was a total failure of proof on the part of the State of the offense charged, for the reason that the allegation in the indictment that the defendant assented to and received a deposit of \$200 in money was not shown to have been true by evidence which showed a deposit of a check. In other words, such allegation of the deposit of money

was not supported by the evidence. It is sufficient to say upon this proposition that if, by competent evidence, it should be shown that a check was drawn upon the bank of Salmon & Salmon in favor of James Paul, and this check was presented to the cashier for payment, and that said James Paul was paid partly in cash and the balance credited to his account in the bank, then in our opinion, in contemplation of law, such balance credited to his account was a deposit in such bank of so much money. This check was drawn upon the bank of Salmon & Salmon, and presented to that bank for payment, and when James Paul received such part in cash as he desired, and had the balance placed to his credit, this, in contemplation of law, was the payment to him of the amount of money called for in the check.

"We are unable to reach the conclusion that before this money could be treated as a deposit it was essential, first, that the cashier should count him out the entire amount of money called for in the check for the purpose of allowing him to retain what ready money he desired, and then return the balance for deposit in the bank. This, in our judgment, would be a useless formality, in fact would have been simply playing and trifling with a purely business transaction. This transaction cannot be treated otherwise than a payment of the check in favor of James Paul.

"We shall not undertake to review all the authorities to which our attention has been directed. We have carefully reviewed them and find that they by no means settle [189] the proposition now under discussion. The law upon this proposition is well stated by Morse on Banks and Banking, section 569, where it is said: 'When a check is presented for deposit drawn on the depository bank, the bank may refuse to pay it, or take it conditionally by express agreement, or by usage, if such a one exists, as in California; but otherwise, if it pays the money, or gives credit to the depositor, the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor. The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit. The intent of the parties must govern, and presenting a check on the bank, with a pass-book in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash.'"

(8) It is also insisted that the proof fails to show that the bank was insolvent, and that the court erred in its declarations of law as to when a bank is insolvent. While the proof is conflicting as to the value of the



bank's securities upon which money had been loaned, and as to the causes for its suspension from business, we think the proof legally sufficient to support the finding that the bank was in fact insolvent at the time Janet's deposit was made, and that appellant was aware of that fact when he received it. Nevertheless, it is true that, according to appellant's evidence, the bank was not insolvent, and would not have suspended business, nor would it have failed to respond to the demands of its depositors and other creditors, but for the fact that its correspondent bank failed to extend the usual and expected credit, and because of the failure to collect certain moneys as soon as had been anticipated.

(9) The court gave an instruction numbered 5, in which insolvency was defined. That instruction is as follows:

"5. Now, upon the question of insolvency, you are instructed that the bank was insolvent in the sense used [190] in the indictment, first, if the bank at the time of the deposit referred to in the indictment by Joe Janet did not have assets sufficient to pay its debts; second, if the bank was financially unable to pay its debts or obligations when they became due. Now, this inability to pay its debts does not mean a temporary inability to pay its debts such as might occur when there is a 'run on the bank' or failure of the officers of the bank to have enough available cash on any particular day to run the bank that day, or because of any other emergency, but it means an inability to meet the bank's obligations or debts and pay depositors in the ordinary course of business when given such a reasonable time to get the money as might be expected or required by a bank in carrying on its banking business.

"In other words, if the bank, under ordinary and usual circumstances, was unable to get the money by putting up its collateral and credit to pay its debts or depositors as same became due and presented for payment in the ordinary course of its business, it was insolvent in the sense used in the indictment."

We think this is a very fair and accurate statement of the law and as favorable to appellant as he could ask. *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110, 20 L.R.A. (N.S.) 444, and cases there cited. Over appellant's objection, however, the court gave on this question of insolvency the following instruction:

"4. The terms debts, liabilities, or obligations as used in the instructions means all debts or obligations of every kind owing by the bank to other persons, including deposits, certificates of deposits, checks unpaid, bills payable, certificates of capital stock, surplus and undivided profits."

(10) We think the giving of this instruction was error which calls for the reversal of the case. If this instruction was correct, any bank would be insolvent which had sustained a loss of sufficient size as to make the book value of its stock worth less than par. A bank might be entirely solvent so far as all of its creditors were concerned, [191] and yet its stock not be actually worth par. This question was discussed in the case of *State v. Myers*, 54 Kan. 206, 38 Pac. 296, and the Supreme Court of Kansas there said:

"In a criminal prosecution against an officer of the bank for knowingly receiving deposits when the bank was insolvent, the capital stock and surplus fund cannot be considered as liabilities or debts in determining the insolvency; otherwise, the greater the capital of the bank, and the larger its surplus fund, the more insolvent it will be. The contrary is the actual fact. The capital and surplus of a bank are its resources, which may be used to pay its depositors and other creditors when there have been losses, by loans or otherwise. If a bank, by using its capital or surplus, or both, can pay promptly its deposits and other debts, . . . it is not insolvent. Upon the book and in the official statements of a bank, capital stock and the surplus fund are denominated as 'liabilities,' but they are resources of the bank with which to transact its business. The more capital a bank has, the better able it is to meet its deposits and other debts. The more surplus on hand, the greater its ability to pay promptly its deposits and other debts. If a bank is able to pay promptly every depositor, and every other creditor in the ordinary course of business, the bank, under section 16 of said chapter 43, is solvent, whether there is any surplus or capital to be distributed afterward to stockholders or not. Section 16 was adopted by the legislature for the protection of the depositors, not for the benefit of the officers or stockholders of the bank."

(11) After the failure of the bank a Mrs. Zearing was appointed receiver, and she had served in that capacity for about a year and a half prior to the time of the trial below. She had been employed in the bank as a bookkeeper prior to its failure. She was shown to have had entire familiarity with all the affairs of the bank, and after testifying at length about the value of the bank's assets and the extent of its liabilities, and after having stated that she was acquainted with the parties who owed [192] the bank and that she had made an investigation of their financial standing, she was asked the following questions:

"From your investigation and from your acquaintance with these parties, state whether or not you may reasonably expect to col-

lect all these notes and overdrafts, or about all of them? And, further, are the overdrafts which you have in your possession valueless or are they good?"

We think the witness should have been permitted to answer these questions. The answer would have been competent and relevant, and the court erred in its exclusion.

For the errors indicated the judgment of the court must be reversed and the cause will be remanded.

Kirby, J., dissents.

#### NOTE.

#### **Criminal Liability of Officer of Insolvent Bank for Receiving Deposit Therein Consisting of Check on Same Bank.**

The reported case lays down the rule that an officer of an insolvent bank who receives a deposit consisting of a check on the same bank is criminally liable, and holds that a check deposited in the same bank on which it is drawn is a deposit within the purview of the following Arkansas statute: "No bank shall accept or receive on deposit, with or without interest, any money, bank bills or notes, or United States treasury notes, gold or silver certificates, or currency, other notes, bills or drafts, circulating as money or currency, when such bank is insolvent; and any officer, director, cashier, manager, member, party or managing party of any bank who shall knowingly violate the provisions of this section . . . shall be guilty of a felony." To substantially the same effect see *Cunningham v. State*, 115 Ark. 392, 171 S. W. 885, and *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106, fully discussed by the court in the reported case. While it was not necessary to a determination of the question actually adjudicated by the court, in the case last cited, a very complete discussion of the proposition was therein given.

For a discussion of the cases passing on the liability of an officer of an insolvent bank for receiving a deposit, as dependent on his actually receiving the deposit in person, see the note to *State v. Mitchell*, Ann. Cas. 1912B 309.

For a collection of cases dealing with the validity of a statute making it a crime to receive a deposit in an insolvent bank, see the note to *Ex p. Pittman*, 20 Ann. Cas. 1319.

#### **HUBBELL ET AL.**

V.

#### **CITY OF DES MOINES ET AL.**

Iowa Supreme Court—June 29, 1914.

166 Iowa 581; 147 N. W. 908.

#### **Eminent Domain — Evidence — Meander Line as Boundary.**

In proceedings to condemn land bordering on a navigable stream, evidence of the government surveyor's field notes showing the meander line of the river in the vicinity of the land in question is inadmissible; meander lines not being considered legal boundaries.

#### **Photograph of Other Property.**

In proceedings to condemn land bordering on a river, photographs and levels taken with reference to a tract nearly a mile above the land in question, and of another tract eight or ten blocks below the land sought to be condemned, are properly excluded for remoteness.

#### **Photograph of Property Taken.**

In proceedings to condemn land bordering on a river, photographs taken of the property at the time of a flood in the river are admissible, when offered merely to produce the conditions and surroundings at or about the time of the condemnation.

#### **Ascertainment of Value — Instructions.**

In proceedings to condemn land, an instruction that the term "reasonable market value" means the fair and reasonable value of the property at the time in question, and may be determined from evidence of facts which the owner will properly and necessarily press on the attention of a buyer with whom he is negotiating a sale, and which would naturally influence or deter a person of ordinary prudence desiring to purchase, the jury being entitled to consider evidence of facts then existing, and which enter into the value of the premises in public and general estimation, and which may tend to influence the minds of sellers and buyers in determining the reasonable value of the property at the time, is proper.

#### **Same.**

An instruction that certain evidence had been admitted as to the price at which properties other than that in question are sold, and the location and character thereof, that such evidence was admitted only as bearing on the value of the opinions of various witnesses in regard to the property in controversy, and that the same should be limited by the jury to such subject, is proper.

#### **Evidence of Value — Price Realized for Similar Property.**

Evidence of sales of other property of the same character similarly located, made in the market a short time after the proceedings in question were instituted, is inadmissible as

substantive independent proof of the value of the property in controversy.

[See note at end of this case.]

Appeal from District Court, Polk county: Hewitt, Judge.

Eminent domain proceeding. Appeal by plaintiffs to district court from award of sheriff's jury. Frederick M. Hubbell et al., plaintiffs, and City of Des Moines, Iowa, et al., defendants. From judgment rendered, plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

*Parker, Parrish & Miller* and *John McLennan* for appellants.

*R. O. Brennan, H. W. Byers* and *Eskil C. Carlson* for appellees.

[582] **DEEMER, J.**—The issues arising in the trial court were, first: the size of the lot, it being bounded on the east by the Des Moines river, which, at the time of the original survey, was declared a navigable stream; and, second, the amount of compensation which should be awarded for the taking of the lot. The lot was sought to be condemned for park purposes, and the entire tract was so taken, so that any question of consequential damages was entirely eliminated.

The latter of the two questions was simply: What was the fair market value of the property taken? Upon the first proposition the trial court instructed the jury as follows:

The Des Moines river is a meandered stream, but the meander line of said stream is not to be taken as the east boundary line of the lot in question, as the same existed on the 16th day of February, 1912, and under the evidence in this case it does not in any sense limit or define the east boundary line of said premises at said time.

Said lot being located upon a meandered stream, the owner of said lot, commonly called a riparian owner, is the owner of the land to a line called the ordinary high-water mark, which is the eastern boundary line of said premises, and the state is the owner of the stream and all parts thereof extending between the ordinary high-water marks on each side thereof.

At the time the said lot 2, Coliseum Place, being the premises involved in this controversy, was appropriated by [583] the defendant under said condemnation proceedings, being the 16th day of February, 1912, the plaintiffs in this case were the owners of said lot, and the said line known as the ordinary high-water mark at the west line of the Des Moines river was the east boundary line of plaintiff's said premises at said time.

Ann. Cas. 1916E.—38.

In fixing the reasonable market value of said premises on said 16th day of February, 1912, you should determine said value upon the basis of the area of said lot as it existed on said date, by determining the location at said time of said ordinary high-water mark which was the eastern boundary line of plaintiff's lot at said time. The ordinary high-water mark of a stream is not always a fixed or permanent line, but under certain conditions may undergo changes caused by the action of the water, and the owner of the land abutting on such stream holds his title subject to the possibility of the amount of his land being increased or diminished by such actions of the water.

The line which fixes or determines the ordinary high-water mark is not the line reached by unusual floods, nor is it necessarily the point to which the water rises at any particular time, but it is the line which the river or stream impresses upon the soil as the limit of its dominion, and such line is to be determined from the record which the river makes for itself. It is that line along the bank or shore of the river or stream where such river or stream leaves a permanent impression of its domain; the limit of the line where vegetation is interfered with by the action of such river or stream. The line which fixes ordinary high-water mark is co-ordinate with the limits of the bed of the river or stream, and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. Soil which is submerged or affected by the water in the bed of the river or stream so long or so frequently in ordinary seasons that vegetation will not grow upon it may be regarded as part of the bed of the river or stream which overflows it, and such soil does not belong to the adjacent property owner.

In this connection you are further instructed that any kind of vegetation, whether trees or smaller growths, which grows and flourishes best in the immediate vicinity of running streams that are subject to overflow, and which, by reason of [584] a peculiar nature that may be adapted to wet places, shoots up in places as the water recedes, and which can withstand the effect of such overflow without injury for a longer period of time than other kinds of vegetation, should not necessarily be classed as vegetation to which the law refers as marking the limits of the ordinary high-water mark in cases of this character, unless the soil on which such vegetation grows is adapted to, and can be used for, the growth of ordinary vegetation or for agricultural purposes.

You are to consider and determine the character of the vegetation, if any, appearing

from the evidence to have a bearing upon the question of the location of the ordinary high-water mark involved in this case at the time in question. The ordinary high-water mark which was the east boundary line of said lot on the 16th day of February, 1912, is the true water mark as the same had theretofore been established or impressed upon the soil by natural causes; that is, by the action of the waters of the Des Moines river as they affected the land or soil along the shore or bank of said river in its natural condition, without human interference, or changes wrought by artificial means.

If you should find from the evidence that the shore or bank of said river at any time prior to said 16th day of February, 1912, had been permanently affected or changed by human interference or by artificial means, so as to permanently obliterate or wipe out the ordinary high-water mark of said river theretofore existing, then and in such case such human interference, and changes caused by artificial means, would not have the effect to change said ordinary high-water mark as the same had been brought about and theretofore existed by reason of such natural causes and before such human interference, and in such cases, if you should find from the evidence that prior to the said 16th day of February, 1912, permanent changes had been made in the shore or bank of said river by reason of human interference and by artificial means which had the effect to permanently obliterate or wipe out the ordinary high-water mark of said river theretofore existing, you should find and locate the east boundary line of said lot 2, Coliseum place, on said 16th day of February, 1912, at the line of the ordinary high-water mark as the same last existed before said permanent changes which were so [585] brought about by such human interference and artificial means.

There has been evidence introduced on the trial tending to show that a waterway formerly known as Bird's run extended through the lot in question and emptied into the Des Moines river at or near the east line of said lot. You are instructed, as a matter of law, that said Bird's run was not a meandered stream, and hence the plaintiffs, or the former owners of said lot, were the owners of all of the bed of said stream which you find to have been upon or over said lot 2, Coliseum place, and the mere fact, if it be a fact, that the Des Moines river in former times of freshets or high water, or at times when the river may have reached a point higher than the ordinary high-water mark, as elsewhere in these instructions defined, overflowed a part of said lot along or adjacent to Bird's run, this fact would not, in any manner, affect the title to any part of plaintiff's lot

which was west of the ordinary high-water mark of the Des Moines river, as you may find the same to have been located at said time.

The title to and ownership of the Des Moines river, which includes the bed of the river with all parts of the shore or bank which lies between the ordinary high-water mark on each side of said river, is in the state of Iowa, but the state of Iowa, by legislative enactment, has granted to the city of Des Moines jurisdiction and control, for park and other purposes, of a certain portion of said river within the city of Des Moines, including that portion which lies east of the ordinary high-water mark of said river, which is the east boundary line of said lot 2, Coliseum place.

You are instructed that at the time of said condemnation proceedings on said 16th day of February, 1912, the plaintiffs were the owners of said lot 2, their ownership extending only to the line of said ordinary high-water mark on or along the east side of said lot, and that the city of Des Moines had jurisdiction and control of all parts of the space or area lying east of the said ordinary high-water mark and west of the ordinary high-water mark at the east shore of said river. In fixing a value upon plaintiffs' said property at the time in question, you will be limited to the land or premises which were west of the ordinary high-water mark at the west side of the Des Moines river as it existed at said time, regardless [586] of the character of the use or occupancy of the space or area lying east of said ordinary high-water mark.

None of these instructions are complained of, and, as they are as favorable to plaintiffs as the law will justify, they must be accepted as correct. That they were not prejudicial to the plaintiffs, see *McManus v. Carmichael*, 3 Ia. 1; *Haight v. Keokuk*, 4 Ia. 199; *Musser v. Hershey*, 42 Ia. 356; *Houghton v. Chicago*, etc. R. Co. 47 Ia. 370; *Welch v. Browning*, 115 Ia. 690, 87 N. W. 430; *Berry v. Hoogenboom*, 133 Ia. 437, 108 N. W. 923; *Merrill v. Cerro Gordo County*, 146 Ia. 325, 330, 125 N. W. 222.

In this connection complaint is made of the trial court's ruling denying plaintiffs the right to offer in evidence the government surveyor's field notes showing the meander line of the river in the vicinity of the lot in question. There was no error here; at least none prejudicial to the plaintiffs. It is well understood that meander lines are not considered in law as boundary lines. See cases before cited. Moreover, both parties admitted upon the trial that the high-water mark at the time of condemnation was not on the meandered line. It also appears that certain exhibits, introduced by plaintiffs with-

out objection, showed the original meandered line. There was no dispute between the parties at any time as to where the meandered line was.

In the same connection plaintiffs offered photographs and levels taken by a surveyor on tracts south and north of the lot in question. The photographs and levels to the north were of a tract nearly a mile above the tract in question, and those to the south were of a tract eight or ten blocks away from the land condemned. These points were so remote and the tracts so dissimilar in character that we are of opinion the trial court correctly held them inadmissible.

Certain photographs offered by the city, taken at the time of a flood in the river, were received over plaintiffs' objections. They were not offered to show the ordinary high-water [587] mark, but to reproduce the conditions and surroundings of the property at or about the time of the condemnation. They were admissible for such purpose, and plaintiffs, if they had wished to have them limited to these purposes only, should have asked an instruction to that effect.

Certain instructions asked by plaintiffs, bearing upon the first proposition involved in the case, were refused, and of this complaint is made. Those given, which we have quoted, fully covered the points presented, and, as we have already remarked, were as favorable to plaintiffs as they were entitled to.

II. Upon the question of value, the trial court gave the ordinary instruction as to market value, and, in addition, the following, which are complained of:

"13. As applied to this case, the term 'reasonable market value' means the fair and reasonable value of said property at the time in question, as the said value may be determined from considering the evidence in regard to those facts which the owner would properly and naturally press upon the attention of the buyer to whom he is negotiating a sale, and in regard to those facts which would naturally influence or deter a person of ordinary prudence desiring to purchase. Evidence, if any, in regard to the facts which then existed, and which entered into the value of the premises in question in public and general estimation, and which may have tended to influence the minds of sellers and buyers generally, may be considered by you in determining the reasonable market value of said property at said time.

"15. Certain evidence has been admitted in this case bearing upon the question as to the price at which other properties than the property involved in this case were sold by various parties, and of the locations and character of such other properties. You are instructed that such evidence has been ad-

mitted, and should be considered by you only in connection with, and as bearing upon, the value of the opinions of the various witnesses respectively, in regard to the value of the property in controversy herein, and the same should not be considered by you as evidence bearing independently upon the value of [588] the property in controversy at the time in question, or as evidence tending to fix the value of said property at said time."

The first of these is a little out of the ordinary as given in such cases; but we see no prejudicial error therein. The facts referred to might properly be considered by the jury in arriving at its final conclusion in the case. Such matters were received in evidence; that is to say the experts on either side took them into account in giving their opinions—those for the plaintiffs pressing upon the attention of the jury the talking points from their standpoint, and the witnesses for the defendants pointing out the objections to the property. It was entirely legitimate, in view of this testimony, for the trial court to instruct with reference thereto. The instruction has some support in *Ranck v. Cedar Rapids*, 134 Ia. 563, 111 N. W. 1027; *Youtzy v. Cedar Rapids*, 150 Ia. 53, 129 N. W. 351. More directly in point are *Colorado M. R. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87; *Russell v. St. Paul*, etc. R. Co. 33 Minn. 210, 22 N. W. 379; and *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L.R.A. 123.

In any event the instruction was without prejudice.

III. Aside from some minor questions as to rulings on evidence, which were either correct or nonprejudicial, and an insistent claim that the verdict is without support in the testimony, the main and really the only debatable question in the case arises out of instruction 15, before quoted; and some rulings on the rejection of testimony as to the selling price of similar property at or about the time the condemnation proceedings were begun.

We may here remark parenthetically that there was a decided conflict in the testimony regarding the value of the property, and a very wide divergence of opinion among the experts as to its true market value; some of plaintiffs' witnesses valuing it at considerably over \$100,000, and some of defendants' witnesses placing it at less than the jury's award. In this connection we here quote another instruction given by the trial court, of which no complaint is made:

[589] "Your verdict in this case must be guided by these instructions, and must be based upon and found from the evidence introduced upon the trial, and, in considering the evidence and in arriving at the truth of the controversy involved herein, you have the right to use your knowledge of affairs

generally in connection with the testimony as to the values which have been given by the witnesses. By this is meant that you are not obliged to rely wholly upon the opinions of the witnesses as to the value of the premises in question, but that in connection with such opinions you may use, and be guided by, your own judgment on such matters in reaching your final conclusion. You cannot disregard the evidence and fix the value of said property arbitrarily or in accordance with your own notion, but you should exercise your own judgment and knowledge as suggested above only in connection with the testimony; that is to say, by taking the testimony into consideration and testing it in the light of your own intelligent judgment, and in harmony with these instructions, you should draw therefrom what you believe to be the proper conclusion in regard to the value of the said premises involved in this controversy at the time in question."

This instruction announces the law as settled by many of our cases, and furnishes one key for the solution of the problem now mooted, to wit: Is the verdict so barren of testimony that we should set it aside? Manifestly we would not, under the record, be justified in doing so if the law was correctly stated in the instruction last quoted.

That the rule announced is correct, and that even a wider discretion might have been imposed on the jury, see *Ranck v. Cedar Rapids*, 134 Ia. 574, 111 N. W. 1027; *Hoyt v. Chicago*, etc. R. Co. 117 Ia. 296, 90 N. W. 724; *Youtzy v. Cedar Rapids*, 150 Ia. 53, 129 N. W. 351.

The serious question in the case is the right of the plaintiffs to show, as substantive, independent proof of value, what property of the same character, similarly located, sold for in the market a short time after the condemnation proceedings were instituted. Such testimony was received by the court, and finally stricken out on motion, and finally the fifteenth instruction was given to cover the point.

[590] Upon no rule of evidence has there been a greater divergence of opinion among courts and text-writers than this one; and courts of any given jurisdiction have not been consistent in their holdings, and refinements have so often been made according to some text-writers that the only solution of the matter is to say that it is within the sound discretion of the trial court to either admit or reject the testimony. Indeed, some of the courts whose opinions are cited in support of the rule admitting such testimony have finally said that the matter was discretionary with the trial court. See *Shattuck v. Stoneham Branch R. Co.* 6 Allen (Mass.) 115; *Presbrey v. Old Colony*, etc. R. Co. 103 Mass. 1; *Bemis v.*

*Temple*, 162 Mass. 342, 38 N. E. 970, 26 L.R.A. 254; *Stinson v. Chicago*, etc. R. Co. 27 Minn. 284, 6 N. W. 784; *Laing v. United New Jersey R. etc. Co.* 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682. But see *Curley v. Jersey City*, 83 N. J. L. 760, 85 Atl. 197, 43 L.R.A. (N.S.) 985; *Washburn v. Milwaukee*, etc. R. Co. 59 Wis. 364, 18 N. W. 328; *Haines v. Republic F. Ins. Co.* 52 N. H. 467; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389, 14 L.R.A. 52.

If these decisions proceed upon the theory that it is within the discretion of the trial court to decide primarily upon the question of the similarity of the property or the remoteness of the sales, they may, perhaps, be logically sustained. But if, as some of them seem to say, it is discretionary with the court to admit or reject such testimony, conceding similarity and that the sales were not too remote, then we think there is no such middle ground. The testimony is either admissible or it is not, and there is no halfway point in principle.

Without going more deeply into the question, it will be found in examining the cases that the rule of admission is founded upon the principle that there is no better method for determining the market value of any piece of property at a given time than to show what other property similar in location and character has voluntarily been sold for at or about the time in question. Some cases say that this is the best testimony which can be adduced: *Chicago*, etc. R. Co. v. *Rottgering* (Ky.) 83 S. W. 584. Other cases say that such testimony [591] is entirely inadmissible when the property has a market value, on the ground that it is the general selling price of property in the neighborhood which is the test of value, and which must be taken into account by experts who give their opinions as to its value, and not the price paid for particular pieces of property; that to permit evidence in chief of particular sales is to let in collateral questions which will lead to confusion and error. *Pittsburgh*, etc. R. Co. v. *Patterson* 107 Pa. St. 461; *Stinson v. Chicago*, etc. R. Co. 27 Minn. 284, 6 N. W. 784; *Selma*, etc. R. Co. v. *Keith*, 53 Ga. 178; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389, 14 L.R.A. 52; *Kerr v. South Park Com'rs* 117 U. S. 379, 6 S. Ct. 801, 29 U. S. (L. ed.) 924; *Union R. Transfer*, etc. Co. v. *Moore*, 80 Ind. 458. Among the cases admitting such evidence, are the following: *Seattle*, etc. R. Co. v. *Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Edmands v. Boston*, 108 Mass. 535; *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227; *Concord R. Co. v. Greely*, 23 N. H. 237; *Baltimore v. Smith*, etc. Brick Co. 80

Md. 458, 31 Atl. 423; Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188. Prof. Wigmore, in his work on Evidence, vol. 1, section 463, says: "There is, however, one question indirectly involving a rule of evidence—the question whether the value of another article is receivable in order to show the value of the article in issue. As the price at a sale is, by the law of damages, conceded to be an element in the test of value (except perhaps in forced sales), this question is usually presented in the form whether a sale of other property is admissible as evidence of the value of the property in question. In answering this question, it is found that the two leading principles already expounded come into joint application—the principle of relevancy and the principle of auxiliary policy. According to the former, the value or sale price of the other property is irrelevant, unless the property is substantially similar in condition; according to the second, it may also be excluded though relevant, if it involves in the case in hand a disproportionate confusion of issues and loss of time. The latter consideration has weighed so much with a few courts that they have treated it as requiring the absolute and invariable exclusion of such evidence. It is enough to note: (1) In answer [592] to the argument from relevancy that, since value is a money estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential, and is so treated in commercial life. All the argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy. (2) In answer to the argument from auxiliary policy, it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to receive it—a solution already considered in its general application to the present subject. Except in a few jurisdictions, this class of evidence is received. In Massachusetts and in New Hampshire the principle of leaving the matter to the trial court's discretion to determine both the substantial similarity of condition and the confusion of issues is well carried out. In some jurisdictions its use is limited to the testing of value witnesses on cross-examination. Even in the jurisdictions where it is rejected its force is so far recognized that numerous absurd quibbles become necessary in order to distinguish between that which is rejected and that of which common sense compels a hearing. The

doctrine of admission moreover, is sometimes recognized for evidencing the value of services or chattels, when not recognized for land value."

It will be noticed from this quotation that the learned author finally adopts the rule that it is discretionary with the trial court. The rationale of the rule rejecting such testimony is well stated in the following quotations:

In *East Pennsylvania R. Co. v. Hiester*, 40 Pa. St. 55, the court of that state said:

"If allowed, each special instance adduced on the one side must be permitted to be assailed and its merits investigated on the other; and thus there would be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate, which in such cases we have seen is a test of value. It would be as liable to be the result of fancy, [593] caprice, or folly as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous."

*Parker, J.* in *In re Thompson*, 127 N. Y. 468, 28 N. E. 389, 14 L.R.A. 52, made the following observations:

"If [such sales are] some evidence of value, then prima facie a case may be made out so far as the question of damages is concerned by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show: First, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance, and such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market. Or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be

similarly situated might present two side issues which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult."

Without more it is sufficient to say that we have, after a full discussion of the matter and a review of the authorities, adopted the Pennsylvania and New York rule in *Watkins v. Railroad*, 137 Iowa 441. This is conceded by counsel for [594] appellants; but they insist that the rule is wrong, and should now be abandoned before any more damage is done. We are not so convinced by the argument of the unsoundness of this rule that we feel justified in abandoning it in so short a time after its adoption, if at any time. There is much to be said in favor of either rule, and the important point is to have it settled so that all may understand it in the future, and not be subject to the hazards of a change in each and every case where it may arise in the future.

The trial court followed the *Watkins* case, after carefully studying it, and, in effect, changed its ruling because of that case. True, that was in some respects a departure from the previous case of *Cherokee v. Sioux City, etc. Town Lot, etc. Co.* 52 Ia. 279, 3 N. W. 42, but that case was in itself somewhat of a departure from the prior rule of *King v. Iowa Midland R. Co.* 34 Ia. 458. It will thus be observed that it was believed essential in the *Watkins* case to settle the rule. If we were now to change, no one can tell what the rule may be in the future. It might depend upon the personnel of the bench, or upon a change of view of a majority of the judges, and could not be said to be finally settled at any time.

If the rules of discretion were adopted, there would be much reason for saying that the trial court did not abuse its discretion because of the peculiar character of the property condemned. It seems that at one time a small creek ran through the lot which was practically on a level with the river for some distance from its outlet. More recently this was converted into a storm sewer, and this sewer drained several blocks of the city. This sewer runs east and west through the lot near its center, and since its construction the old channel of the creek has been filled with refuse of all sorts; the lot being used as sort of a dumping ground. Moreover, the east line of the lot is the Des Moines river, which necessitates the building of a retaining wall, or, until the lot is improved, it is subject to the washing of the river.

No voluntary sales of other property of similar character [595] were shown. But

we do not place the ruling on that ground alone. The remark is made to show that even the Massachusetts rule, as it is called, would not call for a reversal. Knowledge of the sales of other property in general, and of other property so nearly similar as was possible under the circumstances, were shown to qualify some of the witnesses, and lack of knowledge of sales to diminish the weight of the testimony of others was also shown; and in this way each party, we must assume, had the benefit of the testimony in so far as it properly affected the reasonable market price of the property in question.

Under the testimony it is doubtless true that we would have made a larger award had we been trying the case, but, in view of the verdict of the jury and the conclusion of the learned trial judge, we are not justified in saying that the award is so small as to evidence that it was not based upon the testimony, but upon passion or prejudice.

We find no reversible error, and the judgment must be, and it is

Affirmed.

All the Justices concur.

#### NOTE.

#### Admissibility in Eminent Domain Proceeding of Evidence of Price Paid by Another than Condemnor for Similar Property.

##### Majority Rule:

In General, 598.

Reason of Rule, 600.

Limitations of Rule, 600.

Minority Rule, 602.

##### Majority Rule.

##### IN GENERAL.

It is the most generally approved doctrine that evidence of the price paid for similar property by another than the condemnor is admissible on the question of the value of the property condemned.

*England*.—See *Secretary of State v. Charlesworth* [1901] A. C. 373.

*Canada*.—Re *National Trust Co. etc. R. Co.* 29 Ont. L. Rep. 462, 15 Dominion L. Rep. 320, 5 O. W. N. 221.

*United States*.—*Laffin v. Chicago, etc. R. Co.* 33 Fed. 415. See also *Kerr v. South Park Com'rs*, 117 U. S. 379, 6 S. Ct. 801, 29 U. S. (L. ed.) 924.

*Colorado*.—*Loloff v. Sterling*, 31 Colo. 102, 71 Pac. 1113.

*Georgia*.—*Flemister v. Central Georgia Power Co.* 140 Ga. 511, 79 S. E. 148.

*Illinois*.—*Culbertson, etc. Packing, etc. Co. v. Chicago*, 111 Ill. 651; *O'Hare v. Chicago*,



166 Iowa 581.

etc. R. Co. 139 Ill. 151, 28 N. E. 923; Peoria Gas Light, etc. Co. v. Peoria Terminal R. Co. 146 Ill. 372, 34 N. E. 550, 21 L.R.A. 373; Lanquist v. Chicago, 200 Ill. 69, 65 N. E. 681; Chicago, etc. R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229; Eldorado, etc. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281; Aledo Terminal R. Co. v. Butler, 246 Ill. 406, 92 N. E. 909; Illinois Cent. R. Co. v. Roskammer, 264 Ill. 103, 105 N. E. 695; Chicago Sanitary Dist. v. Boening, 267 Ill. 118, 107 N. E. 810. See also St. Louis, etc. R. Co. v. Haller, 92 Ill. 208; Chicago, etc. R. Co. v. Maroney, 95 Ill. 182; Chicago, etc. R. Co. v. Mines, 221 Ill. 448, 77 N. E. 898. Compare Brown v. Illinois, etc. R. Co. 209 Ill. 402, 70 N. E. 905.

*Kentucky*.—Paducah v. Allen, 111 Ky. 361, 63 S. W. 981, 23 Ky. L. Rep. 701, 98 Am. St. Rep. 422; West Kentucky Coal Co. v. Dyer, 161 Ky. 407, 170 S. W. 967; Chicago, etc. R. Co. v. Rottgering, 83 S. W. 584, 26 Ky. L. Rep. 1167.

*Louisiana*.—See also New Orleans v. Manfre, 111 La. 927, 35 So. 981; Louisiana Ry. etc. Co. v. Morere, 116 La. 997, 41 So. 236.

*Maryland*.—Baltimore v. Smith, 80 Md. 458, 31 Atl. 423.

*Massachusetts*.—Paine v. Boston, 4 Allen 168; Shattuck v. Stoneham Branch R. Co. 6 Allen 115; Wyman v. Lexington, etc. R. Co. 13 Metc. 316; Green v. Fall River, 113 Mass. 262; Gardner v. Brookline, 127 Mass. 358; Sawyer v. Boston, 144 Mass. 470, 11 N. E. 711; Patch v. Boston, 146 Mass. 52, 14 N. E. 770; Roberts v. Boston, 149 Mass. 346, 21 N. E. 668; Pierce v. Boston, 164 Mass. 92, 41 N. E. 227; Lyman v. Boston, 164 Mass. 99, 41 N. E. 127; O'Malley v. Com. 182 Mass. 196, 65 N. E. 30; Boston Fourth Nat. Bank v. Com. 212 Mass. 66, 98 N. E. 686; Burley v. Old Colony R. Co. 219 Mass. 483, 107 N. E. 365. See also Edmands v. Boston, 108 Mass. 535.

*Mississippi*.—See Yazoo, etc. Delta v. Nelms, 82 Miss. 416, 34 So. 149.

*Missouri*.—St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L.R.A. 751; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498; Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188; Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

*New Hampshire*.—Concord R. Co. v. Greeley, 23 N. W. 237; Gregg v. Northern R. Co. 67 N. H. 452, 41 Atl. 271. See also March v. Portsmouth, etc. R. Co. 19 N. H. 372.

*New Jersey*.—Laing v. United New Jersey R. etc. Co. 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682; Hadley v. Chosen Freeholders, 73 N. J. L. 197, 62 Atl. 1132; Curley v. Jersey City, 83 N. J. L. 760, 85 Atl. 197, 43 L.R.A. (N.S.) 985.

*North Carolina*.—See Wadsworth Land Co. v. Piedmont Traction Co. 162 N. C. 503, 78 S. E. 299.

*Rhode Island*.—East Shore Land Co. v. Metropolitan Park Commission, 86 Atl. 894.

*Tennessee*.—Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Lewisburg, etc. R. Co. v. Hinds, 183 S. W. 985.

*Texas*.—Sullivan v. Missouri, etc. R. Co. 29 Tex. Civ. App. 429, 68 S. W. 745; St. Louis Southwestern R. Co. v. Hughes, 73 S. W. 976; Ft. Worth v. Charbonneau, 166 S. W. 387; Houston, etc. R. Co. v. Wilson, 176 S. W. 907. See also Newbold v. International, etc. R. Co. 34 Tex. Civ. App. 525, 79 S. W. 1079; Houston Belt, etc. R. Co. v. Dooley, 160 S. W. 594.

*Utah*.—See Telluride Power Co. v. Brun-  
ean, 41 Utah 4, Ann. Cas. 1915A 1251, 125 Pac. 399.

*Virginia*.—Seaboard Air Line Ry v. Cham-  
blin, 108 Va. 42, 60 S. E. 727.

*Washington*.—Seattle, etc. R. Co. v. Gil-  
christ, 4 Wash. 509, 30 Pac. 738; Port Town-  
send Southern R. Co. v. Barbare, 46 Wash.  
275, 89 Pac. 710.

*Wisconsin*.—American States Security Co.  
v. Milwaukee Northern R. Co. 139 Wis. 199,  
120 N. W. 844. See West v. Milwaukee, etc.  
R. Co. 56 Wis. 318, 14 N. W. 292. And  
see 10 R. C. L. 221.

Thus in Gregg v. Northern R. Co. 67 N. H. 452, 41 Atl. 271, it was held that evidence of the price at which sales of railroad stock were made in the Boston stock market was admissible in a proceeding to determine the value of other shares taken under the power of eminent domain. So in Benham v. Dunbar, 103 Mass. 365, it was held that evidence of sales of land on islands and headlands in Boston harbor was admissible in a proceeding to assess the value of a tract of lowland and flats on another island acquired by the United States, it not appearing that the lands sold were at such distances or devoted to such dissimilar uses that the evidence was irrelevant or immaterial. Similarly in Concordia Cemetery Ass'n v. Minnesota, etc. R. Co. 121 Ill. 199, 12 N. E. 536, it appeared that a railroad company condemned for its right of way a strip of land across a tract situated in a village and owned by a cemetery association. It was held that that evidence of sales of prairie land one mile distant was not incompetent, there being no evidence of sales of like property nearer, or of the market value of the property condemned. But evidence of sales of lots in other cemeteries was held to be inadmissible, because the property condemned was not laid off in lots and improved as cemetery property. And in Patch v. Boston, 146 Mass. 55, 14 N. E. 772, it was held that the rule was applicable to evidence of

sales of land with buildings, the court saying: "It is admitted that ordinarily sales of other similar lands in the vicinity, at or about the time in question, may be shown. . . . But it is contended that the rule does not include sales of land with buildings thereon. . . . If it had appeared that the buildings upon the lots which were sold were quite unlike those upon the plaintiff's land, there would be force in the objection; but this does not appear. Houses on the same street in a city often correspond closely in style, cost, and value. The mere fact that buildings were upon the land does not of itself have the effect to vary the rule of law that sales of other similar lands may be shown, upon the question of value; but it is in such case, as in all others, to be determined by the court whether on the whole there was such a general similarity that the price obtained on the sale of one estate may fairly tend to show the value of the other."

#### REASON OF RULE.

In *Peoria Gas Light, etc. Co. v. Peoria Terminal R. Co.* 146 Ill. 372, 34 N. E. 550, 21 L.R.A. 373, the court in discussing the theory on which evidence of the price paid for similar property by another than the condemnor is admissible in an eminent domain proceeding said: "The theory upon which evidence of sales of other similar property in the neighborhood, at about the same time, is held to be admissible is, that it tends to show the fair market value of the property sought to be condemned." So in *St. Louis, etc. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L.R.A. 751, it was said: "We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damage to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinions of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinions upon recent sales of like property are liable to exaggerate or underestimate values; in any consideration they are no more capable of deducing fair conclusion from the known facts than the jury. The object is to ascertain the general market value, and if particular sales are made under exceptional circumstances the fact can be shown, and the jury can determine its probative force. Certainly no more reliable method of determining the fair market values of lands can be reached than that derived from bona fide sales of similar

lands in the vicinity. The objection that such evidence raises collateral issues, as to the character of the land sold and the circumstances of such sales, is more than compensated for by its value in aiding the jury to a correct conclusion." In *Paducah v. Allen*, 111 Ky. 361, 63 S. W. 981, 23 Ky. L. Rep. 701, 98 Am. St. Rep. 422, the court said: "On the trial, appellant offered to prove by various witnesses what adjoining properties of the same class and character had been sold for just before and since the location of the pest house, it being thus attempted to prove that the market value of this property had not been impaired to the extent indicated by the opinions of appellee's witnesses. Of course, market value is the price at which an article sells in the market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses; for, truly, here is where 'money talks.' . . . We are of the opinion that it was error in the trial court to reject the testimony above mentioned."

#### LIMITATIONS OF RULE.

To admit evidence in an eminent domain proceeding of the price paid by another than the condemnor for similar property, the transaction must not be so far removed in point of time from the taking of the property under the power of eminent domain as to make a comparison unjust or impossible. *Flemiston v. Central Georgia Power Co.* 140 Ga. 511, 79 S. E. 148; *Lanquist v. Chicago*, 200 Ill. 69, 65 N. E. 681; *St. Louis, etc. Ry. v. Guswelle*, 236 Ill. 214, 86 N. E. 230; *Chicago Sanitary Dist. v. Boening*, 267 Ill. 118, 107 N. E. 810; *Benham v. Dunbar*, 103 Mass. 368; *Green v. Fall River*, 113 Mass. 262; *Chandler v. Jamacia Pond Aqueduct Corp.* 122 Mass. 305; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668; *Hunt v. Boston*, 152 Mass. 168, 25 N. E. 82; *May v. Boston*, 158 Mass. 21, 32 N. E. 902; *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227; *Bowditch v. Boston*, 164 Mass. 107, 41 N. E. 132; *Boston Fourth Nat. Bank v. Com.* 212 Mass. 66, 98 N. E. 686. See also *Baltimore v. Smith*, 80 Md. 458, 31 Atl. 423; *Sullivan v. Missouri, etc. R. Co.* 29 Tex. Civ. App. 429, 68 S. W. 745; *St. Louis South-Western R. Co. v. Hughes (Tex.)* 73 S. W. 976; *Dallas, etc. R. Co. v. Langston (Tex.)* 98 S. W. 425. What transactions are too remote depends on the circumstances of each case. *Benham v. Dunbar*, *supra*, wherein the court in holding admissible evidence of sales made in the vicinity of the lands in controversy from one to eight years before said:

166 Iowa 581.

"Much must be left to the discretion of the judge who presides at the trial, in determining whether the lands, sales of which were admitted in evidence, were so similar in situation, and adaptation to profitable occupation, and the sales of them so recent, as to make such sales evidence proper to be submitted to the jury. It certainly does not appear from the facts stated in these exceptions that the lands upon other islands and headlands in Boston harbor were at such distances, or devoted to such dissimilar uses, or that the sales testified of were so remote in point of time, that the evidence became irrelevant or immaterial to the issue. It may be that there were no sales more recent to be shown. The rule must vary with the circumstances of each case. If the value of a town lot was in question, it is plain that the evidence should be confined to sales of comparatively recent date and of land in the near vicinity. If it was wild land, in a thinly settled part of the country, a more liberal rule would be applicable. Without some further evidence, we cannot suppose that the changes in the title to real estate in the islands and headlands of the harbor are so frequent, or the difference in situation and value so great, as to render the evidence here objected to inadmissible."

The determination of the similarity of the lands involved in the proffered evidence to those sought to be condemned, and whether the transactions are sufficiently close in point of time to afford a fair comparison, is a matter resting largely in the discretion of the trial court.

*Illinois*.—*St. Louis, etc. Ry. v. Guswelle*, 236 Ill. 214, 86 N. E. 230; *Aledo Terminal R. Co. v. Buter*, 246 Ill. 406, 92 N. E. 909; *Chicago, etc. R. Co. v. Heidenreich* 254 Ill. 231, Ann. Cas. 1913C 266, 98 N. E. 567; *Lambert v. Giffin*, 257 Ill. 152, 100 N. E. 496; *Chicago Sanitary Dist. v. Boening*, 267 Ill. 118, 107 N. E. 810.

*Maryland*.—*Patterson v. Baltimore City*, 127 Md. 233, 96 Atl. 458.

*Massachusetts*.—*Paine v. Boston*, 4 Allen 168; *Shattuck v. Stoneham Branch R.* 6 Allen 115; *Benham v. Dunbar*, 103 Mass. 368; *Green v. Fall River*, 113 Mass. 262; *Chandler v. Jamaica Pond Aqueduct Corp.* 122 Mass. 305; *Sawyer v. Boston*, 144 Mass. 470, 11 N. E. 711; *Amory v. Melrose*, 162 Mass. 556, 39 N. E. 276; *Lyman v. Boston*, 164 Mass. 99, 41 N. E. 127; *Bowditch v. Boston*, 164 Mass. 107, 41 N. E. 132; *Boston Fourth Nat. Bank v. Com.* 212 Mass. 66, 98 N. E. 686; *Burley v. Old Colony R. Co.* 219 Mass. 493, 107 N. E. 365.

*New Jersey*.—*Laing v. United New Jersey R. etc. Co.* 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682; *Manda v. Orange*, 82

N. J. L. 686, Ann. Cas. 1913D 581, 82 Atl. 869.

*Tennessee*.—*Lewisburg, etc. R. Co. v. Hinds*, 183 S. W. 985.

*Wisconsin*.—*Stolze v. Manitowoc Terminal Co.* 100 Wis. 208, 75 N. W. 987; *American States Security Co. v. Milwaukee Northern R. Co.* 139 Wis. 199, 120 N. W. 844. See also *Watson v. Milwaukee, etc. R. Co.* 57 Wis. 332, 15 N. W. 468; *Washburn v. Milwaukee, etc. R. Co.* 59 Wis. 364, 18 N. W. 328. And see also the note to *Manda v. Orange*, Ann. Cas. 1913D 581. In each of the following cases evidence of the price paid for similar property was held to be inadmissible. *St. Louis, etc. Ry. v. Guswelle*, 236 Ill. 214, 86 N. E. 230 (sales three years before taking); *Chandler v. Jamaica Pond Aqueduct Corp.* 122 Mass. 305 (sale three years after taking and general advance in land values); *Sullivan v. Missouri, etc. R. Co.* 29 Tex. Civ. App. 429, 68 S. W. 745 (sales ten years before time of taking although there was testimony that market value of property was unchanged); *Dallas, etc. R. Co. v. Langston (Tex.)* 98 S. W. 425 (sale three years before time of taking).

But in each of the following cases evidence of the price paid for similar property was held to be admissible. *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668 (one sale five months after time of taking and another twenty months after); *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227 (sale two years before time of taking); *Bowditch v. Boston*, 164 Mass. 107, 41 N. E. 132 (sale two and one-half years before time of taking).

Evidence of the price paid for similar property by another than the condemnor is admissible in an eminent domain proceeding only when the sale was made in a free and open market, and was not a compulsory sale. *Peoria Gas Light, etc. Co. v. Peoria Terminal R. Co.* 146 Ill. 372, 34 N. E. 550, 21 L.R.A. 373; *Lanquist v. Chicago*, 200 Ill. 69, 65 N. E. 681; *West Skokie Drainage Dist. v. Dawson*, 243 Ill. 175, Ann. Cas. 776, 90 N. E. 377; *Chicago, etc. R. Co. v. Heidenreich*, 254 Ill. 231, Ann. Cas. 1913C 266, 98 N. E. 567; *Chicago Sanitary Dist. v. Boening*, 267 Ill. 118, 107 N. E. 810; *O'Nalley v. Com.* 182 Mass. 196, 65 N. E. 30; *Burley v. Old Colony R. Co.* 219 Mass. 483, 107 N. E. 365. See also *Chicago, etc. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229; *Baltimore v. Smith*, 80 Md. 458, 31 Atl. 423; *Suburban Land Co. v. Arlington*, 219 Mass. 539, 107 N. E. 432; *Metropolitan St. R. Co. v. Walsh*, 197 Mo. 392, 94 S. W. 860. Thus in *Peoria Gas Light, etc. Co. v. Peoria Terminal R. Co.* supra it was said: "The theory upon which evidence of sales of other similar property in the neighborhood, at

about the same time, is held to be admissible is, that it tends to show the fair market value of the property sought to be condemned. And it cannot be doubted that such sales, when made in a free and open market, where a fair opportunity for competition has existed, become material and often very important factors in determining the value of the particular property in question. But it seems very clear that to have that tendency, they must have been made under circumstances where they are not compulsory, and where the vendor is not compelled to sell at all events, but is at liberty to invite competition among those desiring to become purchasers." In *Suburban Land Co. v. Arlington*, supra, the court in holding to be inadmissible evidence of the price paid to a corporation engaged in the land developing business by one making a purchase under the instalment plan said: "We are of the opinion that this evidence was excluded properly. The petitioner was entitled to receive as compensation the fair market value of the land taken by the town in view of all the uses to which it might be put. The price paid at recent sales of similar lands in the vicinity was admissible, and was admitted in this case. Such a noncompulsory sale between a willing seller and buyer is ordinarily regarded as a good test or criterion to aid the jury in determining the value of the land in controversy. The opinion of the buying public so expressed in a free market is what usually determines value. But there must be an actual sale. Without it, the price fixed in a mere agreement to sell adjoining land is not admissible. . . . The agreements under which the petitioner disposed of its land did not constitute sales, such as are admissible in evidence to show market value. And, as a test of value, we are not inclined to say that the price which is established artificially and temporarily by booming methods should be regarded as equivalent to the market value which is regulated by the natural laws of supply and demand."

The price paid for similar property by another than the condemnor cannot be proven by the introduction of the deed between the parties to the transaction. *O'Hare v. Chicago*, etc. R. Co. 139 Ill. 151, 28 N. E. 923; *New Orleans v. Manfre*, 111 La. 927, 35 So. 981; *Louisiana R. etc. Co. v. Morere*, 116 La. 997, 41 So. 236; *Rose v. Taunton*, 119 Mass. 99; *Yazoo, etc. Delta v. Nelms*, 82 Miss. 416, 34 So. 149; *McLean v. Memphis Union Station Co.* 1 Tenn. Civ. App. 457; *Esch v. Chicago*, etc. R. Co. 72 Wis. 229, 39 N. W. 129.

#### *Minority Rule.*

The rule obtains in several jurisdictions that evidence of the price paid by another

than the condemnor for similar property is inadmissible on the question of the value of the property condemned.

*California*.—See *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

*Iowa*.—*Cherokee v. Sioux City, etc. Co.* 52 Ia. 279, 3 N. W. 42; *Everett v. Union Pac. R. Co.* 59 Ia. 243, 13 N. W. 109; *Watkins v. Wabash R. Co.* 137 Ia. 441, 113 N. W. 924. And see the reported case. *Compare* *Gummins v. Des Moines, etc. R. Co.* 63 Ia. 397, 19 N. W. 268; *Hollingsworth v. Des Moines, etc. R. Co.* 63 Ia. 443, 19 N. W. 325; *Ranek v. Cedar Rapids*, 134 Ia. 563, 111 N. W. 1027; *Millard v. Webster City*, 113 Ia. 220, 84 N. W. 1044.

*Kansas*.—*Kansas City, etc. R. Co. v. Weidenmann*, 77 Kan. 300, 94 Pac. 146.

*Minnesota*.—*Lehmicke v. St. Paul, etc. R. Co.* 19 Minn. 464. *Compare* *Stinson v. Chicago, etc. R. Co.* 27 Minn. 284, 6 N. W. 784.

*Nebraska*.—*Chicago, etc. R. Co. v. Griffith*, 44 Neb. 690, 62 N. W. 868; *Union Pac. R. Co. v. Stanwood*, 71 Neb. 150, 91 N. W. 191, 98 N. W. 656.

*New York*.—*Rondout, etc. R. Co. v. Deyo*, 5 Lans. 298; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389, 14 L.R.A. 52; *Robinson v. New York Elevated R. Co.* 175 N. Y. 219, 67 N. E. 431; *Douglass v. New York El. R. Co.* 14 App. Div. 471, 43 N. Y. S. 847; *Manhattan R. Co. v. Stuyvesant*, 126 App. Div. 848, 111 N. Y. S. 222; *In re New York* 142 App. Div. 665, 127 N. Y. S. 379; *In re East 161st. St.* 159 App. Div. 662, 144 N. Y. S. 717. See also *Kingsland v. New York*, 60 Hun 489, 15 N. Y. S. 232; *People v. McCarthy*, 102 N. Y. 630, 8 N. E. 185; *Langdon v. New York*, 133 N. Y. 628, 31 N. E. 98. *Compare* *In re New York, etc. R. Co.* 27 Hun 151; *Hadden v. Metropolitan El. R. Co.* 75 Hun 63, 26 N. Y. S. 995.

*Ohio*.—*Lorain St. R. Co. v. Sinning*, 6 Ohio Cir. Dec. 753; *Cleveland, etc. R. Co. v. Gorsuch*, 28 Ohio Cir. Ct. Rep. 468, affirmed 76 Ohio St. 609, 81 N. E. 1186.

*Pennsylvania*.—*Railroad Co. v. Patterson*, 32 Pittsb. Leg. J. 257; *Pennsylvania, etc. Canal, etc. Co. v. Bunnell*, 2 Wkly. N. Cas. 633; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. St. 53; *Pittsburgh, etc. R. Co. v. Rose*, 74 Pa. St. 363; *Hays v. Briggs*, 74 Pa. St. 373; *Pennsylvania, etc. R. etc. Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh, etc. R. Co. v. Patterson*, 107 Pa. St. 461; *Pittsburgh, etc. R. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764; *Becker v. Philadelphia, etc. R. Co.* 177 Pa. St. 262, 35 Atl. 617, 35 L.R.A. 583; *Friday v. Pennsylvania R. Co.* 204 Pa. St. 405, 54 Atl. 339; *Henkel v. Wabash Pittsburgh Terminal R. Co.* 213 Pa. St. 485, 62 Atl. 1085; *Neeley v. Western Allegheny R. Co.* 219 Pa. St. 349, 68 Atl. 829; *Rea v.*

Pittsburg, etc. R. Co. 229 Pa. St. 106, 78 Atl. 73, 140 Am. St. Rep. 721; Roberts v. Philadelphia, 239 Pa. St. 339, 86 Atl. 926. See also Hewitt v. Pittsburgh, etc. R. Co. 19 Pa. Super. Ct. 304.

In Neeley v. Western Allegheny R. Co. 219 Pa. St. 349, 68 Atl. 829, the court in stating the rule and discussing the reasoning on which it is based said: "It is well settled by an unbroken line of decisions that the test of value in such a case is not the price paid for a particular property but the general selling price of land in the vicinity and that evidence of particular sales is not admissible to establish market value. The reason for the rule is that particular sales may have been made without regard to the market value and that separate inquiries as to them and a comparison of the properties sold with the property in question and with each other would introduce collateral issues and tend to confuse rather than enlighten the jury: Pittsburgh, etc. R. Co. v. Patterson, 107 Pa. St. 461." And in Kansas City, etc. R. Co. v. Weidenmann, 77 Kan. 300, 94 Pac. 146, it was said: "No error was committed in excluding testimony of particular sales proposed to be given on direct examination of defendant's witnesses. The general selling price in the neighborhood is one of the tests of value, while the price paid for a particular property may have been a sacrifice from necessity, the result of trickery or fraud, or of recklessness and folly. The dissimilarity in properties makes comparison difficult and impracticable; besides, such a rule would introduce as many collateral issues as there were sales, thus making inquiry almost interminable. To test the knowledge of witnesses and the value of their opinions in such cases they may be asked, on cross-examination, as to other transactions and as to sales of other property. On the main issue, however, the price an owner should receive cannot be established by some specific or exceptional case, and the evidence on the direct examination was therefore properly confined to the general selling price in the neighborhood."

It seems, however, that the evidence is admissible in a case of necessity, as where there is no other evidence of the value of the property condemned. Stinson v. Chicago, etc. R. Co. 27 Minn. 284, 6 N. W. 784; Langdon v. New York, 133 N. Y. 628, 31 N. E. 98; Manhattan R. Co. v. Stuyvesant, 126 App. Div. 848, 111 N. Y. S. 222.

And a witness giving in evidence his opinion as to the value of the land condemned may be questioned on cross-examination as to sales of similar property for the purpose of testing his knowledge. Central Pac. R. Co. v. Pearson, 35 Cal. 247; Winkleman v. Des Moines, etc. R. Co. 62 Iowa 11, 17

N. W. 82; Watkins v. Wabash R. Co. 137 Iowa 441, 113 N. W. 924; Chicago, etc. R. Co. v. Stewart, 47 Kan. 704, 28 Pac. 1017; Chicago, etc. R. Co. v. Emery, 51 Kan. 16, 32 Pac. 631; Union Pac. R. Co. v. Stanwood, 71 Neb. 150, 91 N. Y. 191, 98 N. W. 656; In re Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L.R.A. 52; Robinson v. New York Elevated R. Co. 175 N. Y. 219, 67 N. E. 431; In re East, 161st St. 159 App. Div. 662, 144 N. Y. S. 717; Lorain St. R. Co. v. Sinning, 6 Ohio Cir. Dec. 753; Becker v. Philadelphia, etc. R. Co. 177 Pa. St. 252, 35 Atl. 617, 35 L.R.A. 583; Henkel v. Wabash Pittsburg Terminal R. Co. 213 Pa. St. 485, 62 Atl. 1085; Neeley v. Western Allegheny R. Co. 219 Pa. St. 349, 68 Atl. 829; Rea v. Pittsburg, etc. R. Co. 229 Pa. St. 106, 78 Atl. 73, 140 Am. St. Rep. 721; Roberts v. Philadelphia, 239 Pa. St. 339, 86 Atl. 926. And see 10 R. C. L. 221.

## JOHNSON

v.

## ETNA LIFE INSURANCE COMPANY.

Wisconsin Supreme Court—May 1, 1914.

158 Wis. 56; 147 N. W. 32.

### Torts — Procuring Discharge of Servant — Liability.

If defendant was justified in procuring plaintiff's discharge by his employer, the fact that defendant acted from malicious motives will not make it liable to plaintiff.

[See note at end of this case.]

### Same.

If defendant insurance company procured plaintiff's discharge by his employer in order to prevent plaintiff from earning money, to prosecute his suit for damages for personal injuries, defendant is liable to plaintiff in damages for wrongfully procuring his discharge.

[See note at end of this case.]

### Same.

In an action against an insurance company for wrongfully procuring plaintiff's discharge by his employer, evidence for plaintiff held to make a prima facie case that defendant procured plaintiff's discharge to prevent him from earning money so as to enable him to maintain an action for damages for personal injuries.

[See note at end of this case.]

### Same.

In an action by the employee of a manufacturing company against an insurance company for damages for wrongfully procuring

plaintiff's discharge by his employer, evidence held not to sustain a finding that plaintiff was discharged because of defendant's suggestion or wrongful interference in plaintiff's employment.

[See note at end of this case.]

**Evidence — Fact or Conclusion — Reason for Discharge.**

Evidence as to the cause of an employee's discharge by witnesses who were familiar with the cause was as to a fact and not a conclusion.

**Relative Weight of Positive and Inferential Evidence.**

The evidence of unimpeached witnesses testifying from accurate and positive knowledge concerning facts is not controverted by indefinite statements or negative testimony, or by doubtful inferences from undisputed facts.

Appeal from Circuit Court, Milwaukee county: FRITZ, Judge.

Action for damages. Frank E. Johnson, plaintiff, and Aetna Life Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[57] On June 28, 1910, plaintiff, while in the employ of the Simmons Manufacturing Company, suffered an injury to his left eye. Thereafter he commenced an action against said company to recover damages for the injury sustained. The defendant herein appeared in that action (which is still pending) for the Simmons Manufacturing Company, in accordance with a contract of indemnity with such company. As soon as plaintiff recovered from his injury he resumed his employment and continued it until March, 1911, at which time he was discharged. This action was brought against the defendant to recover damages alleged to have been sustained by reason of the action of the defendant in procuring the discharge of plaintiff from his employment because of his refusal to settle his claim in accordance with the terms of the defendant insurance company. The answer denied the material allegations of the complaint. The evidence tended to show that a short time before the plaintiff was discharged an agent of the defendant called upon Mr. Vincent, the general manager of the Simmons Manufacturing Company, and suggested to him that the plaintiff be discharged. Following this interview and on February 28, 1911, the agent of [58] the defendant wrote a letter addressed to "Mr. W. W. Vincent, The Simmons Mfg. Co., Kenosha, Wis.," as follows:

"Dear Sir: Confirming our interview this morning regarding the above entitled matter, I wish to call your attention to the fact that this injured has brought suit against your company, and the further fact that he is

still in your employ. This situation, while it is one which is immaterial to us, and in no way affects us or affects the question of the injured's right to recover, is one which is full of possibilities of trouble to your company for the following reasons: It has the tendency to encourage litigation against your company by your employees for the reason that they feel they can 'take a chance' at obtaining a judgment after they are injured and still lose nothing in the way of being out of employment. It furthermore gives them the opportunity to collect the necessary money with which to fight a lawsuit; in other words, you are furnishing them 'sinews of war' with which to fight yourself. While it is true, as you suggested, that the effect of showing that the company considers the matter one which they are fighting as a matter of principle; and that because they are right, the company is not small enough to consider the fact that a man is fighting it a reason for discharging him, still these facts could not under our rules of evidence be shown at the time the matter is tried for the reason that they are irrelevant. We wish merely to call this fact to your attention, so that you may consider whether it is in accord with your best interests that your employees get the idea that they can undertake to collect damages from you and at the same time remain in your employ, earning money with which to injure you. As for ourselves, as I have stated to you, we are not interested one way or the other. It is entirely immaterial to us, and we make no recommendations one way or the other. We merely submit the matter to your good judgment."

Simmons testified that he was not present at the interview with the defendant's agent; that he never saw the letter until a short time before the trial; that he knew nothing of the request made by the defendant; and that he ordered the plaintiff discharged on his own motion and not because of any action [59] taken by the defendant. His evidence was corroborated by the general superintendent, Vincent. Other facts will be more fully stated in the opinion.

The jury answered all of the questions in the special verdict in favor of the plaintiff, and among other things found that plaintiff's discharge was proximately caused by the defendant. The jury assessed the plaintiff's compensatory damages at \$294 and his punitive damages at \$5,000. In lieu of the granting of a new trial plaintiff was permitted to remit \$4,000 punitive damages, and judgment was entered on the verdict as amended.

*Harper & McMynn and J. E. Dodge for appellant.*

*William L. Tibbs and Rossiter Lines for respondent.*

BARNES, J.—This appeal presents two questions: (1) On the facts found by the jury, was the plaintiff entitled to judgment? (2) Has the finding of causal connection between the acts complained of by the plaintiff and his discharge sufficient support in the evidence? 1. The first question must be resolved in favor of the plaintiff. We agree with defendant's counsel that if their client was justified in doing what it did in the way of procuring Johnson's discharge, the fact that it acted from malicious motives would not give a right of action. The presence of malice would permit the recovery of punitive damages, if defendant acted without justification, but would not in itself create a cause of action where none existed without it. Malice makes a bad case worse, but does not make wrong that which is lawful. This question is definitely set at rest by a number of decisions in this court. *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, 81 Am. St. Rep. 841, 50 L.R.A. 305; *Sullivan v. Collins*, [60] 107 Wis. 291, 299, 83 N. W. 310; *Marshfield Land, etc. Co. v. John Week Land Co.* 108 Wis. 268, 274, 84 N. W. 434; *Madden v. Kinney*, 116 Wis. 561, 569, 93 N. W. 535; *Huber v. Merkel*, 117 Wis. 355, 363, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L.R.A. 589; *Loehr v. Dickson*, 141 Wis. 332, 335, 124 N. W. 293, 30 L.R.A.(N.S.) 495. But the plaintiff had the right to dispose of his labor wherever he could to the best advantage. This is a legal right entitled to legal protection. Such right could be interfered with by one acting in the exercise of an equal or superior right. As against all others, the plaintiff was entitled to go his way without molestation, and if any one assumed to meddle in his affairs he did so at his peril. There is practically little conflict in the cases on this point. *Walker v. Cronin*, 107 Mass. 555, 564; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L.R.A. 339; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 38 Am. St. Rep. 289, 52 L.R.A. 115; *Berry v. Donovan*, 188 Mass. 353, 3 Ann. Cas. 738, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L.R.A. (N.S.) 899; *Lopes v. Connolly*, 210 Mass. 487, 97 N. E. 80, 38 L.R.A.(N.S.) 986; *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756; *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 9 Ann. Cas. 698, 65 Atl. 105, 118 Am. St. Rep. 727, 9 L.R.A.(N.S.) 254; *Ruddy v. United Assoc. of Journeymen, etc.* 79 N. J. L. 467, 75 Atl. 742; *Chambers v. Probst*, 145 Ky. 381, 140 S. W. 572, 36 L.R.A.(N.S.) 207; *Lucke v. Clothing Cutters, etc. Assembly*, 77 Md. 396, 26 Atl. 505; 39 Am. St. Rep. 421, 19 L.R.A. 408; *Hollenbeck v. Ristine*, 114 Ia. 358, 86 N. W. 377; *Wye-man v. Deady*, 79 Conn. 414, 8 Ann. Cas. 375, 65 Atl. 129, 118 Am. St. Rep. 152; *London Guarantee, etc. Co. v. Horn*, 206 Ill. 493, 69

N. E. 526, 99 Am. St. Rep. 185; *Gibson v. New York Fidelity, etc. Co.* 232 Ill. 49, 83 N. E. 539; *Illinois Steel Co. v. Brenshall*, 141 Ill. App. 36; *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 387.

Undoubtedly cases might arise where an insurer such as the defendant might be justified in saying to the insured that it would cancel its policy unless a certain employee was discharged. Such employee might be so careless of his own safety or the safety of his fellow-servants that the insurer might not care to assume the added hazard that would be liable to follow from such conduct. We have no such case before us, however. The jury might well find in the present case that the purpose which the defendant had in mind was [61] to deprive the plaintiff of his earning power so that he could not successfully carry on his suit to recover damages for the injuries which he had received. This savors too strongly of oppression to be considered a legitimate reason for a third party interfering with the relations between employer and employee.

2. On the second question raised, we think the defendant should prevail. Johnson was a day laborer who had the right to quit work at any time without breaching his contract of employment. His employer might dispense with his services at any time for or without cause. This being so, if the employer reached the conclusion that it was not good business policy to keep in its employ men who were suing it, it was acting within its legal rights. We do not see how the Simmons Company or its officers have any interest, near or remote, in the present controversy. We think the president of the company, and the former general superintendent of it, who, by the way, was not in its employ when this action was tried, stood before the court and jury in no other light than that of disinterested witnesses. We do not think their testimony could be disregarded by the jury, where it was uncontradicted, unless the evidence itself was inherently improbable or unless something was shown that warranted the jury in concluding that they testified falsely, and, it may be said, wilfully so testified, because if their testimony was in fact untrue there is little room for saying that it was the result of an honest mistake.

The plaintiff might have been discharged because he was careless of his own safety or of that of his fellow-workers in the manner or doing his work, or because he was not competent or faithful, or because he had sued his employer, or because the employer had no further need of his services, or because of the meddlesome intervention of a third party, or for other reasons. When the plaintiff rested he had made a *prima facie* case, because on the evidence offered by him and [62] so long

as it stood alone and unexplained the jury might legitimately infer that the requests or suggestions of the defendant were what prompted the discharge. There is no conflict whatever between the facts testified to by the witnesses on whose testimony plaintiff relies and those testified to by Simmons and Vincent. Plaintiff's proofs showed that the defendant desired that plaintiff should be discharged and that shortly thereafter he was discharged. He offered no evidence to show that he was in fact discharged because of defendant's request, but rested on the contention that it was a perfectly rational conclusion for the jury to draw that the cause shown was responsible for the result which followed. The conferences and correspondence between the representatives of the defendant and the Simmons Manufacturing Company were all with Vincent, the general superintendent of that company. He testified that they had nothing whatever to do with the discharge, and in effect that he paid no attention to the request. He said that such requests, verbal or written, were never called to Simmons's attention, and that the letter suggesting plaintiff's discharge was written to him personally and was placed in a file in which he kept correspondence dealing with matters that came under his charge. He further testified that he was directed by Simmons to discharge the plaintiff before the matter came up with the insurance company. He construed the direction as allowing him some discretion. Personally he thought it bad policy to discharge employees who had brought suit against the company, so he allowed Johnson to remain. Later Simmons saw Johnson at work in the shop, and peremptorily ordered his discharge, and plaintiff was dismissed because of this order. Simmons testified to substantially the same state of facts, and very definitely stated that he knew nothing of any request having been made by the defendant for plaintiff's discharge. His reason for ordering it, as stated by him, was that he had had some disastrous experiences from retaining men in his employment [63] with whom he was having a lawsuit and he had decided to pursue a different policy. These two witnesses were cross-examined at great length. It is argued that such examinations showed lapses of memory and inaccuracy of statement. These so-called lapses were few and trifling and related to really immaterial details. On the main question their evidence is unshaken. On this question both of them knew whether the discharge was made at defendant's request or not. There is the possibility that they might have committed perjury, but there is hardly even a remote possibility that they were mistaken. If they had any interest in suppressing the truth it is not disclosed or suggested. The witnesses in tes-

tifying to the cause of plaintiff's discharge were testifying to a fact pure and simple. *Bowe v. Gage*, 127 Wis. 245, 249, 106 N. W. 1074, 115 Am. St. Rep. 1010; *Barker v. Western Union Tel. Co.* 134 Wis. 147, 153, 114 N. W. 439, 26 Am. St. Rep. 1017, 14 L.R.A. (N.S.) 533; *Sharpe v. Hasey*, 141 Wis. 76, 79, 123 N. W. 647; *Palmer v. Smith*, 147 Wis. 70, 73, 132 N. W. 614.

The situation then is this: Certain facts were testified to from which it might be inferred that defendant was responsible for plaintiff's discharge; this inference might or might not be correct. But the parties who made the discharge testify that defendant's acts had nothing to do with it and that it was made for a wholly different cause. Such evidence shows that the inference claimed would be incorrect. The question is: Have we any conflict in the evidence, nothing being shown to contradict or impeach the witnesses who testified directly what the cause of the discharge was? Does the mere inference that might be drawn from plaintiff's evidence in itself raise an issue for a jury, or has it been wiped out because not supplemented in some way? Was it not incumbent on the plaintiff to offer some evidence tending to show that the discharge was not made for reasons given by Vincent and Simmons?

It frequently happens that although a plaintiff may have [64] made a case which entitles him to go to the jury when he rests, or which would entitle him to a directed verdict if no other testimony were offered, he has no jury question left when the defendant rests.

If A. brings an action on a promissory note, he makes a *prima facie* case by offering it in evidence. The possession of the note raises a presumption or inference of nonpayment. But if unimpeached and disinterested witnesses swear that they saw it paid and heard the plaintiff agreed to surrender it, or testify that they were present when it was delivered and that it was given in payment of a debt incurred in a gambling transaction, there is no jury question left, unless the credibility of this evidence is in some way attacked.

Perhaps the fire cases furnish a better illustration. A person owning timber some distance from a railroad finds that it has been burned. He finds that a fire was negligently permitted to escape from the right of way and knows that the prevailing wind would drive the fire in the direction of his property and traces the fire line to it. The inference may be very strong that the fire originating on the right of way caused the damage. But if unimpeached disinterested witnesses testify to an independent fire which originated between the right of way and the property burned and that they saw such fire spread to and burn the plaintiff's timber before the



right-of-way fire was set, the inference spoken of is destroyed unless some evidence is offered which disputes this direct testimony as to the actual cause of the burning. *Marvin v. Chicago, etc. R. Co.* 79 Wis. 140, 47 N. W. 1123, 11 L.R.A. 506; *Megow v. Chicago, etc. R. Co.* 86 Wis. 466, 56 N. W. 1099; *Cook v. Minneapolis, etc. R. Co.* 98 Wis. 624, 74 N. W. 561, 47 Am. St. Rep. 830, 40 L.R.A. 457.

In *Jordan v. Osborne*, 147 Wis. 623, 133 N. W. 32, a witness testified that he did not hear the motorman blow the whistle as he approached a highway crossing. A jury might find from this testimony that the whistle was not blown and [65] that defendant was negligent in failing to blow it. The motorman testified that he did blow the whistle. There was positive testimony on one side and negative on the other, and it was held that there was no issue for the jury to pass upon.

In *Linden v. Minneapolis, etc. R. Co.* 156 Wis. 527, 143 N. W. 167, four witnesses testified that they did not hear the bell of a locomotive ring as the train approached a crossing. This evidence was disputed by a number of disinterested witnesses besides the train crew. The jury found that the bell was not rung, and the trial court permitted the finding to stand. This court held that the positive and direct testimony of the defendant's witnesses left no issue for the jury to pass upon, and reversed the judgment.

In *Riger v. Chicago, etc. R. Co.* 156 Wis. 86, 144 N. W. 204, one witness who was in a state of excitement and had only a momentary view of a train testified that it was going sixteen or seventeen miles per hour. This evidence standing alone would warrant the jury in finding that the speed exceeded the lawful rate of twelve miles per hour. The train crew, as well as several disinterested witnesses, estimated the speed at from four to seven miles per hour. The jury found that the speed exceeded twelve miles per hour. The trial court set aside this finding and ordered judgment for defendant. That judgment was affirmed in this court because it was thought the inference or conclusion that might be drawn from the evidence of the single witness was completely overcome.

In *McCabe v. Milwaukee Electric R. etc. Co.* 156 Wis. 621, 146 N. W. 806, there was some slight evidence which, if it stood alone and uncontradicted, might warrant the jury in arriving at the verdict returned. The trial court permitted the verdict to stand. This court reversed the judgment and ordered the action dismissed.

In *Milwaukee v. Plath*, 156 Wis. 586, 146 N. W. 782, the complaining witness, beyond peradventure, testified to a state [66] of facts which, were it not for the other evidence in

the case, entitled the plaintiff to have the issue of self-defense submitted to the jury. This court affirmed the decision of the trial court, holding that on the whole evidence there was no question left for submission to the jury.

In *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238, two witnesses testified to defective conditions which they found in a sidewalk. Their examination was made in the darkness and while they were laboring under excitement. It was said that such evidence did not present a jury issue when opposed to the testimony of seven other witnesses who made what they testified to be accurate measurements.

Again in *Konkel v. Pella*, 122 Wis. 143, 99 N. W. 453, it was held that the estimates of distances made by certain witnesses presented no issue for the jury where other witnesses testified to carefully made measurements. See, further, *Neale v. State*, 138 Wis. 484, 486, 120 N. W. 345; *Wanta v. Milwaukee Electric R. etc. Co.* 148 Wis. 295, 298, 134 N. W. 133.

In *Busse v. State*, 129 Wis. 171, 173, 108 N. W. 64, it is said:

"It has often been held that the testimony of even disinterested and unimpeached witnesses on the subjects of measurements, distances, dates, and the like, which is based merely on memory, estimate, or casual observation, must yield to that which is based on actual measurement or reference to definite data."

Other cases to the same effect are *Robinson v. Eau Claire Book, etc. Co.* 110 Wis. 369, 374, 85 N. W. 893; *Bohan v. Milwaukee, etc. R. Co.* 61 Wis. 391, 21 N. W. 241.

The facts in the cases cited vary. However, they are decided on the basic principle that where unimpeached witnesses testify from accurate and positive knowledge of the facts concerning which they speak, their evidence is not controverted by indefinite statements, by mere negative testimony, [67] or by doubtful inferences that might be drawn from facts concerning which there is no dispute.

The evidence of Vincent and Simmons was clear. They do not dispute a single material fact testified to by any other witness in the case, and no other witness disputes a material fact testified to by them. A mere inference contrary to the facts directly testified to might have been drawn from the other evidence, and that is all. We do not think that at the close of the testimony there was any question of causal relation between the facts shown by the plaintiff and his discharge for the jury to pass upon. The question before us is well summed up in *Ives v. Wisconsin Cent. R. Co.* 128 Wis. 357, 361, 107 N. W. 452, where it is said:

"It has often been declared that when credible and unimpeached witnesses, having exact and certain knowledge so that they cannot be mistaken, testify affirmatively to the existence of a fact, such testimony is not put in issue by mere negative evidence of persuasive facts which, but for the affirmative evidence, might support an inference against the existence of the material fact; where at least the negative testimony may within reason be true and yet the fact may have existed."

By THE COURT.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

The following opinion was filed May 6, 1914:

TIMLIN, J. (*dissenting*).—The error which I believe lurks in the majority opinion is disclosed by the cases cited in that opinion in support thereof. A finding that one executed and delivered his promissory note, taken with another finding that he thereafter paid it, establishes two consistent facts not in the least contradictory. A finding that a fire was negligently permitted to escape from a railroad right of way and that the wind was then blowing from a given direction, taken together with a finding that the property in question was destroyed [68] by another and different fire, establishes two independent facts not contradictory of one another. In these cases if the ultimate propositions of fact are not inconsistent or contradictory the evidence to establish each is not. This relation of issues to one another has been long known in the law as confession and avoidance. But I do not understand that competent circumstantial evidence is nullified or is to be removed from the consideration of the jury merely because of oral testimony of witnesses in negation thereof.

The defendant requested in writing that the employer discharge the plaintiff, and with reasonable promptness after the receipt of such request the plaintiff was so discharged. Two agents of the corporation employer take the stand. The superior agent testifies that he did not know of the written request, but ordered the discharge of the plaintiff upon the same ground contained in the request. The other agent admits receipt of the request to discharge and actually made the discharge, but, as he testifies, because ordered to do so by the superior agent of the corporation employer and not because of the request of the defendant. Under such circumstances I think there is a question of fact for the jury. It will be observed that the testimony on the part of the employer exonerating the defendant insurance company goes to the motive which prompted the discharge and in the nature of things would always be irrebuttable except by circumstantial evidence.

I am authorized to say Mr. Justice Kerwin concurs in this dissent.

A motion for a rehearing was denied, with \$25 costs, on October 6, 1914.

#### NOTE.

##### Civil Liability for Interference with Contract Relations.

Introductory, 608.

In Absence of Statute:

General Rule, 608.

Limitations of Rule, 610.

Interference by Labor Organization, 611.  
Under Statute, 612.

#### Introductory.

It is the purpose of this note to review the recent decisions discussing the question of civil liability for interference with contract relations. The earlier decisions on this question are collated in the notes to *South Wales Miners' Federation v. Glamorgan Coal Co.* 2 Ann. Cas. 436; *Beckman v. Marsters*, 11 Ann. Cas. 332; *Jones v. Leslie*, Ann. Cas. 1912B 1158, and *Webber v. Barry*, 11 Am. St. Rep. 466.

#### In Absence of Statute.

##### GENERAL RULE.

The interference, without sufficient excuse or justification, by a third person with the contractual relations between two or more other persons, causing one of the parties to the contract to break it, is an actionable wrong.

*United States*.—*United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.* 194 Fed. 947, 114 C. C. A. 583; *Sperry, etc. Co. v. Pommer*, 199 Fed. 309; *Lewis v. Bloede*, 202 Fed. 7, 120 C. C. A. 335; *American Malting Co. v. Keitel*, 209 Fed. 351, 126 C. C. A. 277; *Filler v. Joseph Schlitz Brewing Co.* 223 Fed. 313, 138 C. C. A. 555.

*Arkansas*.—*Wakin v. Wakin*, 119 Ark. 509, 180 S. W. 471.

*Iowa*.—*Kock v. Burgess*, 167 Ia. 727, 149 N. W. 858.

*Kentucky*.—*McClure v. McClintock*, 150 Ky. 265, 773, 150 S. W. 332, 849, 42 L.R.A. (N.S.) 388, 392.

*Maryland*.—*Cumberland Glass Mfg. Co. v. DeWitt*, 120 Md. 387, Ann. Cas. 1915A 702, 87 Atl. 927.

*Minnesota*.—*Mealey v. Remidji Lumber Co.* 118 Minn. 427, 136 N. W. 1090; *Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816; *Twitchell v. Nelson*, 126 Minn. 423, 148 N. W. 451, 601, 131 Minn. 375, 155 N. W. 621. See also *Virtue v. Creamery Package Mfg. Co.*

123 Minn. 17, 45, 142 N. W. 930, 1136, L.R.A. 1915B 1179, 1195; Victor Talking Mach. Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

*New York*.—Peerless Pattern Co. v. Pictorial Review Co. 147 App. Div. 715, 132 N. Y. S. 37.

*Oklahoma*.—Schonwald v. Ragains, 32 Okla. 223, 122 Pac. 203, 39 L.R.A. (N.S.) 854.

*Tennessee*.—Donnelly v. Jackson, 2 Tenn. Civ. App. 408; Hutton v. Waters, 4 Tenn. Civ. App. 582, affirmed 132 Tenn. 527, Ann. Cas. 1916C 433, 179 S. W. 134.

*Texas*.—Bowen v. Speer, 166 S. W. 1183; Day v. Hunnicutt, 160 S. W. 134. See also Swift v. Allen (Tex.) 151 S. W. 645.

*Canada*.—Copeland-Chatterton Co. v. Business Sys. 10 Ont. W. Rep. 811. See also Heinrichs v. Wiens, 8 Sask. L. Rep. 153, 23 Dominion L. Rep. 664, 8 West. W. Rep. 373, 30 West. L. Rep. 854; Furnival v. Saunders, 26 U. C. Q. B. 119. Thus in Kock v. Burgess, 167 Ia. 727, 149 N. W. 858, it was said: "As to interference with contracts, not of employment, but based upon personal obligations, the rule which commends itself to us is: That when a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal, and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he had a remedy against the party who has broken the contract." And in McClure v. McClintock, 150 Ky. 265, 773, 150 S. W. 332, 849, 42 L.R.A. (N.S.) 388, 392, it was held that the act of the defendant in making false representations which caused a bonding company to secure its release on the plaintiff's surety bond was actionable. So in Wakin v. Wakin, 119 Ark. 509, 180 S. W. 471, wherein it appeared that the plaintiff was surety on the bond of a third person given to secure his appearance at court, and the defendant conspired with the third person to have him leave the jurisdiction and forfeit his bond, it was held that this was an actionable wrong.

In an action for interference with contractual relations actual malice need not be shown, bad faith being presumed from the fact that the wrongdoer knowingly interferes. Twitchell v. Nelson, 131 Minn. 375, 155 N. W. 621. See also McClure v. McClintock, 150 Ky. 265, 773, 150 S. W. 332, 849, 42 L.R.A. (N.S.) 388, 392.

The right of competition in trade is not a sufficient justification for interference with the rights of another under an existing contract. Sperry, etc. Co. v. Pommer, 199 Fed. 309; Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 387, Ann. Cas. 1915A 702, 87 Atl. 927; Peerless Pattern Co. v. Pictorial Review Co. 147 App. Div. 715, 132 N. Y. S. 37; Ann. Cas. 1916E.—20.

Schonwald v. Ragains, 32 Okla. 223, 122 Pac. 203, 39 L.R.A. (N.S.) 854; Donnelly v. Jackson, 2 Tenn. Civ. App. 408. See also Copeland-Chatterton Co. v. Business Systems, 10 Ont. W. Rep. 819. Thus in Sperry, etc. Co. v. Pommer, supra, it was said: "The right to compete in business does not justify 'unfair' competition in business or trade, or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to violate a valid contract."

Where a person by his wrongful interference secures the discharge of a servant, he will be held liable in an action brought by the servant, Cornellier v. Haverhill Shoe Mfrs. Assoc. 221 Mass. 554, 109 N. E. 643, L.R.A.1916C 218; Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63; Warschauser v. Brooklyn Furniture Co. 159 App. Div. 81, 144 N. Y. S. 257; Bausbach v. Reiff, 244 Pa. St. 559, Ann. Cas. 1915C 421, 91 Atl. 224, L.R.A.1915D 785. In a number of cases an action has been sustained for maliciously causing the discharge of an employee by notifying the employer that the employee had made an assignment of his wages to the defendant. Scott v. Prudential Outfitting Co. 92 Misc. 195, 155 N. Y. S. 497 (holding that the mere fact that the employment was at will did not impair the cause of action); Kennedy v. Hub Mfg. Co. 221 Mass. 136, 108 N. E. 932; Cotton v. Cooper (Tex.) 160 S. W. 597. Compare McCormick v. Weber, 187 Ill. App. 290 (holding that a creditor of an employee has a right to assert his legal remedy by notifying the employer that the employee has made an assignment of wages to him).

In Cornellier v. Haverhill Shoe Mfrs. Assoc. 221 Mass. 554, 109 N. E. 643, L.R.A.1916C 218, equitable relief against an employer's association for wrongfully causing the discharge of the plaintiff was only denied because of the plaintiff's own participation in a strike which was for a lawful purpose but conducted by unlawful means.

It is well settled that the act of enticing away the servant of another is an actionable wrong. Schonwald v. Ragains, 32 Okla. 223, 122 Pac. 203, 39 L.R.A. (N.S.) 854; Burgess v. Tucker, 94 S. C. 309, 77 S. E. 1016; Hooker, etc. Co. v. Hooker, 88 Vt. 335, 92 Atl. 443; Hooker, etc. Co. v. Hooker (Vt.) 95 Atl. 649; Fitzgerald v. Stapleton [1854-1864] Newfoundland L. Rep. 170. Compare Jesse L. Laskey Feature Play Co. v. William Fox Vaudeville Co. 93 Misc. 364, 157 N. Y. S. 106. See also Arkansas L. Ins. Co. v. American Nat. Ins. Co. 110 Ark. 130, 161 S. W. 136; Kock v. Burgess, 167 Ia. 727, 149 N. W. 858, 156 N. W. 174. In Fitzgerald v. Stapleton, supra, it was held that

the fact that the contract of service was signed by the servant only was no defense to an action brought against the defendant for enticing away the servant of the plaintiff. In *Jesse L. Laskey Feature Play Co. v. William Fox Vaudeville Co.* supra, the defendant was held to be liable because he induced the plaintiff's servant by means of fraud to break her contract, the court saying "For inducing the termination or other breach of such a contract a third party is liable only when he has been guilty of unlawful means."

In *Cumberland Glass Mfg. Co. v. DeWitt*, 120 Md. 381, Ann. Cas. 1915A 702, 87 Atl. 927, it was held that the fact that a contract was unenforceable under the statute of frauds was no defense to an action for wrongful interference with contract relations. Compare *Poston v. Lyerly* (S. C.) 89 S. E. 392.

It seems that a party breaking the contract has a right of action against the person whose wrongful or fraudulent conduct induced the breach. *Cullen v. Canadian Detective Bureau*, 44 Nova Scotia 322; *Sumwalt Ice, etc. Co. v. Knickerbocker Ice Co.* 114 Md. 403, 80 Atl. 48. Thus in *Cullen v. Canadian Detective Bureau*, supra, it was held that an action could be maintained by one who was induced to quit her employment by the fraudulent representations of another. And in *Sumwalt Ice, etc. Co. v. Knickerbocker Ice Co.* supra, it appeared that the plaintiff had a contract with the defendant who was an ice manufacturer to obtain ice from him. The plaintiff in turn contracted with a third person to supply with ice, but he was forced to abandon the contract because he was notified by the defendant that ice would not be supplied to furnish that particular customer. After the breach of the contract between the plaintiff and the consumer the manufacturer himself made a contract with the consumer. It was held that a recovery would not be barred on the ground that the plaintiff was in *pari delicto* with the defendant.

#### LIMITATIONS OF RULE.

The assertion of a person's legal rights resulting in the breach of a contract between others cannot be made the basis of a cause of action. *McCormick v. Weber*, 187 Ill. App. 290. And see the reported case. See also *Swift v. Allen* (Tex.) 151 S. W. 645. See also *Brooks v. Ingram*, 186 Ala. 106, 65 So. 138, stated *infra*, in the subdivision *Under Statute*.

Where a contract is unlawful no action will lie against one who by his interference causes its breach. *Dr. Miles Medical Co. v. J. D. Park, etc. Co.* 220 U. S. 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502. See also *Cameron v. Barancik*, 173 Ill. App. 23.

And so it seems that where a person is justified in interfering with the contract relations of others the fact that he is prompted by malice to interfere does not give right to a cause of action. *People's Land, etc. Co. v. Beyer*, 161 Wis. 349, 154 N. W. 382, L.R.A. 1916B 813. And see the reported case.

It has been held that a person is not liable for interference with the rights of the parties to a contract which is terminable at the will of either party. *People's Land, etc. Co. v. Beyer*, 161 Wis. 349, 154 N. W. 382, L.R.A. 1916B 813; *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541. Compare *Scott v. Prudential Outfitting Co.* 92 Misc. 195, 155 N. Y. S. 497. In *McCarter v. Baltimore Chamber of Commerce*, supra, it appeared that the defendant which was a corporation formed to conduct a produce exchange, threatened to reprimand, suspend or expel firms dealing with the plaintiff in violation of a by-law of the corporation. Some of its members who had employed the plaintiff, because of the threat to enforce the by-law, terminated their relations with him. It also appeared that the employment of the plaintiff was at will. It was held that there was no wrongful and malicious interference for which the plaintiff could maintain an action.

Where a workman is injured by the tortious act of a third person under circumstances making the employer liable under a workmen's compensation act the employer can not recover from the third person the amount of the compensation paid the employee. *Inter-State Telephone, etc. Co. v. Public Service Electric Co.* 86 N. J. L. 26, 90 Atl. 1062. In that case the court said: "The case made by the complaint is that an employee of the plaintiff was injured through the negligence of the defendant under such circumstances that he would be entitled to compensation under the Act of 1911. The complaint avers that the plaintiff has lost his services, and has, in addition, been obliged to spend money for medical and hospital services, and has been obliged by the statute to pay him fifty per cent of his weekly wages, and will be obliged to pay that amount for four hundred weeks. The statute is set forth and it is then averred that the plaintiff and its employee agreed and contracted to accept the provisions of section 2, and the elective schedule of compensation therein contained. The injury happened in 1912, and the Act of 1913 (chapter 179) does not apply. The motion raises the question of the right of an employer to recover of a tortfeasor moneys agreed to be paid to an employee. . . . The right to the statutory compensation is a part of the compensation of the employee for services rendered, for which the employer receives a *quid pro quo*. If it were not so, the employer would cease to employ. The compensa-

tion is no more a loss to him than other wages paid for work done, and it is none the less compensation for labor done because the statute directs that its payment shall be distributed over a certain number of weeks in the future. It is one of the necessary expenses of the business against which the employer must protect himself by a higher price for his product or lower regular wages for his employees. The legal right of an employer to recover damages for the loss of services of employees due to a tortious act of a third person has never included the wages paid his servants for past work or the wages he might pay for future work. What the employer loses is the value of the services to him; what the present plaintiff seeks to recover is the value of the services to the employee. The employer loses what he might have made over and above the cost of the employee's services; he does not in any proper sense lose the necessary expense of securing that labor."

#### INTERFERENCE BY LABOR ORGANIZATION. .

It seems to be the more prevalent rule that it is an actionable wrong for a labor organization to induce the breach of a contract by threats of a strike and other means although peaceful and lawful in themselves. *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600; *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756; *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N. E. 885, L.R.A.1916C 986; *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000; *Clarkson v. Laiblan*, 178 Mo. App. 708, 161 S. W. 660; *Sleuter v. Scott*, 21 British Columbia 156, 8 West W. Rep. 714, 22 Dominion L. Rep. 900; *Cotter v. Osborne*, 18 Manitoba 471. See also *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841, 51 L.R.A.(N.S.) 778; *Berry Foundry Co. v. International Moulders' Union*, 177 Mo. App. 84, 164 S. W. 245; *Vulcan Iron Works v. Winnipeg Lodge*, 21 Manitoba 473. Thus in *Connors v. Connolly*, supra, it was held that agreement between a labor union and an employer which provides that the employer shall not employ other persons than union members is contrary to public policy where the agreement is one which takes in an entire industry of any considerable proportions in a community, so that it operates generally in that community to prevent or to seriously deter craftsmen from working at their craft, or workmen obtaining employment under favorable conditions without joining a union, and that the agreement was no justification for the action of a labor organization in procuring the discharge of a nonunion workman. And in *Sleuter v. Scott*, 27 West. L. Rep. 698, wherein it appeared that the plaintiff was forbidden to work by a decision of union officials in the

shop where he was employed, because of an altercation which he had with the walking delegate of the union. The decision was enforced by the refusal of the members of the union to work unless the plaintiff was discharged; the refusal being caused not by the fact that they objected to working with the plaintiff but because they feared that fines would be levied on them if they continued to work with the plaintiff. It was held that the plaintiff had a good cause of action against the union officials.

The rule obtains in several jurisdictions that a labor organization is not liable for inducing workmen to cease their employment, or procuring their discharge, unless unlawful means have been used. *Kemp v. Division No. 241 Amalgamated Assoc.* 255 Ill. 213, Ann. Cas. 1913D 347, 99 N. E. 389; *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 458, 155 N. W. 638; *Cusumano v. Schlessinger*, 90 Misc. 287, 152 N. Y. S. 1081; *Roddy v. United Mine Workers of America*, 41 Okla. 621, 139 Pac. 126, L.R.A.1915D 789. See also *Aluminum Castings Co. v. Local No. 84 of International Moulders' Union of North America*, 197 Fed. 221. Compare *Sutton v. Workmeister*, 164 Ill. App. 105. Thus in *Kemp v. Division No. 241 Amalgamated Assoc.* supra, it was said: "If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination injury may result incidentally to nonunion men through the loss of their positions, that object does not become unlawful. It is apparent that in this case the sole purpose was to insure employment by the railways company of union men, only. The appellees had the right to retain their membership in the union or not, as they saw fit. On the other hand, if the members of the union honestly believed that it was to their best interests to be engaged in the same employment with union men only, and that it was a detriment and a menace to their organization to associate in the same employment with nonmembers, it was their right to inform the common employer that they would withdraw from its service and strike unless members of the union, only, were employed, even though an acquiescence in their demands would incidentally result in the loss of employment on the part of the nonunion men. It was only

incumbent upon them to act in a peaceful and lawful manner in carrying out their plans." And in *Roddy v. United Mine Workers of America*, 41 Okla. 621, 139 Pac. 126, L.R.A. 1915D 789, it was said: "A petition based on the charge that the plaintiff, a nonmember of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such nonunion man was not discharged, the union men would strike, does not state a cause of action for damages against either the labor organization or the individual members thereof."

But the foregoing rule does not apply where the purpose sought to be accomplished by the labor organization is unlawful. *Grassi Contracting Co. v. Bennett*, 160 N. Y. S. 279, wherein it appeared that a strike was called and the plaintiff's workmen were induced to quit their employment in order to compel the employer to hire a foreman designated by the union. The cost of employing the foreman would have greatly increased the cost of fulfilling the plaintiff's contracts. The object of the union was not to prevent future breaches of an agreement between the plaintiff and the labor organization, but was to penalize the employer for several past inadvertent breaches and also to serve as a warning to other employers of union labor. It was held that the employer was entitled to an injunction.

#### *Under Statute.*

The *Alabama Code* (§§ 6849, 6394, 6856) declares that any person who entices, decoys, or persuades any apprentice or servant to leave the service or employment of his master is guilty of a misdemeanor. It also declares it to be a misdemeanor for persons to conspire together for interfering with the business of another, or for any persons to picket, or by force or threats of violence to person or property interfere with the business of another or prevent another from doing work. In *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657, the court in construing the foregoing sections said: "The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. And while the courts do not undertake to enjoin the conspiracy itself, the execution of the conspiracy would be a criminal tort against the employer's property rights which may be prevented by injunction. Section 6395 is more specific in its inhibition of such forms of 'peaceful interference,' and expressly

forbids picketing when it is done 'for the purpose of interfering with or injuring any lawful business or enterprise.' Perhaps our legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes." In *Brooks v. Ingram*, 186 Ala. 106, 65 So. 138, a case outside the purview of the statute heretofore set out, it was held that a person is not liable for the breach of a contract caused by his assertion of his legal rights. In that case a landowner who refused to allow persons to enter his premises and thereby made it unprofitable to run an excursion to the vicinity was held not to be liable to the promoters of a projected excursion which was abandoned.

The *Georgia Code* (Civil Code 1910, §§ 3712, 3713, 3714) denounces as unlawful an interference with the contractual relation of employer and employee, of landlord and tenant, and of landlord and cropper, by employment or renting or furnishing land to the tenant or employee, except on certain conditions, and gives to the injured party a remedy by civil action for a penalty. Section 3712 makes "the provisions of the statute applicable to written contracts, whether made in the presence of an officer or not, and to parol contracts partly performed made in the presence of one or more witnesses." *Polk v. Thomason*, 130 Ga. 542, 61 S. E. 123. Section 3715 declares that "the provision of the three preceding sections shall not apply where the employment given is of such duration and of such nature as to make certain that it could not result in injury to the plaintiff or prosecutor." The statute is constitutional. *Pearson v. Bass*, 132 Ga. 117, 63 S. E. 798. The statute being penal in its nature must be strictly construed. *Orr v. Hardin*, 4 Ga. App. 382, 61 S. E. 518; *Polk v. Thomason*, 130 Ga. 542, 61 S. E. 123. In order for a plaintiff to recover under the foregoing statute he must show a complete valid contract created with the formality prescribed by the statute. *Orr v. Hardin*, supra; *Polk v. Thomason*, supra; *Rawlings v. Sheppard*, 10 Ga. App. 350, 73 S. E. 523. Thus in *Rawlings v. Sheppard*, supra, it was held that in order to sustain a recovery under the statute it was not sufficient to prove that the defendant allowed the plaintiff's tenant to move into a house on his place. In *Johnson v. Hudspeth*, 136 Ga. 771, 72 S. E. 69, it was held that the employment referred to in section 3715 is that of such a transient character as is not inconsistent with the service which the employee contracted to give his employer.

The *North Dakota* statute makes the prevention of the doing of a lawful act unlawful only when the prevention is brought about 'by force, threats, intimidation, or by inter-

fering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use of employment thereof." In *Sleeper v. Baker*, 22 N. D. 386, Ann. Caa. 1914B 1189, 134 N. W. 716, 39 L.R.A.(N.S.) 864, the rule was laid down that "an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff; the consequence after all being only a broken contract for which the party to the contract may have his remedy by suing upon it."

The *West Virginia Code* of 1906 (c. 1515, sec. 14) as amended in 1907 (Acts 1907, c. 78, § 18) among other things provides as follows: "Nor shall any person or persons, or combination of persons, by force, threats, menaces, or intimidation of any kind, prevent or attempt to prevent from working in or about any mine any person or persons who have the lawful right to work in or about the same, and who desires to so work; but this provision shall not be so construed as to prevent any two or more persons from associating together under the name of knights of labor, or any other name they may desire, for any lawful purpose, or for using moral suasion or lawful argument to induce any one not to work in or about any mine." In *Mitchell v. Hitchman Coal, etc. Co.* 214 Fed. 685, 131 C. C. A. 425, reversing *Hitchman Coal, etc. Co. v. Mitchell*, 202 Fed. 512, it was held construing the foregoing statute, that the use of peaceful and lawful methods to induce the servants of the plaintiff to break their contracts by joining labor unions was no ground for the issuance of an injunction. The court said: "It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employee continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employees to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employees under this contract, if they deem proper may, at any moment join a labor union, and the only penalty provided therefor is that they cannot secure further employment from the plaintiff. Therefore, under this contract, if the nonunion men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be

unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the nonunion miners to become members of their organization. Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization."

The *English Trade Disputes Act*, 1906 (§ 3), provides that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills." Under that act a labor organization is not liable for procuring the discharge of an employee because he is not a member of the organization. *Gaskell v. Lancashire, etc. Miners' Federation*, 58 Sol. J. 719, 28 Times L. Rep. 518; *Santen v. Busnach*, 29 Times L. Rep. 214, 57 Sol. J. 226. Nor is it liable where a trade dispute is involved for inducing employees by threats of penalization and the posting of pickets to refuse to work. *Dallimore v. Williams*, 58 Sol. J. 470, 30 Times L. Rep. 432. It seems that the act is inapplicable unless there is a dispute between employers and employees or among the employees. *Larkin v. Long* [1915] A. C. 814, 84 L. J. P. C. 201, 113 L. T. N. S. 337 [1915] W. N. 191, 31 Times L. Rep. 405, 59 Sol. J. 455, (affirming *Long v. Larkin* [1914] 2 Ir. R. 285) wherein the court said: "The next ground relied on by the appellants in support of the appeal was that set forth in the fifth paragraph of their defense, to the effect that at the time the things complained of were done by them a trade dispute was pending between the plaintiff, the dock laborers of the port of Dublin, and the Transport and General Workers' Union acting on their behalf, relative to the wages and rate of remuneration to be paid by the plaintiff to dock laborers for their work in discharging cargoes, and that in refusing to allow any of such laborers to work for the plaintiff, and in withdrawing them from his employment, they were acting as they lawfully might in contemplation and furtherance of such trade dispute within the meaning of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47). The jury have found on the issues raised on this plea that there was no dispute between the plaintiff and the dock laborers. And they have also found that the dispute was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond

to assist. And further, that the laborers did not insist that the plaintiff should become a member of the Stevedores' Association. . . . The Trade Disputes Act of 1906 has no application to such disputes. It only deals with disputes between employers and workmen and workmen and workmen. This dispute was neither of these. This defense, therefore, wholly fails." In the recent case of *Wilkins v. Weaver* [1915] 2 Ch. 322, which did not involve an act done in furtherance of a trade dispute and accordingly was not governed by the statute heretofore referred to, it was held that a person who employs the servant of another knowing that he is bound by contract for an unexpired term is liable in damages to the employer.

Action for death by wrongful act. L. P. Curd's Administratrix, plaintiff, and Cincinnati, New Orleans and Texas Pacific Railway Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Everett B. Hoover* for appellant.

*N. L. Bronaugh, R. A. Thornton and John Galvin* for appellee.

[104] *MILLER, C. J.*—This action was brought by L. P. Curd's administratrix to recover damages from appellee, the defendant [105] below, for negligently causing the death of said Curd; and the trial court having directed a verdict for the defendant at the close of the evidence, the plaintiff appeals.

Curd was struck by one of appellee's trains on December 31st, 1912, and died on February 12th, 1913. He was 68 years old, and, for some time before the accident, he had been employed at a rock crusher located in the town of High Bridge, on the north side of the Kentucky River, in Jessamine County. Appellee's railroad bridge, known as High Bridge, spans the Kentucky River at that point.

The town of High Bridge has three or four hundred inhabitants. It is located upon either side of the track, the larger number of inhabitants being upon the west side. The rock crusher where Curd worked was located several hundred yards north of the bridge. The railroad depot was located on the east side of the railroad, near the bridge. The postoffice was on the west side of the railroad, and nearly opposite the depot building, and between this depot and the postoffice there was, at the time of the accident, a fill under the railroad track about 30 feet high. At the south end of the fill next to the river a public road passed under the north end of the bridge. This road led from the postoffice on the west side of the fill around under the north end of the bridge to the depot on the east side. At the top of the fill, immediately above the depot, there was a shed and platform where passengers boarded and alighted from appellee's trains, and a pathway ran obliquely down the side of the fill from the platform and shed to the depot at the bottom of the fill. The fill extended north of the platform and shed several hundred feet in the direction of the rock crusher.

The present bridge and the trestle which carries the train from the bridge to the mainland were built within the last few years. The old bridge was built on the grade and was about 35 feet lower than the new or present bridge. In building the new bridge thirty-five feet above the old bridge it became necessary to connect the end of the

## **CURD'S ADMINISTRATRIX**

v.

## **CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.**

Kentucky Court of Appeals—February 24, 1915.

**163 Ky. 104; 173 S. W. 335.**

### **Railroads — Trespassers on Track — Implied License.**

The mere use of a railroad track by the public does not convert the users from trespassers into licensees, unless the use be at a public crossing or in a city or populous community where large numbers of people use the track, thereby putting the company upon the duty of anticipating their presence.

### **Duty to Trespasser — Keeping Look-out.**

While a railroad company is bound to maintain a lookout to avoid injuring licensees on its tracks, it is under no duty to look out for trespassers.

[See generally 16 Ann. Cas. 247; 82 Am. St. Rep. 158.]

### **Trespasser on Trestle.**

One struck by a train while crossing a trestle of a railroad company is a "trespasser" for whose death no recovery can be had, where the servants in charge of the train did not discover his position of peril and the public were warned not to use the trestle, this being so despite frequent use of the trestle by persons in the vicinity.

[See note at end of this case.]

Appeal from Circuit Court, Jessamine county.



bridge with the mainland by a trestle several hundred feet long. For the purpose of improving the roadbed appellee had begun filling the space below the trestle so as to eventually make it a dirt fill, instead of a trestle. [106] At the time of the accident the dirt fill did not reach up to the track, thus leaving the track sustained entirely by the wooden trestle, which was about 300 feet long. There was no walkway upon the trestle for pedestrians, and no provision of any kind for any use of it by the public. The cross-ties were the only things upon which one could walk between the rails, and the trestle was not sufficiently wide to permit a person to occupy it while a train was passing over it.

At the north end of the trestle there was a caution board warning people not to trespass thereon; and at or near the shed where passengers boarded the trains there was another like caution board.

On the east side of the main track, and at the bottom of the fill, there is a side-track on level ground extending from the depot to a point some two or three hundred yards north, where a pathway had been made over the railroad track from the east to the west side. Along the west side of the main line, and below the trestle work, is another path running from the platform to the office of the crusher plant.

There is also some proof to the effect that there was a path leading up from the fill on the west side, from near the postoffice, to a point near the platform at the top of the fill.

Curd lived on the west side of the trestle. He left his home shortly after dinner to go to the postoffice, although no witness saw him at the postoffice. He was first seen by one of the witnesses as he was leaving the platform at the top of the fill, walking on the trestle northwardly, toward the rock crusher.

After extending northwardly from the bridge in a straight line for several hundred yards, the railroad track curves sharply to the east. Going south there is a heavy down grade for two or three hundred yards north of the place of the accident; but from that point there is an up grade to the bridge.

When Curd had reached a point on the trestle about 200 feet north of the platform appellee's passenger No. 15, known as the "Ohio Special," going south, and running at a speed of from 15 to 25 miles an hour, rounded the curve at the northern end of the village. Curd attempted to stand on the east end of the cross-ties on the trestle work so as to avoid being struck by the engine; but the space was too narrow, and Curd was [107] knocked from the trestle to the ground below. The train was a through train, and

was not scheduled to stop at High Bridge; and while its engineer and fireman admit they did not give any warning, by whistle or otherwise, at or near the point where Curd was struck, the engineer says he did give the usual signal for High Bridge by two long and two short blasts of the whistle at the telegraph office further up the road.

Furthermore, neither the engineer nor the fireman saw Curd upon the track at any time, and did not know the train had struck him until they were so informed later in the day. They explained their failure to see Curd by the fact that the fireman was "down in the deck" feeding the engine with coal, with his back toward the front of the engine, while the engineer was sitting at his post on the right or west side of the engine, and could not see Curd while rounding the curve, because his view of the point on the trestle where Curd was standing was completely obstructed by the boiler of the engine. The engineer and the fireman are positive in their statement that they did not see Curd at any time, and there is no evidence whatever tending to contradict either of them.

Appellant's theory of this case is, that appellee owed Curd a lookout duty, under the circumstances, and that it failed to perform that duty. On the other hand, the theory of the appellee is, that Curd was a trespasser on its track, to whom it owed no lookout duty, but only the duty to use ordinary care to avoid injuring him after his presence upon the trestle was discovered by those in charge of the train. It is a well established rule that the mere use of a railroad track by the public does not convert the users from trespassers into licensees, unless its use is at a place where the public have a right to go and be, as at a public crossing, or the like; or unless it is in a city, town, or populous community, where large numbers of people use the track, thereby putting upon the company the duty of anticipating their presence upon the track, and the use of ordinary care to avoid injury to them. *Adkins v. Big Sandy, etc. R. Co.* 147 Ky. 32, 143 S. W. 764.

If Curd was a trespasser, appellee did not owe him any lookout duty; but, if he was a licensee, it did.

In order to show that Curd was a licensee appellant attempted to show that the trestle in question had been used generally by the people of High Bridge as a footway, [108] with the consent of the railroad company, thereby bringing the case within the rule above stated, that where a railroad company permits its tracks to be used by such a number of people as would lead it to anticipate the presence of persons upon the track, they become licensees to whom a lookout duty is due. This theory, however, assumes

not only that a sufficiently general use of the trestle by the pedestrians has been shown, but also that a trestle or bridge stands upon the same footing as an ordinary roadbed.

We are aware that in some jurisdictions it has been held that a railroad company is liable to a trespasser on its trestle without ability to save himself from injury, if those in charge of the train discovered, or, by the exercise of ordinary care, might have discovered, the peril of the injured person, and might, by the exercise of ordinary care, have avoided the accident. *Bogan v. Carolina Cent. R. Co.* 129 N. C. 154, 39 S. E. 808, 55 L.R.A. 418; *Roberts v. Louisiana R. etc. Co.* 132 La. 446, Ann. Cas. 1914D 1207, 61 So. 522.

But the rule announced by the Supreme Courts of North Carolina and Louisiana has not been adopted in this State; on the contrary, it has been repeatedly held by this court, and in most other jurisdictions, that the mere acquiescence upon the part of a railroad company cannot be construed into a promise that its bridge may be used by foot passengers as a highway, so as to entitle them to a lookout duty or make them, while using it in such a manner, anything but trespassers.

In the operation of its trains over trestles a railroad company is entitled to a clear track in order that its public functions may be carried out properly.

In *Smith v. Illinois Cent. R. Co.* 28 Ky. L. Rep. 723, 90 S. W. 254, the appellant was struck and killed while she was walking on and near the middle of a railroad trestle about 400 feet long and 20 feet high. Her administrator sued the company to recover damages, but, in denying the plaintiff any relief, this court said:

"The evidence, without contradiction, showed that the decedent was a trespasser upon the railroad bridge of appellee, and the trial judge properly held her personal representative to all of the consequences flowing from her being wrongfully upon it. The employees of the corporation owed her no lookout duty whatever. All they were required to do was, after actually discovering [109] her peril, to exercise ordinary diligence to stop the train in order to avoid injuring her. This proposition of law has been so often decided, and so uniformly upheld, that it is now quite beyond question. The railroad had the exclusive right to the use of its line at all points save those where the public had a right to be, and was under no duty to anticipate the presence of trespassers."

In *Prince v. Illinois Cent. R. Co.* 30 Ky. L. Rep. 469, 99 S. W. 293, the appellant, Fannie Prince, was knocked from a small bridge in the company's switch yard in

Paducah. In that case, as in this, there was a sign at the end of the bridge warning persons to "keep off." In that case the plaintiff was treated as a trespasser upon the company's bridge, and not entitled to recover damages for her injury.

Again, in *Louisville, etc. R. Co. v. Woolfork*, 30 Ky. L. Rep. 569, 99 S. W. 294, Woolfork was injured while he was walking across appellant's railroad bridge within the corporate limits of the city of Henderson, although in a part of the town that was sparsely settled. The bridge was not adapted to the use of pedestrians; it had no footway plank; and, as in the case at bar, those who used it stepped from one cross-tie to another. Woolfork recovered a verdict for \$500.00; but this court reversed the judgment, saying that Woolfork was a trespasser at the time he was injured, and that appellee owed him no lookout duty whatever; but that, after his peril was actually discovered, those in charge of the train were bound to exercise reasonable diligence to avoid injuring him.

A significant portion of the opinion, which is directly applicable to the case at bar, reads as follows:

"We think the court erred in admitting testimony that a great many people habitually trespassed upon appellant's trestle, making of it a passway. These persons were trespassers, and, as a practical proposition, the railroad has no remedy against such trespassers. The public cannot acquire a right in the private property of a railroad by repeated wrongs. If this could be done, then the railroad's tracks, bridges, and trestles would be at the mercy of habitual wrongdoers, and the corporation largely deprived of its property rights for public use without the compensation provided by the Constitution.

[110] "The reasoning which requires railroad corporations to exercise a lookout duty when their tracks cross the streets of cities or towns at grade, or constitute a part of the highway of municipalities or thickly settled places or communities, has no place in the case at bar. A lookout duty is imposed upon the corporations in the class of cases mentioned because the public have a right to cross and be on their roadway, and, therefore, they must use due care not to injure those who are exercising their lawful rights in the premises."

Without further elaboration, it is sufficient to say that the doctrine above announced has been applied by this court in *Becker v. Louisville, etc. R. Co.* 110 Ky. 474, 61 S. W. 997, 96 Am. St. Rep. 459, 53 L.R.A. 267; *Vanarsdall v. Louisville, etc. R. Co.* 23 Ky. L. Rep. 1666, 65 S. W. 858; *Flint v. Illinois Cent. R. Co.* 28 Ky. L. Rep. 1.

88 S. W. 1055; *Beiser v. Chesapeake, etc.* R. Co. 29 Ky. L. Rep. 249, 92 S. W. 928; *Chesapeake, etc. R. Co. v. Barbour*, 29 Ky. L. Rep. 339, 93 S. W. 24; and *Cummings v. Illinois Cent. R. Co.* 33 Ky. L. Rep. 584, 110 S. W. 809.

The cases from other jurisdictions sustaining the rule above stated are collected in the note in *Ann. Cas.* 1914D 1211.

Curd, being a trespasser, to whom the company owed no lookout duty, the only question before the trial court was, whether those in charge of appellee's train exercised reasonable diligence to avoid injuring Curd after his peril was actually discovered; and, as there was no testimony whatever that he was seen at any time by either the engineer or the fireman, the peremptory instruction to find for the defendant was properly given. Judgment affirmed.

**NOTE.**

The employees in charge of a railroad train, it is held in the reported case, are not bound to keep a lookout to discover the presence of a trespasser on a trestle or railroad bridge, even though the railroad may have acquiesced in previous trespasses thereon. The entire duty owed to a trespasser under those circumstances is to use ordinary diligence to avoid injuring him after his presence is discovered. The cases passing on the liability of a railroad for injury to a person other than a servant on a trestle or railroad bridge are collated in the note to *Roberts v. Louisiana R. etc Co.* *Ann. Cas.* 1914D 1207.

**MATTER OF STEPHAN.**

California Supreme Court—April 14, 1915.

170 Cal. 48; 148 Pac. 196.

**Constitutional Law — Regulation of Loan Brokers — Validity.**

St. 1909, p. 969, amended by St. 1911, p. 978, which by section 1 declares that one engaged in loaning or advancing money on the security of chattel mortgages, or personal property, or on security of a lien or assignment of, or power of attorney relating to, wages, shall be deemed a "personal property broker," sections 2 and 3 of which allow such brokers to charge and receive 2 per cent a month, and section 5 of which requires such brokers, on making any loan or advancement, to give the borrower a memorandum showing the name of the lender, the nature of the security, etc., and which declares the

failure to give such memorandum to be a misdemeanor, is not in conflict with Const. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation, nor with section 21, forbidding the granting of special privileges and immunities to any class of citizens, which on the same terms are not given to all, since such business is peculiar and well known and capable of classification.

[See note at end of this case.]

**Same.**

Such act is not within the meaning of Const. art 4, § 25, subd. 23, forbidding special laws "regulating the rate of interest on money."

[See note at end of this case.]

Original application for writ of habeas corpus directed to Chief of Police of City and County of San Francisco. A. H. Stephan, petitioner. The facts are stated in the opinion. WRIT DISCHARGED.

*Olin L. Berry* for petitioner.

*C. M. Fickert* and *A. R. Cotton* for respondent.

[49] SHAW, J.—The petitioner was imprisoned on a charge of having violated the provisions of the act entitled, "An act to define personal property brokers and regulate their charges and business," enacted April 16, 1909, and amended April 21, 1911. (Stats. 1909, p. 969; Stats. 1911, p. 978.) He asks a release from custody on the claim that the law is unconstitutional.

Section 1 of the law provides that every person "engaged in the business of loaning or advancing money" on the security [50] of chattel mortgages or other contracts by which personal property is hypothecated as security for such loan and the use and possession thereof is not to be in the lender, or on the security of a lien upon, or assignment of, or power of attorney relating to "wages, salary, earnings, income or commissions," shall be deemed a "personal property broker." Sections 2 and 3 allow such brokers to charge and receive two per cent per month as interest on the money loaned on such security and provide that they shall not charge or receive more, either directly, or under any pretext, as for costs, expenses and the like. Section 5 requires such personal property broker, on making such loan or advancement, to give to the borrower a memorandum showing the name of the lender, the nature of the instruments taken as security, and certain other particulars of the transaction. It is further provided that contracts for such loans or advancements are void if a greater rate of interest or benefit than the statute allows is accepted therefor or provided for or agreed upon therein, and that a failure of the broker to give the mem-

orandum required by section 5 is a misdemeanor punishable by fine or imprisonment or both.

The petitioner was charged with being engaged in the business aforesaid and with having made such a loan upon the security of a chattel mortgage, without giving to the borrower the memorandum aforesaid.

Section 11 of article I of the constitution declares that "all laws of a general nature shall have a uniform operation." Section 21 of the article forbids the granting of special privileges or immunities to any citizen or class of citizens, which, upon the same terms, shall not be given to all. Under the rules now well established in this state we think it is clear that this statute does not controvert these provisions. It is not a violation thereof for the legislature to enact laws applying to persons throughout the state, but only to those of a specified class, provided the distinctions which mark the class are those which reasonably arise out of the nature of things and distinguish them from others not embraced within it in such a manner that the peculiar legislation is not arbitrary or unreasonable. The legislative judgment as to what is a sufficient distinction cannot be overthrown by the courts, unless it is, beyond rational doubt, erroneous. No authority need be cited in support of these propositions. It follows, also [51] as a corollary, that a decision holding such legislative judgment wrong in this respect with regard to one statute, upon the conditions relating to it, is not necessarily authority for a similar decision upon another statute, unless the facts and conditions are essentially the same in the one case as in the other. The decision in this particular is like any other decision on a question of fact—not a precedent except for cases where the facts are the same.

The present case is not essentially different from *Ex parte Lichtenstein*, 67 Cal. 359 [56 Am. Rep. 713, 7 Pac. 728]. In that case a penal law applying only to pawnbrokers was declared valid and constitutional on the ground that pawnbrokers constituted a class doing a peculiar business which the legislature might justly consider required peculiar regulations. The business of pawnbroking is ancient and its characteristics are, of course, well known. This is not true of personal property brokers. But we think it must now be conceded that in the course of the development of modern civilization the business of loaning money on chattel mortgages, or like instruments, and that of loaning or advancing money on assignments or other transfers of wages, earnings, and the like, as well, have become so well known and so capable of classification and recognition that the legislature is entirely justified in describing them as a

peculiar class and giving them the name of personal property brokers. Their business is as distinct in many respects from other classes of business as is that of a pawnbroker. Nor can it be denied that abuses have grown up in connection therewith which the legislature might well deem to call for the regulations imposed by this law. This being the case the limitation of the legislation to these cases alone does not destroy the uniformity of the law nor confer unlawful special privileges upon those persons not engaged in the business regulated.

It is not a special law, within the meaning of subdivision 23, section 25 of article IV of the constitution, forbidding special laws "regulating the rate of interest on money." This proposition is settled by the decision in *Ex parte Lichtenstein*, 67 Cal. 359 [56 Am. Rep. 713, 7 Pac. 728] where the point was expressly decided with respect to the Pawnbrokers' Act. No substantial difference can be seen between that act and the Personal Property Brokers' Act, so far as the application of this constitutional provision is concerned.

[52] We do not consider the decision in *Ex parte Sohneke*, 148 Cal. 262 [113 Am. St. Rep. 236, 7 Ann. Cas. 475, 2 L.R.A. (N.S.) 813, 82 Pac. 956] as in substantial conflict with these views. The classification there condemned was far more arbitrary and fanciful than that made by this act. There the same kind of an act was punishable in different ways by one of the statutes declared invalid, according to the person who committed it. The other act declared invalid, permitted loans upon mortgages of certain kinds of chattels without limitation as to the rate of interest, while forbidding loans upon such mortgages upon other chattels, except at a limited rate. This is apparently a distinction without a legal difference. There may be expressions in the opinion that are inconsistent with the views here given but they are not essential to the decision and should be disregarded.

The writ is discharged and the prisoner is remanded to the custody of the respondent.

Sloss, J., Melvin, J., Henshaw, J., Lorigan, J., and Angellotti, C. J., concurred.

#### NOTE.

#### State or Municipal Regulation of Personal Property Loan Brokers.

Introductory, 619.

American Statutes:

Generally, 619.

Classification of Persons or Property, 621.

Canadian and English Statutes, 625.

Municipal Ordinances, 625.

*Introductory.*

In discussing the constitutionality of regulations of personal property loan brokers, this note does not treat of the validity of a statute imposing a license tax on the occupation of loaning money on chattel security. Nor does it deal with the regulation of pawnbrokers. A discussion of these subjects will be found in the notes to *Norris v. Lincoln*, Ann. Cas. 1914B 1194 and *Elsner v. Hawkins*, Ann. Cas. 1913D 1278, respectively. This note is confined to regulations which have been judicially passed on and a failure to cite a statute of a particular jurisdiction does not warrant the conclusion that no such statute exists.

*American Statutes.*

## GENERALLY.

As a general rule statutes which regulate the occupation of personal property loan brokers, are held to be constitutional and within the police power. *Griffith v. Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 54 U. S. (L. ed.) 1151; *Mutual Loan Co. v. Martell*, 222 U. S. 225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *In re Home Discount Co.* 147 Fed. 538; *Eaker v. Bryant*, 24 Cal. App. 87, 140 Pac. 310; *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079; *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273; *Zumpfe v. Gentry*, 153 Ind. 219, 54 N. E. 805; *Com. v. Morris*, 176 Mass. 19, 56 N. E. 896; *People v. City Prison*, 89 N. Y. S. 322; *State v. Davis*, 157 N. C. 648, 73 S. E. 130, 39 L.R.A.(N.S.) 136; *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct. Rep. 115, *affirmed* 88 Ohio St. 550, 105 N. E. 768; *Com. v. Young*, 57 Pa. Super. Ct. 521; *Ex p. Hutsell (Tex.)* 182 S. W. 458; *State v. Cary*, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174; *Fahringer v. State*, 148 Wis. 291, 134 N. W. 406; *State v. Sherman*, 18 Wyo. 169, Ann. Cas. 1912C 819, 105 Pac. 299, 27 L.R.A.(N.S.) 898. And see the reported case. The reasons for such statutes were strongly set forth by the court in the case of *In re Home Discount Co.* supra, as follows: "The mischief which called forth the statute is well known. It arose in the contracting and collection of small loans in dealings with necessitous borrowers and small wage earners, who as a rule had no security except the pledge or assignment of wages to be earned and household goods. The borrowers agreed to whatever rate of interest was demanded. In this case the rate was 120 per cent per annum. As an assignment or hypothecation of wages, generally, without regard to some subsisting contract is not valid here, lenders took an assignment of wages to be earned under some

particular contract. When disputes arose between borrower and lender as to the date or amount of payments made, or the date or the amount of the loan, or the borrower was slow in meeting his promises, the lender would file with the employer the instrument assigning the wages. The laborer was thus prevented from receiving his wages, although he continued to work, until the dispute was settled. Cut off from his means of subsistence, the borrower was almost invariably forced to succumb to the demands of the lender. Much suffering ensued among laborers, and great harassment and injury resulted to employers who could not determine with any certainty how long their employees or laborers would remain in their service under contracts which had already assigned their earnings as to which disputes were likely to arise at any time. Railroad companies, owners of furnaces and mills, and other large employers of labor, made and enforced rules for their own protection, that employees who had unsettled disputes about an assignment of their wages should be laid off, and if the dispute were long-continued, should be discharged. Lenders became, in fact, the controllers and dictators of the labor of the borrowers. The differences between lenders and borrowers, and the steps which employers felt compelled to take in consequence, brought on conditions which were yearly reducing hundreds of laborers and other small wage earners to a condition of serfdom in all but name. In the 'business of banking,' these small loans were seldom, if ever, made to this class of borrowers on the security named in the statute. The profits from these loans attracted another and different class of lenders, who, as the legislature knew, monopolized the loans of this class of borrowers and engaged in evil practices, in which banks and bankers did not indulge in the rare instances in which they made such loans. Loans by banks and bankers under \$75, and loans over that amount, no matter by whom made, were rarely secured by an assignment of future wages or a lien upon household goods, and were not productive of the evil which the statute seeks to cure. The legislature knew that the taking of the security named by one class of lenders had almost invariably brought forth evil, while the same loans, on the same security, by another class in 'the business of banking,' had seldom, if ever, been harmful to the public welfare." Likewise in *Eaker v. Bryant*, supra, it was said: "Laws enacted to guard against unreasonable rates of interest are laws against oppression, and should be favorably regarded, as they always have been favored by the common law of England. When there comes into existence in a state a class of business (even though

it be within a more general class) wherein it is customary and habitual for those conducting that business to charge excessive rates of interest and take mortgages upon the personal goods, or assignments of the wages of the borrower as security therefor, the legislature may take cognizance of the fact that such business is in existence as a distinct occupation, and may set it apart as a business subject to regulation peculiar to itself, in order to avoid the wrongs incidental to such business when unregulated. Such legislation, as instanced in the present case, is not arbitrary. It is based upon differences which in some reasonable degree, as said in the Miller case, 'will account for or justify the peculiar legislation.' In *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273, the court said: "The legislature, believing that certain things were done, and certain methods employed that were oppressive to a large number of people of small means, and injurious to the public welfare, passed the act in question for the purpose of remedying an existing evil. It unquestionably had the right to determine where, and by whom, the injurious business was engaged in, and confine the operation of the law to such place and such persons, provided the act affected all of such persons alike and did not make any arbitrary and unreasonable classification of them. The effect of the statute, of course, was to give to those who made small loans certain privileges which were not given to those who made larger ones; but, if it operated alike, and without discrimination, upon all the persons in the county who made small loans, we fail to see wherein it made any unlawful classification within the meaning of the constitution. The purpose of the law was to regulate a business and not to create a class." In *State v. Davis*, 157 N. C. 648, 73 S. E. 130, 39 L.R.A.(N.S.) 136, the reasons for holding such a statute to be valid were stated as follows: "The statute under consideration is a logical and lawful extension of the protection which it has always been the policy of the law to afford this peculiar class of property. The general assembly knew that the man who mortgages his household goods does so because he has nothing else to mortgage. He is the poor man, the illiterate man, and his poverty and his ignorance make him the easy prey of the usurer. The general assembly also knew that in some of the cities of the state there were springing up a class of men who were selling money, like furniture, on the instalment plan. It was to save the things necessary to the existence of a home from the grasp of such men that the Act of 1907 was passed. We submit that the statute tends to preserve the domestic peace, to promote the family

health and prosperity, and is a valid exercise of the police power of the state. It is not class legislation; it operates alike on all who take mortgages on household and kitchen furniture. It regulates a business and does not create a class." And likewise in *Ex p. Hutsell* (Tex.) 182 S. W. 458, the court said: "There is nothing that is prohibitive in the law; it only requires that the creditor or money lender shall deal fairly with the borrower, and charge no more interest than the constitution and the laws of this state permit. And laws which have heretofore been held valid prohibit him, without the provisions of this statute, from charging more than the law permits, and this statute only gives to borrower or debtor a remedy whereby he can recover his money back provided the lender does charge him more than the law allows. The 'right of contract' was impaired, if impaired at all, in providing that the lender should not be allowed to charge more than 10 per cent interest on the money, and, if he did so charge and collect, even though the borrower had contracted to pay it, the borrower might collect back double the amount so paid."

The methods of regulation of personal property loans vary greatly. Some statutes regulate the rate of interest; some fix a limit to the amount loaned; some classify the lenders; some classify the kind of property to be given as security; some require certain recitals in the instrument evidencing the security; some require bonds conditioned on observance of the statutes and the prompt payment of judgments; and some require certain records to be kept and certain reports to be made. No statute, however, employs merely one of these methods, but there are various combinations. Certain provisions of the statutes, however, are either universally held to be valid when contested, or else their constitutionality is granted without argument.

Thus a statute is not void because it fixes a rate of interest. *Griffith v. Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 54 U. S. (L. ed.) 1151; *Eaker v. Bryant*, 24 Cal. App. 87, 140 Pac. 310; *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079; *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273; *Com. v. Morris*, 176 Mass. 19, 56 N. E. 896; *Ex p. Berger*, 193 Mo. 16, 5 Ann. Cas. 383, 90 S. W. 759, 112 Am. St. Rep. 472, 3 L.R.A.(N.S.) 530; *People v. City Prison*, 89 N. Y. S. 322; *State v. Davis*, 157 N. C. 648, 73 S. E. 130, 39 L.R.A.(N.S.) 136; *Com. v. Young*, 57 Pa. Super. Ct. 521; *State v. Cary*, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174; *State v. Sherman*, 18 Wyo. 169, Ann. Cas. 1912C 819, 105 Pac. 299, 27 L.R.A.(N.S.) 898.

The validity of a statute regulating loans on chattel security is not impaired because

a provision requires certain formalities in obtaining a license and in conducting a loan. *Mutual Loan Co. v. Martell*, 222 U. S. 225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *In re Home Discount Co.* 147 Fed. 538; *Zumpfe v. Gentry*, 153 Ind. 219, 54 N. E. 805; *Com. v. Morris*, 176 Mass. 19, 56 N. E. 896; *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct. Rep. 115, *affirmed* 88 Ohio St. 550, 105 N. E. 768; *Com. v. Young*, 57 Pa. Super. Ct. 521; *Ex p. Hutsell* (Tex.) 182 S. W. 458. It was as said in the case of *In re Home Discount Co.* supra: "The law-makers, in devising a remedy, had to consider the different habits and conduct of men in these occupations as to these loans, in order to apply an intelligent and just preventive, and in doing so, necessarily discriminated between these classes according to their well-known habits and customs in the matter. No discrimination is made by the statute between those classes as to the right to contract. All alike are permitted to make these small loans on the security named. No class is licensed or taxed for anything done in connection with them. All classes are left to stand on the same footing in all these respects. The only discrimination is that one class of lenders is required to state, while the others are not, the truth in certain simple particulars as to the actual transaction in the instrument which evidences it and to record that instrument. The statute is a police regulation pure and simple, to check usury and promote fair dealing in loans between one class of money lenders and one class of borrowers on a particular kind of security, by requiring certain statements to be put in their contracts and that they be recorded. If the practice of one class of money lenders makes such precaution necessary as to them, it would be going an unwarranted length to hold that the state police power must either leave them entirely alone or else provide the same regulations, regardless of a need for them, for like loans made by all other classes of money lenders."

The requirement from lenders on chattel security of bonds conditioned on observance of the statute and on payment or judgments is valid. *In re Home Discount Co.* 147 Fed. 538; *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273; *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct. Rep. 115, *affirmed* 88 Ohio St. 550, 105 N. E. 768; *Com. v. Young*, 57 Pa. Super. Ct. 521; *Ex p. Hutsell* (Tex.) 182 S. W. 458.

Some statutes go so far as to require that the borrower's wife must give a written approval of the loan, and such a provision is constitutional. *Mutual Loan Co. v. Martell*, 222 U. S. 225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct.

Rep. 115, *affirmed* 88 Ohio St. 550, 105 N. E. 768. But see the later case of *Chambers v. Cincinnati*, 31 Ohio Cir. Ct. Rep. 8, wherein such a provision in a municipal ordinance was held to be void. In *Cain v. People's Salary Loan Co.* supra, the court said: "As to the ground urged against the law that the provision requiring an assignment of salary to be signed by the husband or wife is a violation of the right of separate contract, we think it is fully within the police power of the state to thus protect families from the improvidence of one member, as in the enactment of homestead and similar laws. The judgment of the common pleas court in each case will be affirmed."

#### CLASSIFICATION OF PERSONS OR PROPERTY.

Statutes regulating the loan of money on chattel security are usually attacked by reason of their classification of the persons who lend or of the property used as security. The provision that is most usually assailed is that which classifies money lenders. As long as there is some reason for the classification, the provision is valid. *Griffith v. Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 34 U. S. (L. ed.) 1151; *Mutual Loan Co. v. Martell*, 222 U. S. 225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *In re Home Discount Co.* 147 Fed. 538; *Eaker v. Bryant*, 24 Cal. App. 87, 140 Pac. 310; *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079; *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273; *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct. Rep. 115, *affirmed* 88 Ohio St. 550, 105 N. E. 768; *Com. v. Young*, 57 Pa. Super. Ct. 521; *Ex p. Hutsell* (Tex.) 182 S. W. 458. In *Eaker v. Bryant*, supra, the court said: "Since the legislature has not included in the prohibitions of this act those persons who make loans without security, we may reasonably assume that the legislature has not found any abuse in that business requiring public correction, if indeed it could find such business in existence at all. And since the lending of money upon the security of real estate, or of bank deposits, or of interests in estates, or of contracts, has not been included within the prohibitions of this statute, we may reasonably assume that the legislature has not found that the business pertaining to such loans are usually accompanied by the abuses which the legislature was seeking to remedy. The exclusion from this act, of the business of taking pledges as security for loans, is accounted for by the terms of the laws already in existence, controlling the business of pawnbrokers." In *Mutual Loan Co. v. Martell*, supra, the Supreme Court said: "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects

of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the Supreme Judicial Court took, and, we think, rightly took. The court said that the legislature might have decided that the dangers which the statute was intended to prevent would not exist in any considerable degree in loans made by institutions which were under the supervision of bank commissioners, and 'believed rightly that the business done by them would not need regulation in the interest of employees or employers.' In *Com. v. Young*, supra, it was declared: "It is a recognition of the supreme authority of the legislature to regulate a business for the promotion of the public welfare where such regulation is made in good faith. The object of the statute under consideration is obvious. It was intended to apply to that considerable class of persons engaged in the business of lending small sums of money to individuals pressed by lack of funds to meet immediate necessities, of whose necessities the lender takes advantage by extracting rates of interest in many instances largely exceeding that permitted by law and frequently amounting to extortion. The exemption of banks, trust companies, building associations and pawnbrokers from its operation doubtless arose out of the fact that the business of these institutions and persons is already regulated by law and in the case of banks, trust companies and building associations the character of their business and the method of carrying it on is such as to distinguish them from the corporations and persons, to whom this statute was intended to apply. We cannot regard it as a local or special law or as one granting any special or exclusive privilege to any corporation, association or individual. It is legislation classifying a special and extensive business and subjecting it to reasonable regulation and control in the interest of borrowers who are liable to be imposed on by unscrupulous lenders. The act applies to the whole class and is in its nature and objects of like character with numerous other statutes to which reference has been or might be made."

A statute may limit its provisions to small loans. In *re Home Discount Co.* 147 Fed. 538; *Com. v. Morris*, 176 Mass. 19, 56 N. E. 896; *Mutual Loan Co. v. Martell*, 222 U. S.

225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *State v. Wickenhoefer*, 6 Penn. (Del.) 120, 64 Atl. 273; *State v. Sherman*, 18 Wyo. 169, Ann. Cas. 1912C 819, 105 Pac. 299, 27 L.R.A. (N.S.) 898. In *State v. Wickenhoefer*, supra, the court said: "The legislature is the only judge of the policy of a proposed discrimination, and, when it declared in the present act that the operation of the law should be confined to persons who made loans in sums not exceeding \$100, it cannot be said by this court there was no fair reason for the law that would not also require its extension to others whom it leaves untouched. The evil was caused by the lenders of small sums of money, and, if the legislature believed it could be removed or prevented by confining the law to such lenders, they had a right to do so, and it was proper to go no further." And in *State v. Sherman*, supra, the validity of the provision was approved as follows: "It is impossible to avoid the knowledge that in this state, as well as in others, there is a class of money lenders distinguished by the fact that their business consists, at least to a large extent, in making small loans at a rate of interest, or upon other charges, generally regarded as extremely exorbitant, and usually to a class of borrowers who, perforce, must borrow from them or not at all. The business is so well advertised and known that the legislature, we think, was justified in regarding and treating it, and the persons engaged in it, as constituting a distinct class in the field of financial operations, and had the power to enact the statute here in question to suppress the practice, conceived by the legislature to be oppressive and extortionate, growing out of the conduct of such business and such transactions. In our opinion, therefore, the statute is not unconditional on the ground of arbitrary or unreasonable classification. As a general law it has a uniform operation, for the reason that it applies equally to all persons in the class and under like circumstances and conditions."

A statute regulating loans on the security of certain classes of chattels only is valid if the classification is reasonable. *Mutual Loan Co. v. Martell*, 222 U. S. 225, Ann. Cas. 1913B 529, 32 S. Ct. 74, 56 U. S. (L. ed.) 175; *Zumpe v. Gentry*, 153 Ind. 219, 54 N. E. 805; *Com. v. Morris*, 176 Mass. 19, 56 N. E. 896; *People v. Manhattan*, 89 N. Y. S. 322; *State v. Davis*, 157 N. C. 648, 73 S. E. 130, 39 L.R.A. (N.S.) 136. But because of the unreasonableness of classification in that respect statutes have been held to be void in some cases. *Ex p. Sohncke*, 148 Cal. 262, 7 Ann. Cas. 475, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L.R.A. (N.S.) 813; *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, 130 Am. St. Rep. 234, 28 L.R.A. (N.S.) 1108; *Rodge v.*



Kelly, 88 Miss. 209, 40 So. 552, 117 Am. St. Rep. 733, 11 L.R.A.(N.S.) 635; Hyland v. Sharp, 88 Miss 567, 41 So. 264; Althaus v. State, 94 Neb. 780, 144 N. W. 799. In the leading case of *Ex p. Sohncke*, supra, there were two statutes involved. One provided for the formation of corporations to be empowered to loan money in sums not exceeding \$300 to be secured by pledges or mortgages of personal property. A rate of interest of 1½ per cent per month plus certain sums for the expenses connected with the loan was allowed. If the statute should be violated by a person other than the corporation, a fine of \$100 was imposed for the first offense; and for each subsequent offense there was a like fine and thirty days imprisonment. If the statute should be violated by a director, officer or employee of an authorized corporation, the penalty was a fine of not more than \$100 or imprisonment for not more than six months, or both. If the statute should be violated wilfully by an authorized corporation, such corporation would thereby forfeit its right to do business under the statute. Because of the different degrees of punishment imposed for the same offense, the statute was declared to be unconstitutional. The court said: "It is manifest that these provisions of the law transgress that provision of the constitution requiring that all laws shall be uniform in operation. The same acts are made punishable by different degrees of punishment according as they may be committed by officers, servants, or employees of the corporations authorized by this particular statute, or by other persons or corporations. . . . There can be no valid ground for such discrimination in favor of the officers of such special corporations. If the magistrates in the locality in which such corporations may be doing business should see fit, they could by imposing like fines practically allow such corporations to charge the forbidden rates, while all other persons would be prohibited from so doing. The uniformity of operation of the law would depend entirely upon whether or not the fines imposed upon such officers were in all cases made precisely the same as those imposed upon other persons regardless of the character of the circumstances attending the offense. Such legislation is clearly a violation of the constitutional restriction." The second statute involved in *Ex p. Sohncke*, supra, was passed on the day next before the statute just discussed. It provided as follows: "It shall not be lawful for any individual, partnership, association or corporation lending money upon chattel mortgages, where there is taken for such loan any security upon any upholstery, furniture or household goods, oil paintings, pictures or works of art, pianos, organs or sewing machines, iron or steel safes, professional

libraries or office furniture or fixtures, instruments of surveyors, physicians or dentists, printing presses or printing material, to have or change for the use of money so loaned more than the rate of one and one-half per cent per month interest thereon, and that no additional sum, either in the way of loans or otherwise, shall be required or exacted of the borrower or borrowers; and further, that no charge for examination or valuation of property offered, insurance of same, and preparation, execution and recording of necessary papers shall be imposed except as follows: For examination or valuation of property offered for mortgage and preparation of papers (both included), no greater sum than five dollars, where the amount loaned does not exceed three hundred dollars. For necessary affidavits, recording of papers, and fire insurance premiums, the amounts actually to be paid for same, provided that the foregoing charges may be deducted from the principal of the loan when the same is made; and provided further, that in no case shall it be lawful to deduct interest in advance, nor make any charge for extension of loans, nor to divide or split up loans under any pretense whatsoever for the purpose of requiring or exacting any other or greater charges than prescribed herein." The statute was declared to be unconstitutional on the ground that the classification was arbitrary. The reasons for the decisions were given by the court as follows: "The business of loaning money is as much a part of domestic trade and commerce as any other legitimate business. There is no substantial reason why those who lend money in sums not exceeding three hundred dollars on chattel mortgages of upholstery, pictures, or works of art, pianos, organs, sewing machines, safes, professional libraries, or office furniture or fixtures, instruments of surveyors, physicians, or dentists, printing presses, or printing material, should be limited in their charges and the business they do in that respect made less profitable than it otherwise would be, while they or others who lend on chattel mortgages upon instruments of a photographer, livestock, agricultural implements, equipments of livery stables, or other property allowed to be mortgaged by section 2055 of the Civil Code (Stats. 1905, p. 36, c. 40), and not enumerated in the act under consideration, or who lend upon pledges of any kind of personal property, or who lend in sums exceeding three hundred dollars upon any kind of security, should be allowed to exact any rate of interest or other charge which they can obtain from the borrower. It is a part of the same kind of business, and there is no distinction between the particular classes of persons or things affected by the act and those exempted from

its provisions that will justify special legislation. It may be that such exorbitant charges should be absolutely prohibited, but, if so, the prohibition should be made general, and should extend to all who engage in the business as lenders on the one hand, and should protect all who are made the victims thereof on the other hand, without discrimination in favor of any." In *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, there was involved a statute declaring that no assignment of the wages or salary of any person should be valid unless certain prescribed formalities were complied with. The statute was held to be unconstitutional. After referring to the evil aimed at by the statute, the court said: "While we think this evil exists, it is yet apparent, upon a careful examination of this statute, that it is too broad in its terms to be justified as an exercise of the police power for the purpose of mitigating or remedying the wrong at which it is aimed. It applies not only to wages but also to salaries. 'Wages,' in its ordinary acceptance, has a less extensive meaning than 'salary.' 'Wages' is usually restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers and others employed in various manual occupations, while 'salary' has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations and public officers. . . . The statute now under consideration is invalid because it violates the provision of our constitution which has been invoked by limiting the right of persons earning the higher salaries to assign or transfer their salaries in such manner as they see fit, there being nothing in the public policy of the state requiring or warranting such abridgment of their right, and nothing requiring or warranting a statute giving to such persons the benefit that might with entire propriety be given to wage earners by an act in reference to the assignment of wages." In *Rodge v. Kelly*, 88 Miss. 209, 40 So. 552, 117 Am. St. Rep. 733, 11 L.R.A.(N.S.) 635, and in *Hyland v. Sharp*, 88 Miss. 567, 41 So. 264, the same statute was involved. In the former case, an ordinance identical to the statute except as to the amount of tax was also in litigation. The statute did not specify any rate of interest but it imposed a burdensome tax on persons and corporations lending money on personal securities "such as household and kitchen furniture, or wearing apparel, pianos, sewing machines, jewelry, silver, glass, plate or ware." The court after condemning the evil sought to be remedied, declared the statute to be class legislation, saying: "The purpose of this act seems to have been to provide this high license in the case of the money-lending sharks well known in some of the cities of this state, who are

in the habit of lending small sums of money at most iniquitous and exorbitant rates to servants in families and other necessitous persons, and securing from such persons bills of sale of household and kitchen furniture, plate, ware, etc., which articles are at the time of such loan in the actual personal use of such persons so securing such loan. The purpose of preventing this infamous system of robbery under the guise of money lending, which sought to subject to quick sale, within a week's time often, the articles which constitute, in such actual personal use of those securing the loan, the necessities of decent existence, is a justly righteous purpose. . . . But the trouble with this statute, as drawn, is that it prohibits loans on personal securities of this kind named without reference to any rate of interest. If only the securities be of the kind named in this statute, no loan could be made, except upon payment of this high license, not exacted of any other money lender, at even six per cent, or five per cent, or any per cent whatever. Again, under this statute, money lenders on personal securities of this kind would have to pay this high license in order to loan at any rate of interest, however low, on jewelry worth \$100,000 in a store, or silverware worth \$100,000 in a store, or on all the pianos in a factory. As written, the statute is unfortunately class legislation, falling within the inhibition of the constitutional provisions named." In *Althaus v. State*, 94 Neb. 780, 144 N. W. 799, the contested statute provided that on loans not exceeding \$250 a rate of interest of not more than 1 per cent per month could be charged when the loan was made for a period not exceeding one year and when the loan was secured only by a mortgage on "household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits, or choses in action." The statute was held to be unconstitutional on the ground that the classification of the property was unreasonable. The court said: "The act by its terms protects from the rapacity of those who loan money on chattel security only owners of the particular items of personal property enumerated. A lender who charges extortionate interest and accepts security on the chattels enumerated by the legislature may be punished. Another lender who makes a loan on identical terms except that he includes in his chattel mortgage an article not enumerated in the act, but similar to those mentioned therein, goes free. If the avarice and greed of those who thrive on the poverty or the misfortune of the owners of 'household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits or choses in action'

are to be wisely and justly curbed by law, as such abominations should be, why should not the law apply also to those who lend money on other chattels of a similar nature? Why should the mortgagor of diamonds be protected by the criminal law from extortionate rates of interest, and the mechanic, who mortgages his tools to buy bread, when out of employment, go without protection? In the eye of the law, why should the owner of household goods, which are being moved from one tenement to another, be protected by statute from the extortion of the lender on chattel security, while the owner of the cart in which such goods are moved is left to the unpunishable avarice of the chattel lienor?"

#### *Canadian and English Statutes.*

In Canada and England there are statutes regulating the occupation of money lenders. Money Lenders Act, 1900 (63 & 64 Vict.) c. 51; Money Lenders Act, R. S. C. 1906, c. 122. These statutes are generally similar to those enforced in the United States. Their validity is of course not subject to impeachment. See generally as to their construction, *Halsey v. Wolfe* [1915] 2 Ch. (Eng.) 330; *Hart v. Hungerford*, 114 L. T. N. S. (Eng.) 663 (1916) W. N. 37, 32 Times L. Rep. 259, 60 Sol. J. 369; *Vanasse v. Robillard*, 47 Quebec Super. Ct. 487; *Rex v. Morgan*, 21 Can. Crim. Cas. 225, 11 Dominion L. Rep. 794, 19 Rev. Leg. 344.

#### *Municipal Ordinances.*

It is competent for the legislature to delegate to a municipality the power to regulate the business of loaning money on chattel security. *Sanning v. Cincinnati*, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A. (N.S.) 686. The delegated power of municipalities has ordinarily been exercised by licensing provisions. See the note to *Norris v. Lincoln*, Ann. Cas. 1914B 1194. In *Sanning v. Cincinnati*, supra, the court sustained an ordinance, which after requiring a license contained the following requirements: "The licensee must have his books and accounts open at any time to the inspection of a specified official. The licensee must give each pledgor, mortgagor, or assignor a card upon which shall be written in ink, typewritten or printed, the name of lender, name of borrower, the articles pledged, the amount of the loan, the amount of the interest, the amount of expense connected with making the loan, the time for which each charge is made, date of loan, date when payable, and shall give a receipt for all payments. Once each week, the licensee must file with the officer a record of all his loans during the preceding week, on special cards provided by the city, showing sub-

Ann. Cas. 1916E.—40.

stantially the same details as required for the receipt for the borrower. The borrower's wife must approve of the loan." The court said: "His objections to these requirements are that compliance would destroy his business, because borrowers of this class are so sensitive in respect to publicity that they will forego a loan rather than expose their necessities to the public; and that it invades the right of privacy. The requirements of the fifth section are not much more exacting, and will not give as much publicity as do most registration acts, and compliance with them will not destroy the business if it is legitimate. Publicity is recognized as one of the most effective preventatives of many harmful practices. If some such ordinance had been in force in Venice, Shylock never would have stipulated for the pound of flesh. We do not think the requirements are unreasonable." In *Chambers v. Cincinnati*, 31 Ohio Cir. Ct. Rep. 8, wherein the same ordinance was involved, the provision relating to the wife's approval was held to be invalid but severable from the rest of the ordinance. Compare *Cain v. People's Salary Loan Co.* 34 Ohio Cir. Ct. Rep. 115, affirmed 88 Ohio St. 550, 105 N. E. 768, wherein a similar provision in a statute was held to be valid.

#### CLARKE

v.

#### YUKON INVESTMENT COMPANY ET AL.

Washington Supreme Court—January 11,  
1915.

83 Wash. 485; 145 Pac. 624.

#### **Landlord and Tenant — Duty of Landlord to Repair.**

In the absence of a covenant to repair or to keep the property in condition for intended use, there is no liability upon the lessor to do so.

#### **Duty to Provide Fire Escape.**

Laws of 1909, p. 43, regulating buildings used for hotels, section 11 (Rem. & Bal. Code, § 6040) of which imposes a penalty upon every owner, manager, agent, or person in charge of a hotel for failure to comply with the act, does not require the owner of a building, leased for a long term to a tenant who is conducting a hotel on the premises, under a lease which did not require the owner to make repairs or equip the building

for such purpose, to pay for the installation of a fire escape, as required by the city under the authority of that act; the term "owner of the hotel" referring to the owner of the hotel business and not to the owner of the building in which it was conducted.

[See note at end of this case.]

Appeal from Superior Court, King county:  
ALBERTSON, Judge.

Action to foreclose mechanic's lien. H. M. Clarke, plaintiff, and Yukon Investment Company et al., defendants. From judgment rendered defendants appeal. The facts are stated in the opinion. REVERSED as to Yukon Investment Company and AFFIRMED as to other defendants.

*Walter B. Beals* for plaintiff.

*Bausman, Kelleher, Oldham & Goodale* for defendant Yukon Investment Company.

*Hughes, McMicken, Dovell & Ramsey* and *Gay & Kelleran* for defendant Purcell Investment Company.

[485] CHADWICK, J.—The Yukon Investment Company is the owner of a certain brick building in the city of Seattle known [486] as the Tourist Hotel property. The Purcell Investment Company held the premises under a long term lease. The lease contained the following provisions:

"Lessee agrees to keep said premises in good repair, and to make all necessary repairs of whatever nature to said premises. . . . That it is the understanding and intent of the parties hereto that said lessor shall not be required to expend any money on said premises during the term of this lease except for taxes, general and special. . . . That lessee . . . shall not suffer or permit therein any violation of any of the laws of the state of Washington, or of any of the ordinances of the city of Seattle. . . . It is provided that all such alterations are to be paid for by the tenant."

After the lease had run for about two years, the city of Seattle, through its proper agents, notified the Yukon Investment Company that it would be necessary to install an additional fire escape. The company replied that the property was held under a long term lease and disclaimed liability. Whereupon the city notified the Purcell Investment Company. The agent of the Purcell Company had certain negotiations with the Yukon Company out of which, as it is alleged in the pleadings, a contract to pay for the fire escape arose, and that it thereafter acted only as the agent of the Yukon Company. In any event Purcell negotiated with plaintiff for the installation of a fire escape, accepting the proposal to do so in writing as follows:

"The H. M. Clarke Iron & Wire Works, June 28, 1913.

"1926-29 Western Avenue, Seattle, Washington.

"Gentlemen: Confirming our telephone conversation of this date, we accept your proposal of the 24th inst., to build and install the fire escape and balconies on the Tourist Hotel Bldg., cor. Occidental Ave. and Main Street, for the sum of nine-hundred forty-eight and no-100 dollars (\$948), same to be in accordance with drawings furnished and in compliance with city ordinances. Yours very truly, Purcell Investment Company, by P. F. Purcell."

We agree with the trial judge that there was hardly a pretense of sustaining this theory of the case upon the trial. [487] Certainly the Purcell Company did not maintain the burden of proof, and we shall not review the testimony but proceed at once to discuss the legal phases of the case.

In the absence of a covenant to make repairs or to keep the property in proper condition for the uses intended, there is no liability on the part of the lessor to do so. It has been so held by us in *Howard v. Washington Water Power Co.* 75 Wash. 255, 134 Pac. 927, 52 L.R.A.(N.S.) 578; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L.R.A.(N.S.) 917; *Johnston v. Nichols*, 83 Wash. 394, 145 Pac. 417. The Yukon Company insists that it is not liable (a) under the express terms of the lease, and (b) by a fair construction of the whole act, ch. 29, Laws of 1909, p. 43 (Rem. & Bal. Code, § 6030 *et seq.*), it is evident that the legislature intended it to apply only to an owner who is in possession and who is conducting a hotel business, and the conclusion is compelled that all of the burdens of the act should be borne by the business. Counsel cite: *McManamon v. Tobiason*, 75 Wash. 46, 134 Pac. 524; *Rockwell v. Eiler's Music House*, 67 Wash. 478, 122 Pac. 12, 39 L.R.A.(N.S.) 894; *Hayton v. Seattle Brewing, etc. Co.* 66 Wash. 248, 119 Pac. 739, 37 L.R.A.(N.S.) 432.

This court has held that, where premises are let under general terms, no restrictions being put upon the use, the lessee having the privilege to use them for all lawful purposes, the landlord is not bound to meet a burden imposed by a statute or an ordinance, whether that burden be in the form of money expended to meet the demands of the sovereignty or whether the use to which the property is put is impaired or destroyed in virtue of the statute or ordinance. The theory being that one who leases property without restriction as to use takes under an implied obligation to meet every expense incident to the use to which it may be put, whether induced by considerations of convenience or profit, or whether compelled by superior authority. If it

were not so, a landlord might be called upon to meet the cost of fire [488] escapes if the lessee decided to open a rooming house. If that use proved unprofitable, the tenant might use the property as a theatre or picture show and the landlord would be compelled to provide such additional exits and escapes as the statutes and ordinances require, or, that venture failing, he might be called upon to meet the expenses of adapting the premises to the requirements of a restaurant if the lessee wished to engage in it.

In the Hayton case, it was held that a *permission* to use the property leased for saloon purposes did not restrict the use of the premises for other lawful purposes, and a retirement from that business under compulsion of the local option law did not terminate the lease. The governing principle, i. e., a landlord will not be held to meet the burden of an exercise of the police power, would seem to apply here.

In the Rockwell case, there was no restriction upon the use of the demised premises. It was alleged that the property had been used for public shows and entertainments; that the lessor knew that the property had been leased for the purpose of carrying on a moving picture show; that the lessee did not know, and the lessor did not disclose to him, that the premises could not be so used or be used for the entertainment of audiences "until an exit for escape in case of fire" had been made in the building. It was agreed in the lease that the lessee should make repairs and permanent improvements. The lessor refused to make the exit at its own expense when notified by the chief of the fire department to do so. An action was brought as for an abandonment of the lease by the lessor. We held:

"That the use of the premises was not limited by the terms of the lease; that the lease is complete in itself; that the respondent did not engage to make any repairs or improvements upon the premises; that the appellant did engage to make certain improvements; that both parties were bound to take notice of the police regulations of the city where the subject-matter of the contract was situated; that there is no [489] averment that the respondent misled the appellant, or that it refused to permit him to construct the exit upon the wall of the building without the terms of the lease; that upon the cancellation or surrender of the lease, the appellant was obligated to pay all rent that had accrued by the terms of the lease, and that the complaint, when read with the lease, shows no breach of any of its terms or of any legal duty upon the part of the respondent."

The logic of this decision is that parties may make any lawful contract and, in the absence of a stipulation specifically covering the disputed right, the contract is made sub-

ject to, and with implied knowledge of, police regulations, present and prospective, which may affect the use of the property while subject to the tenancy.

The McManamon case rests upon the same principle. There the building was, by apt terms, let for hotel purposes and such business as is generally incident to the hotel business. It could not be used for any other business without the written consent of the lessor. There as here the agency of the state, exercising its police power, made certain demands in the interest of the safety of guests and patrons. Here we have an order to install an additional fire escape; there the order was to provide ventilation in certain of the bedrooms, which if complied with required changes and alterations—permanent improvements, considering the use to which the lessor had restricted the use of the building. It was held, upon the ground of insufficiency of the evidence, that a recovery for the expense of the alterations and improvements could not be had. It may be said *arguendo* that a recovery should have been allowed irrespective of the contract if the theory of the Purcell Company is a correct conception of the law, for the improvement was of a permanent character, not within the contemplation of the parties except as the law charged them with notice of possible safeguards in aid of patrons of the hotel. The McManamon case is an apt authority to sustain our reasoning that, while there may be a [490] contract liability for improvements, no such liability arises under the statute where the improvement is compelled by public authority as an incident to the use to which a tenant puts the property.

Counsel for the Purcell Company have cited many cases, *Zeibig v. Pfeiffer Chemical Co.* 150 Mo. App. 482, 131 S. W. 131, being a fair type of all of them, to sustain its contention that where a statute is in terms similar to Rem. & Bal. Code, § 6040 (P. C. 243, § 21), that is,—“every owner, manager, agent or person in charge of a hotel who shall fail to comply with any of the provisions of” the law shall be guilty of a misdemeanor, puts the burden of providing and paying for any improvement which becomes a permanent part of the structure upon the owner of the property. The whole contention of the Purcell Company is stated in the *Zeibig* case:

“As between the owner and the lessee, aside from any contract, the obligation of the law is not identical with that which obtains with reference to the public, for in such circumstances the duty of constructing the fire escape rests primarily upon the owner of the property. . . . It is true, as a general proposition, that by the common law the burden of repairs on the demised premises rests upon the tenant, and, unless he covenants to do so, the landlord is not required

to construct appurtenances nor repair the premises after having placed them in the possession of the lessee. . . . But to this general rule there is a well established exception which obtains with respect to the construction of such permanent improvements or fixtures as fire escapes, where the duty is enjoined by a positive statute as here. . . . It thus appears that as between the plaintiff owner and the defendant lessee the obligation to construct the fire escape primarily obtains against the owner of the property and no recovery may be had against the defendant on account thereof unless it covenanted to do so. The mere fact that defendant leased the premises for business purposes with knowledge that the fire escape which the law required had not been constructed will not imply a covenant to the effect that it should assume the [491] burden suggested; for implied covenants in leases are such only as the law arises from the relation of the parties or from the use of certain terms in establishing that relation."

Other cases relied on are: *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Johnson v. Snow*, 201 Mo. 450, 100 S. W. 5; *Carrigan v. Stillwell*, 97 Me. 247, 54 Atl. 389, 61 L.R.A. 163; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L.R.A. 277.

The *Zeibig* case, as well as the *Arms* case, fell under a statute which required the owner or lessee of *all* buildings having a height of three or more stories and used for business purposes to provide outside fire escapes. It is distinguished because the statute makes a fire escape a component part of, and presumptively a benefit to, a structure irrespective of particular use.

The *McAlpin* case and the *Willy* case were decided under an act chartering the city of Brooklyn. It provided that *any* dwelling house of more than two stories in height, and *any* building of more than two stories in height, when occupied as a hotel, boarding or lodging house, factory, mill, offices, manufactory, or workshops, shall be provided with fire escapes, etc.

The *Landgraf* case, was also a case under a statute providing that "*all* buildings in the state which are more than four stories, etc.," shall be provided with fire escapes. Owners, trustees, lessees and occupants were made answerable to the law.

In the *Carrigan* case, the controlling statute was comprehensive. It required fire escapes to be put upon "*every* building upon which *any* trade, manufacture or business is carried on, etc." Unless these cases fit our statute, they cannot be held to be controlling for admittedly there is no common law liability.

*Landgraf v. Kuh*, supra; *Pauley v. Steam Gauge*, [492] etc. Co. 131 N. Y. 90, 20 N. E. 999, 15 L.R.A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661.

Chapter 29, Laws of 1909, p. 43, is made by its terms applicable to a business, and not to *any* or *all* buildings. The title of the act is,

"An act relating to hotels, inns and public lodging houses, creating the office of State Hotel Inspector, and providing penalties for the violation thereof, and making an appropriation therefor."

It provides for fire escapes, rope escapes, fire extinguishers, gongs, a sufficient supply of bedding and towels; the dumping of ashes; for disinfection and fumigation after contagious diseases; for sanitation and sanitary plumbing; for inspection, and, following a failure to observe the demands of the law, it provides:

"Sec. 17. Any owner, manager, agent or person in charge of a hotel who shall obstruct or hinder an inspector in the proper discharge of his duties under this act, or who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10) nor more than one hundred (\$100) dollars or shall be imprisoned in the county jail for not less than ten days, nor more than three months or both." Rem. & Bal. Code, § 6046.

This section, when taken in connection with the other sections of the act, must mean the owner of the hotel business and not the owner of the building, for surely the lessor would not be punished for failing to properly plumb a building, or to furnish fire extinguishers, gongs, or rope fire escapes to meet the necessities of the lessee's business.

The distinction between the cases relied on and the one at bar is noticed in *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, where, under a statute providing that

"Any owner or agent for owner of any factory, workshop, tenement house, inn or public house, if such factory, workshop, [493] tenement house, inn or public house be more than two stories high, to provide . . . a fire escape" it was held:

"The owner of a building and the owner of a factory which is conducted in the building, may be different persons, and when this is so, the owner of the factory and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty. . . . Again, in the absence of all legislation on the subject, the common law, founded on principles of right and justice, implies, from the relation of master and servant, a duty on the former to provide reasonable means for the safety of the latter. Hence it is more reasonable to infer that the legisla-

ture intended to impose the duty required by this statute upon the owner of the factory, who assumes the relation of master to those employed therein, and for whose safety the duty imposed by this statute is enjoined, than to hold that it was intended to impose the duty upon the owner in fee of the factory building, who may not sustain any relation to the employees in the factory from which the duty to provide for their safety could be implied, and who may not even know that his building is being used as a factory or workshop."

We assume that the same rule would apply as between innkeeper and guest. To the same effect is *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201:

"A number of authorities were cited showing the construction which has been placed upon the word 'owner' both by the legislature and the courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainder man in fee is each an owner. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. When, therefore, the legislature used a term of such varied meaning we must presume they intended such an owner as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner [494] of whose use of it makes a fire-escape necessary. Had the owner in fee been intended it was easy to have said so. This view meets all the requirements of the act. It places the responsibility where it properly belongs, upon the person in the possession and occupancy of the property as owner for the time being, and the nature of whose business renders the erection of fire-escapes necessary to protect the lives of his employees."

This case was followed in *Keely v. O'Conner*, 106 Pa. St. 321, where it was said:

"The Act of 1879 is certainly a highly penal statute; it imposes a duty unknown to the common law, and cannot be extended by implication to parties who do not clearly come within its terms; the authorities which have been cited are cases involving common law liabilities, and we do not think they have application here."

In all of the cases relied on, the lessor was held because the law charged the improvement against the building irrespective of the character of the business, or because it was of a certain height, while with us the additional fire escape is required under a special statute,

and only in consequence of the particular business in which the lessee may engage and in which the lessor has no interest.

Our conclusion seems to us to be sustained by the better reason. In the case at bar, the lessee took the property *caveat emptor*. It knew that, in the exercise of its contract, the state or municipality might from time to time make demands in the interest of safety, and which might involve expense. The law rests upon the theory of benefit to property or business. It cannot be assumed that the improvement will be of benefit or use to the lessor at the expiration of the lease in 1921. Shifting trade centers, more engaging officers of rent from mercantile establishments, warehousemen, and wholesalers, might make the premises no longer adaptable for hotel purposes, thus rendering the additional fire escape no longer a necessity under any law or any ordinance of the city. We would then have the utterly un contemplated result, [495] a landlord meeting an expense for an improvement beneficial and necessary only to his lessee and from which he would reap no benefit or advantage now or hereafter.

A judgment has been heretofore entered affirming the judgment of the court below as to the Purcell Investment Company. The judgment of the lower court as to the Yukon Investment Company is reversed, and the case is remanded with instructions to dismiss as to it.

Crow, O. J., Gose, Morris, and Parker, JJ., concur.

## NOTE.

### Duty to Maintain Fire Escapes.

The purpose of this note is to review the recent cases discussing the duty to maintain fire escapes. A collection of the earlier cases will be found in the notes to *Yall v. Snow*, as reported in 9 Ann. Cas. 1161, and 119 Am. St. Rep. 781, and *Kohn v. Clark*, Ann. Cas. 1913E 775.

The duty to maintain fire escapes arises from comparatively modern statutes which are liberally construed in order to remedy as much as possible an elusive evil. Thus, it has been held in two recent cases that the defendant's failure to comply with a statute requiring fire escapes, coupled with the fact of the death of a person in the building burned, is sufficient proof that the defendant's neglect was the proximate cause of the death to warrant giving the case to the jury. *Burt v. Nichols*, 264 Mo. 1, 173 S. W. 681; *Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830, L.R.A. 1915E 519. The *Canadian* rule, however, is that the lack of fire escapes must be proved to be the cause of death in order to warrant a re-

covery therefor. *Birch v. Stephenson*, 33 Ont. L. Rep. 427.

An ordinance providing that every building three or more stories high, and used as a hotel, office building, theater, lodging or apartment house, etc., shall have at least one fire escape, and as many more as may be necessary for safety, has been held to be mandatory though the location of the escapes were subject to the approval of a designated official. *Mullins v. Nordlow*, 170 Ky. 169, 185 S. W. 825. Under a similar statute it has been held that the owner cannot wait until directed by the official before providing fire escapes. *Goetz v. Duffy*, 215 N. Y. 53, 109 N. E. 113. Under a like statute, the duty has been held to arise when the statute takes effect and not when the notice is given by the officer. *Greene v. L. Fish Furniture Co.* 272 Ill. 148, 111 N. E. 725; *Lichtenstein v. L. Fish Furniture Co.* 272 Ill. 191, 111 N. E. 729.

Where a statute makes it the duty of the owner of a building to erect fire escapes that are easily accessible, it is the owner's duty to provide additional fire escapes whenever his tenants by partitioning the building make it necessary. *Goetz v. Duffy*, 215 N. Y. 53, 109 N. E. 113. Where a statute makes the owner's failure to provide fire escapes a misdemeanor, it is the duty of the owner and not of the tenant to erect fire escapes. *Labor, etc. Depart.* 22 Pa. Dist. 1037.

A statute requiring the erection of fire escapes on factories consisting of three or more stories in height, applies to a building consisting of three stories, the floor of one of which is the ground. *Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830, L.R.A.1915E 519.

In *England* it is held that a statute which gives a committee the power to make such regulations as it may deem fit for the protection from fire in certain public buildings applies to buildings already existing. *London County Council v. Hall of Arts and Sciences Corp.* 110 L. T. N. S. (Eng.) 28.

A landlord cannot by a stipulation in the lease avoid compliance with a statute requiring fire escapes which was enacted for the protection of the tenants. *Mullins v. Nordlow*, 170 Ky. 169, 185 S. W. 825. Nor can a tenant waive the provisions of such a statute. *Burt v. Nichols*, 264 Mo. 1, 173 S. W. 681. As between the owner and the lessee, however, the latter may contract to erect the fire escapes, and thus relieve the owner of his duty to the lessee. Thus, in the reported case it appears that a lessee agreed that he would keep the premises in good repair, that the

owner would not be required to spend any money on the premises except for taxes, and that the lessee would not suffer therein any violation of any of the state or city laws. After the lessee had used the premises for two years, the lessor was notified to erect another fire escape. He declined on the ground that it was the duty of the lessee. The owner's contention is sustained, the court holding that the statute applied to the hotel keeper and not to the owner of the building. In *Lodge Room Co. v. Pacific Bond, etc. Co.* 84 Wash. 150, 146 Pac. 376, involving a lease containing provisions similar to those litigated in the reported case, it appeared that after the lessee had taken possession, he was required to erect a fire escape. He complied with the order and sued his lessor for reimbursement. It was held that the lessor was not liable. The court stated the reasons for its decision as follows: "We are clear that the respondent, having undertaken to make the necessary alterations at its own expense, and having contracted with the full knowledge of the provisions of the city ordinances which is charged to every citizen, could not thereafter complain that the failure of the appellant to make the premises conform to those ordinances in order that they might be used for a lodge room was a breach of any of the terms of the lease, either express or implied."

Where a statute requires the erection of fire escapes or makes further provisions relative to their maintenance, the question whether a person has complied with the statute is one for the jury. *Lichtenstein v. L. Fish Furniture Co.* 272 Ill. 191, 111 N. E. 729; *Hunt v. L. Fish Furniture Co.* 187 Ill. App. 326; *Devine v. L. Fish Furniture Co.* 189 Ill. App. 136; *Wardwell v. Cameron*, 126 Minn. 149, 148 N. W. 110; *Burt v. Nichols*, 264 Mo. 1, 173 S. W. 681.

When it is the landlord's duty to erect a fire escape, his liability for the result of a failure to do so, extends to a subtenant's guest, *Wardwell v. Cameron*, 126 Minn. 149, 148 N. W. 110; and to a tenant's lodgers though the lease prohibits the subletting of any part of the premises. *Mullins v. Nordlow*, 170 Ky. 169, 185 S. W. 825.

It has been held that a statute requiring the erection of fire escapes and providing that penalties for its violation may be recovered by a specified officer, does not give a civil right of action to an injured party, who must recover if at all in a common-law action for negligence. *Evers v. Davis*, 86 N. J. L. 196, 90 Atl. 677.



**BROWN**

v.

**ELM CITY LUMBER CO. ET AL.**

North Carolina Supreme Court—September 30, 1914.

167 N. Car. 9; 82 S. E. 961.

**Libel and Slander — Defamatory Words — Language Not Imputing Crime.**

A libel, as applicable to individuals, is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead or the reputation of one alive, and to expose him to public hatred, contempt, or ridicule; any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, being sufficient to constitute a libel though it does not impute any definite infamous crime.

[See generally 116 Am. St. Rep. 804.]

**Privilege — Statement in Response to Assertion of Claim.**

Defendant lumber company having shipped a car load of hay to complainant, he claimed a shortage and placed his claim with attorneys for collection. They wrote defendant lumber company, and in reply received a communication denying any shortage and closing with a statement that it was just a case where the writer thought complainant wanted to get \$10 allowance on a car of hay. Held, that such statement was not only strictly true, but was not an improper manner of characterizing complainant's claim, and was not therefore libelous.

[See note at end of this case.]

**Same.**

Where a complainant, through his attorneys, made claim on defendant lumber company for a shortage in a shipment of hay and defendant company replied, denying any shortage and stating that in its opinion it was just a case where complainant wanted to get \$10 allowance on a car of hay, the case was one of qualified privilege, and complainant could not recover for an alleged libel contained in the letter to his attorneys, in the absence of proof of malice.

[See note at end of this case.]

**Publication of Libel — What Constitutes.**

Where complainant sought to collect a claim through a firm of attorneys against defendant, the sending of a letter containing an alleged libel by defendant to complainant's attorneys constituted a sufficient publication.

Appeal from Superior Court, Perquimans county: FERGUSON, Judge.

Action for libel. W. T. Brown, plaintiff, and Elm City Lumber Company et al., defend-

ants. Judgment for defendants. Plaintiff appeals. **AFFIRMED.**

[9] This is an action to recover damages for an alleged libel. The plaintiff and plaintiff's witnesses testified substantially to the following facts: That in October, 1912, the plaintiff purchased from the Elm City Lumber Company, through correspondence with N. E. Mohn, a car-load of hay. That the hay was shipped with bill of lading and draft attached, [10] and plaintiff had to pay for same, before inspecting or weighing it. That hay was purchased "weight guaranteed." That upon inspecting same, plaintiff found a part of it to be of inferior quality, and also a shortage of 867 pounds in weight. That he thereupon sent a statement to the Elm City Lumber Company, containing various items, all of which were settled, except the plaintiff's claim for shortage, which he sent to Moore & Dunn, attorneys, of New Bern, N. C., for collection. It is admitted in said company's answer that plaintiff's claim for shortage was presented to said company by Moore & Dunn. Whereupon the defendant company, through defendant N. E. Mohn, wrote to said Moore & Dunn the letter upon which this action is based, in words and figures as follows:

Messrs. Moore & Dunn, New Berne, N. C.

Dear Sirs:—We have your favor of the 5th, and note your remarks in regard to the claim against us sent you by W. T. Brown of Hertford, N. C. This claim for which Mr. Brown contends is for a difference of weight on car of hay that we shipped this party some time ago. He gave us the weights as he states he received them from the car, whereas both the writer and the party who shipped this car of hay for us tallied the car when it was loaded at Shippensburg, Pa. We wrote Mr. Brown when he made this claim that he must be mistaken in his tally, from the fact that we know that the hay as invoiced to him was absolutely correct. This car was shipped to W. T. Brown last October, when the writer was in Pennsylvania, and personally looked after this shipment. Had this not been the case, we would have then entertained Mr. Brown's claim. It is just a case where we think Mr. Brown wanted to get \$10 allowance on a car of hay.

Yours very truly,

Elm City Lumber Company.

Upon receipt of this letter, Moore & Dunn wrote the plaintiff, declining to further prosecute his claim.

The jury found the issues submitted for the plaintiff and returned a verdict for \$200. This verdict his Honor set aside, not as a matter of discretion, but as a matter of law, and the plaintiff excepted and appealed.

*P. W. McMullan and Ward & Thompson* for appellant.

*Charles Whedbee and Moore & Dunn* for appellees.

ALLEN, J.—A libel, as applicable to individuals, is a malicious publication expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead or the reputation of [11] one alive, and to expose him to public hatred, contempt, or ridicule. It is any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Simmons v. Morse*, 51 N. C. 7.

Tested by this rule, there is no libel in the letter written by the agent of the defendant unless it is contained in the last sentence, as all the remaining part of the letter is a statement of facts, couched in respectful language.

The letter was not written voluntarily, but in reply to a demand for payment of a claim, and more latitude is permissible in communications of this character where a failure to answer may furnish some evidence of the justice of the claim.

Lord Denman, speaking of a letter written in reply to one refusing payment of rent, said in *Tuson v. Evans*, 12 Ad. & El. 175, 40 E. C. L. 733: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of the opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bona fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion. To characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary. This case, therefore, was properly left to the jury; and there will be no rule."

In the construction of publications alleged to be libelous, "The general rule is that words are to be taken in the sense which is most obvious and natural and according to the

ideas that they are calculated to convey to those to whom they are addressed. The principle of common sense which now governs in the construction of words requires that courts shall understand them as other people would. The question always is, How would ordinary men naturally understand the language?

"It is not the ingeniously possible construction, but the plainly normal construction, which determines the question of libel or no libel, and in ascertaining whether the words are actionable or not the court will not resort to any technical construction of the language or consider its [12] grammatical structure, but, instead of measuring the injury by the literal force of the words, will look solely to the meaning which the words were naturally calculated to convey. . . . In determining the actionable quality of words the entire conversation or writing must be considered. In ascertaining the meaning of a particular phrase or sentence it must be construed in connection with the remainder of the publication of which it forms a part. A single phrase, if standing alone or used in a different connection, may be capable of a meaning of which it is not susceptible in the connection in which it is actually used." 18 Am. & Eng. Enc. of Law (2d ed.) 974 et seq. "The fact that supersensitive persons, with morbid imaginations, may be able by reading between the lines of an article to discover some defamatory meaning therein is not sufficient to make it libelous." *Reid v. Providence Journal Co.* 20 R. L. 120, 37 Atl. 637.

If these rules of construction are applied to the letter in controversy the language may be distorted into a charge of fraud; but considered naturally, the last sentence is nothing but another form of denying liability. The defendant had the right to say he had weighed the hay and there was no shortage, and that therefore he would not pay the claim, and this statement of fact implied dishonesty, if there is any such implication in the letter, as much as the statement in the last sentence to the effect that the writer thought it was just a case where the plaintiff wanted an allowance on a car of hay.

The sentence complained of is strictly true, as both the plaintiff and the defendant agree that the plaintiff did want an allowance upon the car of hay, and the evidence of the plaintiff, if we understand it correctly, tends strongly to prove that at least a part of the claim made against the defendant was unfounded.

The plaintiff testified: "The bill of lading and freight bill for the movement of the shipment showed the weight of the car to be 21,600 pounds, and it was invoiced and paid for by me as 21,495 pounds." And again: "There is usually an allowance of 1 per cent for weights on hay. These weights are guar-

anted to be within 1 per cent. I never made any reduction for this 1 per cent; they never asked me. I wrote them a letter in which I stated to them that I weighed the hay myself and after making an allowance of 1 per cent charged them with the balance. As a matter of fact, I never made any such allowance of 1 per cent, and continued to sent the statement for shortage of 867 pounds. I do not know of this 1 per cent until after the statement was sent."

If this evidence is true—and the plaintiff cannot complain that it should be acted on, as it is his own—he wrote the defendant that he had made a deduction of 1 per cent, or 216 pounds if calculated according to the bill of lading and freight bill, or 214 pounds if calculated on the [13] invoice, when he had not done so, and he was making a claim for a shortage of 867 pounds when upon his own showing it ought to have been reduced by 214 or 216 pounds.

In the light of these circumstances and considering the occasion and the letter as a whole, we are of opinion that the plaintiff cannot maintain his action upon his showing.

If, however, the publication was libelous, there is another fatal defect in the plaintiff's case.

It is admitted in the plaintiff's brief, and the authorities all sustain the position, that the occasion of writing the letter by the agent of the defendant was one of qualified privilege, and as was said in *Ramsey v. Cheek*, 109 N. C. 274, 13 S. E. 775, "In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. 13 Am. & Eng. Enc. of Law 406. Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se*, when the occasion is not privileged.

"Proof that the words are false is not sufficient evidence of malice unless there is evidence that the defendant knew, at the time of using them, that they were false. *Fountain v. Boodle*, 3 Q. B. 5, 43 E. C. L. 605; *Odgers*, supra, 275. That the defendant was mistaken in the charges made by him on such confidential or privileged occasion, is, taken alone, no evidence of malice. *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870, and cases cited.

"We do not assent to the opposite doctrine which would seem to be laid down by *Pearson, J.*, in *Wakefield v. Smithwick*, 49 N. C. 327, which is not supported by the authority he cites, and, doubtless, intended to follow; for if the words are true, a defendant does not need the protection of privilege. It is when they are false that he claims it. To strip him of such protection there must be falsehood and malice. To hold that falsehood is itself proof of malice in such cases reduces the

protection to depend on a presumption of the truth of the charges."

There is in the plaintiff's evidence a total failure of proof of malice, and there is nothing in the record or in the letter which shows or has a tendency to prove that the defendant did not act in good faith and did not believe the statements he made to be true.

We are inclined to disagree with his Honor in the ruling that the sending of the letter to the attorneys of the plaintiff was not a publication.

The case of *Dickinson v. Hathaway*, 122 La. 644, 48 So. 136, seems to sustain the ruling, although it does not clearly appear from the statement of facts that the letter in that case was read by the attorneys, and the case of *Alabama, etc. R. Co. v. Brooks*, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 529, holds to the contrary.

[14] Being of opinion, however, that the judgment is correct, it will not be disturbed, because based upon a reason to which we do not give our assent. *Hughes v. McNider*, 11 N. C. 248; *Hughes v. Hodges*, 94 N. C. 56. Affirmed.

#### NOTE.

#### Statement in Response to Extra-Judicial Assertion of Civil Liability as Actionable Libel or Slander.

##### Actionable Character of Statement.

As a broad rule, a statement made in response to an extra-judicial assertion of civil liability constitutes actionable libel or slander if the person making the assertion is thereby charged unqualifiedly and unequivocally with crime or other conduct of a disgraceful character. *Ivey v. Pioneer Sav. etc. Co.* 113 Ala. 349, 21 So. 531; *Rice v. Simmons*, 2 Har. (Del.) 417, 31 Am. Dec. 766; *Creelman v. Marks*, 7 Blackf. (Ind.) 281. See also *Merrill v. Marshall*, 113 Ill. App. 447.

Thus in *Creelman v. Marks*, supra, it appeared that the defendant had previously made a promissory note to the plaintiff and another person and a suit was pending on same, and that, referring to that suit the defendant stated in the presence of others that the plaintiff had sued him on a note he had never signed, and that the plaintiff had signed his name to the note without his permission. Reversing a judgment for the plaintiff the court held that while the latter part of the statement was slanderous the first part was not. In *Ivey v. Pioneer Sav. etc. Co.* 113 Ala. 349, 21 So. 531, it was held that a letter written by the defendant's attorney to his client's agent declaring that the plaintiff had, knowingly and corruptly, made and attempted to collect against the defendant, a charge for services rendered, greatly in

excess of their fair value, for the purpose of his own aggrandizement, and in moral fraud of the rights of the defendant, was libelous per se and actionable. The court said: "The question of importance is whether the letter charged Ivey with having knowingly and corruptly demanded largely more for the service than it was reasonably worth; and if so, whether such a charge is actionable per se. The language pertinent to the question, after showing that the work done by Ivey was to enter three conveyances on the abstract is as follows: 'In other states the charge would be 75 cents, and such a charge as Mr. Ivey makes (\$5) is simply petit larceny. If you cannot get Mr. Ivey to do work for reasonable figures do not have him do it at all. A charge of \$1 is ample to cover the amount of labor, and we are certain there is no law authorizing any such charge as he has made. If you have paid this bill we want you to collect \$4 from Mr. Ivey for overcharge, and do not ask him to do another cent's worth of work for us again in any connection. Get along without it, in some way, or pay somebody else to do it, unless he makes the matter right. \$5 for three entries on an abstract is about the biggest charge we ever heard of. . . . You must make Mr. Ivey do the square thing in this matter.' We are of the opinion that the plain, natural import of this language is that Mr. Ivey, knowingly and corruptly, preferred against the defendant, and undertook to collect a charge for services rendered, greatly in excess of the reasonable and fair value of the service. The highly excessive charge is repeated with emphasis, and all further relations with Ivey, in any connection, emphatically forbidden, unless he makes the matter right. The act is given the character of petit larceny, which carries with it the imputation that it was wickedly done; and this thought is accentuated by the injunction that Ivey must be made to do the 'square' thing in the matter. The term 'square' was here used in the sense of the following definitions given by lexicographers: 'Rendering equal justice; exact; fair; honest.' . . . Taken with the context, which denounced the act as grossly unreasonable, and possessing characteristics of larceny, the term 'square' was used in this letter in the sense of 'honest,' and the command was that Ivey must be coerced to do the honest thing, which implies, in the connection used, that he had been dishonest." On the other hand in *Merrill v. Marshall*, 113 Ill. App. 447, an action for slander, it was held that the defendant, by the use of the word "thief," did not intend to impute larceny to the plaintiff, and that the word as used by her was not actionable. The same was held as to a statement of

the defendant that the plaintiff and her husband had formed a conspiracy to defraud, since husband and wife, at common law, are regarded as one person, and to constitute a conspiracy there must be at least two persons. The court said: "The witnesses Johnson, Doolittle and Owen, called by plaintiff, were the only witnesses who testified to the utterance of the word thief by the defendant, in reference to the plaintiff, and it is plain from their evidence that the defendant was speaking of the plaintiff's policy and her claim against the insurance company, and that the witnesses so understood and could not have understood otherwise, and that they did not understand that the defendant meant or intended to impute larceny to the plaintiff. The obtaining an insurance policy by false representations, or making an unfounded or unjust claim against an insurance company, is not larceny."

#### *Privileged Character of Statement.*

A statement in response to an extra-judicial assertion of civil liability, made in good faith and without malice, is one of qualified privilege, and is not actionable. *Jacob v. Lawrence*, 14 Cox C. C. (Eng.) 321; *Massee v. Williams*, 207 Fed. 222, 124 C. C. A. 492. And see the reported case. See also *Reg. v. Velej*, 16 L. T. N. S. (Eng.) 122; *Campbell v. Cochrane*, Sc. Ct. Sess. 8 F. (Eng.) 205; *Coward v. Wellington*, 7 C. & P. 531, 32 E. C. L. 614; *Com. v. Pavitt*, 2 Del. Co. Rep. (Pa.) 16. Thus in *Jacob v. Lawrence*, supra, an action for libel, it appeared that the defendant received from the plaintiff's attorney a letter threatening suit for defamation of character unless he received from him a written apology and retraction. The libel complained of was a reply by the defendant thereto explaining and justifying his conduct. Overruling a demurrer it was held that the letter was privileged, and that whether it was within the privilege possessed by the defendant, consistently with the rules established by the authorities, was a question for the jury. The court said: "Under these circumstances, I think the occasion was clearly privileged. The defendant was absolutely called upon to answer the letter and the charges it contained, and in answering it he was warranted in making statements tending to show that the language he had made use of concerning the plaintiff was not unwarrantable, as alleged, but justified by the plaintiff's conduct. He was entitled to state what that conduct had been and to comment upon it. In fact it was hardly disputed by the plaintiff that the occasion in this case was privileged. His contention rather was that the contents of the letter of themselves demonstrated that

the defendant had exceeded his privilege. His counsel further contended that, though as a general rule the question of excess is to be determined by a jury, such rule does not apply where the document constituting the libel contains defamatory matter not relevant or pertinent to the matter in hand. The privilege, it was argued, which the occasion affords cannot extend to protect imputations or allegations disconnected with that occasion. Now, if the court could clearly see upon the face of the impeached document that the defendant has made use of his so-called privilege, not as a protection and defense but as an opportunity for making an attack upon the character of the complainant, including subjects foreign to the purposes and objects of the privilege, it would probably be in a position to determine that the defense of privilege failed, and the writing and publication being admitted, might itself give judgment against the defendant. But it appears to me that the document constituting the alleged libel in the present case is not open to the imputation of introducing defamatory matter foreign to the occasion. The passage principally complained of by the plaintiff was the passage with which the letter concluded: 'I should suggest to you the advisability of looking after your costs, as a man guilty of such baseness as he has been to me in repudiating this debt cannot be trusted.' This clause in the letter, it has been contended, alleges general dishonesty and untrustworthiness in the plaintiff, and is not confined to the matters in dispute. But it appears to me that this passage is not open to this objection. The baseness alleged is most strictly confined to the conduct of the plaintiff towards the defendant in repudiating the debt he owed him. The defendant draws the inference that it is possible or probable that, if the plaintiff has refused to pay him a debt of a delicate and honorable character, he may also refuse to pay the attorney a debt of an inferior and more commercial description. This is not to attach a further and different blot on his character. It is a mere inference and deduction from what has gone before, and moreover it appears that this suggestion is made in order to cause hesitation and caution in the mind of Mr. Rosenthal as to the prudence on his part of embarking in the menaced litigation. The tendency of the passage would appear to have been dissuasive and self-protective, not aggressive, inculpatory, or malignant." In *Massee v. Williams*, 207 Fed. 222, 124 C. C. A. 492, an action for slander, it appeared that the plaintiff had sued the defendant previously for breach of contract. At an interview in a lawyer's office arranged to compromise the pending suit it was alleged that

the defendant called the plaintiff a thief and scoundrel. Reversing a judgment for the plaintiff the court said: "The defendant's answer was a denial of all slanderous utterances. His contention was, as stated by the court, and there is evidence tending to sustain it, that his statements were made in good faith, without malice, and with reference to the attempted compromise of the then pending suit, and that under all the circumstances, and in view of the previous dealings of the parties, whatever statements he made were, on account of plaintiff's misconduct in such dealings, believed to be true. He had a right at such interview for his own protection to state his defenses to the action brought against him, although his statements involved fraud and misconduct on the part of the plaintiff or were intemperate or excessive from overexcitement . . . and if, in good faith and from reasonable cause, he believed that he had a valid defense to the action for breach of contract, resting on plaintiff's embezzlement, misappropriation of funds, and obtaining money under false pretenses, knowledge of such defense was a matter of interest to both the plaintiff and his counsel and under such circumstances as the defendant claims, might properly be communicated to them, although the communication necessarily contained criminal matter which, but for the privilege, would be slanderous and actionable." So in *Reg. v. Veley*, 16 L. T. N. S. (Eng.) 122, an attorney's response to charges made against a client in newspapers, written without malice and to vindicate the client's character was held to be privileged.

A statement in response to an extra-judicial assertion of civil liability, made maliciously, without belief in its truth, or in excess of what the occasion requires, is not privileged and is actionable as libel or slander. *Huntley v. Ward*, 6 C. B. N. S. 514, 95 E. C. L. 514, 6 Jur. N. S. 18; *Benner v. Edmonds*, 30 Ont. 676; *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533; *Alabama, etc. R. Co. v. Brooks*, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528. See also *Alderson v. Kahle* reported in full ante, this volume, at page 561. Thus in *Preston v. Frey*, supra, it appeared that the plaintiff had heard that the defendant was speaking disrespectfully of her and circulating slanders and she wished her to retract the slanders and sign a paper to that effect. At the plaintiff's request, the parties met at the office of an attorney to talk the matter over, and, if possible, settle their difficulties. The defendant refused to sign any paper and proceeded to make the statements complained of in regard to the plaintiff's past life. Affirming a judgment for the plaintiff the court said: "The claim that the findings were not justified by the

evidence is rested upon the assumption that the slanders were spoken under circumstances which made them privileged communications. A privileged communication is one made 'without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.' Here the words were spoken 'in a spiteful, malicious manner,' to one who was not interested therein, and who repeatedly told the speaker that he did not want to hear them. They were spoken voluntarily, as shown by the testimony of Walker and admitted by Mrs. Frey, no one at the meeting having asked her to repeat them. Walker says he 'had been retained by neither one of them in any way, shape, or form, as a counsel or lawyer.' Under these circumstances, the statements complained of were, in our opinion, rightly held by the court below to be malicious slanders, and not privileged communications." In *Alabama, etc. R. Co. v. Brooks*, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528, which was an action for libel based on a letter written by the superintendent of the defendant railroad, it appeared that the plaintiff had checked his valise on the defendant's road and it was lost. In reply to a claim made by the plaintiff's attorneys the superintendent of the railroad stated that the plaintiff took the valise away himself. Affirming a judgment for the plaintiff the court said: "The court, by instructions to the jury, gave to the defendant the benefit of its defense that the letter alleged to be libelous was in reply to a communication from the plaintiff's attorneys. It told the jury that the circumstances created a qualified privilege, and that the defendant could only be liable upon proof of malice, or the absence of honest belief in the truth of the statements contained in the letter; in other words, that the defendant was not liable if its servant, in making reply to the letter of the attorneys, kept himself within the privilege of the occasion, but was liable if he took advantage of the opportunity afforded by the occasion to maliciously libel him, or to write concerning him libelous matter which he did not believe to be true. That Bond intended by his letter to charge the plaintiff with larceny of the lost baggage, or with having lawfully taken it away and then to have conceived the purpose of fraudulently recovering its value from the defendant by reason of his yet having its check in his possession, was admitted by him while testifying. It is true he affirmed that he honestly believed these facts to be true, but whether he did or did not so believe was

a question for the determination of the jury, and his assertion is not conclusive of what the motive was. . . . The plaintiff, recognizing the occasion of the publication as privileged, assumed the burden of establishing the malice of the defendant's superintendent, and by the verdict of the jury shows that he has supported his contention in that behalf. We are not prepared to say that the verdict is not correct." In *Benner v. Edmonds*, 30 Ont. 676, an action for libel and slander, it appeared that the jury found for the plaintiff as to the libel and for the defendant as to the slander. The evidence showed that the alleged libel was contained in a letter written by the defendant to the plaintiff's mother, which was provoked by a letter to the defendant from the plaintiff's attorney threatening an action for defamation. It was held that the letter written was not privileged, Meredith, C. J. saying: "I do not think the case is brought within the rule so as to make the occasion in this case privileged. The letter was not written in answer to the letter of Mrs. Benner's solicitors; that letter was not answered, but, the threatened action having been brought, the defendant wrote his letter not to the solicitors, but to Mrs. Benner herself, and with the avowed purpose of preventing her from proceeding with her action. The statements in it were not, I think, confined to the matter in hand, but in making them the defendant went out of his way to make a serious and, as the jury has found, unwarrantable charge against the plaintiff, who was not a party to the litigation, and the effect upon her of the statements which the defendant was charged with making had nothing to do with it. The defendant attempted to justify his reference to the plaintiff because the effect upon her of his alleged statements was complained of in the letter of the solicitors. I am not disposed to narrowly limit the scope of the rule which the defendant invokes; but in this case, so far from the letter being, in my opinion, an honest attempt by the defendant to defend his own interests in the references to the plaintiff, every line of it seems to me to be pregnant with malice, and, according to the finding of the jury on the defense of justification, the writing of it appears to have been an attempt on the defendant's part, by making a cruel and unfounded charge against the plaintiff, to deter her mother from proceeding with the action which she had brought against him for the vindication of the wrongs which she charged the defendant with having committed upon herself. Had the letter been written in reply to the solicitors' letter, something might have been said for the defense which is set up, though even then I doubt whether the

occasion would have been privileged." In *Huntley v. Ward*, 6 C. B. N. S. 514, 95 E. C. L. 514, 6 Jur. N. S. 18, it was held that a communication in answer to a letter from the plaintiff's attorney, although it was written without any sinister motive and with a bona fide belief in its truth, was not privileged. The court said that the letter was not confined to an explanation of the nature or history of the words, or the act in question, between the parties, but dealt in general gross abuse of the plaintiff's character. See also *Jacob v. Lawrence*, 14 Cox. C. C. (Eng.) 321.

**KORAB**

v.

**CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY**

Iowa Supreme Court — November 14, 1913.

165 Iowa 1; 146 N. W. 765.

**Master and Servant — Negligence —  
Failure to Block Guard Rail.**

Negligence by an employer cannot be determined, as a matter of law, upon the opinion of experts as to whether a given course of conducting a business is negligence, where the question involves matters as to which common knowledge and observation has evidential weight, such evidence being entitled to the jury's consideration, along with the other evidence on the question; and hence, in an action against a railroad company for the death of a brakeman by catching his foot in the unblocked space between the guard and main rail, it could not be said that defendant was not negligent in not guarding the space between rails by blocking it, because some qualified railroad men testified that blocking such space did not make it safer and was not done on their roads, while others testified that blocking the space between rails was safer.

[See note at end of this case.]

**Evidence — Subsequent Repairs or  
Changes.**

Where, in an action for a railroad brakeman's death by catching his foot in the unblocked space between main and guard rails, defendant claimed that since the custom of blocking or not blocking such space was not uniform, neither method would have been negligence, evidence was admissible in rebuttal for plaintiff whether the guard rails had been blocked on certain part of defendant's line after the accident, though not admissible as an admission of negligence.

**Same.**

Evidence of conditions or changes made after the accident is not admissible to show negligence, or an admission of negligence, at the time of the accident.

**Appeal — Decision in Former Appeal —  
Effect.**

A decision of the Supreme Court, on a former appeal in an action for an employee's death, that loose boards lying near the place of the accident did not show negligence was not res judicata of the admissibility of evidence of such loose boards in a subsequent action; the former decision being on the weight of the evidence and not to its admissibility.

**Harmless Error — Admission of Evi-  
dence.**

Where, in an action for a railroad brakeman's death by catching his foot in the unblocked space between the main and guard rails, the court submitted, as the only ground of negligence, the failure to block such space, the admission of evidence of loose boards lying near the place of accident could not have prejudiced defendant.

**Instructions — Assumed Risk.**

Where the instruction requested by defendant in an action for railroad brakeman's negligent death did not in terms place the burden of proving assumed risk on defendant, which the instruction given by the court on the subject properly did, it was not error to refuse the requested instruction.

**Verdict — Special Interrogatories — As  
to Evidentiary Facts.**

Special interrogatories requested, which did not call for a finding on the ultimate facts, were properly denied.

**Death by Wrongful Act — Damages.**

There is no fixed rule for the jury to follow in awarding damages for wrongful death, except that all the elements which enter into the value of a human life as they appear from the evidence should be considered by the jury in the exercise of their discretion in making the award.

[See Ann. Cas. 1916C 449.]

Appeal from District Court, Johnson county: HOWELL, Judge.

Action for death by wrongful act. Paul A. Korab, administrator, plaintiff, and Chicago, Rock Island and Pacific Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*R. L. Parrish* for appellant.

*Wade, Dutcher & Davis* for appellee.

[3] **WITHROW, J.**—I. This is an action for the death of Elmer A. Little, a brakeman upon a freight train operated by defendant. This case was first tried in May, 1909, and a verdict directed for defendant. Upon appeal

the case was reversed and remanded for a new trial, the decision being reported in 149 Iowa 711. This appeal involves the questions arising upon the retrial.

The petition alleges, in substance, that on the evening of October 10, 1907, at Oxford, Iowa, the decedent, Little, was in performance of the duties of his employment as a brakeman; that it was the duty of the defendant to block its guard rails, but that the defendant at that point negligently omitted to properly and sufficiently guard or block the space between the guard rail and main rail, so that said space became a dangerous trap to brakemen and other employees, in consequence of which negligence, without contributory negligence on the part of the decedent, his foot became caught and held fast in said space, and he was killed. The original petition also contained an allegation of negligence as to a pile of boards left negligently near the track, which was in some manner instrumental to the injury, but this ground of negligence was not submitted to the jury. The answer of defendant was a general denial, and by a separate division that defendant did [4] not at the time block, and for several years prior had not blocked, its guard rails, and that decedent assumed the risk thereof.

II. On the previous trial of this case, on the appeal to this court, we held the facts were such that the question of contributory negligence should have been submitted to the jury, and the same was also held as to the assumption of risk. Counsel for appellant concede that in the present record there is no material change in the facts bearing upon those questions, and that the former decision must stand as the law of the case.

As to the additional question whether there was negligence of the defendant in permitting unblocked frogs in its yards, it was held in the former opinion that the facts were such as to justify its submission to the jury. On the retrial the defendant, this appellant, introduced much testimony, not presented at the first trial, tending to show that among experienced railroad men and construction engineers there was, at the time of the happening of this accident and is yet, an honest difference of opinion as to which is the safer, the blocked or the unblocked frog, and that under such evidence it could not be found that the defendant was negligent in permitting its frogs to be unblocked. Witnesses testified as to the custom or practice of about one hundred different railroads throughout the United States as to blocking frogs. The testimony disclosed that at or about the time material to this inquiry the many different witnesses examined upon this subject were familiar with the use of blocks for guard rails as a railroad appliance; that they knew of guard rails being blocked by some roads and unblocked by

others in 1907 and before that time. Some of the witnesses testified that the unblocked frog was safer; others that the blocked frog might reduce the danger to trainmen; that if guard rails could be well blocked and kept well blocked they might be of some assistance; and another that "in my experience it is very [5] much safer to be without blocking than to have blocking that is not in perfect condition." Summing up the testimony of these many witnesses, all of whom may admittedly be considered as men of experience in their particular lines of work and duty, in the construction, maintenance, and operation of lines of railway, the evidence, when accepted in the light claimed for it by the appellant, permits the conclusion of fact that in 1907, and prior thereto, among the class of men so testifying there was no uniform practice as to blocking frogs, but there was a difference of opinion, based largely upon operating advantages, including safety to the public and employees, as to which was the better plan; some roads blocking frogs and others not. From the conclusion thus drawn the appellant urges that under the law there can be no liability in the present case.

III. We accept the statement of the proposition relied upon by counsel in argument as fairly presenting the precise question raised, and which was not, on the former appeal, considered in the light of proof now in the record: "Where the undisputed evidence shows that railroad companies at the time of this accident used both the blocked and unblocked frog, some using one and some the other, and that it was questionable which was the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence. Where it is shown that it is questionable which is the safest or most suitable, or where it is shown that it was honestly considered by railway managements to be questionable which was the safest or most suitable at the time of the accident, then the adoption of either method cannot be said to be negligence." The question presented is one in which there is a want of harmony in the authorities, and which in the form stated has not been the subject of decision by this court, although, as we shall later note, what we consider to be the controlling principle, as bearing upon the question of duty and negligence, and proof of such, has had frequent announcement by us. It cannot be questioned but the cases relied upon [6] by the appellant give support to its claim, and in some instances decide without qualification that from a state of facts such as appear in this record there can be no finding of negligence. Of this line of cases we note *O'Neill v. Chicago, etc. R. Co.* 66 Neb. 638, 92 N. W. 731, 60 L.R.A. 443, 1 Ann. Cas. 337. In that



case an employee who had been injured alleged negligence in an unblocked frog, which caused his injury. There was a directed verdict for the defendant. On appeal the judgment was reversed, but upon a rehearing it was affirmed. We quote from the opinion, as it quite clearly states as the law adopted by that court that which is now contended for by the appellant:

A more thorough examination of the record, aided by a more complete analysis thereof by counsel than we were favored with on the former hearing, has disclosed that there were wide differences of opinion between railway companies and their skilled managers with respect to the relative safety to their servants and to the public of the blocked and unblocked guard rails; that a very large number—perhaps a majority—of the principal railway systems of the country continue the use of unblocked rails, and that in some instances the managers of the companies have used the blocked and unblocked alternately, because of an inability to satisfy their own minds which, upon the whole, is the safer and more prudent course to pursue. . . . Upon this state of the record, can it be properly said that a railroad company is negligent because of using or of failing to use the block? We think not. It is a case not analogous to the use of defective machinery, or of omitting the use of a device generally approved, and obviously adapted to prevent or lessen a known and specific danger. The rule of law is that in such cases the employer must exercise such care and skill as under the circumstances reasonable and ordinary prudence requires to be used. . . . It may be said generally that a man cannot be held responsible in damages for the consequences of an error in judgment, carefully formed after an intelligent survey of all the elements entering into the problem which he is called upon to solve.

[7] The discussion of the question by the Nebraska court is extended, but in the quotation above we have presented sufficient to indicate the line of argument which was followed.

The question was also considered in *Southern Pac. v. Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 U. S. (L. ed.) 391. In that case the decedent had lost his life because of an unblocked frog, and action for damages was brought by his administratrix in the then territory of Utah. That trial court refused certain instructions, and refused to direct a verdict on the motion of the defendant. Upon submission to the jury a verdict was rendered in favor of the plaintiff, which was affirmed by the Supreme Court of the territory. The case was taken on error to the Supreme Court of the United States. The evidence tended to show that the unblocked frog was then generally used in the West, and that

it was better than the blocked frog. In the trial court the defendant had asked an instruction to the effect that if "the jury found from the evidence that railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence." This instruction was refused, and upon the final appeal the court held in the cited case that it should have been given. That court also held that, in view of the facts and the authorities cited by it in its opinion, the defendant was entitled, not only to the instruction prayed for, but that upon the whole evidence the prayer for a peremptory instruction in the defendant's favor ought to have been granted.

Among the cases cited by the appellant in support of its position are *Reese v. Hershey*, 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. Rep. 795; *Dooner v. Delaware, etc. Canal Co.* 171 Pa. 581, 33 Atl. 415; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Louisville, etc. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

In many cases it is held that when the question is an engineering problem, entering into the construction, to resolve [8] that problem in favor of one method as against another, when there existed honest differences of opinion as to which was better, does not constitute actionable negligence.

There is another line of authorities which holds to the rule that under such conditions it is yet a question for the jury to determine whether, in adopting a particular method of equipment or construction there was the exercise of ordinary care; but recognizing that the adoption of one method over another, and as to which there may have been difference of opinion among experts, while tending to show ordinary care, is not conclusive on that question. Or, stated differently, when such question arises, and reasonable minds might differ as to whether there was the exercise of ordinary care in adopting the plan as safer to the employees, it is a question for the jury. Of course, if but one conclusion could be reached, the duty of determining the question would be in the court. Such cases are based upon the rule that due regard must be had for the safety of the employees, and while from the fact of accident or injury under particular circumstances negligence may not be inferred, if the cause is such that there may be reasonable differences of opinion as to whether it was or was not negligent, the jury must decide it.

Upon these questions this court has frequently passed; but before referring to our previous decisions, we would notice the expressions of the courts of some other states and of law writers, which are in full support

of what we conclude to be the rule of our own state. In discussing the question in this work on Master and Servant, volume 3, section 947, Mr. Labatt recognizes a division in judicial opinion, as regards it, and one group of states as holding to the rule that "the master's conformity to general usage is regarded merely as evidence tending, more or less strongly, to exculpate him from the danger of negligence," and cites as states holding to that doctrine, Alabama, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, New York, South Carolina, Texas, Vermont, Washington, and Wisconsin, [9] and some of the federal courts. That writer, in the course of his discussion of the subject, which is based upon the cases cited by him from the states named, employs the following language:

The principle upon which a large number of decisions are based, some of which emanate from the courts whose rulings are reviewed in the preceding sections, is that embodied in the remark of Willes, J., with reference to the plea put forward by the defendant in a well-known case, that 'no usage could establish that what is in fact unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to be reasonably careful.' That is to say, the position is taken that custom furnishes no excuse, if the custom itself is negligent. In this point of view, the master's conformity to general usage is regarded merely as evidence tending more or less strongly to exculpate him from the charge of negligence. After it has been shown that the defendant had complied with the usage of other employers in the same line of business, the question whether the particular instrumentality or method was reasonably safe still remains open, and, unless it is decided in the master's favor, he must indemnify the servant.

In *Smith v. St. Louis, etc. R. Co.* 69 Mo. 32, 33 Am. Rep. 484, action was brought by a brakeman for injuries resulting from having his foot caught in a guard rail. An instruction was asked which embodied the claim relied upon by appellant; that is, if the style of track and guard rail were in general or universal use, and that the same were placed as located in the usual or approved methods in use by the best constructed roads, then there could be no recovery. The instruction was held by the appellate court to be erroneous.

*Huhn v. Missouri Pac. R. Co.* 92 Mo. 440, 4 S. W. 937, presented a question quite similar to the one now being considered. Plaintiff's intestate was killed while engaged in drawing a coupling between cars which were in motion. His foot caught between the guard rail and track, with the result that he was held and crushed by the moving [10] cars. There was presented in the evidence the ques-

tion of fact as to the safer method of guarding against accidents and injuries from open frogs, and whether by blocking or by having them unblocked, such would be secured. In finally passing upon the question of negligence under such fact the court in the case cited said:

It is true that the question of negligence cannot be resolved alone upon the fact as to how many roads do or do not block the guard rails; nor can it be said the company was guilty of negligence simply because the blocks made it safer for the employees. These are facts, however, to receive a proper consideration from the jury. It may be that the use of blocks would be imprudent on the main line, and quite essential in the car yards, where the employees are constantly engaged in coupling and uncoupling cars; for, as the danger increases, the care should increase. The guard rail in this case was on the side track leading to the main track. The defendant was not called upon to discard the existing rails. The defendant seems to have recognized the propriety of using the blocks in some of its car yards. There is certainly evidence that it does use them in one. They are used by some other roads; and there can be no doubt but that the evidence here, in no way contradicted, shows that they add much to the safety of the employees. Where the facts are either disputed, or different inferences may be fairly drawn from the undisputed facts, the question of negligence should be submitted to the jury.

In *Martin v. California Cent. R. Co.* 94 Cal. 326, 29 Pac. 645, a brakeman had been killed when engaged in coupling cars. The special negligence charged was in using particular couplings, of different types, upon the two cars, couplings which when fitted to one of their kind worked properly, but when applied to another type, it is claimed, were dangerous. While that case differs from the present one in the facts, there arose in it the question we now consider, and upon which the court said: "The instruction asked by appellant that if this character of coupling was in general use among railroad companies, then [11] it was not negligence upon the part of the appellant to use it, was properly refused. Such general use was evidence tending to show ordinary care in the selection of the coupling, but not conclusive evidence."

These cases recognize the principle which has governed the decisions of this court in many cases, and which has late expression in *Kirby v. Chicago, etc. R. Co.* 150 Ia. 594, 129 N. W. 963. After having discussed the question and referred to previous cases decided by this court, the conclusion was announced as follows:

In accordance with the views thus expressed, evidence of the general use of locomotives in design and plan such as the one

in question by reasonably careful and prudent railways was properly received as bearing on the question of defendant's negligence in using such style of locomotive; but such evidence, although uncontradicted, would not justify the giving of an instruction to the effect that, if locomotives such as that in question were in general use on reasonably careful and prudent railways, then the verdict must be for defendant, for railways which are in general well managed in respect to prudence and care in the selection of machinery may nevertheless in particular instances be negligent, and it cannot be said that the concurrence in such negligence by many well managed railroads changes the character of the act itself.

In others of our cases the same rule has been stated, where custom or usage as to the manner of doing a particular act, or of construction, was presented; but in all instances it has been left as a question of fact for the jury to determine whether, even though such method was followed, in so doing the defendant acted with reasonable care and prudence, and evidence to so show was competent. *Austin v. Chicago, etc. R. Co.* 93 Ia. 238, 61 N. W. 849; *Metzgar v. Chicago, etc. R. Co.* 76 Ia. 387, 41 N. W. 49, 14 Am. St. Rep. 224; *Wilder v. Great Western Cereal Co.* 134 Ia. 451, 109 N. W. 789; *Hall v. Chicago, etc. R. Co.* 140 Ia. 32, 116 N. W. 113.

Holding to the spirit of our previous decisions, not from [12] an indulgent purpose because of their having been the utterances of this court, but because we are convinced that they are based upon a principle which should not be overthrown—that is, that negligence or want of negligence cannot be made to depend upon matters of opinion alone, nor upon the declaration of a witness who testifies as an expert upon a question which yet involves matters from which common knowledge and observation may yield opinions entitled to some evidential weight—we conclude that the contention of appellant, as broadly stated by counsel, cannot be admitted. We prefer and adhere to the rule that, while evidence of the character in question is at all times admissible under issues properly framed, it is not necessarily conclusive upon the subject, and that it is yet within the province of the jury to determine whether, in choosing between two or more methods of construction or of guarding against injury, the master exercised reasonable care.

IV. The defendant requested the trial court to give to the jury instructions Nos. 1, 2, 2½, and 3, which request was refused and because of such error is charged. The first two related to and were based upon the proposition stated by counsel as the rule of law which should control. From the conclusions reached by us, as given above, it follows that we find no error in such refusal.

Ann. Cas. 1916E.—41.

V. Instruction No. 2½, which was refused, related to certain evidence, which had been admitted over defendant's objection, as to whether the guard rails had been blocked on the line of the appellant company, and in the yards at Iowa City, after the time of the accident resulting in the death of Little. It is the law that evidence of subsequent conditions is not admissible as tending to show negligence or admission of negligence at a given time preceding. *Fitter v. Iowa Telephone Co.* 129 Ia. 610, 106 N. W. 7. The evidence upon which the requested instruction was based was received in rebuttal. It was directed to the testimony introduced on the part of the defendant upon the question [13] as to the custom of roads in blocking frogs, some of which testimony was not limited to a time prior to the injury. The instruction which was asked contained among other provisions that which stated that such evidence could not be considered in determining the advisability of using blocked or unblocked guard rails. The question of use and method while largely, was not entirely, limited to a time preceding October, 1907. It was not, of course, claimed that on or near that day there was a change in view among railroad engineers and operators as to which was the better, and we are of the opinion that the evidence was not improper in rebuttal, as bearing upon the question of the practice of railroads in that respect, in the light of the claim upon which the whole defense was practically rested, which was that, in view of the shown division of opinion on the subject, neither the use of the unblocked frog or the blocked frog would have been negligence, and that evidence upon that subject would not tend to show negligence or want of it, but only that as to certain roads one means of caring for the frogs was employed.

VI. On the former trial on appeal we held that the evidence which had been introduced as to loose boards lying near the place of the accident did not show negligence. During the trial which resulted in the judgment from which this appeal was taken, evidence of the same character was admitted over the objection of appellant, and this is now urged as error, it being claimed that, as to such, there has been an adjudication. The former holding was not directed to the admissibility of the evidence, but to the legal effect of that which had been introduced on that subject. Evidence which may be competent to show circumstances and surrounding conditions may yet be short of proving an ultimate question.

In the present hearing the trial court submitted but [14] one ground of negligence, that of the unblocked frog, and in such view the evidence as to loose boards near by, while of no weight as to the final question, was not of itself incompetent, and its admission worked no prejudice.

VII. The third requested instruction relates to the assumption of risk. We have given attention to the instruction of the trial court on this subject, and find in it nothing which falls short of what it was its duty to state to the jury. The requested instruction did not, in terms place the burden of proving such defense on the defendant, and this was done in the instruction of the trial court. The jury having been properly instructed upon this subject there was no error in the refusal.

VIII. Special interrogatories were asked by the defendant, all of which related to the difference of opinion or usage among railroad companies as to the relative safety of the different methods of using blocked or unblocked frogs. In the light of the conclusions reached by us as to the main question, the interrogatories did not call for ultimate or controlling facts in the case. The trial court was not required to submit them. *Runkle v. Hartford Ins. Co.* 99 Ia. 421, 68 N. W. 712; *Thomas v. Schee*, 80 Ia. 237, 45 N. W. 539.

IX. Instruction No. 6, given by the trial court, was the one relating to the single charge of negligence relied upon. The court told the jury that the evidence of the various witnesses upon the question of the use of blocked or unblocked frogs might be considered in determining whether or not the defendant was guilty of negligence, but that the fact that others did not block the guard rail, or that experts differed as to the advisability of so doing, would not of itself excuse the defendant, if the practice itself was negligent. The standard of duty and rule as to proof were properly given, and were in harmony with what we find to be the law governing the case.

[15] X. The jury returned a verdict for \$10,000, for which judgment was entered. This is claimed to be excessive. As we have said at other times, there is no fixed guide which a jury must follow in reaching a verdict in cases of this nature, excepting that due consideration must be given to all elements which properly enter into the value of a life, as they appear in the evidence, and properly considering such, in the exercise of a fair discretion, the amount of recovery should be fixed. While in this case the award of the jury was liberal, yet in the light of the age of the deceased, twenty-five years, his expectancy of life, his earnings, and his reasonable prospects of advancement in his employment, we do not feel that the finding of amount was an abuse of discretion which requires correction.

The judgment of the trial court is Affirmed.

Weaver, C. J., and Ladd and Gaynor, JJ., concur.

## NOTE.

### Duty of Railroad Company to Block Frogs, Switches and Guard Rails.

#### Common-law Duty to Employees.

In accord with the holding in *Wabash R. Co. v. Kithcart*, 149 Fed. 108, 9 Ann. Cas. 497, the greater weight of recent authority is to the effect that, in the absence of a statute, the failure of a railroad company to block its frogs, switches or guard rails does not constitute actionable negligence. *Dongan v. Baltimore*, etc. R. Co. 165 Fed. 869, 91 C. C. A. 555; *Choctaw*, etc. R. Co. v. *Thompson*, 82 Ark. 11, 100 S. W. 83; *York v. St. Louis*, etc. R. Co. 86 Ark. 244, 110 S. W. 803; *Lane v. Missouri Pac. R. Co.* 64 Kan. 755, 68 Pac. 626; *Newlin v. St. Louis*, etc. R. Co. 222 Mo. 375, 121 S. W. 125 (action for death by wrongful act arising under laws of Kansas); *Western Trust Co. v. Regina*, 32 West. L. Rep. 307, 24 Dominion L. Rep. 26 (Saskatchewan). Compare *Toledo*, etc. R. Co. v. *Howe*, 191 Fed. 776 (question for jury). Compare also *Gilkey v. Louisiana*, etc. R. Co. 103 Ark. 231, 146 S. W. 497, wherein it appeared that the plaintiff while riding on the front end of a hand car had his foot caught between the guard rail and the main rail and was thrown off and run over by the car. There was testimony from which the jury might have inferred that the injury happened to the plaintiff because of an unusual jerk given to the car by the section hands just before the injury was received. It was held that the plaintiff was not guilty of contributory negligence as a matter of law but that that question, and the one as to the negligence of the defendant were for the jury.

It has been held in one recent case that a railroad company owes its employees the duty of blocking its frogs, switches and guard rails. *Matthews v. New Orleans*, etc. R. Co. 93 Miss. 325, 47 So. 657. In that case it was said: "Upon the subject of unblocked frogs, we feel it our duty to say that this question was carefully considered by this court in the case of *St. Louis*, etc. R. Co. v. *Nickerson*, affirmed without a written opinion June 29, 1908 [46 So. 717]. That case was almost identical on its facts with the instant case. There, as here, it was the custom of the company to block some of its frogs and leave others unblocked. There, as here, the party injured was a brakeman who caught his foot in an unblocked frog. There, as here, there was involved a rule of the company which was shown to have been commonly disregarded. In that case, however, all the issues were submitted to the jury, and a judgment based on \$7,500 verdict was affirmed. In that case, upon the subject of unblocked frogs, this court approved the doctrine contended for in 4 *Thompson* on

the Law of Negligence, §§ 4324, 4326. It is there said: 'That a railroad company is liable in damages to its negligence in having its switches so constructed as not to be reasonably safe, having reference to the nature of railway switches and the dangers which necessarily attend them, must be regarded as a truism, following from the general doctrines stated and illustrated in this chapter. The observance of the rule of reasonable care is demanded of the company, to the end that its switches shall be so constructed without impairing their efficiency as switches, that its employees may pass over them in the discharge of their duties without danger. The decisions of the courts have been very generally to the effect that for a railway company to fail to block its frogs or switches, in consequence of which failure its employees get their feet caught therein and are killed or maimed, does not constitute actionable negligence, but that the risk of injury from this source is one of the risks of the service which the employee accepts. But this is not the universal doctrine, nor is it worthy of the least commendation. The better doctrine is that a railroad company owes its employees the duty of so maintaining the blocking in the space between the guard rails and the main rail that the heels and soles of their boots will not be caught therein; and where there was evidence tending to show that the defendant was guilty of negligence in that respect by reason whereof a switchman caught his foot between the guard rail and the main rail and was run over, and there was no evidence on which it could be held as a matter of law that the deceased assumed the risk or was guilty of contributory negligence, it was held that the trial court properly refused to take the case from the jury.' We are bound to conclude that the peremptory instruction in this case should not have been given, but that the case should have gone to the jury on proper instructions."

A third rule obtaining in several jurisdictions that whether a railroad company is negligent in failing to block frogs, switches and guard rails is a question for the jury finds support in the reported case and in *Gibson v. Chicago Great Western R. Co.* 117 Minn. 143, Ann. Cas. 1913C 1263, 134 N. W. 516, 38 L.R.A.(N.S.) 184. Compare *Siglin v. Chicago, etc. R. Co.* 151 Ia. 290, 130 N. W. 1057. In the reported case it is held that although the evidence tends to show that there is an honest difference of opinion as to which is safer, the blocked or the unblocked frog, the question as to the negligence of a railroad in maintaining an unblocked frog is one for the jury. See also *Korab v. Chicago, etc. R. Co.* 149 Ia. 711, 128 N. W. 529, 41 L.R.A.(N.S.) 32. So in *Gibson v. Chicago Great Western R. Co.* supra, it appeared that a railroad em-

ployee was run over by a locomotive by reason of having his foot caught in the unfilled space between one of the rails and a plank at a crossing. It was held that the question of the negligence of the railroad company was for the jury, and that the act of the railroad company in leaving the space between the rail and the plank unfilled was not purely an engineering problem. The court said: "In the case at bar rules of law required that the crossing be safe for the protection of the public, as well as employees. In the matter of the distance between the rail and the plank, the principle contended for can well be applied, as modern large engines may require that space; but in the matter of blocking and filling the space underneath we are unable to see any problem for engineers. It is true that defendant's witnesses testified that if the space were filled, either with dirt or a rail, objects might fall upon the filling and cause derailment, and that a filled crossing is not as safe, in general, as an open one; but this evidence does not impress us as making this an engineering problem, or anything more than a question of fact for a jury. We cannot escape from the idea that it would have been easily possible to guard against such an accident as this, without thereby endangering the safety of passengers, employees, or property, and without interfering with the operation of trains. The space underneath the ball of the rail was clearly useless, and blocking or filling would have been a simple matter. We think the question was for the jury." But in *Siglin v. Chicago, etc. R. Co.* 151 Ia. 290, 13 N. W. 1057, wherein it appeared that an employee was injured by reason of stumbling over the end of a guard rail it was held that negligence of the railroad company could not be predicated on the fact that it had failed to block the end of the guard rail since that would have increased rather than diminished the danger of stumbling.

If a railroad company has customarily kept its frogs blocked it is negligence for it to permit the block to become so worn and rotten that an employee is injured by reason of having his foot caught in it. *Grand Trunk Western R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26. In *Dolge v. Northern Pac. R. Co.* 107 Minn. 242, 119 N. W. 1066, 26 L.R.A.(N.S.) 600, it appeared that the American Railway, Engineering, and Maintenance of Way Association adopted five inches as the standard throw of split switches and that it was the purpose of the defendant railroad company to conform to that standard from time to time as new switches were installed, and that the switch at which a switchman was run over by reason of having his foot caught was separated from the main rail by a distance of four and three-fourths inches.

It was held that an action could not be maintained against the railroad on the ground that the switch was maintained at a greater distance than was necessary. The court said: "The fact that at the time of the accident some switches with a three and one-half inch throw were in use by respondent company, and that a majority of the switches examined by appellant's witnesses were less than the five-inch standard, does not of itself establish negligence in maintaining the particular switch under consideration at four and three-fourths inches. The question is not to be determined from the standpoint alone of the greatest safety to switchmen, or others, who have occasion to walk on the tracks. In constructing and operating railroads, every question which enters into the problem must be considered, and if those competent to judge of such matters have decided that safe railroading requires the maintenance of a space from four to five inches, no negligence can be predicated upon the adoption of such a standard. It cannot be assumed that the association mentioned inconsiderately adopted the five-inch standard. On the contrary, it must be assumed that such action was based upon thorough investigation as a result of experience and must be accepted, so far as the courts are concerned."

#### *Statutory Duty.*

As a general rule the recent cases are agreed that the failure of a railroad company to comply with the provisions of a statute requiring the blocking of frogs, switches or guard rails is negligence as matter of law. *Cooper v. Baltimore*, etc. R. Co. 159 Fed. 82, 14 Ann. Cas. 693, 86 C. C. A. 272, 16 L.R.A. (N.S.) 715 (applying Ohio statute); *Toledo*, etc. R. Co. v. *Kountz*, 168 Fed. 832, 94 C. C. A. 244 (applying Ohio statute); *Erie R. Co. v. White*, 187 Fed. 556, 109 C. C. A. 322, *rehearing denied* 187 Fed. 944, 109 C. C. A. 326 (applying Ohio statute); *Parker v. Union Station Assoc.* 155 Mich. 72, 118 N. W. 733, 15 Detroit Leg. N. 909; *Scott v. Boyne City*, etc. R. Co. 182 Mich. 514, 148 N. W. 719; *George v. Quincy*, etc. R. Co. 179 Mo. App. 283, 167 S. W. 153; *Street v. Canadian Pac. Ry.* 18 Manitoba 334, 9 West. L. Rep. 558; *Amendola v. Doheny*, 7 Ont. W. Rep. 32. See also *Newlin v. St. Louis*, etc. R. Co. 222 Mo. 375, 121 S. W. 125; *Alberg v. Campbell Lumber Co.* 66 Wash. 84, 119 Pac. 6; *Mallory v. Winnipeg Joint Terminals*, 25 Manitoba 456; *Cooper v. Hamilton Steel*, etc. Co. 8 Ont. L. Rep. 353; *Rajotte v. Canadian Pac. R. Co.* 5 Manitoba 365 (no statute referred to). And it seems that an employee has a right to assume that the railroad company has complied with the requirements of the statute. *Scott v. Boyne City*, etc. R. Co. 182 Mich. 514, 148 N. W. 719.

It is generally held that the statutes apply to railroads operated for private purposes as well as to those engaged in business as common carriers. *Alberg v. Campbell Lumber Co.* 66 Wash. 84, 119 Pac. 6; *Amendola v. Doheny*, 7 Ont. W. Rep. 32; *Cooper v. Hamilton Steel*, etc. Co. 8 Ont. L. Rep. 353.

It has been held that a statute requiring frogs to be blocked was designed for the protection not only of employees who might step into them, but of those dragged or pushed into them by an engine or cars. *Cooper v. Baltimore*, etc. R. Co. 159 Fed. 82, 14 Ann. Cas. 693, 86 C. C. A. 272, 16 L.R.A. (N.S.) 715 (Ohio statute); *Toledo*, etc. R. Co. v. *Kountz*, 168 Fed. 932, 94 C. C. A. 244 (Ohio statute).

Some statutes limit the duty of a railroad company as to blocking frogs and switches to those in yards, divisional and terminal stations. *Toledo*, etc. R. Co. v. *Kountz*, 168 Fed. 832, 94 C. C. A. 244 (construing Ohio statute); *George v. Quincy*, etc. R. Co. 179 Mo. App. 283, 167 S. W. 153. In the case last cited, it was held that the term "yard" included the grounds commonly spoken of as yards used in connection with an ordinary station on the line.

A statute requiring blocking does not prevent a railroad company which fails to comply with it from escaping liability to an injured employee who is guilty of contributory negligence. *Scott v. Boyne City*, etc. R. Co. 182 Mich. 514, 148 N. W. 719; *Alberg v. Campbell Lumber Co.* 66 Wash. 84, 119 Pac. 6; *Street v. Canadian Pac. Ry.* 18 Manitoba 334, 9 West. L. Rep. 558. Compare *Erie R. Co. v. White*, 187 Fed. 556, 109 C. C. A. 322, *rehearing denied* 187 Fed. 944, 109 C. C. A. 326, wherein the court in construing the Ohio statute held that the doctrine of comparative negligence was applicable. In *Denver*, etc. R. Co. v. *Norgate*, 141 Fed. 252, 5 Ann. Cas. 448, 72 C. C. A. 365, 6 L.R.A. (N.S.) 981 (*followed* in *Denver*, etc. R. Co. v. *Gannon*, 40 Colo. 195, 90 Pac. 853, 11 L.R.A. (N.S.) 216, it was held that the Colorado statute providing that the failure of railroad companies to block their frogs and guard rails as specified should be prima facie evidence of the negligence of the railroad company did not abolish the doctrine of assumption of risk by the employee where the railroad company failed to comply with the statute. The court said: "We are clearly of the opinion that the frog blocking act of Colorado, . . . did not take away from the railroad company the defense of assumption of risk in this case. . . . It is conceded that the common law declares that *Norgate*, when he entered the employ of the railroad company, assumed all the risks and dangers of his occupation which were known to him, and all of which a reasonably prudent man in his situation would have known. By

the ruling of the trial court this old and well-established rule of the common law was held to have been repealed by the statute of Colorado, providing for the blocking of frogs and guard rails. We first naturally turn to the law itself to find the repeal. We find the law expressed in clear, unambiguous terms, and, this being so, we are not permitted to go elsewhere to find the meaning and intention of the lawmaking power. Nothing whatever is said in the law as to assumption of risk. The legislature could have easily repealed this principle of the common law above quoted, as other legislatures have done. Code Iowa 1888, § 2002; Acts Tex. 1891. p. 25, c. 24; Acts Fla. 1891, p. 113, c. 4071; Acts Wyo. 1890-91, p. 350, c. 80, § 17; Burns' Ann. St. Ind. 1901, § 708. But, instead thereof, the legislature simply imposed the duty upon railroad companies of blocking their frogs and guard rails, and further provided that a failure to do so should be *prima facie* evidence of negligence." But in *Yost v. Union Pac. R. Co.* 245 Mo. 219, 149 S. W. 577, wherein the same statute was construed it was held that an employee who was run over by some cars by reason of having his foot caught in an opening between a crosstie and one of the spread bars of a split switch, did not assume the risk arising from the existence of the dangerous space beneath the spread bar which was not customary and not according to the standard of construction adopted by the railroad.

Where a statute prescribes a penalty for the failure of a railroad company to comply with a requirement that frogs be blocked, a company cannot be subjected to the penalty for failure to block a guard rail at a switch. *Com. v. Louisville, etc. R. Co.* 143 Ky. 501, 136 S. W. 869, wherein the court said: "The frog is so called from its shape as originally made. The guard rail to keep the wheel from slipping off the other rail while it is passing over the frog, is in no sense a part of the frog. The guard rail is put there to keep the wheel on the track. Guard rails are in common use along railroads. The statute was not aimed to secure the blocking of guard rails. It mentions only frogs and it would be an undue extension of the statute to interpret it as including guard rails; for they are used not only at frogs but at other places. . . . The purpose of our statute is to require the point of space at the apex of the frog to be filled so that a man's foot will not be caught and held. In the new Webster's Dictionary, a frog is thus defined: 'A device now usually made of several rail sections secured to a plate or bolted together through distance pieces forming a connection of one track with another branching from or crossing it. There are many special forms.' It must be presumed that the legislature used

the word 'frog' in its recognized sense. While it is true that there must be a guard rail at a frog, there must also be main rails, but the guard rail is no more a part of the frog than the opposite main rail."

The act of the legislature of Ontario, which in terms applies only to every railroad and railway company in respect to which the legislature of Ontario has authority does not apply to a company which is a Dominion railway and within sections 91 and 92 of the British North American Act. *Clegg v. Grand Trunk R. Co.* 10 Ont. 709, following *Monkhouse v. Grand Trunk R. Co.* 8 Ont. App. 638. It has been held that a statute providing that "every company shall adjust, fix or block the frogs on its track to prevent the feet of its employees from being caught therein" was intended for the protection of employees and did not affect the obligation of a railroad company using a street; that as to a person not an employee injured by having his foot caught in a frog in the street the liability of the company depended on the failure of the company to keep the street in proper condition irrespective of whether the frog was blocked in accordance with the statute. *Louisville Bridge Co. v. Sieber*, 157 Ky. 151, 162 S. W. 804.

# MACKENZIE

v.

# HARE ET AL.

United States Supreme Court — December 6, 1915.

239 U. S. 299; 36 S. Ct. 106.

## Aliens — Marriage of Woman Citizen to Alien — Effect.

No exception in favor of an American-born woman who marries a resident foreigner and remains within the jurisdiction of the United States may be read into the provisions of the Act of March 2, 1907 (34 Stat. at L. 1228, chap. 2534, Fed. St. Ann. 1909 Supp. p. 69) that "any American woman who marries a foreigner shall take the nationality of her husband," but may resume her American citizenship at the termination of the marital relation, if within the United States, by her continuing to reside therein, and, if abroad, by returning to the United States, or by registering as an American citizen.

[See note at end of this case.]

## Same.

Congress could validly enact the provisions of the Act of March 2, 1907 (34 Stat. at L. 1228, Chap. 2534, Fed. St. Ann. 1909 Supp.

p. 69) under which an American-born woman who marries a foreigner forfeits her citizenship, even though she remains within the jurisdiction of the United States.

[See note at end of this case.]

Error to Supreme Court of California.

Action for mandamus. Ethel C. Mackenzie, petitioner, and John P. Hare et al., respondents. Judgment for respondents. Petitioner brings error. The facts are stated in the opinion. **AFFIRMED.**

*Milton T. U'Ren* for plaintiff in error.

*Thomas V. Cator, William McDevitt and Percy V. Long* for defendants in error.

[305] **MCKENNA J.**—Mandamus prosecuted by plaintiff in error as petitioner against defendants in error, respondents, as and composing [306] the Board of Election Commissioners of the city and county of San Francisco, to compel her registration as a qualified voter of the city and county, in the appropriate precinct therein.

An alternative writ was issued but a permanent writ was denied upon demurrer to the petition.

The facts are not in dispute and are stated by Mr. Justice Shaw, who delivered the opinion of the court, as follows:

"The plaintiff was born and ever since has resided in the State of California. On August 14, 1909, being then a resident and citizen of this State and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this State his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States."

Plaintiff in error claims a right as a voter of the State under its constitution and the Constitution of the United States.

The constitution of the State gives the privilege of suffrage to "every native citizen of the United States," and it is contended that under the Constitution of the United

States every person born in the United States is a citizen thereof. The latter must be conceded, and if [307] plaintiff has not lost her citizenship by her marriage she has the qualification of a voter prescribed by the constitution of the State of California. The question then is, Did she cease to be a citizen by her marriage?

On March 2, 1907, c. 2534, 34 Stat. 1228, that is, prior to the marriage of plaintiff in error, Congress enacted a statute the third section of which provides "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registration as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." (See Fed. St. Ann. 1909 Supp. p. 69.)

Plaintiff contends that "such legislation, if intended to apply to her, is beyond the authority of Congress."

Questions of construction and power are, therefore, presented. Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman (remaining within the jurisdiction of the United States), of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, "that the intention of Congress was solely to legislate concerning the status of citizens abroad and the questions arising by reason thereof."

Does the act invite or permit such assistance? Its declaration is general, "that any American woman who marries a foreigner shall take the nationality of her husband." There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume [308] her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power in insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment,



must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

The application of the law thus being determined, we pass to a consideration of its validity.

An earnest argument is presented to demonstrate its invalidity. Its basis is that the citizenship of plaintiff was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation.

The argument to support the contention and the argument to oppose it take a wide range through the principles of the common law and international law and their development and change. Both plaintiff and defendants agree that under the common law originally allegiance was immutable. They do not agree as to whom the rigidity of the principle was relaxed. Plaintiff in error contests the proposition which she attributes to defendants in error [309] "that the doctrine of perpetual allegiance maintained by England was accepted by the United States," but contends "that the prevalent doctrine of this country always has been that a citizen had a right to expatriate himself," and cites cases to show that expatriation is a natural and inherent right.

Whether this was originally the law of this country or became such by inevitable evolution it is not important to inquire. The first view has certainly high authority for its support. In *Shanks v. Dupont*, 3 Pet. 242, 246, 7 U. S. (L. ed.) 666, Mr. Justice Story, delivering the judgment of the court, said: "The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens." And Kent, in his commentaries, after a historical review of the principle and discussion in the Federal courts, declares that "the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." 2 Kent. 14th ed. 49.

The deduction would seem to have been repelled by the naturalization laws, and it was certainly opposed to executive opinion; and, we may say, popular sentiment, so determined that it sought its vindication by war. Further discussion would lead us far afield, and, besides, would only have historical interest.<sup>1</sup> The condition which Kent suggested has occurred; there is a legislative declaration. In 1868, c. 249, 15 Stat. 223, Congress explicitly declared the right of expatriation to have been and to be the law. And the declaration was in effect said to be the dictate of necessity. [310] The act recites that emigrants have been received and invested with citizenship in recognition of the principle of the right of expatriation and that there should be a prompt and final disavowal of the claim "that such American citizens, with their descendants, are subjects of foreign states." Rev. Stat. § 1999. (1 Fed. St. Ann. 788.)

But plaintiff says, "Expatriation is evidenced only by emigration, coupled with other acts indicating an intention to transfer one's allegiance." And all the acts must be voluntary, "the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to 'throw off the former allegiance, and become a citizen or subject of a foreign power.'"

The right and the condition of its exercise being thus defined, it is said that the authority of Congress is limited to giving its consent. This is variously declared and emphasized. "No act of the legislature," plaintiff says, "can denationalize a citizen without his concurrence," citing *Burkett v. McCarty*, 10 Bush (Ky.) 758. "And the sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime," citing *Ainslie v. Martin*, 9 Mass. 454. "The Constitution does not authorize Congress to enlarge or abridge the rights of citizens," citing *Osborn v. United States Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204. "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. . . . The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a complete right of citizenship," citing *U. S. v. Wong Kim Ark*, 169 U. S. 703, 18 S. Ct. 456, 42 U. S. (L. ed.) 890.

It will thus be seen that plaintiff's contention is in exact antagonism to the stat-

<sup>1</sup> The course of opinion and decision is set forth in Van Dyne's "Citizenship of the United States" and in his "Naturalization

in the United States;" Moore's Digest of International Law. See also Cockburn on Nationality.

ute. Only voluntary expatriation, [311] as she defines it, can divest a woman of her citizenship, she declares; the statute provides that by marriage with a foreigner she takes his nationality.

It would make this opinion very voluminous to consider in detail the argument and the cases urged in support of or in attack upon the opposing conditions. Their foundation principles, we may assume, are known. The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?

Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with [312] a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may

involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequences must be considered as elected.

Judgment affirmed.

McReynolds, J., is of opinion that this court is without jurisdiction, and that, therefore, this writ of error should be dismissed.

#### NOTE.

The reported case, which affirms *Mackenzie v. Hare*, Ann. Cas. 1915B 261, declares authoritatively the validity of the Act of Congress of March 2, 1907 (34 Stat. L. 1228, Fed. St. Ann. 1909 Supp. p. 69) and holds that under its provisions a woman who is by birth a citizen of the United States loses her citizenship by marrying an alien. The effect of marriage on the citizenship of a woman is discussed in the note to *Mackenzie v. Hare*, Ann. Cas. 1915B 261.

#### CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

v.

GUNN.

Arkansas Supreme Court — April 13, 1914.

112 Ark. 401; 166 S. W. 568.

#### Railroads — Lookout for Trespassers.

Under the lookout law requiring train operatives to keep a lookout for trespassers, they, discovering a light ahead on the track, should use care in approaching it.

[See generally 16 Ann. Cas. 247; 82 Am. St. Rep. 158.]

#### Same.

In view of the lookout law, evidence in an action for the killing by a train, running 35 miles an hour, with a lantern in place of a headlight, the headlight having been broken, of a trespasser riding on a speeder held to authorize a recovery; the light on the speeder having been seen, though not recognized as

such, when the train was a quarter of a mile distant, only a crossing signal having been given, and no effort to stop the train having been made till it was nearly on the speeder.

**Death by Wrongful Act — Evidence — Habits and Character of Deceased.**

Rejection of evidence, in an action for death of a white man, that the negro woman who was accompanying him was a strumpet, is harmless; other evidence admitted tending as fully to show his dissolute character and depraved disposition.

[See note at end of this case.]

**Same.**

Though the action is only for the pecuniary loss sustained by deceased's children from his death, evidence that he taught his little girl her Sunday school lessons, and wanted her to go to Sunday school, and made her practice her music lessons, is admissible to show he had an affection for his children, took an interest in their welfare, and on that account would be likely to contribute in the future to their support.

[See note at end of this case.]

**Argument of Counsel — Misconduct Harmless.**

Improper argument of counsel, the only injurious effect of which would be to enhance damages, will be deemed harmless; the verdict not being complained of as excessive.

Appeal from Circuit Court, Monroe county: Dr Bois, Judge.

Action for death by wrongful act. James Gunn, administrator, plaintiff, and Chicago, Rock Island and Pacific Railway Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[401] Appellee instituted this action against appellant to recover damages for the death of his intestate, which it was alleged was caused by the negligence of appellant. The facts are substantially as follows:

An inspector of appellant lived at Brinkley, Ark., and used a speeder on the tracks of appellant in the discharge of his duties. He was not permitted to use the [402] speeder after dark, nor was he allowed to employ any one as a substitute. He did, however, employ Charles L. Hodges to perform his duties for him; but appellant company had no knowledge of this fact. About 11 o'clock on the night of October 11, 1912, Charles L. Hodges, who was a white man, left a negro dance hall in Brinkley with a negro woman and a negro man, to go to Biscoe, a station on appellant's line of railway about thirteen miles west of Brinkley. They went on the speeder which Hodges had been using while discharging the duties of the inspector. When they got to Biscoe, the negro man, who had been carried along for the purpose of

helping Hodges propel the speeder, stayed with the speeder and Hodges and the negro woman went to a saloon and stayed about an hour. They returned with two quarts of whisky and some beer, and appeared to have been drinking while at the saloon. Hodges and the negro woman both continued to drink on the way home, and the negro man who was with them testified that they were drunk. When they had arrived at a point about one mile west of Brinkley, a passenger train going east struck the speeder, and Hodges was thrown from it and killed. The track of appellant from Brinkley west, as far as Eden, which is five miles distant, is perfectly straight. It was dark at the time the passenger train struck the speeder, and the engine on the passenger train had no headlight, except a lantern. The negro man who was on the speeder with Hodges testified that he looked back every time he thought of it and did not observe the approach of the train until it was about to strike the speeder; that the train was running pretty fast, and gave no warning of its approach. That he jumped off of the speeder just before the train struck it; that he was not drunk at the time, and had only taken one drink of whisky on the trip.

John T. Maloney, for appellant, testified substantially as follows: I was locomotive engineer on the passenger train that killed Hodges. I took my train out of Little Rock on that night at 1:05 A. M. for Memphis. The [403] engine had an electric headlight on it, and it was in perfect order when I left Little Rock. The headlight was the regular size, and remained in perfect condition until I got to Biscoe. When I got there I had to take the siding, and, in compliance with the rules, I turned the headlight off. When the train for which I took the siding had passed by, I turned on the steam to the headlight, but the headlight would not burn. I examined the wires and lamp in the headlight, and examined the dynamo. I then found that the wire connecting the magneto insulator was broken, and thus cut off the current from the headlight. I could not find any wire with which to patch the headlight, and took the porter's lantern and turned the light up to what we would call about four candle-power light, and put it in the headlight. I then proceeded on my way at the rate of about thirty-five miles an hour. When I got near Brinkley, I saw that I was about forty-five minutes late, and the train was still running at about thirty-five miles an hour. I noticed a light on the track about a quarter of a mile ahead of my engine. I was then between Eden and Brinkley and near what we call the second road crossing out of Brinkley. There is a little dip, or sag, there. I blew the whistle for the second road crossing

account. While the proof introduced by appellee as to the contribution made by decedent to the support of his children is contradicted by that introduced by appellant, yet the jury were the judges of the credibility of the witnesses and the weight to be given to their testimony, and, under the testimony adduced by appellee, the jury would have been warranted in rendering a larger verdict than they did. Therefore, we do not think we should reverse the judgment on account of the argument, even if we concluded that it was erroneous. *St. Louis, etc. R. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884. In that case the court held that an improper argument will not be deemed prejudicial where its only injurious effect would have been to enhance appellee's damages, if appellant does not complain that the verdict was excessive.

The judgment is affirmed.

#### NOTE.

#### Admissibility in Action for Death by Wrongful Act of Evidence of Habits or Physical Condition of Deceased.

Introductory, 652.

As Affecting Earning Capacity, 652.

As Affecting Life Expectancy, 654.

Rule in Alabama, 655.

#### Introductory.

This note discusses the admissibility, in an action for death by wrongful act, of evidence as to the habits or physical condition of the deceased, in so far as it bears on the pecuniary value of his life; excluding, however, cases ruling on the admissibility of such evidence as bearing on the question of the care used by the deceased at the time of the accident causing his death. For cases concerning the admissibility, in an action for the killing of a person at a railroad crossing, of evidence as to the habits of the deceased on approaching such a crossing, see the note to *Frederickson v. Iowa Cent. R. Co.* Ann. Cas. 1916B 224.

This note does not include cases in which the habits and physical condition of the deceased have been referred to as factors in determining the measure of damages for his death, without a specific ruling as to the admissibility of evidence thereof. See the note to *Carter v. West Jersey, etc. R. Co.* 16 Ann. Cas. 929. See also 8 R. C. L. tit. *Death*, p. 827.

#### As Affecting Earning Capacity.

In an action for death by wrongful act it is well established that, as bearing on the pecuniary value of the life of the deceased

to the persons to whom the recovery inures, evidence is admissible to show the physical condition or state of health of the deceased, and to show his habits as to industry and sobriety, as to disposition of his earnings, and as to care of and attention to his family.

*United States*.—*Hall v. Galveston, etc. R. Co.* 39 Fed. 18; *Memphis Consol. Gas, etc. Co. v. Letson*, 135 Fed. 969, 68 C. C. A. 453; *Grand Trunk Western R. Co. v. Reddick*, 160 Fed. 898, 88 C. C. A. 80. See also *Keller v. Central R. Co.* 5 McCrary 653, 48 Fed. 663; *Holmes v. Oregon, etc. R. Co.* 6 Sawy. 262.

*Arkansas*.—*St. Louis, etc. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571. See also *St. Louis, etc. R. Co. v. Hutchinson*, 101 Ark. 424, 142 S. W. 527. And see the reported case.

*California*.—*Taylor v. Western Pac. R. Co.* 45 Cal. 323; *Barboza v. Pacific Portland Cement Co.* 162 Cal. 36, 120 Pac. 767.

*Colorado*.—See *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352; *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

*Delaware*.—*Wilcox v. Wilmington City R. Co.* 2 Penn. 157, 44 Atl. 686.

*District of Columbia*.—See *Baltimore, etc. R. Co. v. Golway*, 6 App. Cas. 143.

*Georgia*.—*Killian v. Augusta, etc. R. Co.* 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410. See also *Atlantic, etc. R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776.

*Illinois*.—*Chicago, etc. R. Co. v. Travis*, 44 Ill. App. 466; *Pendergast v. Chicago City R. Co.* 114 Ill. App. 156; *Devine v. Boston Store*, 167 Ill. App. 443.

*Indiana*.—*Lake Erie, etc. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Wright v. Crawfordsville*, 142 Ind. 636, 42 N. E. 227; *Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345, 92 N. E. 54, reversing 89 N. E. 602; *Pittsburgh, etc. R. Co. v. Parish*, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120. See also *Pennsylvania Co. v. Reesor*, 108 N. E. 983.

*Indian Territory*.—*Missouri, etc. R. Co. v. Elliott*, 2 Indian Ter. 407, 51 S. W. 1067.

*Iowa*.—*Donaldson v. Mississippi, etc. R. Co.* 18 Ia. 280, 87 Am. Dec. 391; *Simonson v. Chicago, etc. R. Co.* 49 Ia. 87; *Van Gent v. Chicago, etc. R. Co.* 80 Ia. 526, 45 N. W. 913; *Wheeler v. Chicago, etc. R. Co.* 85 Ia. 167, 52 N. W. 119, 49 Am. & Eng. R. Cas. 693; *Spaulding v. Chicago, etc. R. Co.* 98 Ia. 205, 67 N. W. 227; *Nicoll v. Sweet*, 163 Ia. 683, Ann. Cas. 1916C 661, 144 N. W. 615.

*Kansas*.—*Coffeyville Min. etc. Co. v. Carter*, 65 Kan. 565, 70 Pac. 635.

*Kentucky*.—See *Louisville, etc. R. Co. v. Graham*, 98 Ky. 688, 34 S. W. 229; *Louisville, etc. R. Co. v. Gardner*, 140 Ky. 772, 131 S. W. 787; *Cincinnati, etc. R. Co. v. Lovell*, 141 Ky. 249, 132 S. W. 569, 47 L.R.A. (N.S.) 909, rehearing denied 142 Ky. 1, 133 S. W. 788.

*Maine*.—*Oakes v. Maine Cent. R. Co.* 95 Me. 103, 49 Atl. 418.

*Michigan*.—*Shall v. Detroit*, etc. R. Co. 152 Mich. 463, 116 N. W. 432, 15 Detroit Leg. N. 295; *Seeba v. Manistee R. Co.* 155 N. W. 414.

*Minnesota*.—*Shaber v. St. Paul*, etc. R. Co. 28 Minn. 103, 9 N. W. 575, 2 Am. & Eng. R. Cas. 185; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575.

*Missouri*.—*Darks v. Scudder-Gale Grocer Co.* 146 Md. App. 246, 130 S. W. 430; *Chambers v. Krupper-Benson Hotel Co.* 154 Mo. App. 249, 134 S. W. 45. See also *Powell v. Union Pac. R. Co.* 255 Mo. 420, 164 S. W. 628; *Loomis v. Metropolitan St. R. Co.* 188 Mo. App. 203, 175 S. W. 143.

*New Jersey*.—*Smith v. Barnard*, 82 N. J. L. 472, 81 Atl. 736.

*New York*.—*Slaven v. Germain*, 64 Hun 506, 19 N. Y. S. 492; *Sternfels v. Metropolitan St. R. Co.* 73 App. Div. 499, 77 N. Y. S. 309, *affirmed* 174 N. Y. 512, 66 N. E. 1117; *McIlwaine v. Metropolitan St. R. Co.* 74 App. Div. 496, 77 N. Y. S. 426; *Mix v. Hamburg-American Steamship Co.* 85 App. Div. 475, 83 N. Y. S. 322; *Fearon v. New York L. Ins. Co.* 162 App. Div. 560, 147 N. Y. S. 644; *Meng v. Emigrant Industrial Sav. Bank*, 169 App. Div. 27, 154 N. Y. S. 509. See also *Houghkirk v. Delaware*, etc. Canal Co. 92 N. Y. 219, 44 Am. Rep. 370, *reversing* 28 Hun 407; *Murphy v. Erie R. Co.* 202 N. Y. 242, 95 N. E. 699, *reversing* 134 App. Div. 992, 119 N. Y. S. 183.

*North Carolina*.—*Kesler v. Smith*, 66 N. C. 154; *Burton v. Wilmington*, etc. R. Co. 82 N. C. 504; *Mendenhall v. North Carolina R. Co.* 123 N. C. 275, 31 S. E. 480; *Watson v. Seaboard Air Line R. Co.* 133 N. C. 188, 45 S. E. 555. See also *Benton v. North Carolina R. Co.* 122 N. C. 1007, 30 S. E. 333; *Burns v. Asheboro*, etc. R. Co. 125 N. C. 304, 34 S. E. 495.

*Tennessee*.—*Nashville*, etc. R. Co. v. *Prince*, 2 Heisk. 580; *East Tennessee*, etc. R. Co. v. *Gurley*, 80 Tenn. 46, 17 Am. & Eng. R. Cas. 568; *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

*Texas*.—*San Antonio*, etc. R. Co. v. *Long*, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L.R.A. 637; *Standlee v. St. Louis*, etc. R. Co. 25 Tex. Civ. App. 340, 60 S. W. 781; *Galveston*, etc. R. Co. v. *Harris*, 36 S. W. 776; *Beaumont Traction Co. v. Dilworth*, 94 S. W. 352; *Fort Worth*, etc. R. Co. v. *Stalcup*, 167 S. W. 279.

*Utah*.—*Openshaw v. Utah*, etc. R. Co. 6 Utah 132 (semble); *Wells v. Denver*, etc. R. Co. 7 Utah 482, 27 Pac. 688; *Chilton v. Union Pac. R. Co.* 8 Utah 47, 29 Pac. 963, *dismissed* 163 U. S. 708, 16 S. Ct. 1207, 41 U. S. (L. ed.) 308; *Evans v. Oregon Short Line R. Co.* 37 Utah 431, Ann. Cas. 1912C 259, 108 Pac. 638.

*Virginia*.—*Baltimore*, etc. R. Co. v. *Wightman*, 29 Grat. 431, 26 Am. Rep. 384.

*Canada*.—*Renwick v. Galt*, etc. St. R. Co. 11 Ont. L. Rep. 158, 6 Ont. W. Rep. 413.

In *Chicago, etc. R. Co. v. Travis*, 44 Ill. App. 466, it was said: "We think that evidence as to the habits and character of the deceased, so far as they affected the pecuniary relations of the next of kin with him and the support, if any, they were receiving, or were likely to receive from him, or were giving to him, should have been received" . . . and "The action is for the pecuniary loss sustained; this may be greater in the case of a sober, industrious man, who devoted his earnings to the support of his family, than in the case of a father who, utterly neglecting his children, spent his wages in drunken dissipation." And in *Pittsburgh*, etc. R. Co. v. *Parish*, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120, the court said: "The loss from the death of a careful, experienced man would be greater than from that of one who was careless and inexperienced. The law estimates the value of a human life as best it can, and in doing so it will take into consideration, among other things, the habits of the individual as to sobriety and industry, and such qualities as affect his capacity to earn money." In *Spaulding v. Chicago*, etc. R. Co. 98 Ia. 205, 67 N. W. 227, it was said: "A sister of the decedent was permitted to testify that she had received from him, during his life-time, various sums of money, which amounted to eight hundred dollars, and perhaps more; that she had visited him in St. Paul, and that he had paid for her support while she was there; that she had received, since his death, insurance on his life to the amount of two thousand dollars. It was competent to show the amount of money which he had sent to the witness and to others, as tending to show his ability to earn money, and his habits with respect to saving it; and for the same reason it was competent to show that he had invested some of his earnings in life insurance." In *Sternfels v. Metropolitan St. R. Co.* 73 App. Div. 499, 77 N. Y. S. 309, *affirmed* 174 N. Y. 512, 66 N. E. 1117, the court said: "It is claimed by the railway company that errors were committed in the reception of evidence which call for a reversal of this judgment. These errors, it is claimed, were committed by the plaintiff in offering and the court in permitting evidence to be given of the habits of the deceased in reference to his family life; the attention which he bestowed upon the members of it; the interest he took in their social entertainment; that he was 'a home body;' spent much of his time with his family; took great interest in the education of his children and especially in the education and culture of his daughter. . . . The learned counsel for the railway company insists that the subject-matter of this evidence constitutes error

for the reason that it presented for the consideration of the jury an erroneous measure of damage; that the jury were not entitled to measure the damage sustained by the plaintiff and the next of kin based upon personal association with the deceased; that such matters are not embraced within the statute which awards a recovery only for pecuniary loss sustained. It is to be observed, however, that the plaintiff was entitled to prove the character, habits, health, business ability or any other matter tending to lay before the jury the character of the man, his ability and earning power. It is perfectly evident that a defendant would be authorized to show, when it is sought to charge it in damages for negligent injury causing death, that the deceased was vile in habits, uniformly sought bad associations, contributed nothing to the support of his family or the culture of his children, did not perform the duties of a husband and father properly, either by pecuniary assistance, or by moral association and help; that he was without property, earning power or ability, and discharged none of the duties which by common consent devolved upon him as a reputable member of society. All of these facts would bear pertinently and directly upon the value of the life and the consequent pecuniary injury entailed on account of the death. . . . It is evident, therefore, that proof which tends to show the character and habits of the life which has been destroyed bears direct relation to the pecuniary loss sustained by the widow and the next of kin. The proper observance of family relations and the fidelity of their discharge by the deceased is as much an element in determining the value of the life and the loss to the next of kin as are the extent of his possessions and his ability to earn."

In *Wright v. Crawfordville*, 142 Ind. 636, 42 N. E. 227, the court held to be admissible evidence of repeated specific acts of drunkenness on the part of the deceased as tending to prove confirmed habits of drunkenness. The court said: "We think that the evidence was legitimate, under the issues, to be considered by the jury upon the question of the amount of damages to be awarded. The repeated acts of drunkenness disclosed by the evidence, tended to prove that the deceased was addicted to the vicious habit of becoming intoxicated to an extent that, had he lived, would have tended to impair his ability to earn money and so use it in a manner as would contribute to the proper support of his family. It is a fact generally conceded and recognized, that drunkenness, as a habit, tends to absorb the earnings of the person addicted thereto, and renders him less fit to accomplish that which he might if he were of temperate habits. In actions of the character of the one under consideration, the

jury is authorized, in awarding damages, to take into consideration the pecuniary loss or injury resulting to those most nearly related to the deceased; and it is obvious, we think, that where it is made to appear that the decedent was addicted to the habit of intoxication and in spending his earnings in whole or in part, as the case might be, for intoxicating liquors, the loss resulting from his death to those dependent upon him for support and protection in the future, would not be as great as in a case where it appeared that the deceased was a sober and industrious man."

In *Nordhaus v. Vandalia R. Co.* 147 Ill. App. 274, affirmed in 242 Ill. 166, 89 N. E. 974, the court held to be admissible evidence that the deceased, a Hungarian section-hand, had previous to his death purchased money orders to be sent to his widowed mother in Hungary, as showing his habit with respect to contributing to her support. In *Galveston, etc. R. Co. v. Harris (Tex.)* 36 S. W. 776, evidence that the deceased had been in the habit of spending his money on a certain prostitute was held to be admissible to contradict the testimony of his mother that he expended most of his wages in support of her and her children.

However, in at least one jurisdiction evidence as to whether the deceased was in the habit of saving his earnings has been held to be inadmissible. Thus, in *Baltimore, etc. R. Co. v. State*, 81 Md. 371, 32 Atl. 201, the court said: "The fifth exception is taken to the refusal of the court below upon the objection of the plaintiff to permit inquiry to be made as to whether or not the decedent saved anything out of his earnings. The question was properly excluded, and we think, wholly irrelevant."

It was held in *Lipcomb v. Houston, etc. R. Co.* 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L.R.A. 869 (*modifying* 62 S. W. 954) that evidence that the deceased was a member of the church and not in the habit of using profane language was too remote to be of value in determining the pecuniary loss of the plaintiffs. But in *White v. Central Vermont R. Co.* 87 Vt. 330, 89 Atl. 618, it was held that it was competent to prove that the deceased was a member of the church, as indicating the moral training and discipline and influence which would have been received from him by his children.

#### *As Affecting Life Expectancy.*

As bearing on the pecuniary worth of the deceased, his expectancy of life is material, and therefore evidence of his habits or physical condition is admissible as being relevant to the probable continuance of his life. *Broughel v. Southern New England Tel. Co.* 73 Conn. 614, 48 Atl. 751, 84 Am. St. Rep.

176; Wilcox v. Wilmington City R. Co. 2 Penn. (Del.) 157, 44 Atl. 686; Wheelan v. Chicago, etc. R. Co. 85 Ia. 167, 52 N. W. 119, 49 Am. & Eng. R. Cas. 693; Nicoll v. Sweet, 163 Ia. 683, Ann. Cas. 1916C 661, 144 N. W. 615; Coffeyville Min. etc. Co. v. Carter, 65 Kan. 565, 70 Pac. 635; Slaven v. Germain, 64 Hun 506, 19 N. Y. S. 492; McIlwaine v. Metropolitan St. R. Co. 74 App. Div. 496, 77 N. Y. S. 426; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Illinois Cent. R. Co. v. Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907; Galveston, etc. R. Co. v. Gormley (Tex.) 27 S. W. 1051; Hardin v. St. Louis Southwestern R. Co. (Tex.) 88 S. W. 440; Evans v. Oregon Short Line R. Co. 37 Utah 431, Ann. Cas. 1912C 259, 108 Pac. 638. See also Hall v. Galveston, etc. R. Co. 39 Fed. 18; Cincinnati, etc. R. Co. v. Lovell, 141 Ky. 249, 132 S. W. 569, 47 L.R.A. (N.S.) 909, rehearing denied 142 Ky. 1, 133 S. W. 788; Baltimore, etc. R. Co. v. Golway, 6 App. Cas. (D. C.) 143; Terhune v. Joseph W. Cody Contracting Co. 72 App. Div. 1, 76 N. Y. S. 255. Thus in *McIlwaine v. Metropolitan St. R. Co.* 74 App. Div. 496, 77 N. Y. S. 426, the court said: "It is common knowledge that the use of intoxicating liquors to any extent has a bearing upon the ability of the subject to withstand certain kinds of illness and disease. In estimating the probability as to the decedent's future health and the duration of his life, the jurors were called upon to consider the probabilities as to his becoming ill, which involved his susceptibility to disease, and his ability to withstand the ravages of disease. His use of intoxicating liquors had a bearing upon this subject, the importance of its bearing depending upon the extent of the use. Moreover the habits of the decedent with reference to the use of intoxicating liquors, which involved the expenditure of part of his earnings, would throw some light both upon the question as to the probable amount of his savings and the amount of money which he would contribute to his family, and also upon the question as to the amount of his earnings, the weight of the evidence depending of course upon the extent to which he indulged in such liquors. Furthermore, in view of the decedent's occupation, if he was in the habit, even though only occasionally, of becoming intoxicated while in the performance of his duties, the jury had a right to take that into consideration in weighing the chances of his death by accident or the impairment of his capacity to earn money by injury. The question called for facts in the history of decedent's life which would be indicative of his habits or customs and which were proper for the consideration of the jury on the question of pecuniary loss sustained by the widow and next of kin."

While recognizing the admissibility of evi-

dence as to the habits and condition of health of the deceased, the Illinois court in one case declared to be incompetent evidence offered by the plaintiff that her husband, the deceased, spent most of his time at home with her and the children, because of its tendency to introduce the element of loss of companionship into the measure of damages. *Conover v. Harrisburg, etc. Co.* 161 Ill. App. 74, wherein the court said: "She [the plaintiff, widow of deceased] was permitted to testify that her husband spent most of his time at home with her and the children and that he was the only support she had and that she had no other means of support. This testimony tended to impress the jury with loss of companionship when there could be no recovery except for the pecuniary loss, and also tended to show the financial condition of the wife. The testimony should be limited to the earnings of the husband, his age, habits and condition of his health and whether the wife was supported by him."

In *Ilwaco R. etc. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169, the court held that while it was competent to prove to the jury the state of health and physical condition of a deceased child, it was not competent for a physician to testify that if the child had been healthy it would, in his opinion, have survived the injury. The court said: "It is true that the measure of plaintiff's damage is the loss occasioned by the death of deceased, and that his health, mental and physical condition, and his expectancy of life, were proper subjects to be submitted to the jury for their consideration in estimating the amount of the damage sustained by the estate. But it does not follow that defendant should have been permitted to show that, in the opinion of the witness, deceased would not have died from the effects of the frightful injury he received, if he had been as strong and healthy as some other boy, or even if he himself had been more vigorous. There was no controversy as to the cause of the child's death, and the question then before the jury was not what amount of injury, of the character suffered by him, he could or would have survived under other circumstances, but what was, in fact, his health and physical condition at the time of the injury; and that the witness had already stated. We see no error of the court in excluding the question."

#### *Rule in Alabama.*

In Alabama, the statute (Code 1886, § 2589) relating to actions "for wrongful act, omission, or negligence causing death," has been said to be an act purely punitive and exemplary in its nature, so that the compensatory element is eliminated from the measure of damages, and in an action under that statute evidence of the habits and physical condition

of the deceased as bearing on his pecuniary worth has been held to be irrelevant and inadmissible. *Richmond, etc. R. Co. v. Freeman*, 97 Ala. 289, 11 So. 880; *Buckalew v. Tennessee Coal, etc. Co.* 112 Ala. 146, 20 So. 606; *Louisville, etc. R. Co. v. Tegner*, 125 Ala. 593, 28 So. 510. Thus in *Richmond, etc. R. Co. v. Freeman*, supra, the court said: "The damages recoverable being punitive and exemplary in all cases under the statute [Code 1886, § 2589]—punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite to diligence in the avoidance of fatal casualties—the purpose being the preservation of human life regardless of the pecuniary value of a particular life to next of kin under statutes of distributions, the admeasurement of the recovery must be by reference alone, to the quality of the wrongful act or omission, the degree of culpability involved [sic.] in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without reference to, or consideration of, the loss or injury the act or omission may occasion to the living. Such is the construction given by this court to the act."

But another statute (Code 1886, § 2590), an employer's liability act, has been said to be compensatory in nature, and in an action under that statute the Alabama court has held to be admissible evidence as to the habits and physical condition of the deceased, in accord with the general rule as laid down in other jurisdictions. *Columbus, etc. R. Co. v. Bridges*, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; *Louisville, etc. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360; *James v. Richmond, etc. R. Co.* 92 Ala. 231, 9 So. 335; *Richmond, etc. R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577; *McAdory v. Louisville, etc. R. Co.* 94 Ala. 272, 10 So. 507; *Central Foundry Co. v. Bennett*, 144 Ala. 184, 39 So. 574, 113 Am. St. Rep. 32, 1 L.R.A.(N.S.) 1150; *Central of Georgia R. Co. v. Alexander*, 144 Ala. 257, 40 So. 424; *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362; *Alabama Steel, etc. Co. v. Griffin*, 149 Ala. 423, 42 So. 1034; *Louisville, etc. R. Co. v. Fleming (Ala.)* 69 So. 125. Thus the court in *Columbus, etc. R. Co. v. Bridges*, supra, said: "Section 2591 authorizes the personal representative to maintain an action, if the injury results in the death of the employee, and directs the distribution of the recovery. The statute does not prescribe or fix the measure of damages, neither are they submitted to the arbitrary discretion of the jury. It has no punitive purpose, and the common-law rules as the measure of damages are applicable. It is wholly unlike, in its objects and purposes, the statute of February 5, 1872 [brought forward in Code 1886, § 2589], which was intended to prevent homicide."

## DEPUTY

v.

KIMMELL.

West Virginia Supreme Court of Appeals—  
February 3, 1914.

73 W. Va. 595; 80 S. E. 919.

### Automobiles — Rights and Duties as to Pedestrian.

The rights of pedestrians and drivers of automobiles, when using streets or other public highways, are mutual, equal and co-ordinate, except as varied by the nature of the appliance or mode of travel employed; and as long as each observes the reciprocal rights of the other neither will be liable for any injury his use may cause.

[See note at end of this case.]

#### Same.

A person using an automobile on a public highway owes the double duty to avoid danger to himself by another having an equal right to such use, and the infliction of injury upon such other person. Both must exercise that degree of care which a reasonably prudent man would exercise under the same circumstances.

[See note at end of this case.]

#### Same.

Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operator of an automobile, while on the public highway, and especially at street crossings, than is required of persons using the ordinary or less dangerous instruments of travel. He should exercise such care in respect to speed, warnings of approach and the management of the car as will enable him to anticipate and avoid collisions which the nature of the machine and the locality may reasonably suggest likely to occur in the absence of such precautions.

[See note at end of this case.]

#### Same.

The vigilance and care required of the operator of an automobile vary in respect of persons of different ages or physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or, by the exercise of reasonable care, should see, on or near the highway. More than ordinary care is required in such cases.

[See note at end of this case.]

#### Same.

Where a wagon or other vehicle obscures or obstructs his view of a street crossing, when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the auto operator, in order to prevent injury to persons on such crossing.

[See note at end of this case.]



**Contributory Negligence of Pedestrian.**

The mere negligent act of one person will not excuse negligent injury to him by another. If, therefore, a person who negligently places himself in a situation of imminent danger is injured by one who by the exercise of reasonable care could have avoided such injury, the negligence of the former will not bar recovery.

[See 4 Ann. Cas. 400.]

**Same.**

A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained.

**Negligence — Contributory Negligence of Children.**

In determining the question of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary caution for them is that degree of care and prudence which children of the same age are accustomed to exercise under like circumstances.

[See Ann. Cas. 1913B 969.]

**Proof of Negligence — Variance from Pleading.**

In order to recover, it is unnecessary for plaintiff to prove literally the acts of negligence averred in the declaration. If the allegations are substantially proved, this is sufficient. Hence, an instruction, in an action of case for personal injury, which tells the jury that it cannot find for plaintiff, unless it believes from the evidence "that the defendant was negligent in the very manner set out in the declaration," is erroneous, and should be refused.

(Syllabus by court.)

**Error to Circuit Court, Mineral county.**

Action for damages. Dewey Deputy, plaintiff, and E. G. Kimmell, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

*Chas. N. Finnell and Frank O. Reynolds* for plaintiff in error.

*R. F. Leedy and W. H. Griffith* for defendant in error.

[596] LYNCH, J.—The injury, damages for which plaintiff seeks recovery by an action of trespass on the case, was inflicted by defendant in the operation of an automobile on the streets of Keyser. [597] The car collided with plaintiff at a street crossing, and within a few feet of the curb, over which he had just stepped into the street. At that time, he

Ann. Cas. 1916E.—42.

was ten years and six months old. In company with him were two companions, one eleven, the other nine years old. They were interested in the pictures of noted baseball players, contained in a box of candy purchased by one of them at a store near the crossing. These they were examining, as they leisurely approached and entered upon the crossing at the time of the collision.

Defendant drove his car along Piedmont street, and thence to the left over the crossing and into Orchard street. As the car entered on the crossing, it collided with two of the three boys, knocking plaintiff to the pavement, thereby causing the injury.

The trial court entered judgment for plaintiff on the jury's finding on the facts. Hence, the case is here on writ of error.

While defendant admits the collision and its resultant effect, he denies liability on the ground that but for the negligence of the plaintiff the collision would not have occurred. But the question of defendant's negligence, and that of plaintiff, if any, contributing to the injury, were submitted to the determination of the jury; and its findings cannot be disturbed, except for good and sufficient cause.

Was defendant negligent? He was lawfully on the public highway. It was open alike to him and to the plaintiff. Their rights thereon were mutual and co-ordinate. The rights of the one were not superior to the rights of the other. Highways are constructed and maintained, at public expense, for public use by all persons alike, without limitation or restriction, save only that the use must conform to the well established rules and regulations prescribed by law.

That the use of automobiles on the highways for business or recreation is lawful, is no longer open to question. Such use involves only the application of a new appliance and mode of travel, rather than any new legal principle. It does not exclude or seriously interfere with the original modes in which the highways were used, but simply adds another use in furtherance of the general object for which they were dedicated. But new appliances and modes of travel must [598] be exercised with due regard for the rights of others using the highways; "and as long as such care is exercised the owners will not be liable for any injury their use may cause." *Berry on Automobiles*, § 115, and numerous cases cited.

So that, in whatever manner or for whatever lawful purpose one uses a public highway, he owes a double duty: (1) to avoid danger to himself by another having the right to such use, and (2) to avoid infliction of an injury upon such other person. Both must exercise such care as reasonably prudent persons would exercise under the same circumstances and conditions, in order to avoid

being injured or causing injury. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 6 Ann. Cas. 656, 74 N. E. 615, 1 L.R.A.(N.S.) 238; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; 28 Cyc. 27, 29; *Berry on Automobiles*, §§ 128, 150, 163, 171, 173; *Huddy on Automobiles*, §§ 84, 95, 99, 101; *Babbitt on Motor Vehicles*, § 913.

But what may be due and reasonable care in the use of a highway under some circumstances, may be negligence under others. No inflexible rule applicable alike to all cases has been or can be definitely stated. Each case must be determined upon its own peculiar facts. The degree of care varies also to some extent with the character of the vehicle. There is an obvious difference in that respect between the use and operation of a road-wagon and an automobile. The latter has weight and power, and also greater capacity of speed and agility in its movements. It responds more readily to the will of the operator. Therefore, "the operator must enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which the use of his vehicle has made more imminent." *Berry on Automobiles*, § 119. "Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions." *Id.*, §§ 124, 154; *Huddy on Automobiles*, § 95.

On this subject the observations of the court in *Irwin v. [599]* Judge, 81 Conn. 402, 71 Atl. 572, are pertinent. "To persons riding along or crossing our public roads, and especially our city streets, the rapidly moving automobile is a source of constant danger. Their great weight and speed power and resulting momentum render the consequences of a collision with them much more serious than with ordinary carriages even moving at a higher rate of speed, and it is much more difficult to avoid, and much more confusing to attempt to avoid, the rapidly moving automobile than the street railway car, which has a fixed and known direction and course upon the tracks. While owners of automobiles have the right to drive them upon public streets, yet the proper protection of the equal rights of all to use the highways necessarily requires the adoption of different regulations for the different methods of such use; and what may be a safe rate of speed at which to ride a bicycle or drive a horse may be an unreasonably rapid rate at which to drive an automomobile in the same place. For the reasons stated, and others which might be given, driving of an automobile at a high rate of speed through city streets at times when and places where other vehicles are constantly passing, and men, women and children are liable to be crossing; around corners at the intersection of streets, or in passing street cars from which passengers have just alighted, or may be about to alight; or in other similar places and situations where people are liable to fail to observe an approaching automobile, the driver is bound to take notice of the peculiar danger of collisions in such places. He cannot secure immunity from liability by merely sounding his automobile horn. He must run his car only at such speed as will enable him to timely stop it to avoid collision. If he fails to do so, he is responsible for the damage he thereby causes." See also *Tudor v. Bowen*, 152 N. C. 441, 21 Ann. Cas. 646, and note, 67 S. E. 1015, 136 Am. St. Rep. 836, 30 L.R.A.(N.S.) 804; *Liebrecht v. Crandall*, 110 Minn. 454, 126 N. W. 69; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 Atl. 379, 37 L.R.A. 533; *Cooke v. Baltimore Traction Co.* 80 Md. 551, 31 Atl. 327; *Berry on Automobiles*, §§ 128, 173.

The vigilance and care required vary also in respect of persons of different ages or physical conditions. The operator of an automobile must increase his exertions in order to avert danger to children, whom he may see or by the exercise of [600] reasonable diligence and attention can or should see on or near the highway. Their lack of capacity to apprehend and guard against danger makes such care and caution necessary. *Thies v. Thomas*, 77 N. Y. S. 276; *Buscher v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. S. 798; *McDonald v. Metropolitan St. R. Co.* 80 App. Div. 233, 80 N. Y. S. 577; *Huddy on Automobiles*, § 81. In the first case cited, the essence of the holding is that one in charge of an automobile is required to exercise more than ordinary care to avoid injury to children whom he meets in a public thoroughfare. *Gross v. Foster*, 134 App. Div. 243, 118 N. Y. S. 889; *Berry on Automobiles*, § 155.

But it is said defendant complied with all the conditions thus prescribed, and that, notwithstanding the cautious and prudent operation of the car, he could not avert the collision. That he had control of the car, that it was moving at moderate speed (varying, according to the estimate by himself, from 8 to 10 miles an hour), and that he repeatedly gave warning of the car's approach to the crossing—though in conflict with the evidence adduced by the plaintiff—may be conceded, and yet, under the principles announced by the authorities cited, defendant may have been negligent to such a degree as to warrant the verdict and judgment of which he com-

plains. He admits that at a distance of 68 feet from the place of collision he saw plaintiff and his companion, near the crossing and leisurely approaching it from the opposite direction. He saw them; they did not see him or his car. He then knew, and they did not know, that he intended to drive the car onto Orchard street, or that he would necessarily pass them while on the crossing. Even had they heard the signals if given, they may have thought he would continue his course up Piedmont street—as in fact his course seemed to be, according to testimony not contradicted. He could also observe, and perhaps did observe, their inattention to the approach of the car, thus evidently demanding greater care on his part to avoid injuring them.

That defendant was driving the car at a greater rate of speed than he seemed willing to admit, appears from a reasonable interpretation of his testimony. The accident occurred after five o'clock P. M. He was on his way to keep a five [601] o'clock engagement, then overdue. There is in this admission an indication of an attempt to hasten to his destination.

But, in the interval of time between his first and second view of the positions of the boys, the continuity of view, as defendant contends, was obstructed by a wagon preceding him along Piedmont street and to the left onto Orchard street, and hence over the crossing, and around which he was obliged to pass to the right and thence also to the left in order to turn onto Orchard street. Assuming, however, the presence of the wagon at the time and place designated sufficiently proved under the conflicting testimony, it was a light and open delivery-wagon, not of sufficient height to obstruct defendant's view. If it did in fact obstruct his view, it did not deprive him of the knowledge that the crossing was in constant use by pedestrians, and of the possibility of contact with those thereon, and especially with those who he knew would probably be thereon when the car reached it. In *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L.R.A. (N.S.) 1228, 124 Am. St. Rep. 402, the plaintiff was struck by an automobile as he was following a street car which was about to stop on the opposite side of a street to permit him to board it. The defendant was driving his automobile at from eight to ten miles an hour on one of the principal thoroughfares of the city. He was unable to see the crossing as he approached it because the street car was between him and the crossing, and, instead of stopping his automobile until the car passed, he merely changed his direction, so as to go around the passing car, when he was brought face to face with plaintiff at a distance too short to prevent a collision. The court, holding defendant guilty of gross negligence, said: "He

states the car was going at the rate of eight to ten miles an hour. He was on one of the principal thoroughfares of a great city, and approaching a crossing where it was at least reasonable to expect pedestrians to be. He could not see this crossing for the reason that the street car was between him and it, and thus obscured his vision. Instead of stopping his automobile until the car passed and he could see whether there were pedestrians on the crossing beyond, he simply changed his direction so as to go around the passing car, and by his own act was [602] brought face to face with the appellee at a distance too short to prevent the collision at the rate he was moving. This was, in itself, gross negligence to the verge of recklessness. In practical result there was no difference between what he did and if he had shut his eyes and driven his automobile over the street crossing without observing whether any one was in his way or not."

But there is a further infirmity in the argument based on the obstruction. The wagon turned around the corner to the left near the curb. Defendant passed to the right of the wagon, and then turned to the left onto Orchard street, thus placing the position of the boys and the curb at which he first saw them to his right. The streets at their intersection are 30 feet between the curbs. His car should have been, and so far as appears was, on the right-hand side of Piedmont street. At least, the provisions of § 8, Ch. 32, Acts 1911, required him to pass to the right of the intersection of the center line of the two streets in turning to the left into Orchard street. If duly attentive to the operation of his car, he had sufficient space and opportunity to observe the crossing and the danger to be avoided. But at that time he was, according to one witness whose testimony he does not deny, engaged in looking at property owned by him located immediately in front of the intersection of Orchard street and Piedmont street, with which the former connects but beyond which it does not extend.

But whether defendant was negligent was a question for the determination of the jury. It did determine the question against his contention; and we cannot, under the facts and circumstances thus far detailed, reach the conclusion that its findings are not correct, especially in view of the conflict of all the evidence introduced on the trial before the jury.

We reach the same conclusion also upon the question of contributory negligence of the plaintiff. An accident seldom occurs which, in some aspect or view, is not in part due to the negligence of both parties affected. In this instance, there was in some degree negligence on plaintiff's part. The duty imposed by law on pedestrians required him to exer-

cise some care and caution for his own safety. But was his negligence, [603] if any appears, such as to preclude recovery? We answer that question also in the negative, as did the jury. In its view, the negligence attributable to defendant was the proximate cause of plaintiff's injury.

As stated, the care to be exercised by pedestrians using the highways varies with the circumstances of each particular case. The mere fact of negligence will not excuse the infliction of an injury, where by due care and caution the injury may be avoided by the one inflicting it. One may negligently place himself in a situation where danger may reasonably seem imminent; yet if injury is avoidable by another through the exercise of reasonable care, the carelessness of the person affected does not excuse the infliction of an injury. *Norfolk, etc. R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310; *Dauids on Motor Vehicles*, § 118; *Green v. Los Angeles Terminal R. Co.* 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408; *Riedel v. Wheeling Traction Co.* 69 W. Va. 18, 71 S. E. 174; *Chesapeake, etc. R. Co. v. Corbin*, 110 Va. 700, 67 S. E. 179.

A person in a public highway may rely upon the exercise of reasonable care on the part of drivers of vehicles to avoid injury. A failure to anticipate the omission of such care does not render him negligent. *Caesar v. Fifth Ave. Coach Co.* 45 Misc. 331, 97 N. Y. S. 359; *Hayward v. North Jersey St. R. Co.* 74 N. J. L. 678, 65 Atl. 737, 8 L.R.A. (N.S.) 1062; *Kathmeyer v. Mehl*, 60 Atl. (N. J.) 40; *Hennessey v. Taylor*, 189 Mass. 583, 4 Ann. Cas. 396, 76 N. E. 224, 3 L.R.A. (N.S.) 345; *Spina v. New York Transp. Co.* 96 N. Y. S. 270; *Buscher v. New York Transp. Co.* supra.

What may be deemed negligence by adults may not be chargeable as negligence by infants. In determining whether or not a plaintiff is guilty of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary care for them is that degree of care and prudence which children of the same age are accustomed to exercise under like circumstances. *Huddy on Automobiles*, § 81; *Berry on Automobiles*, § 161; *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025; *Lynch v. Shearer*, 83 Conn. 73, 75 Atl. 88; *Verdon v. Crescent Automobile Co.* 80 N. J. L. 199, 76 Atl. 346; *Marius v. Motor Delivery Co.* 146 App. Div. 608, 131 N. Y. S. 357. "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and [604] caution toward them must calculate upon this and take precaution accordingly." *Ficker v. Cleveland, etc. R. Co.* 7 Ohio N. P.

600; *Harriman v. Pittsburgh, etc. R. Co.* 45 Ohio St. 11, 27, 12 N. E. 451, 4 Am. St. Rep. 507. A pedestrian is not bound, as a matter of law, when using a public highway, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that upon his failure to do so, if he is injured, his own negligence must be conclusively presumed. *Hennessey v. Taylor*, 189 Mass. 583, 4 Ann. Cas. 396, 76 N. E. 224, 3 L.R.A. (N.S.) 345; *Gerhard v. Ford Motor Co.* 155 Mich. 618, 119 N. W. 904, 20 L.R.A. (N.S.) 232. Such negligence, to avail as a defense, must be proved by defendant, unless it sufficiently appears from plaintiff's testimony. *Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632, 32 L.R.A. (N.S.) 1177.

This action was twice tried, with the same result except as to amount, the first finding being more favorable to the defendant. Complaint is now made, however, that the case as submitted on the second trial, perhaps on both, was on the theory that plaintiff's injury permanently disabled him, when in fact, as defendant contends, its affect was only temporary. But, on whatever theory submitted, no substantial reason appears from the record to justify interference with the result of the trial for the reasons assigned. The plaintiff, according to the contention urged in his behalf, and to some degree sustained by the proof, is that he was violently knocked down and run over by the car; that his body and limbs were bruised; that thereafter he was unconscious for several hours; that his head was injured, and his memory impaired. With this proof before it, we cannot say the amount returned is unreasonable. On the contrary, it seems to us reasonable and just, even though the injury thus inflicted may not in fact result in permanent physical disability.

Nor do we find the instructions amenable to the criticism urged by counsel. At least, they do not so far incorrectly propound the law applicable to the facts appearing in the record as to warrant reversal. Of these, 2 and 3 are criticised because given on the theory of permanent injury to plaintiff. If so, there is in the record evidence tending to some extent to sustain that theory. Plaintiff's mother testified that his memory is impaired, that he is now forgetful; that "he complained [605] of his head, and did all last winter; he was kept out of school a great deal." "He has an earache, and dizziness in his head." "He vomited blood nearly all night," the night of the accident, and "from ten o'clock until four the next morning, and then it ran out of his mouth on the pillow." "I could not raise him up to give him anything to eat; if I raised him up he would start to vomit, and I had to keep him" in bed for a period of nine days after the accident. Instruction number 6 fairly presents

the law applicable to the facts appearing in the record.

Instructions numbers 1 and 3, proposed by defendant, were properly refused; the first, because it was misleading and would have told the jury that it could not find for the plaintiff unless it believed from a preponderance of the evidence "that the defendant was negligent in the very manner set out in the declaration." No such rigid, inflexible rule obtains. It is sufficient if plaintiff substantially proves the negligence averred. The court therefore properly modified the instruction accordingly. Number 3 as proposed was properly refused, because not in accord with the principles herein announced. As modified and given, it presented defendant's contentions in a light more favorable than was allowable under our view of the law applicable to the facts of the case.

Defendant's objection to the competency of the plaintiff and the two boys present when the accident occurred to testify is not tenable. Their statements show sufficient capacity to understand and comprehend the nature of an oath.

Finding no reversible error, we affirm the judgment.

**Affirmed.**

#### NOTE.

#### **Rights and Duties of Persons Driving Automobiles in Highways.**

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General Principles, 661.

As to Horse Drawing Vehicle:

Horse Frightened:

In General, 662.

Duty to Slow Down or Stop Automobile, 663.

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As to Pedestrian:

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As to Another Automobile, 670.

As to Passenger on Street Car, 673.

As to Conductor on Street Car, 674.

As to Bicycle, 675.

As to Motorcycle, 676.

#### *Introductory.*

It is intended in this note to discuss the recent cases passing on the rights and duties of persons driving automobiles in highways. The earlier cases are collated in the notes to *House v. Cramer*, 13 Ann. Cas. 461; *Tudor v. Bowen*, 21 Ann. Cas. 646; and *Christy v. Elliott*, 108 Am. St. Rep. 196.

#### *General Principles.*

An automobile is now a generally recognized means of conveyance. As such its operator stands on equal ground with the drivers of other conveyances with respect to the right to enjoy the use of the highway. He is, also, charged with the same degree of care and caution and regard for the rights of others in its use. *Reaves v. Maybank* (Ala.) 69 So. 137; *Smiley v. East St. Louis, etc. R. Co.* 256 Ill. 482, 100 N. E. 157; *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Smith v. Hersh*, 161 Ill. App. 83; *Kerchner v. Davis*, 183 Ill. App. 600; *Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128; *Riley v. Fisher* (Tex.) 146 S. W. 581. See also *Brown v. Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Crawford v. Elhinney*, 171 Ia. 606, 154 N. W. 310. Thus in *Smith v. Hersh*, supra, the court said: "Automobiles are lawful means of conveyance and their use is being constantly increased everywhere. They have equal rights upon the highway with horses but it is the duty of those using them to take into account the unusual appearance of the machine, its noise, its new use in the vicinity, its tendency to frighten horses and all other pertinent considerations, and to use them with that reasonable degree of care which under all the circumstances ordinary prudence and care for the safety of others suggest." And in *Reaves v. Maybank* (Ala.) 69 So. 137, it was said: "The automobile being a convenient, appropriate, and recognized instrument of conveyance and transportation, the public ways are open to its proper use, just as they are open to the proper use of other appropriate and recognized means of conveyance. While the proprietor of the automobile is entitled to drive or to have it driven over the thoroughfares of the state, the law exacts of the operator of the machine in a public way a prudent and careful regard for the rights of others who may be or who are lawfully using the public way. From the common right of use of the public ways, the automobile is not excluded; but, in the enjoyment of that right, prudence and care is exacted of the operator of such machines." So in *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, the court said: "The mere fact that automobiles are run by motor power and may be operated at a dangerous and high rate of speed gives them no superior rights on the highway over other vehicles, any more so than would the fact that one is driving a race horse give such driver superior rights on the highway over his less fortunate neighbor who is pursuing his journey behind a slower horse. Highways are established and maintained at public expense for the mutual benefit of all, and all persons have a right to use them, subject to the duty which the law imposes upon them that they shall at

all times exercise ordinary care and caution for their own safety and also for the safety of all others who are traveling thereon in the exercise of their lawful rights." Likewise in *Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128, it was said: "The automobile furnishes an improved method of travel. It is to be welcomed as a saver of time and a protection to man's favorite domestic animal, the horse, against long drives. It is said to be in use in all civilized countries, and it has come to stay. We are told that there are 750,000 automobiles in use in the United States alone. The law therefore does not denounce the use of an automobile on a public highway, and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln." And in *Kerchner v. Davis*, 183 Ill. App. 600, the court said: "Automobiles have no greater right in the streets than other vehicles. Pedestrians and automobile drivers have equal rights in the use of the streets. There is a clear distinction between the requirements where one approaches a place of known danger like a railroad crossing and where one simply attempts to cross a street where automobiles and other vehicles may run. The rails hold cars to a particular line. Not so in the case of automobiles. The driver selects a track and directs the course of an automobile the same as a driver of a team and wagon. The weight and power of the automobiles together with the reckless and unskilled driving so prevalent require the utmost stringency of the law to check the increasing casualties that are taking place."

But in *Love v. Worcester Consol. St. R. Co.* 213 Mass. 137, 99 N. E. 960, the court said that an automobile not registered in the name of its owner was unlawfully on the highway, and the sole duty owing to its driver was to abstain from injuring him by wantonness or recklessness. See in this connection the note to *Atlantic Coast Line R. Co. v. Weir*, Ann. Cas. 1914A 126.

In *Burton v. Nicholson* [1909] 1 K. B. (Eng.) 397, 78 L. J. K. B. 295, 100 L. T. N. S. 344; 73 J. P. 107; 7 L. G. R. 535; 25 Times L. Rep. 216, it appeared that an order provided that a person driving a motor car on a highway should "when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same." It was held that a tramcar was a carriage within the meaning of the order and that a motor car must pass it on the right or off side.

In *State v. Buchanan*, 32 R. I. 400, 79 Atl. 1114, it appeared that a statute prohibited persons from operating motor vehicles in any event on any public highway, where the territory was closely built up, at a rate of speed greater than 15 miles per hour. Sustaining a conviction of the defendant for operating

a motor vehicle at an excessive speed it was held that notwithstanding the fact that care was exercised by the operator to have his machine under control, any excess of speed, however slight, constituted an infraction of the statute.

In *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441, the court said that since operators of automobiles have the right to use the highways in common with other persons otherwise lawfully using them, they are liable only for the consequences of negligence in respect to the enjoyment of the common right stated.

In several cases the court has said that an automobile is not a nuisance in itself. *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80; *Cumberland Telephone, etc. Co. v. Burns*, 1 Tenn. Civ. App. 148; *Riley v. Fisher* (Tex.) 146 S. W. 581.

### *As to Horse Drawing Vehicle.*

#### **HORSE FRIGHTENED.**

##### *In General.*

The mere fact that a horse takes fright at an automobile, with resulting damage, will not entitle the owner of the horse to recover. *Walls v. Windsor* (Del.) 92 Atl. 989; *Turner v. Bennett*, 161 Ia. 379, 142 N. W. 999; *Shelton v. Hunter*, 162 Ky. 531, 172 S. W. 950. Thus in *Walls v. Windsor*, supra, it was held that where a person drives his automobile in a careful and cautious manner, and does not know, and in the exercise of due care, cannot ascertain, that his automobile is causing fright to a horse, or if the horse does not become frightened until after the automobile has passed, there is no liability on the part of the automobile owner.

In *Staley v. Forrest*, 157 Ia. 188, 138 N. W. 441, it appeared that the defendant operated his automobile at an unreasonable and dangerous rate of speed on a city street. On approaching the plaintiff who was driving a horse and buggy from the opposite direction, the horse became frightened, upset the buggy and threw the plaintiff out. It was held that the operator of the car was guilty of negligence. And in *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80, the court said that the owner of an automobile is required to take notice that such machines are liable to scare horses along the highway and that a proper lookout should be kept in order to avoid injury to others.

In *Zellmer v. McTague*, 170 Ia. 534, 153 N. W. 77, the statute under which the defendant was held by the trial court to be liable provided that when the driver of a vehicle should approach another from the rear on a highway and desires to pass, it should be the duty of the operator of the vehicle ahead to give up half of the beaten path by turning to the

right, and that the vehicle approaching from the rear should turn to the left and should not return to the road within less than thirty feet of the vehicle passed. It appeared that the driver of the plaintiff's team on hearing the approach of a car drove entirely outside the beaten path and there either stopped or slowed down the team to allow the machine to go by and that the team became frightened and ran away. Reversing the judgment the court said: "The driver of plaintiff's team had driven entirely out of the beaten track into the highway, and was waiting for defendant to pass with his machine. At no time did defendant drive out of the beaten path, and at no time, according to the testimony, did he return to the road in front of plaintiff's team. The statute to which reference was made in the instructions had no application to the case, and it should not have been given." In *Carter v. Walker* (Tex.) 165 S. W. 483, wherein it appeared that a man, unreasonably frightened at an approaching automobile, jerked his horse suddenly causing it to fall, the court said that the facts did not show misconduct on the part of the defendant justifying a recovery. In *Reed v. Snyder*, 38 Pa. Super Ct. 421, it appeared that in proceeding to pass a frightened horse, after having stopped, a volume of vapor spurted from a tube under and against the horse causing it to become unmanageable, overturning the buggy and injuring a person. Holding that the question of negligence was for the jury, the court said: "Each of the parties had rights on that highway, and each was required to exercise toward the other duty of reasonable care according to the circumstances, and each had a right to expect that such reasonable care would be exercised by the other, and to rely on this in determining his own manner of using the road. The defendants must necessarily have seen the nervous horse, the man at its head, the mother and child in the buggy, and must certainly have known that when the machine over which they had full control would be started by their direction, the vapor would be ejected in the direction of the horse, that a noise would be produced with an accompanying odor of gasoline. A jury would be warranted in concluding that they had full control of their machine, and should have known the hazard following their progress, which could have been relieved of all possible danger by remaining stationary for but a moment. The fact that the plaintiff did not ask them to remain stationary does not necessarily imply an invitation to proceed; it might as reasonably have been his expectation that they would allow him to take his horse out of that place of danger. Whether their act was the direct cause of the uncontrollable fright of the horse, and whether they should have anticipated such a re-

sult was purely a question of fact and not one of law."

#### *Duty to Slow down or Stop Automobile.*

When the driver of an automobile sees or in the exercise of ordinary care should see that a horse which he is approaching, whether he is going in the same or the opposite direction, is frightened by the machine, he should slow down or bring it to a full stop if this can be done with due regard for the safety of its occupants, and if the exercise of ordinary care requires it, the motor should be stopped. The failure to do either of these things, when ordinary care requires that they should be done, renders the driver liable for damages resulting therefrom. *McCray v. Sharpe*, 188 Ala. 375, 66 So. 441; *Stout v. Taylor*, 168 Ill. App. 410; *Fitzsimmons v. Snyder*, 181 Ill. App. 70; *Arrington v. Horner*, 88 Kan. 817, 129 Pac. 1159; *Nelson v. Halland*, 127 Minn. 188, 149 N. W. 194; *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275; *Fields v. Siever*, 184 Mo. App. 685, 171 S. W. 610; *Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128; *Union Transfer, etc. Co. v. Westcott Exp. Co.* 79 Misc. 408, 140 N. Y. S. 98; *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626; *Cumberland Telephone, etc. Co. v. Burns*, 1 Tenn. Civ. App. 148; *Marshall v. Gowans*, 20 Ont. W. Rep. 38, 3 Ont. W. N. 69; *Stewart v. Steele*, 5 Sask. L. Rep. 358, 22 Western L. Rep. 6, 6 Dominion L. Rep. 1. See also *Walls v. Windsor (Del.)* 92 Atl. 989; *Turner v. Bennett*, 161 Ia. 379, 142 N. W. 999; *Stern v. Issitt*, 89 Kan. 357, 131 Pac. 551; *Ellsworth v. Jarvis*, 92 Kan. 895, 141 Pac. 1135; *Riley v. Fisher (Tex.)* 146 S. W. 581. Thus in *Stout v. Taylor*, 168 Ill. App. 410, it was said that when it appears to the driver of an automobile that a horse is about to become frightened, he has no discretion as to what he shall do; it is his duty to stop the automobile. And in *Nelson v. Halland*, 127 Minn. 188, 149 N. W. 194, the court said that it is the duty of the operator of an automobile to exercise reasonable care to avoid frightening horses met with on the highway, and if necessary he must slow down or stop his automobile and that this must be done whether the driver of a team signals to slow down or not. So in *Fitzsimmons v. Snyder*, 181 Ill. App. 70, the court said that it was negligence on the part of the operator of a motor car to drive through a herd of horses, confined in a lane, at a speed of from 18 to 20 miles an hour, and sustained a judgment in favor of the owner for the death of one of them caused by its running into a wire fence in its fright.

In *Cumberland Telephone, etc. Co. v. Burns*, 1 Tenn. Civ. App. 148, the court said that while it is the duty of the operator to stop

when he discovers that a horse is frightened, still the rule seems to be that if the animal shows fright at or about the time the machine is opposite him, it is left to the good judgment of the operator under the circumstances to determine whether it is best to stop or move on.

In *Ellsworth v. Jarvis*, 92 Kan. 895, 141 Pac. 1135, wherein it appeared that the driver of an automobile brought his machine alongside restive horses and stopped, the court said that a jury might well conclude that he was not warranted in doing so, and that he might have anticipated that after he had stopped abreast of the horses and did not stop his engine they would become panic stricken. In *Smith v. Hersh*, 161 Ill. App. 83, the statute involved provided as follows: "Whenever it shall appear that any horse driven or ridden by any person upon any . . . highway is about to become frightened by the approach of any such motor vehicle it shall be the duty of the person driving or conducting such motor vehicle to come to a full stop until such horse or horses shall have passed." The following facts appeared: "Appellee's intestate in company with her husband was traveling on the highway in a covered buggy with side curtains, the back curtain was rolled up. The husband was driving two horses about five years old. The horses were not accustomed to the sight of motor vehicles, never having seen one before this occasion. Appellant driving an automobile came up behind the buggy of the intestate traveling in the same direction. The highway at that point was about forty feet wide with ditches on each side making the traveled portion about thirty-five feet wide. As appellant came near the buggy he sounded the horn on the car. He and his companion who testified, both say the horn was sounded about a half quarter of a mile from the buggy and again twice before coming up with it. When the car came up it attempted to pass around the buggy when the horses took fright and ran, overturning the buggy and throwing both occupants out." Reversing a judgment for the plaintiff the court said that the statute quoted was intended to apply to cases where motor vehicles meet horses in the highway and not to cases where they pass horses going in the same direction. In *Messer v. Bruening*, 25 N. D. 599, 142 N. W. 158, 48 L.R.A. (N.S.) 945, under a statute requiring automobiles to be stopped on the signal of the driver of a horse, it was held that a signal to the driver of an automobile to stop must be given by the driver of the horse. The court said: "The driver is named as the responsible party required to signal, and whose signal is required to be noticed by the other driver; and thus by necessary implication the right of any other person, occupant, or bystander to

give the statutory signal is excluded. And this is so for good reasons. The plaintiff is the person who was responsible for the manner in which this horse was controlled. It is his negligence or contributory negligence for which he is held responsible. It is his horse. As an owner he is presumed, in law and in fact, to know it and its characteristics, habits, and disposition, gentleness or viciousness, better than any other person, and sense more fully and quickly than any occupant of the rig an actual dangerous situation. He knows, or is presumed to know when he has control of the animal. He, as a driver, is required to exercise care and diligence in driving at this as in all similar situations. And he, upon whose acts safety depends, it not depending upon any occupant of the rig, is charged with knowledge of the law and the duty to act with reference thereto. He must know that the automobile driver must look to him, as the person in control of his part of the situation, as the proper person to and charged with the duty of giving the warning signal, and until such warning is given by signal, shouting or otherwise, the automobile driver had the right to assume it was unnecessary to stop, so long as he was using due care and ordinary caution not to frighten the horse in passing upon the meeting of such vehicles. In other words, until the driver of the horse shall give the statutory signal, it is not given in fact or law, even though an occupant or occupants of the horse-drawn vehicle may, on their own initiative, signal the automobile to stop." In *Sterner v. Iseitt*, 89 Kan. 357, 131 Pac. 551, it was held that the expression "look out" used by the driver of a horse to an automobile would not be ordinarily understood as a request to stop. The court said: "It does not appear that these words have any local meaning, nor is there any claim that there was any accompanying motion or signal which might indicate a meaning other than that ordinarily applied to them."

In the case of *Rex v. Hydman*, 17 Can. Crim. Cas. 469, a criminal action, it was held that it was the duty of an automobile driver to stop his car on signal from the driver of a carriage approaching.

#### COLLISION.

##### *In General.*

The driver of an automobile must use the highway with due regard for the rights of the driver of a horse and vehicle, and, broadly stated, he may drive any place on the highway except when about to meet another vehicle when he must turn to the right of the center of the highway. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319; *Giles v.*



Ternes, 93 Kan. 140, 143 Pac. 491; Ternes v. Giles, 93 Kan. 436, 144 Pac. 1014; Haden v. McColly, 166 Mo. App. 675, 150 S. W. 1132. In *Stohlman v. Martin*, supra, it was held that, while under the law a person operating a motor vehicle must keep to the right of the street, the fact that he did not do so was not conclusive negligence in all cases. The court said: "He might for a sufficient reason be compelled to drive on the left of the center of the road or street, and do so in such manner as to leave to approaching vehicles, pedestrians, or animals ample opportunity to pass with perfect safety to themselves, in which case, if damage occurred by collision with his vehicle, the question as to whose negligence was directly responsible therefor would depend for its solution upon the other circumstances attending the accident. In brief, and in other words, the fact that he was driving over the highway on the left of the center of the roadway, where injury to another had resulted therefrom, constitute prima facie evidence of negligence, but it would amount to no more than that, and its evidentiary effect might properly be overcome or dispelled by other evidence." And in *Haden v. McColly*, 166 Mo. App. 675, 150 S. W. 1132, the court said that if the plaintiff was so situated that he could not turn from his course in the center of the highway because other vehicles near prevented him, and the collision occurred solely by reason of the defendant turning his vehicle suddenly into the center of the road, it was no defense to the defendant to say that the plaintiff had no cause of action because he was occupying the center of the road.

In *Hamilton v. Larrimer*, 183 Ind. 429, 105 N. E. 43, there was involved a city ordinance requiring vehicles to keep to the right and allow other vehicles coming from behind to pass on the left. It appeared that a motor truck of the appellant in endeavoring to pass to the right of a sprinkling cart caused injury to the appellee. The court said: "The ordinance in question made no exception as to a sprinkling cart, and the court was justified in ruling that the motor truck was required to go to the left, the same as it would have to go to the left of any vehicle it was passing."

A collision with a horse and carriage caused by the excessive speed of the operator of a motor vehicle renders him liable for the damages therefrom. *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Rupp v. Keebler*, 175 Ill. App. 619. See also *Anthony v. Kiefer*, 96 Kan. 194, 150 Pac. 524. Thus in *Scragg v. Sallee*, supra, it was held that the driver of an automobile, who because of excessive speed and because of driving on the wrong side of the street, collided with a wagon, whose driver was free from negligence, was

responsible for the consequent damages. And in *Rupp v. Keebler*, 175 Ill. App. 619, it appeared that a motorist was driving at a rate of 15 miles an hour with an unobstructed view of an approaching loaded wagon and collided therewith at a crossing. But for continuing at that speed he could have stopped his car easily before the collision. Affirming a judgment for the plaintiff the court said: "Before reaching the crossing he could plainly see that the horse had already entered upon it and was continuing over it in a trot, keeping to the west and proper side of the street, and thus on the opposite side from him. Under such circumstances he should have kept his automobile under control. He was as much bound to look out for those crossing the street he was on as they were bound to look out for him, and the law of the road does not require that wagons simply because they are slower vehicles shall be stopped to let automobiles pass with undiminished speed. The first to reach the crossing in the exercise of ordinary care should have the right of way, and the others should approach with sufficient care to permit the exercise of such right without danger of collision. The driver of the wagon in thus continuing over the crossing he had fairly entered upon, before plaintiff in error, approaching in plain view of him, had reached it, was not guilty of contributory negligence, and the collision ensuing under such circumstances was properly attributed to the negligent driving of the automobile."

In *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718, wherein it appeared that a taxicab collided with a team, the court said in affirming a judgment for the owner of the team that in order to recover damages in such a case the collision must have been proximately caused by negligence on the part of the driver of the taxicab, and through no fault of the other person.

In *King v. Brenham Automobile Co. (Tex.)* 145 S. W. 278, it was held that, though the plaintiff was guilty of contributory negligence, the defendant, who was operating his machine recklessly and who discovered the perilous position of plaintiff in time to prevent injury, was liable in spite of the contributory negligence. The court said: "A man does not become an outlaw, with the brand of Cain upon him, and whom 'every one that findeth him may slay,' because he disregards his safety and puts himself in the way of danger. The persons and lives of human beings are held in too high esteem by the laws of every civilized community to permit automobiles and other vehicles to be recklessly and wilfully run over them and mutilate or destroy them, and then permit the guilty parties to escape punishment by the plea that the victim got in the way of the vehicle."

In *Pease v. Gardner*, 113 Me. 264, 93 Atl. 560, wherein it appeared that a chauffeur backed an automobile into a team, of whose presence he was not aware, but took no sufficient means to ascertain, it was held that his conduct was clearly such as to render him liable. The court said: "To suddenly back an automobile in a public street of a village without first ascertaining or making reasonable efforts to ascertain whether another vehicle was standing within a short distance behind, and without giving any preliminary warning or signal, save perhaps the cut-out, which sounded almost at the same instant that the team was struck, cannot be deemed the act of a reasonably prudent man. The mere statement of the case proves negligence on the part of the chauffeur."

In *Wells Fargo & Co. Express v. Keeler* (Tex.) 173 S. W. 926, wherein it appeared that damage was done to a delivery automobile of the plaintiff as the result of the defendant's horse backing into it, the court held that the fact that the conduct of the horse, was the result of its inherent nature, would not relieve the defendant of liability.

#### *Rear-end Collision.*

In several cases the owner of a vehicle drawn by a horse has recovered for injuries to himself or his property from being struck by an automobile from the rear. *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Blado v. Draper*, 89 Neb. 787, 132 N. W. 410; *Judge v. Wallen*, 98 Neb. 154, 152 N. W. 318, L.R.A. 1915E 436; *Schultz v. Morrison*, 91 Misc. 248, 154 N. Y. S. 257, *judgment affirmed* 156 N. Y. S. 1144.

In *Furtado v. Bird*, 26 Cal. App. 152, 146 Pac. 58, it appeared that the plaintiff, who was "hard of hearing," was riding a horse along the highway. The defendant driving a large automobile approached from the rear and overtook him. A collision occurred and the plaintiff was thrown from his horse, causing his arm to be broken. Affirming a judgment for the plaintiff the court said: "Appellant contends that plaintiff was guilty of contributing to his injury because being hard of hearing it was his duty to look back as well as forward and that if he had been doing so this accident would not have occurred. We do not think it was the plaintiff's duty to be constantly looking back. Both parties had an equal right to the use of the road but defendant was in the better position to avoid a collision and when he observed that plaintiff appeared not to hear the horn it was defendant's duty to slow down and even to stop his car if necessary to avoid running against plaintiff's horse. Furthermore, he had ample room to turn his car to the right and could thus have avoided the accident. He says he

did this but that the horse backed up against the car after it was stopped and caused plaintiff to fall off and the horse to go down also. The jury evidently did not believe this and we cannot say they were unauthorized to reject defendant's story of the accident." In substantial accord is *Traeger v. Wasson*, 163 Ill. App. 572.

In *Pietsch v. McCarthy*, 159 Wis. 251, 150 N. W. 482, it was held that an owner could not recover damages caused to his automobile by running into the rear of a wagon. The court said: "The plaintiff testified that he was proceeding at a rate of speed of from ten to thirteen miles an hour; that his vision was so dazzled by headlights of automobiles coming in the opposite direction that he could not see the wagon ahead of him; and that in this situation he proceeded a distance of 100 feet without slackening his speed until he bumped into the wagon which he did not see until he struck it. It seems clear under these facts that he was guilty of contributory negligence as a matter of law."

#### *As to Pedestrian.*

##### IN GENERAL.

A pedestrian and the operator of an automobile have in general equal and correlative rights in the street, and each is held to the exercise of ordinary care and entitled to exact the like measure of prudence from the other. *Lane v. Sargent*, 217 Fed. 237, 133 C. C. A. 231; *Brown v. Brashear*, 22 Cal. App. 133, 133 Pac. 505; *Brown v. Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Goldblatt v. Brocklebank*, 166 Ill. App. 315; *Winner v. Linton*, 120 Md. 276, 87 Atl. 674; *Lynch v. Fisk Rubber Co.* 209 Mass. 16, 95 N. E. 400; *Patrick v. Deziel*, 223 Mass. 505, 112 N. E. 223; *Caradine v. Forad* (Mo.) 187 S. W. 285; *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L.R.A. (N.S.) 1178; *Quinn v. Ross Motor Car Co.* 157 Wis. 543, 147 N. W. 1000. And see the reported case. In *Aiken v. Metcalf* (Vt.) 97 Atl. 669, the court said that greater caution was necessary on the part of the operator than the pedestrian.

Ordinary or reasonable care must be exercised by the operator. *Reaves v. Maybrook* (Ala.) 69 So. 137; *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36; *Kessler v. Washburn*, 167 Ill. App. 532; *J. F. Darmody Co. v. Reed* (Ind.) 111 N. E. 317; *Crawford v. McElhinney*, 171 Ia. 606, 154 N. W. 310; *Brown v. Des Moines Steam Bottling Works* (Ia.) 156 N. W. 829; *Com. v. Horsfall*, 213 Mass. 232, Ann. Cas. 1914A 682, 100 N. E. 362; *Tuttle v. Briscoe Mfg. Co.* (Mich.) 155 N. W. 724; *Geise v. Mercer Bottling Co.* 87 N. J. L. 224, 94 Atl. 24; *Gnecco v. Pederson*, 154 N. Y. S. 12; *Marsh v. Boyden*, 33 R. I. 519, 82 Atl.

393, 40 L.R.A.(N.S.) 582; *Bartley v. Marino* (Tex.) 158 S. W. 1156; *Chase v. Seattle Taxicab, etc. Co.* 78 Wash. 537, 139 Pac. 499. Where the driver of a motor vehicle, because of excessive speed, careless driving or other negligent conduct, hits a pedestrian who is crossing a street there may be a recovery for injuries resulting therefrom. *Goldring v. White*, 63 Fla. 162, 58 So. 367; *Schumacher v. Meinrath*, 177 Ill. App. 530; *Jenkins v. Goodall*, 183 Ill. App. 633; *Kuchler v. Stafford*, 185 Ill. App. 199; *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592; *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675; *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450; *Hopfinger v. Young* (Mo.) 179 S. W. 747; *Lewis v. National Cash Register Co.* 84 N. J. L. 598, 87 Atl. 345; *Holmboe v. Morgan*, 69 Ore. 395, 138 Pac. 1084; *Curley v. Baldwin* (R. I.) 90 Atl. 1; *Prince v. Taylor* (Tex.) 171 S. W. 826; *Jaquith v. Worden*, 73 Wash. 349, 132 Pac. 33, 48 L.R.A.(N.S.) 827; *Franey v. Seattle Taxicab Co.* 80 Wash. 396, 141 Pac. 890; *Tooker v. Perkins*, 86 Wash. 567, 150 Pac. 1138. See also *Yarbrough v. Carter*, 179 Ala. 356, 60 So. 833; *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94; *Carpenter v. Campbell Automobile Co.* 159 Ia. 52, 140 N. W. 225; *Walker v. Rodriguez* (La.) 71 So. 499; *Huggon v. Whipple*, 214 Mass. 64, 100 N. E. 1087; *Roach v. Hinchcliff*, 214 Mass. 267, 101 N. E. 383 (pedestrian on sidewalk); *Griffin v. Taxi Service Co.* 217 Mass. 293, 104 N. E. 838; *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993; *Kurty v. Towrison*, 241 Pa. St. 425, 88 Atl. 656; *Coughlin v. Weeks*, 75 Wash. 588, 135 Pac. 649. But in the absence of a showing of negligence there can be no recovery. *Hyde v. Hubinger*, 87 Conn. 704, 87 Atl. 790; *Shaw v. Corrington*, 171 Ill. App. 232; *Carlin v. Clark*, 172 Ill. App. 240; *Havermarle v. Houck*, 122 Md. 82, 89 Atl. 314; *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456; *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633; *Paul v. Clark*, 161 App. Div. 456, 145 N. Y. S. 985; *Dudley v. Raymond*, 133 N. Y. S. 17; *Shott v. Korn*, 10 Ohio App. 458, 34 Ohio Cir. Ct. Rep. 260. See also *Sorrusca v. Hobson*, 155 N. Y. S. 364 (car started by children); *Barger v. Bissell* (Mich.) 154 N. W. 107 (negligence not presumed from striking child in street).

In *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450, the court said that it was negligence on the part of the operator of a motor vehicle to run his machine through a crowd of children at a speed of five or six miles per hour. And in *Hopfinger v. Young* (Mo.) 179 S. W. 747, it was held that the driver of an automobile was negligent in not seeing a child on roller skates and avoiding a collision. So in *Lewis v. National Cash Register*, 84

N. J. L. 598, 87 Atl. 345, the court said: "There was proof that the automobile was being propelled through a thickly populated public street at a high rate of speed and that the plaintiff, a child of seven years of age, who was then crossing the street, was run into and dragged a distance of about eight or ten feet." In *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592, the court said that the plaintiff was obliged to show only ordinary negligence on the part of the driver. In *Van Winckler v. Morris*, 46 Pa. Super. Ct. 142, wherein it appeared that a car skidded and injured a pedestrian on the sidewalk, the court said that the driver was negligent in driving too fast on a slippery pavement and the pedestrian could recover damages. In substantial accord is *McGettigan v. Quaker City Automobile Co.* 48 Pa. Super. Ct. 602. In *American Exp. Co. v. Terry*, 126 Md. 254, 94 Atl. 1026, it appeared that a driver left an automobile truck unattended in a street and it ran away. In endeavoring to stop it the plaintiff was injured. Affirming a judgment in his favor the court said: "If the driver failed to exercise due care, it cannot be doubted that he was guilty of negligence, and under the circumstances testified to by the plaintiff the jury may well have inferred that the driver Small had been careless in the management and control of the truck. The plaintiff's evidence was legally sufficient to raise a prima facie presumption of negligence, which the defendant was bound to rebut or overcome. The evidence precludes the theory that the truck was started by the intervening act of some third party, and had the machine been in good order and the current turned off and the brake properly applied, it is difficult to see how it could have been found running down the street in the manner described by the witnesses." In *Oakshott v. Powell*, 6 Alberta L. Rep. 178, 24 West. L. Rep. 654, 12 Dominion L. Rep. 148, the court said that swerving a car to keep from injuring one person would not excuse the driver from negligence in injuring another. Compare *Moir v. Hartt*, 189 Ill. App. 567 (skidding of car from sudden application of brakes to prevent accident). In *Crawford v. McElhinney*, 171 Ia. 606, 154 N. W. 310, the court said that if it was imprudent or dangerous to use a crossing then ordinary care would require an operator to stop the car or seek another crossing. And in *Com. v. Horsfall*, 213 Mass. 232, Ann. Cas. 1914A 682, 100 N. E. 362, the court said that "it would savor too much of refinement to hold that there is any practical inaccuracy in saying that one driving a high-powered automobile must exercise greater care toward others on a state highway than one plodding along a country road with an ox-team." In *Burger v. Taxicab Motor Co.* 66 Wash. 676, 120 Pac. 519, the court said that

an operator must use reasonable care not to injure a person working on a street. See to the same effect *Cochran v. Pavise*, 1 Tenn. Civ. App. 1. In *Brown v. Des Moines Steam Bottling Works (Ia.)* 156 N. W. 829, it was held that the operator of a heavy motor truck was guilty of negligence when his truck struck a frog on a track, running thereafter on the sidewalk where it struck the plaintiff. The court said: "It is a matter of common knowledge that the movements of these heavy, fast-moving vehicles upon the street are required to be kept under reasonable control, to avoid having their course diverted by the intervention of obstacles upon the street, and that if not held under control, a slight obstacle will so divert them and imperil the safety of those rightfully upon the street, that, when diverted, they become a menace to those in the vicinity of their course, a menace from which it is difficult sometimes to escape. Therefore it becomes the duty of one upon a public highway in a thickly populated part of the large city to exercise reasonable care to see that he has the instrumentality under control, and to so manage it that it will not unreasonably or unnecessarily imperil the safety of others upon the public highway."

It is the duty of an operator of an automobile to keep a sharp lookout in order to avoid injury to pedestrians. *Hartwig v. Knapwurst*, 178 Ill. App. 409; *Shields v. Fairchild*, 130 La. 648, 58 So. 497; *Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429; *Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880; *Clark v. General Motor Car Co.* 177 Mo. App. 623, 160 S. W. 576; *Eisenman v. Griffith*, 181 Mo. App. 183, 167 S. W. 1142; *Ginter v. O'Donoghue (Mo.)* 179 S. W. 732; *Smith v. Coon*, 89 Neb. 776, 132 N. W. 535; *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649. Thus in *Shields v. Fairchild*, supra, the court said: "To look too late to avert an accident is not to look at all. The conductor of the street car following saw the plaintiff and the girl get off the car and cross the neutral ground. The automobile was running along by the side of the car in the rear, yet the chauffeur saw nothing but the stop of the car in front. The rain and wind increased the danger of collisions with pedestrians at street crossings, and the situation demanded more than ordinary vigilance on the part of the operators of automobiles." To the same effect is *Hartwig v. Knapwurst*, 178 Ill. App. 409, wherein the court said: "There was nothing to prevent the driver from seeing them, and the conditions of weather against which pedestrians had to contend were such as to require greater vigilance on his part in approaching where pedestrians had the right and might be expected to cross." So in *Toronto Gen. Trust Corp. v. Dunn*, 20 Manitoba 412, 15 West. L. Rep. 314, the court

allowed a recovery where it appeared that the lights on a car were not strong enough to enable the operator to see pedestrians who were walking. And in *Holderman v. Witmer*, 166 Ia. 406, 147 N. W. 926, the court said that the operator of a car in attempting to pass over a crossing which was necessarily frequented by pedestrians was confronted with the duty to look, which duty "implied the duty to see what was in plain view, unless some reasonable explanation was presented for a failure to see." In *Porter v. Hetherington*, 172 Mo. App. 502, 158 S. W. 469, the court said that the driver of a car must stop for pedestrians if it is necessary to do so to avoid injuring them.

If the street is crowded the driver of an automobile must use care proportioned to the possibility of accident. *Ratliff v. Sperrth*, 95 Kan. 823, 149 Pac. 740; *Ostermeier v. Kuigman-St. Louis Impl. Co.* 255 Mo. 128, 164 S. W. 218; *Aronson v. Ricker*, 185 Mo. App. 528, 172 S. W. 641; *Moy Quon v. M. Furuya Co.* 81 Wash. 526, 143 Pac. 99. See also *Com. v. Hoskins*, 23 Pa. Dist. Ct. 528.

If the blindness or other incapacity of a pedestrian is discoverable by the use of reasonable care, greater diligence is required to avoid injury to him than in the case of a person more able to care for himself. *Brown v. Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44. And see *McLaughlin v. Griffin*, 155 Iowa 302, 135 N. W. 1107.

Violation of a statute or ordinance regulating the operation of automobiles is negligence per se, rendering the violator liable to any person injured as a proximate result thereof. *Grier v. Samuel*, 4 Boyce (Del.) 74, 85 Atl. 759; *Benson v. Larson (Minn.)* 158 N. W. 426; *Clark v. Wright*, 167 N. Car. 646, 83 S. E. 775; *Whaley v. Ostendorff*, 90 S. Car. 281, 73 S. E. 186.

In *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876, the court said: "A person may lawfully use what is to him the left-hand side of the road, if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger. But a person upon the wrong side of the way must always exercise a care commensurate with his position. This is usually a higher degree of care than that required of him while on the correct side of the way." In *Winckowski v. Dodge*, 183 Mich. 303, 149 N. W. 1061, it was held to be the duty of each driver to look out for pedestrians suddenly appearing from behind the other vehicles when two vehicles are passing. The court said: "If facts were shown warranting the driver in passing to the left, it then became his duty to observe that degree of caution and proceed with care at such reduced speed as was commensurate with the unusual conditions." In *Forgy v. Rutledge*,

167 Ky. 182, 180 S. W. 90 it was said that the fact that the speed of an automobile was within the limit fixed by law did not necessarily relieve the operator from the imputation of negligence.

## CONTRIBUTORY NEGLIGENCE.

If the failure of a pedestrian to use reason and ordinary care contributes to cause an accident wherein he is injured by an automobile, he cannot recover. *Barbour v. Shebor*, 177 Ala. 304, 58 So. 276; *Carlin v. Clark*, 172 Ill. App. 240; *Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369; *Cole Motor Car Co. v. Ludorff* (Ind.) 111 N. E. 447; *McLaughlin v. Griffin*, 155 Ia. 302, 135 N. W. 1107 (blir); *Johnson v. Kansas City Home Tel. Co.* 87 Kan. 441, 124 Pac. 528; *Shipelis v. Cody*, 214 Mass. 452, 101 N. E. 1071; *Tolmie v. Woodward Taxicab Co.* 178 Mich. 426, 144 N. W. 855; *Fox v. Great Atlantic, etc. Tea Co.* 84 N. J. L. 726, 87 Atl. 339; *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A. (N.S.) 487, *affirming* judgment 137 App. Div. 529, 121 N. Y. S. 1079; *Marius v. Motor Delivery Co.* 146 App. Div. 608, 131 N. Y. S. 357; *Jessen v. J. L. Kesner Co.* 159 App. Div. 898, 144 N. Y. S. 407; *Citizens' Motor Car Co. v. Hamilton*, 32 Ohio Cir. Ct. Rep. 407, *judgment affirmed* 83 Ohio St. 450, 94 N. E. 1103; *Lewis v. Seattle Taxicab Co.* 72 Wash. 320, 130 Pac. 341; *Laughlin v. Seattle Taxicab, etc. Co.* 84 Wash. 342, 146 Pac. 847. See also *Braud v. New Orleans Taxa Cab Co.* 129 La. 781, 56 So. 885; *Moran v. Smith*, 114 Me. 55, 95 Atl. 272; *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912; *Osgood v. Maxwell* (N. H.) 95 Atl. 954; *Conrad v. Green* (N. J.) 94 Atl. 390; *Larmer v. New York Transp. Co.* 149 App. Div. 193, 133 N. Y. S. 743; *Willis v. Harby*, 159 App. Div. 94, 144 N. Y. S. 154; *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983; *Daugherty v. Metropolitan Motor Car Co.* 85 Wash. 105, 147 Pac. 655. Thus in *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912, it was held that a boy was guilty of contributory negligence in jumping off of a wagon backwards and running in front of a machine. And in *Osgood v. Maxwell* (N. H.) 95 Atl. 954, the court said that a boy sliding down a hill in such manner that a collision could not be prevented, contributed to the collision and could not recover. So in *Todesco v. Maas*, 8 Alberta L. Rep. 187, 33 Dominion L. Rep. 417, 7 West. Wkly. Rep. 1373, the court said that a pedestrian leaving a sidewalk to cross a street and halting to let a street car pass was guilty of negligence in stepping back to the sidewalk and had no right of recovery. *Compare* *Schneider v. Locomobile Co.* 83 Misc. 3, 144 N. Y. S. 311. In *Ludke v. Burck*, 160 Wis. 440, 152 N. W. 190, L.R.A.1915D 968, the court said that contributory negligence might

be a bar to one's recovery even though the automobile in question was operated over the speed limit of an ordinance.

In *Fitzsimons v. Isman*, 166 App. Div. 262, 151 N. Y. S. 552, wherein it appeared that a police officer recovered damages for being hit by an automobile, the court said that such an officer was required to use reasonable care though not as much as was necessary in the case of a pedestrian.

It is not necessary for a pedestrian in using a highway to look and listen for the approach of an automobile. *Barbour v. Shebor*, 177 Ala. 304, 58 So. 276; *Bachelder v. Morgan*, 179 Ala. 339, Ann. Cas. 1915C 888, 60 So. 815; *Dozier v. Woods*, 190 Ala. 279, 67 So. 283; *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36; *Harker v. Gruhl* (Ind.) 111 N. E. 457; *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A. (N.S.) 487, *affirming* judgment 137 App. Div. 529, 121 N. Y. S. 1079; *Jessen v. J. L. Kesner Co.* 159 App. Div. 898, 144 N. Y. S. 407; *McNabb v. Gannaway*, 3 Tenn. Civ. App. 79; *Vesper v. Lavender* (Tex.) 149 S. W. 377; *Aiken v. Metcalf* (Vt.) 97 Atl. 669. *Compare* *Lorah v. Rinehart*, 243 Pa. St. 231, 89 Atl. 967. Thus in *Barbour v. Shebor*, 177 Ala. 304, 58 So. 276, wherein it appeared that a pedestrian was injured by being struck by the automobile of the defendant, it was held that the "look and listen" law, as applicable to railroads, could not be applied to automobiles on streets, the court said: "There is no warrant in law for such application. A railroad acquires a right of way for the express purpose of running trains at a rapid rate of speed over the same, and travelers on the public highways, knowing this fact, are required to observe due caution in approaching the tracks. Even as to street railroads, the tracks mark the line of danger, so that the pedestrian knows just where to look and how to avoid the point of peril; but automobiles have no special privileges in the streets, more than other vehicles. They simply travel upon the streets with the same privileges and obligations as other vehicles, and the mere fact that they can run faster than other vehicles does not give them any right to run at a dangerous rate of speed, any more than the fact that one man drives a race horse gives him a right to travel the streets at a higher rate of speed than another who drives a plug. The simple rule is that drivers on the streets and pedestrians, each recognizing the rights of the other, are required to exercise reasonable care." In *Mosso v. E. H. Stanton Co.* 75 Wash. 220, 134 Pac. 941, L.R.A.1916A 943, the court said that it is not necessary for a pedestrian to look continually for the approach of a motor vehicle. See to the same effect *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531. In *Raymond v. Hill*, 168 Cal. 473, 143 Pac. 743, the court

said that pedestrians are under no legal obligation to look back to see whether there is danger of being struck from behind by an automobile. See to the same effect *McNabb v. Gannaway*, 3 Tenn. Civ. App. 79. In *Ginter v. O'Donoghue* (Mo.) 179 S. W. 732, the court said that the failure of a pedestrian continually to look behind for approaching cars was not negligence per se.

However in *Davis v. John Breuner Co.* 167 Cal. 683, 140 Pac. 586, it was held that the plaintiff, who was injured by the defendant's automobile while crossing a street, was guilty of contributory negligence barring a recovery. The court said: "It is the duty of a foot passenger to look both ways before starting to cross a street, particularly, when, as in this instance, the street over which he intends to pass is a busy thoroughfare in the heart of the business district of a great city."

A pedestrian has the right to assume that the operator of an automobile will not run his machine at an unlawful speed or otherwise violate any law or ordinance. *Kessler v. Washburn*, 157 Ill. App. 532; *Trzietatowski v. Evening American Pub. Co.* 185 Ill. App. 451; *Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369; *Cole Motor Car Co. v. Ludorff* (Ind.) 111 N. E. 447; *Aiken v. Metcalf* (Vt.) 97 Atl. 669; *Franev v. Seattle Taxicab Co.* 80 Wash. 396, 141 Pac. 890; *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649. Thus in *Cole Motor Car Co. v. Ludorff*, supra, the court said: "In the absence of knowledge to the contrary, one who is lawfully using a public street has the right to presume that others using it in common with him will use ordinary care to avoid injuring him, and, in the absence of information or notice to the contrary, may presume that persons driving upon the street will not in so doing violate any ordinance or law, but will conform thereto." And in *Trzietatowski v. Evening American Pub. Co.* 185 Ill. App. 451, wherein it appeared that a boy crossing a street with a roller skate on one foot was struck and injured by an automobile truck running on the wrong side of the street, the court said that one crossing a street may reasonably expect that danger from vehicles will arise only from persons driving in conformity with the law of the road.

A pedestrian placed in a position of peril by the negligence of the driver of an automobile cannot be held to the exercise of the same degree of care that a person would use ordinarily. *Feehan v. Slater*, 89 Conn. 697, 96 Atl. 159; *Kessler v. Washburn*, 157 Ill. App. 532; *Kuchler v. Stafford*, 185 Ill. App. 199; *Wescoat v. Decker* (N. J.) 90 Atl. 290; *Dougherty v. Davis*, 51 Pa. Super. Ct. 229. Compare *Braud v. Taxa Cab Co.* 129 La. 781, 56 So. 885. Thus in *Feehan v. Slater*, supra, it appeared that the plaintiff while walking

along the highway was overtaken by the defendant's automobile. Plaintiff not knowing of the approach of the car until it was a few feet away dashed to the left-hand side of the road where he was run into and injured. Affirming a judgment for the plaintiff the court said: "The fact that there was a general statute that provided that a person overtaking another on a highway 'shall pass on the left side of the person overtaken, and the person overtaken shall, as soon as practicable, turn to the right so as to give half of the traveled road and a free passage on the left to the other,' did not in itself prevent a recovery. It should have also appeared that the violation of the statute was the proximate cause of the injury sustained." And in *Kessler v. Washburn*, 157 Ill. App. 532, the court said: "It is clear from the evidence that appellee was called upon to act instantly, when, as he says, the flash of the light from the automobile was in his eyes. Having suddenly found himself in a place of peril, he could not be expected to act with the deliberate judgment of a man under no apprehension of danger. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent and careful man; the law makes allowance for them and leaves the circumstances of their conduct to the jury." So in *Wescoat v. Decker* (N. J.) 90 Atl. 290, the court said: "If this testimony were true, the woman was clearly in imminent danger from the on-rushing automobile, charging down upon her when she looked up and stepped first back and then forward, as indicated in the evidence claimed to show contributory negligence. If so, her action may have resulted from natural uncertainty in a moment of extreme danger as to just what was best to do in order to escape, and under such circumstances the law is well settled that, while what she did may not in fact have been the best thing she could have done, the court cannot decide as a court question that it constituted contributory negligence." See to the same effect *Kuchler v. Stafford*, 185 Ill. App. 199.

#### *As to Another Automobile.*

Where one automobile is run into by another automobile traveling in another direction, if the collision resulting is due solely to the negligence of one of the vehicles, a cause of action for damages arises in favor of the owner of the other. *Pilgrim v. Brown*, 168 Ia. 177, 150 N. W. 1; *Barton v. Faeth* (Mo.) 186 S. W. 52; *McClung v. Pennsylvania Taximeter Cab Co.* (Pa.) 97 Atl. 694; *Verral v. Dominion Automobile Co.* 24 Ont. L. Rep. 551, 20 Ont. W. Rep. 178, 3 Ont. W. N. 108. See also *Withey v. Fowler Co.* 164 Ia. 377, 145 N. W. 923; *Brown v. Mitts* (Mich.) 153 N. W.

714. In *Barton v. Faeth*, supra, the court said that it was negligence per se for an autoist to run his car in excess of the speed fixed by an ordinance. And in *McClung v. Pennsylvania Taximeter Cab Co. (Pa.)* 97 Atl. 694, the court in affirming a judgment for the plaintiff said: "It is the duty of one approaching the crossing of a street intersection to have his vehicle under control, and to observe what is or may be approaching on the other street. And where another vehicle is first at the crossing to give it an opportunity to clear the same, and to use due care to avoid a collision."

In *B. & R. Co. v. McLeod*, 5 Alberta 176, 22 West. L. Rep. 274, 7 Dominion L. Rep. 579, wherein it appeared that both automobiles were running in excess of the speed limit at the time of the collision, the court in dismissing the action said that the cause of the accident was not the negligence of one any more than of the other. But in *Thomas v. Ward*, 7 Alberta 79, 24 West. L. Rep. 250, 11 Dominion L. Rep. 231, it was held that the defendant was liable for negligence although the plaintiff was also negligent. The court said: "My view of the case is, that the real cause of the accident was the defendant's negligence in being on the wrong side of the road. I think that constitutes negligence; not that there is an absolute law that you must always be on the right-hand side of the road; but, when an automobile driver is going along the road, and knows, as this man must have known, that he was going to meet another man, although there is no penalty for not being at all times on the right-hand side of the road, yet it is negligent, it seems to me, for him to be on the left-hand side, which is not the usual side according to the common practice in this country. It is then negligent for him, without any excuse, not to be on the right-hand side of the road. More than that, in this case the defendant broke the statute in not turning to the right in seasonable time, which, I think, is what the statute means. Therefore, although I think that the plaintiff was himself guilty of some negligence in going at an excessive rate of speed down that hill, yet I think the defendant might have avoided the accident if he had not been himself negligent, and that the real cause of the accident was the defendant's being on the wrong side of the road, where he did not need to be at all, and his not turning out as soon as he should have done, and his embarrassing the plaintiff by staying there too long, and putting the plaintiff to the difficulty of making a decision on a sudden whether he should run in between an apparently very narrow space or whether he should turn to the left, which was his wrong side of the road. Now I do not think the defendant can blame the plaintiff for being

embarrassed and taking what ultimately turned out to be a wrong course. His doing so is due to the defendant's action in being on the wrong side of the road."

In *Trout Auto Livery Co. v. People's Gas Light, etc. Co.* 168 Ill. App. 56, the court said that the law did not require an operator of a motor vehicle to anticipate that the chauffeur on another car would violate the law of the road by driving his machine on the wrong side of the street. In *Skene v. Graham (Me.)* 95 Atl. 950, the defendants contended that the plaintiff did not seasonably turn to the right and that the chauffeur driving the defendants' car was obliged to decide quickly whether to continue his course and collide with plaintiff's car, or turn to the left and avoid a collision. Granting a new trial on motion of the defendants the court said. "It is manifest that the collision was due to the fact that both cars swerved from their course at the same instant, the car of the defendants swerving from its lawful position to one of supposed safety in order to avoid an accident, the other leaving its unlawful position and course for the same reason. That the swerving of defendants' car was imperative is apparent; that an emergency existed, not only justifying, but authorizing, the defendants' chauffeur in so swerving, is equally apparent. That his act was not due to his unlawful use of the road is shown by an overwhelming weight of the evidence, and that the defendants are not liable for any damage arising in the circumstances is a principle firmly established. When two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence in taking either."

In *House v. Fry (Cal.)* 157 Pac. 500, it was held that the defendant was guilty of negligence in endeavoring to pass in front of an auto truck before his automobile. The court said: "This negligence was the proximate and sole effective cause of the collision. No warning having been given to House of the approach of the automobile, he did not learn of its presence until it was too late for him to avoid the collision by turning to the right (which under section 8 would have been his duty), and his failure to turn to the right was not, under the circumstances, negligence causing or contributing to the occurrence of the collision." In *Hubbard v. Bartholomew*, 163 Ia. 58, 144 N. W. 13, 49 L.R.A. (N.S.) 443, it appeared that the plaintiff was riding in the car of another. In an endeavor to pass the defendant's car in order to avoid a collision the car in which the plaintiff was riding struck a tree. Sustaining a verdict for the defendant, the court said:

"If defendant, acting as an ordinary cautious man, could have safely turned his car to the right, so as to have allowed Reeve's car to pass on the other side, it was his duty to do so, and if he failed therein he must have been found to have been negligent. Conceding defendant to have been negligent, were plaintiff's injuries the proximate consequence thereof? The cars did not collide. Reeve steered his to the left, and, according to the undisputed evidence, there was a space between defendant's car and the west curb line of twenty-three feet or a little more, and both Reeve and plaintiff noticed that defendant was not turning but continued to drive his car within five or six feet of the east curbing without indicating a purpose of turning. As soon as they understood he was not going to turn, it became their duty to do so in order to avoid a collision, and this happened, according to their evidence, when 'pretty close' and, according to Mason, when seventy-five or ninety feet away. Now, it is manifest that defendant's failure to turn compelled Reeve to do so. There was ample room for this. The cars were practically the same distance from the curbing and, as defendant's car was but five or five and a half feet wide, Reeve need only have swung towards the west this distance to have avoided collision. As the day was clear and the sun shining, there could have been no mistake concerning the situation of the parties and the paved way, and, but for something unexplained, it would seem the car would have passed in safety."

Where an automobile is not registered as required by law, or the registration is illegal, there can be no recovery by the owner of damages for injury caused by the negligence of another operator. *Stroud v. Water Com'rs* (Conn.) 97 Atl. 336; *Crompton v. Williams*, 216 Mass. 184, 103 N. E. 298. Compare *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542. Thus in *Stroud v. Water Com'rs*, supra, wherein it appeared that a motor car, falsely registered under the name of a person not its owner, was damaged by a motor truck, the court said that in accordance with a statutory provision no recovery could be had for such damage.

In *Ray v. Brannan* (Ala.) 72 So. 16, it appeared that a "right of way" ordinance provided that at a crossing a vehicle going north or south should be so conducted, circumstances permitting, as to allow a vehicle going east or west to pass safely in front. It was held that the mere fact that one vehicle had the "right of way" over others crossing its path did not release the vehicle thus favored from the duty of exercising due care not to injure the others at the place of crossing. The court said: "On the contrary, the duty of due care to avoid collisions remains reciprocal, and the driver of each vehicle may, with-

in reasonable limits, rely upon the discharge of this duty by the other—including, among other things, the reasonable observance of those municipal regulations with respect to speed and position, which are designed not only to facilitate traffic and travel, but also to make it safe for the public as far as is humanly possible." In *Russell v. Kemp*, 159 N. Y. S. 865, reversing a judgment of the lower court it was held that the contributory negligence on the part of the operator of the plaintiff's automobile barred a recovery. The following facts appeared: "Plaintiff's automobile, in charge of her son, was proceeding down the Ocean boulevard in Brooklyn, running south and approaching Eighteenth street, which crosses the boulevard at right angles. The car was running along about twenty-five feet from the right-hand curb. The son, who was plaintiff's only witness to the accident, testified that at a point about one hundred feet north of Eighteenth street he put up his hand (which is the signal that he was going to stop). He then turned around and saw defendant's automobile about one hundred and fifty feet beyond and about twenty feet from the curb proceeding in the same direction, namely, to the south. When he reached the intersection of Eighteenth street, he put up his hand again, and then says that he turned around and saw defendant's automobile running along on the same line about fifteen feet behind him. He then stopped, and defendant's automobile ran into the rear of plaintiff's car." The court said: "It is perfectly manifest on this record that plaintiff's son was guilty of contributory negligence. Not only did he violate every one of the traffic ordinances applicable to his case (except as to the rate of speed), but his course was so irrational that it is difficult to understand what plaintiff can claim defendant should have done under the circumstances. Plaintiff's son testified that he had intended to turn west into Eighteenth street. Why he twice gave a stop signal, if he intended to turn, is incomprehensible. If he intended merely to stop, he violated the ordinance which required him to do so at the curb. He also violated the ordinance which required him to keep as near the right-hand curb as possible while running along the road. This, however, under the circumstances, and at the rate of speed at which he was proceeding, was probably immaterial. More particularly, however, he violated the ordinance which requires that, in turning under these circumstances, he should keep as near as possible to the right-hand curb." In *Van Dyke v. Johnson*, 82 Wash. 377, 144 Pac. 540, affirming a judgment for the defendant, the court said that inasmuch as the plaintiff had seen and observed the defendant's car coming towards them, the sounding of a horn as re-



quired by a city ordinance would have been of no additional efficacy in avoiding an accident as the purpose of sounding a horn was to give warning and apprise others of the approach of a vehicle in time to avoid accidents.

#### *As to Passenger on Street Car.*

Where a person alighting from a street car is hit by an automobile by reason of negligence in its operation, he is entitled to recover. *Memphis Taxicab Co. v. Parks*, 202 Fed. 909, 121 C. C. A. 267; *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L.R.A. (N.S.) 214; *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078; *Naylor v. Haviland*, 88 Conn. 256, 91 Atl. 186; *Winner v. Linton*, 120 Md. 276, 87 Atl. 674; *Bongner v. Zeigenheim*, 165 Mo. 328, 147 S. W. 182; *Cool v. Petersen*, 189 Mo. App. 717, 175 S. W. 244; *Michalsky v. Putney*, 51 Pa. Super. Ct. 163; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160. Thus in *Minor v. Mapes*, *supra*, it appeared that the appellee alighted from a street car at the front end and started to across the track in front of it. Hesitating at first the motor-man told him to go ahead. As he stepped beyond the end of the car the appellant's automobile running at a speed of ten or twelve miles an hour struck him. There was a space of sixty feet between the street car and the curb. Sustaining a verdict for the appellee the court said: "The machine was being operated at a rapid rate of speed, unnecessarily near the street car, though there was abundant space further out in the street for the machine to pass along. It was customary for passengers to alight from the front end of street cars, and it was reasonably to be anticipated that they might pass in front of a car going to the other side of the street. The jury was warranted in finding that it constituted a negligence for an automobile driver to run the machine at a rapid speed so near a street car which had stopped for passengers to alight. Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated." In *Naylor v. Haviland*, 88 Conn. 256, 91 Atl. 186, it appeared that the plaintiff's decedent was getting off a trolley when he was struck by the defendant's automobile coming from the opposite direction to that in which the trolley had been moving. The defendant was driving his car on that side for the reason that the other side was impassable on account of paving operations. In approaching the trolley car he saw that it was about to stop to let off or take on passengers and slackened

his speed somewhat, but drove past the trolley car at a speed in excess of eight miles an hour and so near as to leave a space of not more than three feet between the trolley car and the automobile. Affirming a judgment for the plaintiff the court said that the facts clearly established the defendant's negligence. So in *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078, it appeared that the plaintiff was a passenger on a street car. At the intersection of a street, where the car stopped, she alighted, intending to cross the driveway to the sidewalk, at which time she collided with an automobile operated by the defendant.

Evidence was produced that the defendant gave no warning of his approach and violated the city ordinance in that, while attempting to pass the street car, he had neglected to keep his vehicle at least four feet from the lowest step of the car. Affirming a judgment for the plaintiff the court said: "Plaintiff had the right to assume that while within such zone she occupied a position of safety, and in the absence of any warning or reason to believe that defendant would violate the city ordinance, she was not negligent in failing to look up and down the street when she alighted from the car to see if the drivers of approaching vehicles were operating same on that part of the street upon which they were prohibited from traveling. Contributory negligence cannot be predicated upon the assumption that one will violate the law; hence plaintiff was not negligent in failing to look in order to see if defendant was running his auto within what was prescribed as the zone of safety for passengers alighting from the car. Being lawfully there, she had the right to assume that for the time being she would be as safe from collision with automobiles as she would be upon the sidewalk." In *Memphis Taxicab Co. v. Parks*, 202 Fed. 909, 121 C. C. A. 267, the court said that a passenger was not bound to look and listen for an approaching automobile. And in *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160, the court said that a failure on the part of the passenger to stop, look and listen was not negligence per se.

But in *Baldwin v. Maggard*, 162 Ky. 424, 172 S. W. 674, it was held that a motor car in passing a street car should be under reasonable control and that absolute control was not necessary. The following were the facts: "On August 2, 1913, Sol Baldwin lost his life by being struck and run over by appellee's automobile on Winchester avenue, near where it intersects 29th street, in Ashland, Kentucky. . . . When the Winchester avenue car reached 29th street, it stopped at its regular stopping place for passengers to get off and on the car. Baldwin, with other passengers, left the car; and after Baldwin had about reached the sidewalk, some one called

his attention to the fact that he had forgotten his basket, whereupon he returned to the car to get it. By this time the street was about clear of passengers. While he was climbing upon the rear platform of the car a passenger sitting at an open window handed Baldwin's basket out of the window, either to Copp or to Baldwin, whereupon Baldwin started to return to the sidewalk, and either stumbled or staggered into appellee's automobile which was then passing the street car. One or both of the wheels of the automobile passed over Baldwin's body, and injured him to such an extent that he died during the day." And in *Leach v. Asman*, 130 Tenn. 510, 172 S. W. 303, reversing a judgment for the plaintiff it was held that the question whether a person who walked towards the sidewalk diagonally from a street car was guilty of contributory negligence, was one for the jury.

Where a person in endeavoring to board a street car is injured by a motor vehicle negligently operated, a recovery of damages is allowed. *Grouch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23; *Posener v. Long* (Tex.) 156 S. W. 591; *Adams v. Averill*, 87 Vt. 230, 88 Atl. 738; *Yanase v. Seattle Taxicab, etc. Co.* (Wash.) 157 Pac. 1076; *Mehegan v. Faber*, 158 Wis. 645, 149 N. W. 397; *Rose v. Clark*, 21 Manitoba 635. In *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892, in reversing a judgment for the defendant the court said that whether, after looking once and seeing a clear street, a person acted as a reasonably prudent man in proceeding from a point within twelve feet of the street intersection toward the street car which he was intent on boarding, without again turning and looking south along the avenue, in the absence of any sound of horn or other warning of an automobile, was plainly a question for the jury. In *Kerchner v. Davis*, 183 Ill. App. 600, it appeared that in passing a trolley car the driver of an automobile was but five feet from it and traveling at eight miles an hour without sounding a horn or any other signal. It was held that the driver was negligent. In *Kit-tanning v. Burns*, 47 Pa. Super. Ct. 540, the court applied a statute requiring the operator of a motor vehicle to bring his car to a standstill. In *Foster v. Curtis*, 213 Mass. 79, Ann. Cas. 1913E 1116, 99 N. E. 961, 42 L.R.A. (N.S.) 1188, the court sustained exceptions of the plaintiff to a verdict for the defendant. The following facts appeared: "The plaintiff had just alighted from the right-hand side of an open electric car, and while in the act of stepping forward to cross the street to the curb in front, the defendant's automobile, which had been following in the rear, turned to the right to pass the car and in passing struck and injured him." The court said: "Although street cars are vehicles within the

meaning of the statute, their drivers are relieved from the requirement of turning to either side of the middle of the traveled part of the road. The reason is obvious. The cars need not turn, because they cannot diverge from the tracks on which they run. Persons lawfully using a public way have a right to presume that drivers of free teams and vehicles will act in conformity with these directions, and if a driver neglects to obey them, and injury results, this is a circumstance which the jury may consider in determining whether he was careless, and unless explained it is indicative of his negligence."

#### *As to Conductor on Street Car.*

In *Kling v. Thompson-McDonald Lumber Co.* 127 Minn. 468, 149 N. W. 947, it was held that the driver of a motor vehicle in passing a stationary trolley car owes the same duty to the conductor of the trolley car that he does to a passenger alighting from or boarding the car. The following facts appeared: "Plaintiff was the conductor of an interurban street car running between St. Paul and Minneapolis. While his car was crossing the tracks of the Chicago, Milwaukee & St. Paul Railway Co. in Minneapolis, the trolley came off the wire. The momentum of the car carried it across the tracks, and to the usual place for discharging and receiving passengers beyond such tracks, where it was brought to a stop by the motorman. Three passengers entered the car but none alighted therefrom. After the car came to a stop, plaintiff's attention was called to the fact that the trolley was off the wire. He was inside the car but hastened to the rear vestibule and, while standing upon the platform, tried to put the trolley back in place. He testified that he worked in this manner for three or four minutes without succeeding, and then stepped into the street, at the side of and facing the rear vestibule of the car, and, while in this position, had worked for two or three minutes trying to replace the trolley, when he was struck and knocked down by defendant's auto truck. He also testified that he had not seen the truck and did not know that it was approaching." The court said: "The statute casts upon an auto driver, approaching a street car, stopped to allow passengers to alight or embark, the burden of keeping watch and taking such action as may be necessary to guard against injury to persons coming into the street. He is required to slow down, and, if necessary for the safety of the public, to stop. In effect, under such circumstances, pedestrians are given the right of way to and from the car, and the auto driver must govern himself accordingly. If he does not stop, he must exercise a high degree of care to avoid injury

to those who may be, or may come, upon the street. He is not an insurer against accidents, however, and, if the roadway is clear and appears likely to remain clear, so that, apparently, he can proceed without endangering anyone, and he goes forward with due caution and with his machine under such control as to enable him to avert any danger that could reasonably be anticipated, he is not liable for the happening of an accident which, in the exercise of reasonable caution and prudence he could not have foreseen or guarded against. It is undisputed that plaintiff was struck and injured by the truck. If he was standing upon the street, as he claimed, and, while in plain view and engaged in replacing the trolley, was run down by the truck, defendant's negligence is clear. If he fell from the car, as the great weight of evidence indicates, whether defendant is chargeable with negligence depends upon whether the circumstances were such as to justify the driver of the truck in undertaking to pass the car, and whether in passing the car he exercised that degree of care and caution, in the operation of his machine, which, under the circumstances, appeared to be reasonably necessary for the safety of those in a position where they might suddenly come in front of the truck as it passed the car entrance. Several passengers entered the car after it stopped, but this was while the truck was back at the railroad tracks. When the truck approached the car, no one was either entering or leaving it, and no one was upon the street. The driver saw the conductor attempting to put the trolley in place, and might reasonably have assumed, as seems to have been the fact, that the car was no longer waiting for passengers to alight or embark, but was merely waiting for the conductor to re-connect it with its source of motive power. It cannot be held that the statute makes an attempt to pass, under such circumstances, negligence per se. But, in attempting to pass, the driver is required to exercise such care as, under the circumstances, shall appear to be reasonably necessary to guard against injuring any one then in a position to move suddenly either toward or from the car. Plaintiff fell under the truck and, as expressed by the witnesses, was shoved along the pavement by the wheel for a considerable distance. The driver estimates it as six or eight feet. Several of the witnesses state the distance as more than half the length of the street car, which was over forty feet long. Considering the distance which the truck ran after striking plaintiff, in connection with its slow speed and all the other facts and circumstances, it was a fair question for the jury whether the driver was exercising proper care in the management of his machine at the time of the accident, and the evidence is sufficient to sustain their verdict."

*As to Bicycle.*

A bicyclist injured by reason of the negligent operation of an automobile may recover for the injuries sustained. *Travers v. Hartman* (Del.) 92 Atl. 855; *Ware v. Lamar*, 16 Ga. App. 560, 85 S. E. 824; *Anderson v. Sterrit*, 95 Kan. 483, 148 Pac. 635; *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903; *Olson v. Holway*, 152 Wis. 1, 139 N. W. 422; *Calahan v. Moll*, 160 Wis. 523, 152 N. W. 179, L.R.A. 1916A 744; *Riggles v. Priest* (Wis.) 157 N. W. 755; *Bernstein v. Lynch*, 28 Ont. L. Rep. 435; *Wales v. Harper*, 17 West L. Rep. 623. Thus in *Ludwigs v. Dumas*, supra, in affirming a judgment for the plaintiff the court said: "The fact that he was riding a bicycle, or was standing, or was in some other vehicle either standing or moving, would make no difference. He was upon or so near the crossing that he must be regarded as upon it, and it was therefore the duty of the driver of the automobile to slow down to the required speed, or at least to prevent his machine from running down some person who was there ahead of him, or who was likely to be endangered by the automobile."

In *Luther v. State*, 177 Ind. 619, 98 N. E. 640, the court holding that automobiles and bicycles have equal rights on the streets and equal rights in the use thereof with other vehicles said: "While the duty of using reasonable and ordinary care falls alike on the driver of an automobile and the rider or driver of a bicycle, for reasons growing out of inherent differences in the two vehicles, it is obvious that more is required from the former to fully discharge the duty than from the latter. The great weight of the automobile, the high speed at which it may be driven, and the ease with which the great power of its motor engine may be applied, distinguish it, in the matter of danger to others, from the light foot-power bicycle, and much is therefore required of the driver of it to discharge the duty of due care." In *Harnan v. Haight* (Mich.) 155 N. W. 563, wherein it appeared that a bicyclist was overtaken and run down, the court said even though he was in the middle of the road the driver of the automobile could not excuse himself for running him down, and that he was required by law to have such lights as would show objects immediately in front of him and have his machine under such control as not to overtake and run down people within the scope of his lights. In *Kent v. Treworgy*, 22 Colo. App. 441, 125 Pac. 128, reversing a judgment for the plaintiff the court said that the question whether the driver of the automobile used reasonable care to prevent injuring a bicyclist was for the jury. In *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461, reversing a judgment for the defendant the court said that the driver of a motor vehicle should keep to

the right of the highway in accord with the ordinance of the city and that when on the left side his rights are inferior to other vehicles passing in the opposite direction. In *Clarke v. Woop*, 159 App. Div. 437, 144 N. Y. S. 595, it appeared that the plaintiff's son, riding on a bicycle, collided with the defendant's motor car and was killed. Reversing a judgment for the plaintiff the court said that where an experienced driver was ascending a hill at a moderate speed, and a bicyclist seeing the car and with nothing to obscure his view or to prevent his taking his way to the right of the car, the driver in the exercise of due care was not bound to bring his motor car to a standstill. In *Baillargeon v. Myers*, 27 Cal. App. 187, 149 Pac. 378, it appeared that the plaintiff while riding his bicycle down a street of approximately a fourteen per cent grade toward the intersection of another street tried to stop and discovered his brake would not work. When he reached the intersection he proceeded straight across where he collided with the defendant's automobile. At the time of the collision he was on the side of the street where he was entitled to be and if the defendant's automobile had not been on the wrong side the accident would not have occurred. The court said that while the defendant was guilty of negligence *per se* in operating his car on the wrong side of the street in violation of a municipal ordinance, there still was no liability on his part for injuries to the plaintiff unless the particular negligence in question was the proximate cause of such injuries.

If the negligence of a bicycle rider contributes to produce a collision between himself and an automobile he cannot recover for the injuries received therein. *Ude v. Fuller* (Mich.) 153 N. W. 769; *Twitchell v. Thompson* (Ore.) 153 Pac. 45; *Barton v. Van Gesen* (Wash.) 157 Pac. 215. Thus in *Ude v. Fuller*, *supra*, wherein it appeared that the plaintiff's son saw the automobile coming down the street before he attempted to cross, when it was about one hundred feet away, and that he continued on his way without looking again until he was within ten feet of it and it was too late to avoid a collision, the court said that the situation presented a strong case of contributory negligence and there could be no recovery.

In *Orser v. Mireault*, 7 West W. Rep. 837, it appeared that a bicyclist was struck by an automobile, thrown to the ground and seriously injured. The trial judge in dismissing the action said: "I think the defendant was negligent, but I think there was contributory negligence on the plaintiff's part in increasing the speed of his bicycle and endeavoring to pass in front of the defendant's automobile." On an appeal from that judgment the appellate court being equally divided, the appeal was dismissed.

But though a bicycle rider is negligent if that negligence is not a contributory cause of a collision with an automobile it does not prevent a recovery. Thus in *Anderson v. Sterrit*, 95 Kan. 483, 148 Pac. 635, it appeared that the plaintiff had no license to ride his bicycle and did not carry the light required by an ordinance. Affirming a judgment for the plaintiff the court said: "The absence of a license was not a factor causing the collision, and the defendant testified that he saw the plaintiff when he was a long distance from the point of collision. Consequently, neither violation of the city ordinance contributed to the plaintiff's injury." So in *Travers v. Hartman* (Del.) 92 Atl. 855, a recovery was allowed although the bicyclist, who was a young boy, was riding on the wrong side of the street in violation of an ordinance. In *Wright v. Mitchell* (Pa.) 97 Atl. 478, reversing a judgment for the defendant it was held that if at the time of an accident a bicyclist was exercising proper care in passing along the highway and an operator of a motor car negligently managed his machine so as to imperil suddenly his safety, he would not be guilty of negligence if, while exercising the caution of a prudent man, his bicycle struck the curb when he was attempting to escape the peril. The court said: "In that case the proximate cause of the accident would not be the act of the plaintiff in riding his bicycle against the curb, but the negligence of the defendant which endangered the plaintiff's safety. If the plaintiff would have been struck and injured by the defendant's machine had he not deflected from the straight course along the highway as a means of escaping from impending danger, he would not necessarily be guilty of negligence if, in attempting to escape the danger, he did not exercise the care or judgment required of him if it had been his voluntary action. All that was required of him to protect himself from the anticipated danger was to use the care of an ordinarily prudent man, under all the circumstances, and, if he did so, he could not be charged with negligence. When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether under different circumstances he might and ought to have seen and avoided the latter danger."

#### *As to Motorcycle.*

Damages may be recovered from the owner of an automobile for negligently causing a collision with a motorcycle. *Carpenter v. Campbell Automobile Co.* 159 Ia. 52, 140 N. W. 225; *Williams v. Kansas City* (Mo.) 177 S. W. 783; *Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151. Thus in *Anderson v. Kinnear*, *supra*, it appeared that an automo-

bilist running at excessive speed ran into a motorcyclist. The court in affirming judgment for the plaintiff said: "It was clearly negligence for the appellant to run upon this crossing at the rate of twelve miles per hour when the respondent was upon the crossing, and if the appellant ran upon the respondent at this rate of speed while the respondent was standing still, the appellant was clearly guilty of negligence and the respondent was entitled to recover." In *Williams v. Kansas City (Mo.)* 177 S. W. 783, affirming a judgment for the plaintiff the court held that an operator backing his car suddenly must exercise the highest degree of care. The court said: "The evidence for plaintiff tends to show that the automobile was traveling east and was suddenly, and without warning or signal of any kind, reversed and backed diagonally in the street and into the motorcycle; that deceased when struck rolled to the northwest; that the motorcycle, in turning east on the boulevard, was on the proper, that is, the south, side of the street, while the automobile was on the wrong side for it to be going west, although on the proper side if going east. The two streets are both important streets of the city and much traveled. Deceased, in turning east on the boulevard, had a right to expect that every vehicle on the south side of the street would be going east; and when he turned the corner and discovered too late that, instead of going east, the automobile was backing rapidly to the northwest, he should not be charged with contributory negligence as matter of law, even if, when confronted with this sudden and dangerous situation, he attempted to avoid the collision and unfortunately failed to do so. The law imposed upon the automobile driver the duty of exercising the highest degree of care of a very careful person, and it was his negligence in suddenly backing the car that produced a dangerous and unexpected situation which suddenly confronted the deceased; and, even if the latter could be said to have erred in judgment as to the best way to avoid the danger, it was not his negligence that brought about the situation, but that of the city employee. Hence deceased cannot be charged with contributory negligence as matter of law."

But in *Borg v. Larson (Ind.)* 111 N. E. 201, wherein it appeared that a motorcyclist was injured as the result of a collision with an automobile which he had overtaken and endeavored to pass on the right, when there was sufficient room to pass on the left, the court held that no damages could be recovered by him.

In *Reitz v. Hodgkins (Ind.)* 112 N. E. 386, it appeared that the appellant in driving his automobile on a street in a city collided with

the appellee who was riding on a motorcycle. Affirming a judgment for the latter the court said: "In the absence of special statutory regulations, automobiles are governed by the same rules of the road as apply to other vehicles using a street or highway, and among these rules generally recognized as a measure of the common-law duty to use due care is that which requires vehicles, when approaching from opposite directions to pass, to keep to the right to avoid a collision, and this rule applies at street intersections." In substantial accord, see *Elgin Dairy Co. v. Shepherd*, 183 Ind. 466, 108 N. E. 234; *Elgin Dairy Co. v. Shepherd (Ind.)* 103 N. E. 433; *Berckhemer v. Empire Carrying Corp.* 158 N. Y. S. 856.

In *Stovall v. Corey Highlands Land Co.* 189 Ala. 576, 66 So. 577, wherein it appeared that the plaintiff's motorcycle collided with the defendant's automobile, the court said that the fact that the motorcycle was not registered in no way affected the general duty of the defendant so to operate its automobile while traveling on the public highway as not to injure negligently the person or property of another. In substantial accord is *Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109. And to the same effect is *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181, wherein the court said: "It is next urged that the respondent cannot recover for the reason that he was himself, at the time of the collision, violating the statute. This contention is founded on the fact that the respondent was operating his motorcycle on the public highway without first obtaining the license required by sections 5562 to 5566, inclusive, of Rem. & Bal. Code (P. C. 33 sections 1, 9). The sections cited constitute the revenue portion of the statute licensing and regulating the use and operation of motorcycles and automobiles on the public highways. Had the respondent violated some part of the regulative part of the statute, and his injury had resulted therefrom, unquestionably he could not recover, regardless of the negligence of the appellants, as long as such negligence was not wanton. But the violation of the revenue part is an offense against the state, solely, and it alone may enforce the penalties. In other words, before the violation of the statute by the person injured will constitute a defense to the negligent act of the person injuring him, there must be shown some causal connection between the act involved in the violation of the statute and the act causing the injury. Here there was no such causal connection. The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the state and been in possession of the statutory license."

KUHN

v.

**MILWAUKEE ELECTRIC RAILWAY  
AND LIGHT COMPANY.**Wisconsin Supreme Court — October 27,  
1914.*158 Wis. 525; 149 N. W. 220.***Street Railways — Negligence — Striking Pedestrian in Rounding Curve.**

Plaintiff having often boarded street cars before they rounded a corner where she desired to board a car, approached the usual stopping place without notice of an ordinance requiring the car not to stop until it had turned the corner. The motorman signaled her to go to the far corner, which she started to do. The car was then approaching a curve at about three miles an hour, and the speed was increased to six miles before the car got around the curve which was on a grade, and, as it did so, plaintiff was struck by the outswing of the car. Held, that there was no evidence of actionable negligence on the part of the carrier.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: FRITZ, Judge.

Action for damages. Minnie Kuhn, plaintiff, and Milwaukee Electric Railway and Light Company, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[525] Personal injuries. The plaintiff was injured at about 10 o'clock in the evening of March 5, 1913, by being struck by the outward swing of the rear end of a street car as it was going around a curve at the corner of Brady street (which runs east and west) and Van Buren street (which runs north and south) in the city of Milwaukee. She was a woman in fair health, in possession of her faculties, who had resided more than twenty years in Milwaukee. She came to the southwest corner of Brady and Van Buren streets and waited for the coming of a street car. The car which she proposed to take was the Holton street car, which came from the west on Brady street and turned at this corner north on to the Holton street viaduct, which is substantially a continuation northward of Van Buren street. She had taken this [526] car before and had boarded it at the near side of Van Buren street, i. e., at the corner where she was waiting, but at the time of the accident the city ordinance regulating street cars had been changed and the stopping place was on the far corner after the car had rounded the curve. The plaintiff had no knowledge of this change. There is an up grade as Brady

street approaches and crosses Van Buren street. The plaintiff saw the car approaching up this grade with its lights burning and saw the motorman in front. She stepped down from the sidewalk into the street and moved toward the west, expecting the car would stop to take her on. When she was four or five feet from the track and the car was approaching from the west at a distance of about ten or twelve feet, the motorman motioned to her. She understood that he meant that he would not stop then, but would stop on the viaduct after making the turn. She at once turned and walked eastward in the same direction as the car and keeping about the same distance from the outside rail of the track. She had proceeded but four or five steps when she was struck in the back by the rear end of the car and knocked down, and suffered the injuries for which this action is brought. The evidence tends to show that the car was proceeding at about three miles an hour as it came up the grade and that the speed increased to about six miles an hour as rounded the curve, which curve is also slightly up grade. The car was fifty-one feet in length and has an overhang on a straight track of about two feet, but when rounding a curve like the one in question the end swings out from the track nearly six feet. It was this swinging out of the end of the car which caused the accident. The plaintiff testified that she knew the car would swing out as it went around the corner, but didn't know how much, and that she was struck just as she was going to take a step or so south so as to be sure she was far enough away from the track. From a judgment of nonsuit the plaintiff appeals.

*William L. Tibbs, L. A. Zavitsky and A. W. Foster* for appellant.

*Van Dyke, Shaw, Muskat & Van Dyke* for respondent.

[527] WINSLOW, C. J.—The trial judge granted a nonsuit on the express ground of contributory negligence. We are not to be understood as expressing approval of this reason for the ruling. The outward swing of the end of a long car like the one in question when rounding the sharp curve at a street corner is quite surprising in extent to one who has not given the matter serious attention, and we should not wish to say [528] that every person who knows there is some outward swing must be held guilty of contributory negligence because he underestimated its extent and thus found himself struck when he thought himself safe. We are, however, of opinion that the judgment was right because no negligence was shown on the part of the defendant. The business of the motorman

is to operate the car with reasonable celerity for the accommodation of the traveling public, obeying city ordinances and exercising due care to protect from injury not only those who are passengers on his car but those who are in the street. He cannot move his car from the tracks, and he must certainly be entitled to assume that people on the street in apparent possession of their faculties, who see his car approaching and are then out of harm's way, will not allow themselves to come within reach of the car. The situation here was clearly not one which would lead the motorman to suppose there was any danger of injury to the plaintiff. He knew that she was waiting for the car and that she saw it approach. He knew also that he had signaled to her to go to the far corner and that she had seen and comprehended the signal and had started for that corner. Under these circumstances, and in the absence of any ordinance prescribing any different rule of action, we are unable to say that there was any fact from which a jury could find negligence in the handling of the car. It is true that it appears that the speed of the car was increased from about three to about six miles per hour, but we see no evidence of negligence here. We suppose it to be a well known fact that in rounding a sharp curve on an up grade with a long and heavy car there is much friction by the grinding of the wheels on the inside of the rails and consequent necessity for greater power and speed in order to make the curve successfully. *South Covington, etc. R. Co. v. Besse*, 33 Ky. L. Rep. 52, 108 S. W. 848, 16 L.R.A.(N.S.) 890; *Widmer v. West End St. R. Co.* 158 Mass. 49, 32 N. E. 899.

BY THE COURT.—Judgment affirmed.

# NOTE.

## Liability of Street Railway Company for Injuries Caused by Striking Pedestrian in Rounding Curve.

### Generally.

It seems that a street railway company is bound to use only a reasonable amount of care to keep pedestrians from being injured by being struck by its cars at curves. See the reported case and the cases cited throughout this note.

A street railway company is under no duty of keeping a lookout to prevent persons from coming in contact with the rear end of a car in rounding a curve, its servants having a right to assume that persons in the street are aware of the obvious fact that the end of a car in rounding a curve must necessarily swing out from the track on the outside of

the curve and that they will not place themselves in a position where they are likely to be struck. *Wood v. Los Angeles R. Corp.* (Cal.) 155 Pac. 68; *Gribbins v. Kentucky Terminal, etc. Co.* 150 Ky. 276, 150 S. W. 338 (citing *South Covington, etc. R. Co. v. Besse* (Ky.) 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L.R.A.(N.S.) 890, and *Louisville R. Co. v. Ray* (Ky.) 124 S. W. 313); *Widmer v. West End St. R. Co.* 158 Mass. 49, 32 N. E. 899; *Brightman v. Union Street R. Co.* 216 Mass. 152, 103 N. E. 379; *Jelly v. North Jersey St. R. Co.* 76 N. J. L. 191, 68 Atl. 1091; *Miller v. Public Service Corp.* 86 N. J. L. 631, 92 Atl. 343, L.R.A.1915C 604; *Greenleaf v. Public Service Corp.* 88 N. J. L. 715, 92 Atl. 344; *Riddle v. Forty-Second St. etc. R. Co.* 173 N. Y. 327, 66 N. E. 22; *Kaufman v. Interurban St. R. Co.* 43 Misc. 634, 88 N. Y. S. 382; *Matulewicz v. Metropolitan St. R. Co.* 107 App. Div. 230, 95 N. Y. S. 7; *Beeck v. Coney Island, etc. R. Co.* 135 N. Y. S. 600; *Hoffman v. Philadelphia Rapid Transit Co.* 214 Pa. St. 87, 63 Atl. 409. Thus in *Miller v. Public Service Corp.* supra, it was said: "The rule approved by the weight of authority is, that in view of the well-known fact that in rounding a curve the rear end of a street car will swing beyond the track, and overlap the street to a greater extent than the front, the motorman may rightfully assume that an adult person standing near the track who is apparently able to see, hear and move, and having notice of the approach of a street car, and of the existence of the curve, will draw back far enough to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and, therefore, no legal duty is imposed upon the motorman to warn such a person against the possible danger of a collision with the rear, because of the swing, if he remains in the same position." And in *Riddle v. Forty-Second St. etc. R. Co.* 173 N. Y. 327, 66 N. E. 22, the rule was applied to bar a recovery for the death of a man caused by his being struck by the step of a car as it was rounding a curve. It appeared that he was working in a ditch near the car track and when the car started to pass him he leaned back, but raised up before the rear end had passed. In *Hoffman v. Philadelphia Rapid Transit Co.* 214 Pa. St. 87, 63 Atl. 409, wherein it appeared that while a car was backing around a curve the fender struck a pedestrian who was waiting to cross the track, it was held that the company was not guilty of negligence because the fender had not been raised previous to backing the car. In *Gribbins v. Kentucky Terminal, etc. Co.* 150 Ky. 276, 150 S. W. 338, it was held that negligence could not be attributed to a street railway com-

pany for injuries to a pedestrian struck by the rear end of a car as it was rounding a curve because the car was traveling at a speed of six miles per hour, the court saying: "The speed at which the car is alleged to have been traveling, to wit: six miles an hour, cannot be attributed to appellees as an act of negligence, for, the rear end of the car, in rounding the curve, was not thereby caused to extend any further beyond the track than it would have, if it had been going at a much lower rate."

But the foregoing rule does not apply where by reason of peculiar circumstances there is an unusual danger present. Thus in *Schwartz v. New Orleans, etc. R. Co.* 110 La. 534, 34 So. 667, it appeared that there was a double track street railway turning a street corner. The plaintiff had passed in front of a car which had come from around the curve on the first track, his progress then being intercepted by another car bound in the opposite direction and which was just entering the curve of the second track. The first car stopped after its front end had passed the plaintiff, and while he was in this position between the two cars, the rear end of the second car swung outward from the track and squeezed him against the car behind him. The street railway company was held liable for the injuries to the plaintiff. The court said: "It stands to reason that to have produced upon this crossing—one of the most frequented in the city—a danger by which any one of the pedestrians upon the crossing might at any time be overtaken unawares was culpable negligence. Pedestrians and cars had equal right upon the crossing, and one could not use his right so as unnecessarily to create danger for the other. The maxim, '*Sic utere tuo ut alienum non laedas*,' applies to such a case. This danger might have been avoided without material impairment of the efficiency of the car service by simply not permitting the cars to meet on the crossing, and it was incumbent upon defendant to do so. See, in this connection, *Summers v. Crescent City R. Co.* 34 La. Ann. 145, 44 Am. Rep. 419. That there is danger to the public in permitting the cars to meet at this crossing, the present case and another case before this court but too sufficiently attest. Defendant should have known of this danger, and guarded against it. He who creates a danger upon or near a public highway must see to it that no harm results therefrom to the public." Likewise in *Mittleman v. New York City R. Co.* 56 Misc. 599, 107 N. Y. S. 108, it appeared that the plaintiff in crossing a street was compelled to pass along a path between an unguarded excavation and the defendant's street car tracks. As she with several others was about to cross the

tracks, a car approaching the curve was stopped by a policeman to enable them to pass. The plaintiff was the last to cross, and she had passed the front end of the car when it started and she was struck by the rear fender. At that time she was about two feet from the track. The side of the car passed her safely, but the fender, which was fastened to the car by a strap and one corner of which projected beyond the car about a foot, struck her and threw her into the excavation. It was held that the street railway company was negligent. The court said: "The motorman knew that the plaintiff and those who had crossed ahead of his car were proceeding near to the track and between the track and the excavation, and it was his duty to wait before starting his car until they had had an opportunity of reaching a place of safety, especially where, as it appears, even the overhang of the car, as well as the projecting fender, was liable to strike a pedestrian as the car rounded the curve. This duty he evidently failed to recognize. Although it has been held that a person at or near a curve in a railroad track may be charged with knowledge that the rear end of a car will project a certain distance beyond the track, the decisions declaring this principle have no application to the facts disclosed in the case at bar. The plaintiff crossed in front of a car while it was at a standstill; and she had a right to assume that the car would not be started, or so operated as to strike her, until she had enjoyed a reasonable opportunity to pass the point of danger."

The rule that a street railway company is under no duty to keep a lookout to prevent persons from coming in contact with the rear end of a car in rounding a curve applies to persons leaving a car and to those intending to become passengers. *Miller v. Public Service Corp.* 86 N. J. L. 631, 92 Atl. 343, L.R.A.1915C 604; *Garvey v. Rhode Island Co.* 26 R. I. 80, 58 Atl. 456; *Gannaway v. Puget Sound Traction, etc. Co.* 77 Wash. 655, 138 Pac. 267; *Kuhn v. Milwaukee Electric R. etc. Co.* 158 Wis. 525, 149 N. W. 220. And see the reported case. Compare *White v. Connecticut Co.* 88 Conn. 614, 92 Atl. 411, L.R.A.1915C 609; *Walger v. Jersey City, etc. R. Co.* 71 N. J. L. 356, 59 Atl. 14. In *Gannaway v. Puget Sound Traction, etc. Co. supra*, the rule was applied to bar a recovery for injuries to persons who had just left the car. The court said: "The respondents had ceased to be passengers on the car when the accident happened, and the appellant owed them no greater duty to look out for their personal safety than it owed to persons passing along the street generally. It is not a duty of street car companies to warn pedes-



trians on the streets that there is an overhang to an ordinary street car when it rounds a curve. This is a matter of common knowledge, and ordinary prudence requires that every one take notice of the fact. But it is claimed that the circumstances shown here makes a case different from that of an ordinary case where a pedestrian on the street is struck by the overhang of a street car. It is said that the conductor knew, or ought to have known, the direction the respondents had taken on leaving the car, and that they were upon the platform and liable to be injured when he directed the motorman to proceed onward with the car. But there is nothing in the evidence to justify this conclusion. The accident happened at about eight o'clock in the evening, and although there was an electric arc light at the junction of the streets, the car inside was more brilliantly lighted than the space surrounding it. This would prevent the conductor inside of the car from seeing anything on the outside, even had he attempted to look, but he owed the respondents no duty to look. He had performed his full duty when he saw that they were safely alighted on the street out of the way of harm from the car. If, after being thus put in a place of safety, they deliberately walked into a place the dangers of which they knew as well as the conductor knew, he cannot be blamed because he did not follow them and warn them." But in *White v. Connecticut Co.* 88 Conn. 614, 92 Atl. 411, L.R.A.1915C 609, it was held that where a street railway company uses as a regular stopping place one known to its servants to be dangerous because the rear end of a car in swinging around the curve in that place is likely to strike a person who has just left the car, it is the duty of the servants in charge of the street car company to a passenger leaving the car at that place either to wait until the passenger is out of danger or to warn him of his perilous situation, and for the failure of the servants to discharge this duty the street railway company is liable in damages for injuries resulting therefrom.

As to a person on a sidewalk the degree of care which a street railway company must exercise to keep him from being struck by a car rounding a curve varies with the circumstances of the case. It seems, however, it must use a higher degree of care than as to a person on the street. *Brentlinger v. Louisville R. Co.* 156 Ky. 688, 161 S. W. 1107; *Fritch v. Pittsburgh Rys. Co.* 239 Pa. St. 6, 86 Atl. 526. See also *Bryant v. Boston Elevated R. Co.* 212 Mass. 62, 98 N. E. 587, 40 L.R.A.(N.S.) 133. Compare *Hayden v. Fair Haven, etc. R. Co.* 76 Conn. 355, 56 Atl. 613. Thus in *Brentlinger v.*

*Louisville R. Co.* supra, wherein it appeared that a temporary sidewalk on one of the main thoroughfares of a city was so constructed that the rear end of a car in rounding the curve at that place would strike a person on the sidewalk, the court in discussing the duty to a person on the sidewalk said: "In view of the character of the thoroughfare, the unusual condition of this corner, and the fact that any car turning out Fifth street would endanger a person on this sidewalk, it was a question for the jury whether those in charge of the street car in the exercise of ordinary care should have anticipated the presence of persons on the sidewalk when a car was making this turn, and should have maintained a lookout for them or taken other precautions for their safety." And in *Fritch v. Pittsburgh Rys. Co.* 239 Pa. St. 6, 86 Atl. 526, it appeared that at a place where the tracks of a street railway company turned into a narrow street the fender of a car in rounding the curve would extend over the sidewalk for several inches. In an action for damages for injuries to a pedestrian on the sidewalk who was struck by the fender of a car rounding the curve it was held that the questions as to the negligence of the street railway company and the contributory negligence of the plaintiff were for the jury. The court said: "Pedestrians have the unquestioned right to make use of the pavement without fear of being injured by the operation of the cars of a street railway company upon the cartway of the street or alley. Appellee was not familiar with the operation of cars at the place of accident, and had no reason to anticipate the danger to which he was subjected. He was not bound to foresee that the fender of the car would sweep the entire alley and extend out over the curb. On the other hand, appellant knew the situation and either did anticipate the danger to pedestrians, or should have done so, and thus a very high degree of care was required under the circumstances. . . . Under the facts, both questions were for the jury, and they were so submitted." In *Bryant v. Boston Elevated R. Co.* 212 Mass. 62, 98 N. E. 587, 40 L.R.A.(N.S.) 133, it appeared that at a place where the tracks of a street railway company turned from one street into a cross street a car and a wagon were moving in the same direction around the curve, when the rear end of the car swung over and came into a collision with the wagon and forced it over the sidewalk where it injured the plaintiff. It was held that negligence of the motorman concurred with that of the driver of the wagon and that the street railway company was jointly liable for injuries to the plaintiff. But in *Hayden v. Fair Haven, etc. R. Co.* 76 Conn. 355, 56 Atl. 613, it was held that

as to a person standing on a sidewalk at a place where a car in rounding a curve extended over the sidewalk the motorman had the right to presume that on the approach of the car, after due warning had been given, an adult person in a position near the track who was liable to be struck, would exercise reasonable care for himself; that the same degree of care which the company would be required to use as to one of its passengers need not be used. And in *Hayden v. Fair Haven*, etc. R. Co. 76 Conn. 355, 56 Atl. 613, it was held that the mere use of a car which extends over the sidewalk in rounding the curve is not negligence where the car is of the kind in general and ordinary use by other companies engaged in the same business.

In *Wechsler v. Pittsburgh Rys. Co.* 247 Pa. St. 96, 93 Atl. 19, it appeared that while the plaintiff, who was a newsboy, was standing a little over a foot away from the front platform of a street car engaged in handling change to another boy on the platform, the car started around the curve at that place and struck plaintiff. The motorman saw the position of the plaintiff before the car started. A judgment for the plaintiff was affirmed, the court saying: "The motorman . . . must have known about the overhang of his car and the probable effect it would have upon one in the position of the plaintiff, yet, notwithstanding this, he started around the curve. Under the circumstances, the lad had a right to assume that the car would not start, and this distinguishes the case at bar from most of those cited."

A street railway company will be held liable for injuries to a person not guilty of contributory negligence who is struck, while crossing the tracks at a curve, by a car rounding the curve at an excessive rate of speed. *Jetter v. New York*, etc. R. Co. 2 Keyes (N. Y.) 154, 2 Abb. Dec. (N. Y.) 458; *Hackett v. Metropolitan St. R. Co.* 27 Misc. 839, 58 N. Y. S. 1141, *affirmed* 29 Misc. 745, 60 N. Y. S. 1139; *Brown v. Twenty-third St. R. Co.* 56 Super. Ct. (N. Y.) 356, 4 N. Y. S. 192, *affirmed* 121 N. Y. 667, 24 N. E. 1094, 30 N. Y. St. Rep. 1014, mem. See also *Muessman v. Metropolitan St. R. Co.* 76 App. Div. 1, 78 N. Y. S. 571. *Compare* *Gribbins v. Kentucky Terminal*, etc. Co. 150 Ky. 276, 150 S. W. 338, and the reported case.

#### *Contributory Negligence.*

The rule that a pedestrian when approaching a street car track on which a car is likely to come has not, in the absence of a sudden emergency or an imperious necessity, the right to dismiss all thought of danger applies with equal force to a person about to cross a street car track at a curve, and

the failure of a person to use some care to keep from being struck by a car coming around the curve constitutes contributory negligence. *Pittsburg R. Co. v. Cluff*, 149 Fed. 732, 79 C. C. A. 438; *Jetter v. New York*, etc. R. Co. 2 Keyes (N. Y.) 154, 2 Abb. Dec. (N. Y.) 458; *Muessman v. Metropolitan St. R. Co.* 76 App. Div. 1, 78 N. Y. S. 571; *Squire v. Central Park*, etc. R. Co. 36 Super. Ct. (N. Y.) 436; *Cornell v. Pittsburgh Rys. Co.* 54 Pa. Super. Ct. 230. *Compare* *Brown v. Twenty-third St. R. Co.* 56 Super. Ct. (N. Y.) 356, 4 N. Y. S. 192, *affirmed* 121 N. Y. 667, 24 N. E. 1094, 30 N. Y. St. Rep. 1014 mem. Thus in *Cornell v. Pittsburgh Rys. Co.* supra, it was held that a person starting to cross a street car track at a curve who had seen a car beyond the curve was not warranted in assuming that the car would not take the curve instead of the straight track and that his failure to look immediately before entering on the curved track was contributory negligence barring a recovery of damages for injuries sustained by his being struck by the car. To the same effect see *Pittsburg R. Co. v. Cluff*, supra.

Where a person misjudges the swing or overhang of a car rounding a curve and consequently is struck by it he is guilty of contributory negligence barring his right to recover for injuries. *Wood v. Los Angeles R. Corp.* (Cal.) 155 Pac. 68; *Gribbins v. Kentucky Terminal*, etc. Co. 150 Ky. 276, 150 S. W. 338, *citing* *South Covington*, etc. R. Co. v. Besse (Ky.) 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L.R.A.(N.S.) 890; *Louisville R. Co. v. Ray* (Ky.) 124 S. W. 313; *Widmer v. West End St. R. Co.* 158 Mass. 49, 32 N. E. 899; *Jelly v. North Jersey St. R. Co.* 76 N. J. L. 191, 68 Atl. 1091; *Riddle v. Forty-Second St.* etc. R. Co. 173 N. Y. 327, 66 N. E. 22; *Kaufman v. Interurban St. R. Co.* 43 Misc. 634, 88 N. Y. S. 382; *Matulewicz v. Metropolitan St. R. Co.* 107 App. Div. 230, 95 N. Y. S. 7; *Beeck v. Coney Island*, etc. R. Co. 135 N. Y. S. 600; *Townsend v. Houston Electric Co.* (Tex. Civ. App.) 154 S. W. 629; *Gannaway v. Puget Sound Traction*, etc. Co. 77 Wash. 655, 138 Pac. 267. And see the reported case. *Compare* *Mittleman v. New York City R. Co.* 56 Misc. 599, 107 N. Y. S. 108. "For one to place himself within reach of the swing or overhang of a car while it is in motion is as much a bar to his recovery in an action against the company as though he had negligently placed himself in front of a moving car, and been injured thereby." *Jelly v. North Jersey St. R. Co.* supra. In *Townsend v. Houston Electric Co.* (Tex. Civ. App.) 154 S. W. 629, it appeared that a person intending to become a passenger on a street car placed himself in such a position that the overhang of the car as it came

around the curve at that place struck and injured him. In an action to recover damages for the injuries it was held that the plaintiff was negligent as a matter of law and that the refusal of the trial court to submit to the jury the speed of the car in rounding the curve and the failure of the motorman to keep a proper lookout was proper.

But a person on a sidewalk need not exercise the same degree of care as a person on the street to keep from being struck by a car rounding a curve although it seems that he must exercise some care. *Hayden v. Fair Haven*, etc. R. Co. 76 Conn. 355, 56 Atl. 613; *Brentlinger v. Louisville R. Co.* 156 Ky. 685, 161 S. W. 1107; *Fritch v. Pittsburg Rys. Co.* 239 Pa. St. 6, 86 Atl. 526. Thus in *Hayden v. Fair Haven*, etc. R. Co. *supra*, it was said: "Request (a) in effect asked the court to charge the jury that because the plaintiff was on the sidewalk, he was under no duty to exercise reasonable care with reference to the approach of a car around the curve in question. We think the court did not err in failing so to charge. Standing where the plaintiff did, so near the edge of the sidewalk, it was, we think, his duty to exercise some degree of care with reference to the street traffic. He was not, standing there, as free from all duty with regard to that traffic as he would have been in bed; yet that is substantially the import of this request. Standing in the street it would have been his duty to exercise a higher degree of care, perhaps, than would be required of him on the sidewalk; but even on the sidewalk he is not entirely free from the duty to exercise some care with reference to street traffic. Whether on street or sidewalk he was bound to exercise some care, the degree of care varying with the circumstances. In short, he was bound, standing where he did, to exercise such care as would be exercised by a reasonably prudent man in like circumstances; and this is just what the court charged."

### CHRISTOPHERSON

v.

### MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

North Dakota Supreme Court — May 28,  
1914.

28 N. Dak. 128; 147 N. W. 791.

### Railroads — Crossing Accident — Con- tributory Negligence of Driver.

The driver of a private conveyance who collides with a train while attempting to

cross a railroad track at a public crossing known by him to be a very dangerous one on account of complete obstructions to his view of the defendant's train, and who, knowing that a train was about due, concededly did not stop and listen or exercise any precaution to ascertain whether a train was approaching, except to look around as he was driving, when he knew his vision of the track was completely obstructed, is guilty of contributory negligence as a matter of law.

### Same.

Where the facts respecting the failure to exercise care by the driver of a team about to cross a railroad track are conceded or uncontradicted, and it can be said that reasonable men could not draw different conclusions or inferences therefrom, the question of the contributory negligence of such driver is one of law for the court.

### Negligence of Driver Imputed to Oc- cupant of Vehicle.

Where the plaintiff and the negligent driver of a private conveyance were, at the time of plaintiff's injury resulting from a collision with defendant's train at a railroad crossing, engaged in a joint enterprise, the driver's negligence is imputed to such plaintiff, and no recovery can be had.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Barnes county: COFFEY, Judge.

Action for damages. Thomas Christopher-son, plaintiff, and Minneapolis, St. Paul and Sault Ste. Marie Railway Company, defend-ant. Judgment for defendant. Plaintiff ap-peals. The facts are stated in the opinion. **AFFIRMED.**

Page & Engler for appellant.

Lee Combs & L. S. B. Ritchie and John L. Erdall for respondent.

[132] FISK, J.—Plaintiff seeks to recover damages for personal injuries received by him through the alleged negligence of defendant in running its train over a certain public crossing near St. Croix Falls, in the state of Wisconsin, on November 2, 1905. Plain-tiff's injury was caused by a collision at such crossing at about 6:30 A. M. on such date, and while plaintiff, his brother, and a lady friend were about to cross the railroad track at such point.

At the close of the plaintiff's testimony the defendant moved for a directed verdict upon the ground, among others, that such testi-mony disclosed that he was guilty of con-tributory negligence as a matter of law, which motion was granted and a verdict di-rected for the defendant. Thereafter plain-tiff moved for a new trial, which motion was denied and judgment entered in defendant's favor for costs. The appeal is both from the

judgment and from the order denying a new trial.

The assignments of error, of which there are three in number, relate to the rulings of the court aforesaid.

We deem it unnecessary to consider any question presented other than that constituting the first ground of defendant's motion for a directed verdict, for we are agreed that the learned trial court properly granted defendant's motion upon the ground that plaintiff was guilty of contributory negligence, barring his recovery.

The plaintiff's testimony discloses the following undisputed facts: Plaintiff and the other two occupants of the vehicle, which consisted of a single-seated top buggy drawn by two horses with the top down, were returning early in the morning from the home of plaintiff's father to St. Croix Falls, and they were required to cross a branch line of defendant's railroad at a point known as "Charlie Pickles' crossing." This crossing was a very dangerous one owing to the fact that the highway approaching thereto is about 20 feet deep and down hill through a narrow cut, just wide enough to permit teams to pass, being only [133] about 15 or 20 feet wide at the crossing, and the railroad track is also in a cut between 15 and 20 feet deep with bur oaks growing on top of either embankment, and extending to a considerable distance down on the sides thereof. These bur oaks were quite thick and from 10 to 12 feet in height. From 12 to 15 rods east of the crossing the railroad track makes a curve, and the cut extends back from the crossing from 15 to 20 rods. At the time of the accident it was somewhat windy, and the proof tends to show that the defendant's servants did not blow its whistle or ring its bell on approaching such crossing. The train came from a northeasterly direction. The plaintiff and his brother were well acquainted with the crossing in question, and knew that it was impossible to see a train approaching from the northeast until they arrived at a point very close to the crossing. They had lived in that community for five or six years prior to the accident, and had been over the crossing repeatedly. Plaintiff and his brother jointly hired the rig to make the trip on the preceding evening for the purpose of visiting their father's home, and plaintiff drove the rig going out and his brother Charlie drove on the return trip and at the time of the accident. Among other things, Charlie testified as follows: "I knew the crossing was a bad one. I knew that the train was about to come or was due at that time. I had been through there five or six times before. I knew it was a pretty bad crossing. I looked back to see if there was any train coming. I knew there was one coming, and I knew I

could not see until I got close to the track had it been coming. I could not see any until I got down close to the track. I did not stop the team. I made no other investigation to see whether it was coming or not. You would have to go down on the track to see it. I knew that. We approached the track without stopping the team, knowing that we could not see it. Before the team heard the train I could have stopped and looked down the track. I did not do that. I knew it was about time for the train to come along there. After the horses sheared off to one side the engine passed over the crossing. The engine did not strike the horses from the head-end part. There was nothing that prevented me from getting out of the rig, and leaving the team in the hands of my brother, and going to the side of the track to look east and west, if I had elected to do so before the horses reached the crossing. I would not have been in danger myself if I had done that."

[134] The evidence of the plaintiff and the lady who was in the rig, and who is now plaintiff's wife, was substantially the same as that of the witness Charlie Christopherson.

It will thus be seen that we are here confronted with an exceptional state of facts: First, an extremely dangerous crossing, and known to be such by the plaintiff and his brother, owing to the fact that it was impossible to see an approaching train from the northeast; second, the plaintiff's brother knew that a train was due at about the time in question; and, third, the only precaution taken on approaching the crossing to ascertain whether a train was coming was that testified to by Charlie, the driver of the rig, that he looked back to see if there was an approaching train, when he knew that to look would avail him nothing. It seems to us that to drive the team down to the crossing under these circumstances, without even stopping to listen for an approaching train, was, to say the least, most reckless and heedless conduct, and clearly constituted gross negligence as a matter of law.

Concededly, it was impossible to see the train as they approached this crossing, and the undisputed proof shows that they did not stop nor take any precaution whatever, except the driver testified that "I looked around as I was driving." Had they stopped the team a few seconds, and listened for an approaching train, the accident would not have happened.

Seefeld v. Chicago, etc. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811, 7 Am. Neg. Rep. 452; Blackburn v. Southern Pac. Co. 34 Ore. 215, 55 Pac. 225.

We are not unmindful of the well-settled rule in this state that contributory negligence is usually a question of fact for the

jury, and that it is only very exceptional cases that a trial court is justified in taking from the jury the question of the exercise of care on the part of the plaintiff, commensurate with the known or reasonably apprehended danger. The following are some of the cases decided by this court in support of such rule:

*Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Kunkel v. Minneapolis, etc. R. Co.* 18 N. D. 367, 121 N. W. 830; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91; *Hollinshead v. Minneapolis, etc. R. Co.* [135] 20 N. D. 642, 127 N. W. 993; *Rober v. Northern Pac. R. Co.* 25 N. D. 394, 142 N. W. 22. But we think each of the foregoing cases may be differentiated from the case at bar on the facts involved, and each case must, of course, be governed by its own peculiar facts. As before stated, the case at bar presents an exceptional state of facts which, we think, clearly disclose as a matter of law the negligence of the driver of the rig; for it is clear to our minds that reasonable men cannot differ or draw different conclusions or inferences from the facts disclosed, but would be forced to the one conclusion from the conceded facts, that the driver was guilty of recklessness and want of due care which directly contributed to the plaintiff's injury. See *Haugo v. Great Northern R. Co.* 27 N. D. 268, 145 N. W. 1053, and cases cited, where the rule respecting contributory negligence as a matter of law is stated.

The facts being undisputed, and there being no basis for reasonable minds to differ as to the inferences or conclusions to be deduced from such facts, it became merely a question of law for the court; and we are satisfied that the decision of the trial court was entirely correct, provided the contributory negligence of plaintiff's brother, the driver of the rig at the time of the accident, is imputed to plaintiff. Upon this latter point there is, we think, no room for doubt under the authorities. The undisputed proof discloses that these brothers were at the time engaged in a joint enterprise, they having hired the rig and agreed to share equally the expense of such hiring. Each, therefore, had as much authority and control over the manner of driving as the other had. This being true, the negligence of one was the negligence of both.

*Lightfoot v. Winnebago Traction Co.* 123 Wis. 479, 102 N. W. 30; *Beaucage v. Mercer*, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774; *Nesbit v. Garner*, 75 Ia. 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; *McBride v. Des Moines City R. Co.* 134 Ia. 398, 109 N. W. 618; *Koplitz v. St. Paul*, 86 Minn. 373, 58 L.R.A. 74, 90 N. W. 794; *Johnson v. Gulf, etc. R. Co.* 2 Tex. Civ. App. 139, 21 S.

W. 274; *Donnelly v. Brooklyn City R. Co.* 109 N. Y. 16, 15 N. E. 733; *Schroen v. Staten Island Electric R. Co.* 16 App. Div. 111, 45 N. Y. S. 124, 3 Am. Neg. Rep. 61; *Cass v. Third Ave. R. Co.* 20 App. Div. 591, 47 N. Y. S. 356; *Boyden v. Fitchburg R.* [136] Co. 72 Vt. 89, 47 Atl. 409; *Omaha, etc. Valley R. Co. v. Talbot*, 48 Neb. 628, 67 N. W. 599. See also note in 8 L.R.A. (N.S.) 628, and 29 Cyc. 542, 550, and cases cited.

For a correct statement of the rule as to when the negligence of the driver of a private conveyance is imputable to the injured person, and when not, see 7 Am. & Eng. Enc. Law, 2d ed. 447, 448, and authorities cited in notes.

Affirmed.

### NOTE.

#### Contributory Negligence of Driver as Imputable to Occupant of Vehicle.

Introductory, 685.

General Rule, 685.

Exceptions to Rule, 687.

Care Required of Occupant, 688.

Rule in Michigan and Wisconsin, 689.

#### Introductory.

The earlier cases discussing the contributory negligence of the driver as imputable to the occupant of a vehicle, are collected in the notes to *Colorado, etc. R. Co. v. Thomas*, 3 Ann. Cas. 700; *Shutz v. Old Colony Street Railway Co.* 9 Ann. Cas. 402, and *Hampel v. Detroit, etc. R. Co.* 110 Am. St. Rep. 291. This note reviews the recent cases on the subject. Cases discussing the negligence of the driver of an automobile as imputable to an occupant thereof, are reviewed in the note to *Anthony v. Kiefner*, reported ante, this volume, at page 264.

#### General Rule.

It is well settled that the negligence of the driver of a private vehicle is not to be imputed to an occupant thereof who is injured through the combined negligence of the driver and a third person, where the occupant is without fault and has no control over the driver.

*United States.*—*Winona v. Rotzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L.R.A. (N.S.) 204. See also *Monongahela River Consol. Coal, etc. Co. v. Schinnerer*, 196 Fed. 375, 117 C. C. A. 193 (rule held applicable to navigator of motor boat).

*Alabama.*—*North Alabama Traction Co. v. Thomas*, 164 Ala. 191, 51 So. 418; *Louis-*

ville, etc. R. Co. v. Calvert, 170 Ala. 565, 54 So. 184; Birmingham-Tuscaloosa Ry. etc. Co. v. Carpenter, 69 So. 626; Perkins v. Galloway, 69 So. 875; Central of Georgia R. Co. v. Jones, 70 So. 729.

*California*.—Fujise v. Los Angeles R. Co. 12 Cal. App. 207, 107 Pac. 317; Parmenter v. McDougall, 156 Pac. 460.

*Delaware*.—Evans v. Wilmington City R. Co. 7 Penn. 458, 80 Atl. 634; Campbell v. Walker, 2 Boyce 41, 78 Atl. 601; Igle v. People's R. Co. 93 Atl. 668.

*Indiana*.—Cincinnati, etc. Electric St. R. Co. v. Cook, 44 Ind. App. 303, 88 N. E. 76; Wabash R. Co. v. McNown, 53 Ind. App. 116, 99 N. E. 126 (petition for rehearing overruled 100 N. E. 383); Henry v. Epstein, 53 Ind. App. 265, 101 N. E. 647; Chicago, etc. R. Co. v. Biddinger, 109 N. E. 953.

*Illinois*.—Eckels v. Muttschall, 230 Ill. 462, 82 N. E. 828; Nonn v. Chicago City R. Co. 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114; Illinois Southern R. Co. v. Hamilla, 128 Ill. App. 152 (judgment affirmed 226 Ill. 88, 80 N. E. 745); Chicago v. Bork, 128 Ill. App. 357; Donnelly v. Chicago City R. Co. 131 Ill. App. 302; Bohen v. Chicago City R. Co. 141 Ill. App. 261; Dudley v. Peoria R. Co. 153 Ill. App. 619; Storm v. Cleveland, etc. R. Co. 156 Ill. App. 88; Hess v. Hoyt, 164 Ill. App. 539; Odett v. Chicago City R. Co. 166 Ill. App. 270; Meek v. Chicago R. Co. 183 Ill. App. 256; Graham v. Hagmann, 189 Ill. App. 631 (judgment affirmed 270 Ill. 252, 110 N. E. 337). See also Henderson v. Chicago R. Co. 170 Ill. App. 616.

*Iowa*.—Johnston v. Delano, 154 N. W. 1013; Fisher v. Ellston, 156 N. W. 422.

*Kansas*.—Williams v. Withington, 88 Kan. 809, 129 Pac. 1148.

*Kentucky*.—Louisville R. Co. v. McCarthy, 129 Ky. 814, 112 S. W. 925, 130 Am. St. Rep. 494, 19 L.R.A.(N.S.) 230; Illinois Cent. R. Co. v. Wilkins, 149 Ky. 35, 147 S. W. 759; Lexington v. Philley, 155 Ky. 224, 159 S. W. 665; Louisville v. Heitkemper, 169 Ky. 167, 183 S. W. 465; Paducah Traction Co. v. Waller, 169 Ky. 721, 185 S. W. 119; Paducah Traction Co. v. Sine, 111 S. W. 356, 33 Ky. L. Rep. 792.

*Maine*.—Denis v. Leviston, etc. R. Co. 104 Me. 39, 70 Atl. 1047; Sykes v. Maine Cent. R. Co. 111 Me. 182, 88 Atl. 478.

*Maryland*.—Earp v. Phelps, 120 Md. 282, 87 Atl. 806.

*Massachusetts*.—Peabody v. Haverhill, etc. R. Co. 200 Mass. 277, 85 N. E. 1051; Tennien v. Chase, 201 Mass. 497, 87 N. E. 901; Ingalls v. Lexington, etc. R. Co. 205 Mass. 73, 90 N. E. 1164; Davis v. Boston, etc. R. Co. 214 Mass. 98, 100 N. E. 1032.

*Minnesota*.—Carnegie v. Great Northern R. Co. 128 Minn. 14, 150 N. W. 164.

*Missouri*.—Moon v. St. Louis Transit Co. 237 Mo. 425, Ann. Cas. 1913A 183, 141 S. W. 870; Farrar v. Metropolitan St. R. Co. 249 Mo. 210, 155 S. W. 439; Ingino v. Metropolitan St. R. Co. 179 S. W. 771; Zalotuchin v. Metropolitan St. R. Co. 127 Mo. App. 577, 106 S. W. 548; Connor v. Wabash R. Co. 149 Mo. App. 675, 129 S. W. 777; Byars v. Wabash R. Co. 161 Mo. App. 692, 141 S. W. 928; Dudley v. Wabash R. Co. 171 Mo. App. 462, 154 S. W. 652; Elbert v. Metropolitan St. R. Co. 174 Mo. App. 45, 160 S. W. 34; Johnston v. Springfield Traction Co. 176 Mo. App. 174, 161 S. W. 1193.

*Nebraska*.—Craig v. Chicago, etc. R. Co. 97 Neb. 586, 150 N. W. 648.

*New Jersey*.—Mittelsdorfer v. West Jersey, etc. R. Co. 77 N. J. L. 698, 73 Atl. 538; Weber v. Philadelphia, etc. R. Co. 96 Atl. 54.

*New York*.—Caminez v. Brooklyn, etc. R. Co. 127 App. Div. 138, 111 N. Y. S. 384; Foley v. New York Central, etc. R. Co. 132 App. Div. 606, 117 N. Y. S. 956; McCullough v. Pennsylvania R. Co. 158 N. Y. S. 4.

*Ohio*.—Toledo, etc. Central Ry. v. Flippin, 32 Ohio Cir. Ct. Rep. 755 (judgment affirmed 86 Ohio St. 334, 99 N. E. 1134); Pennsylvania R. Co. v. Stahl, 34 Ohio Cir. Ct. Rep. 157.

*Oklahoma*.—Chickasha St. R. Co. v. Marshall, 43 Okla. 192, 141 Pac. 1172.

*Pennsylvania*.—Walsh v. Altoona, etc. Electric R. Co. 232 Pa. St. 479, 81 Atl. 551; Kammerdiener v. Rayburn Tp. 233 Pa. St. 328, 82 Atl. 464; Sieb v. Central Pennsylvania Traction Co. 47 Pa. Super. Ct. 228.

*Tennessee*.—James v. Memphis St. R. Co. 3 Tenn. Civ. App. 298.

*Virginia*.—Southern R. Co. v. Jones, 88 S. E. 178.

*Utah*.—Atwood v. Utah Light, etc. Co. 44 Utah 366, 140 Pac. 137.

*Washington*.—Cable v. Spokane, etc. R. Co. 50 Wash. 619, 97 Pac. 744, 23 L.R.A.(N.S.) 1224; Cathey v. Seattle Electric Co. 58 Wash. 176, 108 Pac. 443; Leland v. Chehalis Lumber Co. 68 Wash. 632, 123 Pac. 1086.

*West Virginia*.—Warth v. Jackson County Court, 71 W. Va. 184, 78 S. E. 420.

*Canada*.—Eisenhauer v. Halifax, etc. R. Co. 42 Nova Scotia 426; Loach v. British Columbia Electric R. Co. 19 British Columbia 177.

In Hess v. Hoyt, 164 Ill. App. 539, the court said: "The rule is that the negligence of the driver of a vehicle is not to be imputed to a guest riding with him while personally in the exercise of all the care which ordinary caution requires so as to preclude the guest from recovering from a third person for personal injuries proximately resulting from his negligence, where the driver

is not the agent of or under the control of the passenger."

The same rule has been applied in the case of the contributory negligence of the driver of a hired conveyance. *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664; *Birmingham-Tuscaloosa Ry. etc. Co. v. Carpenter* (Ala.) 69 So. 626; *Central of Georgia R. Co. v. Jones* (Ala.) 70 So. 729; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 Pac. 136; *Field v. Spokane, etc. R. Co.* 64 Wash. 445, 117 Pac. 228.

Where a husband is driving with his wife, the negligence of the husband will not be imputed to his wife, if she is without fault, and is exercising no control over the management of the team at the time of the accident. *Chicago, etc. R. Co. v. Biddinger* (Ind.) 109 N. E. 953; *Cleveland, etc. R. Co. v. Dukeman*, 130 Ill. App. 105; *Bohen v. Chicago City R. Co.* 141 Ill. App. 261; *Dudley v. Peoria R. Co.* 153 Ill. App. 619; *Fisher v. Ellston* (Ia.) 156 N. W. 422; *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Louisville R. Co. v. McCarthy*, 129 Ky. 814, 112 S. W. 925; *Livingston v. Pilley*, 155 Ky. 224, 159 S. W. 665; *Denis v. Leviston, etc. R. Co.* 104 Me. 39, 70 Atl. 1047; *Moon v. St. Louis Transit Co.* 237 Mo. 425, Ann. Cas. 1913A 183, 141 S. W. 870; *Johnson v. Springfield Traction Co.* 176 Mo. App. 174, 161 S. W. 1193; *Toledo, etc. Central Ry. v. Flippin*, 32 Ohio Cir. Ct. Rep. 755 (judgment affirmed 86 Ohio St. 334, 99 N. E. 1134); *Kammerdiener v. Rayburn Tp.* 233 Pa. St. 328, 82 Atl. 464; *Eisenhauer v. Halifax, etc. R. Co.* 42 Nova Scotia 426.

Where a son is driving and his parent is the occupant, it has been held that the negligence of the son will not be imputed to the parent if the parent is not exercising any control over the son at the time of the accident. *Cincinnati, etc. Electric St. R. Co. v. Cook*, 44 Ind. App. 303, 88 N. E. 76. And likewise, it has been held that where the parent is driving and his child is the occupant, the negligence of the parent will not be imputed to the child. *Johnston v. Delano* (Ia.) 154 N. W. 1013; *Dudley v. Wabash R. Co.* 171 Mo. App. 652, 154 S. W. 462.

The negligence of the driver of a hose carriage has been held not imputable to a fireman riding thereon. *Donnelly v. Chicago City R. Co.* 131 Ill. App. 302.

The fact that the relation of fellow servants exists between the driver and the occupant does not cause the negligence of the driver to be imputed to the occupant in an action against a third person who is not their common master. *Paducah Traction Co. v. Sine*, 111 S. W. 356, 33 Ky. L. Rep. 792; *Louisville v. Heitkemper*, 169 Ky. 167, 183

S. W. 465; *Earp v. Phelps*, 120 Md. 282, 87 Atl. 806.

### Exceptions to Rule.

Where the driver of the vehicle is under the direction and control of the occupant, the negligence of the driver is imputable to the occupant. *Louisville v. Bott*, 151 Ky. 578, 152 S. W. 529; *Bofill v. New Orleans Ry. etc. Co.* 135 La. 996, 66 So. 339, L.R.A. 1915C 419; *Moon v. St. Louis Transit Co.* 237 Mo. 425, Ann. Cas. 1913A 183, 141 S. W. 870; *Landrum v. St. Louis, etc. R. Co.* (Mo.) 178 S. W. 273. See also *Louisville, etc. R. Co. v. Armstrong*, 127 Ky. 367, 105 S. W. 473, 32 Ky. L. Rep. 252. Thus where the driver is the servant of the occupant, the negligence of the driver will be imputed to the occupant. *Moon v. St. Louis Transit Co.* 237 Mo. 425, Ann. Cas. 1913A 183, 141 S. W. 870. See also *Louisville, etc. R. Co. v. Armstrong*, 127 Ky. 364, 105 S. W. 473, 32 Ky. L. Rep. 252. And the negligence of the driver will be imputed to the occupant if the occupant is actively participating in controlling the vehicle at the time the injury is inflicted. *Lopes v. Lynch*, 168 App. Div. 41, 153 N. Y. S. 673. Where it appeared that a master was driving a vehicle in which his servant was an occupant, and one was to look in one direction for trains and the other in another direction, it was held that the negligence of the master would be imputed to the servant. *Lundergan v. New York Cent. etc. R. Co.* 203 Mass. 460, 89 N. E. 625. It has been held that the burden is on the defendant to prove that the driver was the servant of the occupant. *Moon v. St. Louis Transit*, 237 Mo. 425, Ann. Cas. 1913A 183, 141 S. W. 870. Where the relation of parent and child existed between the driver and the occupant, it has been held that it is easier to infer that the occupant exercised control over the driver than in other cases; and that this is especially so where the child is a minor. *Peabody v. Haverhill, etc. R. Co.* 200 Mass. 277, 85 N. E. 1051. But ordinarily, the question, whether the occupant was exercising control over the driver, is one of fact for the jury. *Craig v. Chicago, etc. R. Co.* 97 Neb. 586, 150 N. W. 648; *Peabody v. Haverhill, etc. R. Co.* 200 Mass. 277, 85 N. E. 1051. Where the occupant merely gives directions as to the place he wishes to go, it has been held that that is not exercising such control over the driver as to impute the driver's negligence to the occupant. *Farrar v. Metropolitan St. R. Co.* 249 Mo. 210, 155 S. W. 439.

Another exception to the general rule obtains where the driver of a vehicle and the occupant thereof are engaged in a joint or common enterprise. In that case the negli-

gence of the driver will be imputed to the occupant. *Louisville, etc. R. Co. v. Armstrong*, 127 Ky. 367, 105 S. W. 473, 32 Ky. L. Rep. 252. And see the reported case. Thus where the driver and the occupant were jointly engaged in hauling fodder it was held that the negligence of the driver was imputable to the occupant. *Louisville, etc. R. Co. v. Armstrong*, 127 Ky. 367, 105 S. W. 473, 32 Ky. L. Rep. 252. And see the reported case wherein it appears that brothers had hired a rig and agreed to share equally the expense of the hiring. But in *Davis v. Boston, etc. R. Co.* 214 Mass. 98, 100 N. E. 1032, it was held that mere gratuitous services on the part of the occupant, such as leading a horse behind a buggy for the driver, does not create a joint or common enterprise.

#### *Care Required of Occupant.*

While it is well settled that the negligence of the driver of a vehicle is not ordinarily imputed to an occupant thereof, it is equally well settled that the occupant cannot recover if he is guilty of independent contributory negligence; hence it is essential to the right of an occupant of a vehicle to recover for his injuries that he should be in the exercise of reasonable care at the time of the accident. *Davis v. Chicago, etc. R. Co.* 159 Fed. 10; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 Pac. 136; *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601; *Evans v. Wilmington City R. Co.* 7 Penn. (Del.) 458, 80 Atl. 634; *Chicago, etc. R. Co. v. Biddinger (Ind.)* 109 N. E. 953; *Storm v. Cleveland, etc. R. Co.* 156 Ill. App. 88; *Hess v. Hoyt*, 164 Ill. App. 539; *Peabody v. Haverhill, etc. R. Co.* 200 Mass. 277, 85 N. E. 1051; *Connor v. Wabash R. Co.* 149 Mo. App. 675, 129 S. W. 777; *Mittelsdorfer v. West Jersey, etc. R. Co.* 77 N. J. L. 698, 73 Atl. 538; *Caminez v. Brooklyn, etc. R. Co.* 127 App. Div. 138, 111 N. Y. S. 384; *Toledo, etc. Central Ry. v. Flippin*, 32 Ohio Cir. Ct. Rep. 755 (judgment affirmed 86 Ohio St. 334, 99 N. E. 1134); *Pennsylvania R. Co. v. Stahl*, 34 Ohio Cir. Ct. Rep. 157; *James v. Memphis St. R. Co.* 3 Tenn. Civ. App. 298; *Southern R. Co. v. Jones (Va.)* 88 S. E. 178; *Atwood v. Utah Light, etc. Co.* 44 Utah 366, 140 Pac. 137; *Cable v. Spokane, etc. R. Co.* 50 Wash. 619, 97 Pac. 744, 23 L.R.A. (N.S.) 1224. The cases are not entirely clear or harmonious as to the extent of care to be exercised by the occupant. But it has been held that it is a part of the duty of the occupant of a vehicle to observe dangers and avoid them if possible by suggestion or protest to the driver. *Storm v. Cleveland, etc. R. Co.* 156 Ill. App. 88. And it has been held that where the oc-

cupant of a vehicle knows of an existing or approaching danger, whether it is known or unknown to the driver, he is negligent if he fails to call the driver's attention to it, or to try in some way to avoid it. *Warth v. Jackson County Ct.* 71 W. Va. 184, 76 S. E. 420. What is reasonable care on the part of the occupant under the circumstances, is generally held to be a question for the jury. *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 Pac. 136; *Illinois Southern R. Co. v. Hamill*, 128 Ill. App. 152 (judgment affirmed 226 Ill. 88, 80 N. E. 745); *Cleveland, etc. R. Co. v. Dukeman*, 130 Ill. App. 105; *Brown v. Chicago City R. Co.* 153 Ill. App. 242; *Odett v. Chicago City R. Co.* 166 Ill. App. 270; *Denis v. Leviston, etc. R. Co.* 104 Me. 39, 70 Atl. 1047; *Zalotuchin v. Metropolitan St. R. Co.* 127 Mo. App. 577, 106 S. W. 548; *Mittelsdorfer v. West Jersey, etc. R. Co.* 77 N. J. L. 698, 73 Atl. 538; *Foley v. New York Cent. etc. R. Co.* 132 App. Div. 506, 117 N. Y. S. 956; *Chickasha St. R. Co. v. Marshall*, 43 Okla. 192, 141 Pac. 1172; *Walsh v. Altoona, etc. Electric R. Co.* 232 Pa. St. 479, 81 Atl. 551; *Atwood v. Utah Light, etc. Co.* 44 Utah 366, 140 Pac. 137. But the circumstances may be such that the occupant may be guilty of independent contributory negligence as a matter of law. *Caminez v. Brooklyn, etc. R. Co.* 127 App. Div. 138, 111 N. Y. S. 384. Thus, it has been held that ordinary care on the part of the occupant requires him to look and listen for approaching trains at railroad crossings, *Pennsylvania R. Co. v. Stahl*, 34 Ohio Cir. Ct. Rep. 157; *Southern R. Co. v. Jones (Va.)* 88 S. E. 178, or to endeavor to stop, look and listen before crossing, *Cable v. Spokane, etc. R. Co.* 50 Wash. 619, 97 Pac. 744, 23 L.R.A. (N.S.) 1224. Where the occupant of the vehicle was a superior servant to the driver, and could have seen an approaching train and stopped the horse before crossing, it was held that he was guilty of independent contributory negligence in failing to do so. *Klinecyk v. Lehigh Valley R. Co.* 152 App. Div. 270, 136 N. Y. S. 696. Where both the driver and his passenger were engaged in looking and listening for approaching trains, it was held that the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Erie R. Co. v. Hurlburst*, 221 Fed. 907, 137 C. C. A. 477. But see *Louisville, etc. R. Co. v. Calvert*, 170 Ala. 565, 54 So. 184, wherein it appeared that a daughter, while being driven by her father, was injured at a railroad crossing. In that case it was held that the fact that the father's hearing was not perfect did not place on the daughter the responsibility of checking the horse. And see *Georgia R. Co. v. Jones (Ala.)* 70 So. 729, wherein it was held that



an occupant of a wagon having no control over the driver was not negligent in failing to stop, look and listen before crossing a railroad track. Likewise in the case of *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317, it was held that the occupant of a vehicle had a right to assume that the driver was competent, and hence it could not be said as a matter of law that the occupant was guilty of independent negligence in failing to look before the driver turned across a street car track.

#### *Rule in Michigan and Wisconsin.*

A doctrine contrary to the general rule has been followed in Michigan, where the rule is well settled that negligence of the driver of a private conveyance, in which a person of mature years is riding as a voluntary passenger, is imputable to the latter, who is held to assume the risk of the driver's negligence. *Lake v. Springfield Tp.* (Mich.) 153 N. W. 690. And in Wisconsin it has been held that where parents intrust an infant to the care of its grandparent, who is driving a vehicle, the negligence of the grandparent will be imputed to the parents when they seek to recover for the infant's death. *Kuchler v. Milwaukee Electric Ry. etc. Co.* 157 Wis. 107, Ann. Cas. 1916A 891, 146 N. W. 1133.

## MUSIC

v.

### BIG SANDY AND KENTUCKY RIVER RAILROAD COMPANY.

Kentucky Court of Appeals — March 18, 1915.

163 Ky. 628; 174 S. W. 44.

#### **Eminent Domain — Measure of Recovery — Taking of Part of Tract.**

The measure of damages for property taken or injured under eminent domain, where part of the tract is taken, is the fair market value of the part taken, considering it in relation to the entire tract, together with such other direct damages as result to the remainder of the tract by reason of the situation in which it is left by the taking of the part in question, and by reason of such improvements, fencing, etc., as may be rendered necessary by the taking of the part, in the establishment of new means of egress and ingress, and otherwise necessary for the reasonable enjoyment of the remainder of the tract; but such direct damages shall not exceed the difference between the fair market value of the whole tract immediately before the taking

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and the fair market value of the remainder immediately after the taking.

[See 10 R. C. L. tit. *Eminent Domain* p. 153.]

#### **Indirect Damages and Benefits.**

In arriving at the damages from taking land by a railroad indirect or consequential benefits may not be deducted from the direct damages, but if they exceed the indirect or incidental damages resulting from a prudent construction and operation of the railroad, they do not affect the amount of the recovery, but if the indirect or incidental damages resulting from a prudent construction and operation of the railroad do exceed the consequential benefits, there may be included in the recovery such excess of incidental damages over consequential benefits.

[See generally Ann. Cas. 1914B 478; Id. 512.]

#### **Evidence — Value of Adjacent Lands.**

Where land sought to be condemned for railroad right of way lay along a creek, and the entire tract comprised nearly 400 acres of which but about 25 acres was bottom land, and the railroad ran through in approximately the same direction as the creek, testimony concerning the value of lands in that community is relevant, and also testimony as to the relative value of the bottom lands apart from the remainder of the tract.

#### **Proof of Offer to Buy Remaining Land.**

Where, in proceeding to condemn part of a tract of land, the owner testified that the market value of the tract before the taking was \$21,000, and that the value of the remainder after the taking was \$10,500, an offer, made by a witness for the railroad company while on the witness stand, to pay the owner \$21,000 for the land, is incompetent.

[See 5 Ann. Cas. 971.]

#### **Weight of Evidence — Number of Witnesses.**

While the jury is to be guided by the evidence, it is under no necessity of comparing the number of witnesses, and rendering verdict accordingly, but should weigh all the testimony.

[See 3 Ann. Cas. 302.]

#### **Review of Facts.**

While in condemnation proceedings the weight of the evidence may be in favor of the defeated party, if there is any evidence to support the verdict, it will not be disturbed unless flagrantly against the weight of the evidence, and disparity in the number of witnesses will not justify a finding that it is flagrantly against the weight.

#### **Costs on Appeal — Liability of Landowner.**

Ky. St. § 840. provides that if the landowner appeals and fails to increase the recovery beyond the amount "awarded in the county court," he shall pay the costs of the appeal, but if he increases recovery the condemnor pays the costs and makes similar provision as to appeal by the condemnor. Section 839 provides that when a railroad company seeks to condemn lands and either party ap-

peals "from the county court," the company, on payment of the damages assessed and all costs, may take possession of the land. Held, that as no provision was made as to costs in the county court, the circuit court, on appeal to it from the county court, properly imposed costs in the county court on the condemnor, following the rule that in the absence of statute the condemnor should pay costs.

[See note at end of this case.]

Appeal from Circuit Court, Johnson county.

Condemnation proceeding. Big Sandy and Kentucky River Railroad Company, plaintiff, and John Music, defendant. From judgment rendered, defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*J. F. Bailey and Fogg & Kirk* for appellant.

*H. S. Howes and C. B. Wheeler* for appellee.

[628] **HANNAH, J.**—The Big Sandy & Kentucky River Railroad Company instituted in the Johnson County Court a proceeding to condemn a strip of land for right-of-way purposes through the farm of John Music, appellant herein, having been unable to agree with him upon compensation therefor. The commissioners appointed by the county court awarded the landowner a total sum of four thousand dollars. He and the railroad company both filed exceptions to the report of the commissioners; and upon a trial thereof in the county court, the jury's total finding was \$2,500. Music appealed to the circuit court, where a trial resulted in a verdict fixing his compensation and damages at \$2,300. He appeals from the judgment entered upon this verdict.

[629] The farm owned by Music lies on Jennies Creek, and comprises nearly four hundred acres, of which only a small portion, probably twenty-five acres, is creek bottom land, the remainder being hill land. The railroad right-of-way runs through the farm in approximately the same direction as the creek, i. e., up the creek valley, and there is about five acres of the land taken.

1. Appellant contends that the trial court erred in permitting appellee to show by its witnesses the fair market value per acre of lands in that community, and the fair market value per acre of the bottom lands apart from the whole tract in connection with it.

The measure of damages for property taken, injured or destroyed under power of eminent domain in Kentucky, where part of the track is taken, is the fair market value of the part taken, considering it in relation to the entire track, together with such other direct damages as result to the remainder of the tract by reason of the situation in which

it is left by the taking of the part in question, and by reason of such improvements, additional fencing, etc., as may be rendered necessary by the taking of the part, in the establishment of new means of egress and ingress, and otherwise necessary for the reasonable enjoyment of the remainder of the tract; but such direct damages shall not exceed the difference between the fair market value of the whole tract immediately before the taking and the fair market value of the remainder immediately after the taking. Indirect or consequential benefits may not be deducted from the direct damages; but, if they exceed the indirect or incidental damages resulting from a prudent construction and operation of the railroad, they do not affect the amount of the recovery; but if the indirect or incidental damages resulting from a prudent construction and operation of the railroad do exceed the consequential benefits, there may be included in the recovery such excess of incidental damages over consequential benefits. *Big Sandy R. Co. v. Dils*, 120 Ky. 563; 27 Ky. L. Rep. 952, 87 S. W. 310; *Louisville, etc. R. Co. v. Hall*, 143 Ky. 497, 136 S. W. 905; *Broadway Coal Min. Co. v. Smith*, 136 Ky. 725, 125 S. W. 157, 26 L.R.A. (N.S.) 665.

Inasmuch as the recovery for direct damages is limited by the difference between the fair market value of the whole tract before the taking, and the fair market value of the remainder after the taking, we think testimony [630] concerning the value of lands in that community was relevant, as well as that relative to the value of the bottom lands apart from the remainder of the tract; and the court properly overruled appellant's objections to the admission of this testimony. The value of similar properties in the same vicinity was relevant to the issues presented. *Paducah v. Allen*, 111 Ky. 361, 63 S. W. 981, 23 Ky. L. Rep. 701, 98 Am. St. Rep. 422. If appellant's farm was of such character as to render it more valuable than other similar lands in that community, appellant could show that fact and thus destroy the force of the testimony of which complaint is made.

2. Appellant's serious contention is that the verdict is against the weight of the evidence.

Upon the issues as to the amount of compensation to which appellant was entitled, the evidence was conflicting, and sharply so. Appellant himself, for instance, testified that the market value of his farm before the taking was \$21,000, and that the fair market value of the remainder, after the taking, was \$10,500; while the last witness introduced by appellee testified that the value of appellant's farm before the taking was \$6,000, and that after the taking it was \$21,000, and this witness, on the witness stand, offered to pay defendant the last-mentioned sum therefor.

This offer was, of course, incompetent, and the court properly excluded it from the jury. It is referred to here merely as illustrating the wide difference of opinions of the witnesses as to values.

Upon the amount of damages, the appellant has the advantage in the number of witnesses, and all his witnesses fix the damages at a much greater sum than that fixed by the jury; but a number of witnesses for appellee testified that the farm was of the value of \$10,000 before the taking; in other words, about the same as appellant valued it at after the taking. These witnesses also testified that the value of the strip taken was \$500 to \$750. Some of them testified that the farm was of greater value after the taking than before.

The jury was of the vicinage, and while they were required to be guided by the evidence, they were under no necessity of simply comparing the number of witnesses on each side and rendering a verdict according to the numerical superiority thus exhibited. It was their peculiar province to weigh all the testimony and to reconcile the differences of opinion as to values, and in the [631] domain of fact their finding is conclusive. They viewed the premises themselves, and their verdict was within \$200 of that of the jury in the county court, the jury in the county court having also had a view of the premises. The weight of the evidence may be in favor of the defeated party, and yet, where there is any evidence to support the verdict, it will not be disturbed on appeal unless it is flagrantly against the weight of the evidence; nor is a mere disparity in the number of witnesses testifying for the respective parties sufficient to justify a finding that the verdict is flagrantly against the weight of the evidence. *Eby v. Norris* (Ky.) 128 S. W. 878; *Henderson v. Lexington*, 132 Ky. 390, 111 S. W. 318, 33 Ky. L. Rep. 703, 22 L.R.A. (N.S.) 20; *Louisville, etc. R. Co. v. White Villa Club*, 155 Ky. 452, 159 S. W. 983.

3. By the judgment of the circuit court appellee railroad company was required to pay all the costs in the county court, although adjudged a recovery against appellant for the costs in the circuit court. And from that part of the judgment requiring it to pay the costs in the county court the railroad company prosecutes a cross-appeal.

Appellee insists that as both parties filed exceptions to the report of the commissioners in the county court, and it succeeded in the county court in reducing the amount of damages from \$4,000, as fixed by the commissioners, to \$2,500, as fixed by the jury in the county court, it should have judgment for its costs accruing after the filing of the report of the commissioners.

The statutes authorizing the condemnation of private property by railroads seems to

make no special provision for the payment of the costs in the county court.

In a number of the States the rule is that where the condemnor appeals, the landowner is not liable for the costs on the appeal, even though the condemnor succeeds in reducing the damages awarded, upon the theory that such costs are merely expenses incurred in ascertaining the compensation to which the landowner is entitled, and that as the landowner by the constitution is entitled to just compensation for his property, the expense of ascertaining the amount thereof is not chargeable against him. This, in the absence of a statute to the contrary, would seem to be an equitable and proper rule.

But in this State it has been provided by Section 840, Kentucky Statutes, that if the landowner appeals [632] and fails to increase the recovery beyond the amount awarded in the county court, he shall pay the costs of the appeal, but if he succeeds in increasing the recovery, the condemnor must pay the costs of the appeal; and that if the condemnor on appeal decreases the recovery, the landowner shall pay the costs of the appeal, while if the condemnor fails to decrease the recovery on appeal, he shall pay the costs of the appeal; but nothing is said in that section concerning the costs in the county court.

Section 839, Kentucky Statutes, provides that when the railroad company seeks to condemn land, and either party appeals from the county court, the company upon the payment of the damages assessed and all costs, may take possession of the land condemned. Inferentially this seems to cast the burden of the costs in the county court upon the condemnor; and this rule is established by the weight of authority in this country.

In *Lewis on Eminent Domain*, Third Edition, Section 812, it is said:

"It seems to us that courts should be guided by the following principles and considerations in the matter of costs: By the constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional. . . . When the compensation has once been ascertained by a competent tribunal at the expense of the condemning party, the law has done all for the owner which the constitution requires. If the owner is given a right

of appeal or review, it may be upon such terms as to costs as the Legislature may deem just." See also note in 36 L.R.A. (N.S.) 624; and note in 1912C Ann. Cas. 533; 15 Cyc. 973.

In proceedings to condemn a private pass-way the costs in the county court are chargeable against the condemnor. *Vice v. Eden*, 113 Ky. 255, 68 S. W. 125, 24 [633] Ky. L. Rep. 132, construing Kentucky Statutes, Sections 895 and 4352. And the same rule applies in proceedings to condemn land for a public road. See Kentucky Statutes, Section 4299; Acts 1914, p. 344; *Rawlings v. Bigge*, 85 Ky. 251, 3 S. W. 147, 8 Ky. L. Rep. 919; and *Broadway Coal Min. Co. v. Smith*, 136 Ky. 725, 125 S. W. 157, 26 L.R.A. (N.S.) 565, in which latter case, the court said:

"In cases like this the landowner cannot be charged with any costs in the county court although he may file exceptions to the commissioners' report and demand a jury trial."

The trial court properly charged the cost of the proceedings in the county court upon appellee.

Affirmed both on the original and on the cross-appeal.

#### NOTE.

The reported case holds that though a condemnor who succeeds on appeal from the confirmation of an award is, by the express terms of a statute, entitled to costs on appeal, the landowner is entitled to recover all his costs in the court wherein the award is originally confirmed though both parties appeal to that court from the award and a reduction is ordered on the appeal of the condemnor. The liability of a landowner for costs on appeal in an eminent domain proceeding is discussed in the note to *Peoria, etc. Traction Co. v. Vance*, Ann. Cas. 1912C 532.

#### TOWN OF AKRON

v.

#### McELLIOTT.

Iowa Supreme Court — June 19, 1914.

166 Iowa 297; 147 N. W. 773.

#### Municipal Corporations — Powers.

A municipal corporation can exercise only such power as is conferred on it expressly, or such as arises by necessary implication as in-

cidental to powers expressly granted, or such as are indispensable to the purpose of its creation.

#### Regulation of Electricians.

Code, §§ 680, 695, 711, empowering municipal corporations to adopt ordinances to carry into effect duties conferred, and to make regulations against danger from accidents by fire or electrical apparatus, etc., does not authorize a town owning an electric light plant to require electric wire men to procure a license, and to execute a bond conditioned on their indemnifying the town and the superintendent of public works from liability for any damage arising from any negligence in doing their work.

[See note at end of this case.]

#### Same.

A town owning an electric light plant may make all reasonable rules as to the method of doing the work of wiring, and provide for inspection prior to connection with its system, and require conformity to standards reasonably necessary to safety and efficiency.

[See note at end of this case.]

Appeal from District Court, Plymouth county: BOISE, Judge.

Prosecution for violation of municipal ordinance. J. E. McElligott convicted on trial before mayor. On appeal to district court, defendant discharged on ground of invalidity of ordinance. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

T. M. Zink for appellant.

McDuffie & Keenan for appellee.

[298] EVANS, J.—Information was filed against the defendant before the mayor of the town. Such information sufficiently indicates the general nature of the prosecution and is as follows:

"The defendant, J. E. McElligott, is accused of the crime of doing and performing an act prohibited by the ordinances of the town of Akron, Iowa, for that the said defendant, J. E. McElligott, on the 26th day of September, in 1912, at the town of Akron aforesaid, did engage in the business of wiring for electricity a certain house in the said town of Akron, to wit, the residence of one B. F. Wintersteen, and did wire said house for electricity, and did request the superintendent of public works in and for said town of Akron to inspect and pass upon the said wiring for the purpose of supplying said residence with electricity from the city plant, without first obtaining a license to do such wiring, as required by part 16 of section 2 of Ordinance No. 68 of the town of Akron, and procuring and filing the bond required therein, contrary to the provisions of the ordinance in such case made and provided and against the peace and dignity of the town of Akron."

Such information was subsequently amended. For the [299] purposes of our discussion, we need not set forth such amendment. The plaintiff was the owner of its own electric light plant. For the purpose of the administration of such plant and the use of its product, it adopted certain rules and regulations in relation thereto. These were 18 in number, and were included, duly numbered, in section 2 of Ordinance No. 68. The particular parts of this ordinance which are alleged to have been violated by the defendant are rules 15 and 16, which are as follows:

"Part 15—Any electric wire man wishing to do business in connection with the electric works shall before receiving license, file in the office of the town clerk a petition in writing, giving his name and that of each member of the firm, if any, and place of business, asking to become a licensed electric wire man of the said town of Akron, Iowa, stating his willingness to be governed in all respects by the rules and regulations of the electric light department now or hereinafter adopted concerning his business; said petition shall be signed by two responsible citizens of the said town vouching for the business capacity and good reputation of the applicant and for his worthiness to receive a license, which application shall be presented to the council at their first regular meeting thereafter, and if approved by the council, the mayor shall issue a license to the applicant to do business as an electric wire man in the said town of Akron, Iowa. Before receiving the license the applicant shall file in the office of the town clerk a bond with two sureties, to be approved by the town council, in the sum of one thousand dollars (\$1,000.00), conditioned that he will indemnify and keep harmless the said town of Akron, Iowa, and the superintendent of public works from all liability for any accident and damages arising from any negligence or unskillfulness in doing or protecting his work or from any unfaithful or inadequate work done in pursuance of this license, and that he will pay all fines that may be imposed on him for violation of any rules or regulations adopted by said town or superintendent of public works, and in force during the time of his license. The license so issued shall be in full force and effect for a period of one year from the date of issuance thereof, unless the same be sooner revoked for cause shown."

[300] "Part 16—Any electric wire man who shall be guilty of a violation of any of the rules and regulations by the said town, or the superintendent of public works, or whose bond shall not be maintained to the satisfaction of the said town council shall forfeit his license. A forfeiture of the license of any electric wire man shall operate as a suspension of the license held by any and all co-partners in the same business, or of any person in his or their employ."

The case was tried upon a stipulation of facts. This included a stipulation that the defendant "was a competent electrician, and possessed the necessary knowledge and training to perform the work which he performed," and that as such he wired two residences in the town of Akron, and that he did so without complying with the requirements of rules 15 and 16, above set forth. No question is raised but that his work was in fact properly performed, and that it complied with every requirement of the ordinance. No claim is made that any part of his work was disapproved by the inspector, nor that it could have been properly disapproved by such inspector in any other respect than that it had been done by the defendant without first complying with the requirements of sections 15 and 16. The contention of the defendant in brief is that the requirements of rules 15 and 16 transcend the authority of the municipal corporation, and that such requirements are therefore null and void. This contention was sustained by the trial court.

It is well settled that the power of a municipal corporation is only such as is conferred upon it by the statutes, and that it has no other powers than are so conferred upon it by express legislative grant, or such as arise by necessary implication as incidental to powers expressly granted, or such as are indispensable to the purpose for which the municipality was created. *Burroughs v. Cherokee*, 134 Ia. 429, 109 N. W. 876; *Cherokee v. Perkins*, 118 Ia. 405, 92 N. W. 68; *Logan v. Pyne*, 43 Ia. 524, 22 Am. Rep. 261; *Burlington v. Bumgardner*, 42 Ia. 673; *Keokuk v. Scroggs*, 39 Ia. 447.

[301] We inquire, therefore, first by what statute the power was conferred upon the plaintiff municipality to enact rules 15 and 16 above set forth. The appellant relies upon Code, sections 680, 695, and 711. These are as follows:

"Sec. 680. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

"Sec. 695. Cities and towns . . . shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein.

"Sec. 711. They shall have power to make regulations against danger from accidents by fire or electrical apparatus, to establish fire limits, and to prohibit within such limits the erection of any building or addition thereto,

unless the outer walls be made of brick, iron, stone, mortar, or other noncombustible material, with fireproof roofs, and to provide for the removal of any structure erected contrary to such prohibition."

That the municipality had the right to make all reasonable requirements as to the nature and method of the work to be done, and to require submission to appropriate inspection, and to require the elimination of all elements of danger or even waste, may be conceded. Nothing of this kind is attempted in the rules under consideration. These rules do not purport to deal with the merit or method of the work to be done. They merely lay artificial and arbitrary requirements upon the persons who are to be permitted to do the work of electric wiring. They can have no practical effect, except to limit the number of competent persons who will be permitted to do the required work. It would be grotesque to construe the cited statutes as conferring power upon a municipality to require a \$1,000 bond from a competent mechanic, conditioned that he would pay all [302] fines which might be imposed against him for a breach of the ordinance. He could as well be required to give bond to keep the peace.

We think it too clear for extended argument that the rules in question are not within the power conferred upon a municipality either by the express terms of any statute or by necessary implication.

Appellant places reliance upon the case of Lane-Moore Lumber Co. v. Storm Lake, 151 Ia. 141, 130 N. W. 924. That was a case involving the power of the municipality to establish fire limits, and to enforce reasonable regulations to that end. It was held that the requirement for permit in advance of building was a reasonable regulation, in that it amounted only to an approval or disapproval in advance of the fireproof character of the proposed construction. Such an inspection of proposed plans in advance operates to the advantage of the proposed builder, and operates to his protection against the loss which might ensue to him, if condemnation of his plans were withheld until after his money was expended in the construction. Such regulation in advance is also necessary to the protection of the public in such case. Danger to a district from a combustible building arises as soon as the construction is begun. To postpone inspection in such case until after construction would be to subject the district to the fire hazard during the period of construction. The only other alternative is to inspect in advance the proposed plans, and to require the process of construction to conform to the results of the inspection. We see nothing in such case which will lend support to appellant's contention herein.

No question is raised herein but that the city has full power of inspection *previous to*

*the making of any connection with its system.* It may thereby require conformity to such standards as are reasonably necessary to safety and efficiency. Such standards being met, and all the work being properly done, as is conceded in this case, it is beyond the concern of the city to inquire [303] who did it. We think the trial court rightly held to the invalidity of this part of the ordinance.

II. There were two prosecutions against the same defendant for violation of the same ordinance in the wiring of two separate buildings of different owners. Both prosecutions were dismissed by the district court. Appeals to this court were taken in both cases. By agreement, they have both been submitted here upon one record; both cases bearing the same title.

The order of the district court in each case will therefore be

Affirmed.

All the Judges concur.

#### NOTE.

#### State or Municipal Regulation of Electricians.

A municipal regulation requiring every person engaged in the installation of electric wiring to obtain a permit, and prescribing rules for the installation of wiring is a valid exercise of the police power. *Collins v. District of Columbia*, 30 App. Cas. (D. C.) 212; *Toledo v. Winters*, 21 Ohio Dec. 171; *Ex p. Cramer*, 62 Tex. Crim. 11, Ann. Cas. 1913C 588, 136 S. W. 61, 36 L.R.A.(N.S.) 78. See also *Electric Imp. Co. v. San Francisco*, 45 Fed. 593, 13 L.R.A. 131. Compare the reported case wherein the requirement of a bond of \$1000 is held to be unreasonable. In *Collins v. District of Columbia*, supra, it was said: "The express object of the regulation is to furnish as complete protection as may be practicable against the great danger to the public consequent upon the use of electrical lighting and power that has become so general. It is of prime importance that wiring for the purpose of introducing the electric current in either new or old buildings shall be permitted only upon compliance with reasonable rules looking to safety. For this reason the occupant of a building is required to make application for a permit, in which he must designate the premises and describe the proposed construction. . . . It is only by inspection of the premises and the character of the proposed work, before granting the permit, that the danger to the public can be properly guarded against. The additional right to control the installation of the meter and the introduction of the current through the same would not answer the purpose, because the chief danger necessarily lies in the passage of the current through the wiring sys-

tem, any defects in which would then be concealed from view. The power to enact the regulation to the full extent of the meaning that has been given to sec. 2 is, we think, conferred by the Act of Congress pursuant to which it was promulgated by the commissioners. Nor can the regulation, as interpreted, be regarded as unreasonable in the sense that it is unnecessary and oppressive restriction of the ordinary rights of property. The importance and necessity of guarding against fires and their communication to adjacent buildings in towns and cities have always been regarded as within the police power. That this power extends to the provision of regulations controlling the introduction of the dangerous agency of electricity for light and power purposes in buildings is apparent. It is quite true that the owner of a building might without let or hindrance, as contended, erect wires along his walls for ordinary purposes of convenience; but when he erects or strings them for the express purpose of thereafter introducing an electric current, a different rule applies. The requirement that this shall not be done, save after inspection and approval by the municipal authorities, is clearly a reasonable exercise of the police power on behalf of the public safety." In *Toledo v. Winters*, supra, the court said: "But it is further urged that by sec. 422 which provides in substance that the electrical inspector shall adopt and promulgate proper rules and requirements for the installation of electrical wiring and appurtenances, and that all electrical construction, material and appliances shall be constructed and installed in conformity with the rules and requirements of the National Electrical Code is void, because it delegates legislative power to the inspector and to the National Board of Fire Underwriters. It is stated in 6 Am. & Eng. Enc. of Law (2d ed.) 1029 that: 'There is no constitutional reason why legislative functions which are merely administrative or executive in their character should not be delegated by that branch of the government to other departments, or to bodies created by it for that purpose. A distinction is drawn between a delegation of power to make the law, involving necessarily a discretion as to what it shall be, and a grant of authority relative to its execution, though the latter involves the exercise of discretion under and in pursuance of the law.' Laws under the police powers have often been sustained in which other officers or boards have been instructed or permitted to make regulations to carry them into effect. In *Martin v. Witherpoon*, 135 Mass. 175, 178, the court say: 'Such regulations (in that case pilotage regulations) are in the nature of police regulations, the making of which within defined limits may be entrusted to other bodies than the legislature.'"

But in *State v. Gantz*, 124 La. 535, 50 So. 524, 24 L.R.A. (N.S.) 1072, a statute which required that a license should be procured by every electrician before he practiced his profession, but which exempted lighting and electric railway companies and the department of police and public buildings of the city of New Orleans from its provisions, was declared to be discriminatory and therefore unconstitutional. The court said: "The right to work cannot be restrained without reason. Constituted authorities have been careful not to sanction unreasonable interference with the right. Here not only there is no good reason, but there is discrimination. Why should the companies and the department before named have the right to employ unlicensed, untrained, and even ignorant electricians, if they choose, while the average owner or employer, who does not come within the exemption, must employ only a licensed electrician? To extend the inquiry further on the same line: Why should an electrician who has no license be able to find employment with these companies and departments, while if another electrician, equally as competent, is called upon by another owner or employer, he must produce a license or lose the opportunity to work and earn a livelihood? Class legislation, discriminating against some and favoring others, is prohibited. *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 U. S. (L. ed.) 923. And, it follows, equally prohibited is legislation permitting a company or a department of public works to employ one class of artisans, and denying to this class and to others in similar situations to work for other owners and employers."

In *Wichita Electric Co. v. Hinckley* (Tex.) 131 S. W. 1192, it was held that an ordinance providing for the licensing of electricians conferred the power to revoke a license on the city recorder and that the power could not be exercised by the council.

## MICHIGAN CENTRAL RAILROAD COMPANY ET AL.

v.

## MICHIGAN RAILROAD COMMISSION.

Michigan Supreme Court — October 3, 1914.

183 Mich. 6; 148 N. W. 800.

### Carriers of Goods — Demurrage Power of State to Regulate.

By Act June 20, 1906, c. 3591, 34 Stat. 584 (Fed. St. Ann. 1900 Supp. p. 255) the Inter-

state Commerce Commission Act was amended by section 1 so as to define the term "transportation" to include cars, vehicles, and all instrumentalities and facilities for the carriage of goods and all services in connection with the receipt, delivery, elevation, and transfer in transit, etc., requiring that the carrier shall provide such transportation on reasonable request and establish just and reasonable rates applicable thereto. Section 6 declares that the schedules printed and filed by the carrier shall contain a classification of freight in force, and shall state separately all terminal, storage, icing charges, or the value of service rendered to the passenger, shipper, or consignee. Held, that terminal and storage charges include demurrage, and, the Interstate Commerce Commission having tentatively approved the revised car demurrage rules adopted by the American Railroad Association, the state Legislature had no jurisdiction to pass Pub. Acts 1911, No. 173, § 1, amending Pub. Acts 1909, No. 300, §§ 3, 8, so far as they attempted to confer on the State Railroad Commissions power to adopt and enforce different demurrage rules applicable to interstate commerce.

[See note at end of this case.]

**Same.**

A state railroad commission having adopted demurrage rules under authority conferred by Pub. Acts 1911, No. 173, § 1, amending Pub. Acts 1909, No. 300, §§ 3, 8, such rules, though applicable to interstate commerce, are valid and applicable to intrastate shipments, in the absence of evidence presented by an objecting carrier to show their unreasonableness, under Pub. Acts 1909, No. 300, § 26, providing that, in all actions under such section to avoid orders of the Commission, the burden of proof shall be on the complainant to show, by clear and satisfactory evidence, that the order is unlawful or unreasonable.

[See note at end of this case.]

Appeal from Circuit Court, Wayne county:  
HALL, Judge.

Action for injunction. Michigan Central Railroad Company et al., plaintiffs, and Michigan Railroad Commission, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. MODIFIED.

*Beaumont, Smith & Harris and Grant Fellows* for appellant.

*Taylor, Delbridge & Behr* for appellees.

[7] STONE, J.—This cause deals with the power of the defendant to promulgate rules covering car service and demurrage, applicable to shipments of freight loaded or unloaded, in Michigan, and the validity of the rules promulgated by the defendant on July 5, [8] 1912. The history of the controversy is somewhat lengthy and involved.

As early as January 1, 1909, the railroads of the lower peninsula of the State promulgated and placed in effect a set of demurrage rules applicable to both State and interstate business in Michigan. Those rules were contained in tariffs regularly filed by the railroads, with both the defendant and the Interstate Commerce Commission.

During the year 1909 the National Association of Railroad Commissioners, composed of the railroad commissioners of the several States, and the Interstate Commerce Commission, gave consideration to the formulation of a code of car service and demurrage rules. This code was finally adopted by that association, and was tentatively approved by the Interstate Commerce Commission, on December 18, 1909. The Michigan railroads decided to adopt these rules, and announced them to be effective May 1, 1910, and published their tariffs and filed them as required by law. In the meantime the defendant had under consideration, on a complaint pending before it, the formulation of a set of demurrage rules, and on February 3, 1910, it promulgated, by an order, such a set of rules to be effective March 1, 1910, accompanied by an opinion as to its power, and as to the reasonableness of its rules.

Upon March 1, 1910, a bill of complaint was filed in the circuit court for the county of Wayne, in chancery, by a number of railroad companies, which are likewise parties complainant in the instant case, praying that the defendant be restrained from enforcing the rules it had promulgated to be effective on that date. The bill charged in substance that the defendant, under the act by which it was created, had no authority to make such rules; that the rules themselves were a burden upon interstate commerce; and that, by the express terms of the act, the defendant commission [9] was limited in its power over transportation to the transportation of property between points within the State of Michigan. The defendant demurred to this bill of complaint. Upon a hearing in the circuit court a decree was entered sustaining the demurrer. Upon an appeal to this court by complainants, the decree of the lower court was reversed, and it was held in substance that the statute (Act No. 300, Pub. Acts 1909) limited the authority of the defendant to the regulation of transportation within the State of Michigan. *Ann Arbor R. Co. v. Michigan R. Commission*, 163 Mich. 49, 127 N. W. 746. Justice Blair, writing the opinion, said:

"It is apparent, therefore, that, by the terms of the act creating the defendant and defining its powers, its authority to promulgate demurrage rules is limited to cases where the property has been or is to be transported between points within this State." It be-



comes unnecessary, therefore, to consider the power of the legislature to grant the authority claimed for the defendant or the other interesting questions discussed in the briefs of counsel, since the limitations of the act creating it negative any authority on the part of defendant to establish and enforce demurrage rules where the transportation is interstate."

This opinion was handed down September 28, 1910. As the law then stood, it is therefore *res adjudicata* that the defendant had no jurisdiction over demurrage upon interstate shipments.

However, by Act No. 173, Public Acts of 1911 (3 How. Stat. [2d ed.] §§ 6526, 6531), sections 3 and 8 of the act under which the defendant was organized were amended, so that they read as follows; the amendments appearing in italics:

"Sec. 3 (d). The provisions of this act shall apply to the transportation of passengers and property between points within this State, and to the receiving, switching, delivering, storing and handling of such [10] property, and to all charges connected therewith, including icing and mileage charges: *Provided, however, that this provision shall not be construed as a limitation on the authority of the commission created by this act to prescribe car service and demurrage rules applicable to all traffic beginning or ending within this State.*"

"Sec. 8. Every railroad shall, when within its power so to do, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight in car load lots. . . . The commission shall have power to make and enforce, and shall make and enforce reasonable regulations for the furnishing and distribution of freight cars to shippers and switching the same, and for the loading and unloading thereof, and for the weighing of the cars and the freight offered for shipment over any line of railroad and shall fix a reasonable *per diem* demurrage to be paid for the detention of cars by shipper or consignee (*which said car service and demurrage rules and regulations shall be applicable to all traffic whether the same begin or end within the State of Michigan*), and for the failure or delay of the railroad in the furnishing of such cars, and for the failure of the railroad to move the cars the number of miles per day as ordered by the commission."

At the time of the above legislation, the present case was pending in the circuit court, but the bill of complaint was so framed as to raise only the question of the power of the defendant to enforce its demurrage rules as to intrastate commerce.

An order had been entered on handing down our decision in the Ann Harbor Railroad Co. Case, modifying the previous injunction, and permitting the railroad companies to make effective, on interstate business, the rules known as the uniform rules, and permitting the defendant to enforce upon State business the rules it had promulgated.

In view of the State legislation above referred to, the complainants, on September 2, 1911, filed an [11] amended bill of complaint, setting forth the foregoing proceedings, and charging that the defendant claimed that it had the power to enforce its rules upon both State and interstate business in Michigan; that the freight cars of complainants could not be detained without unlawfully burdening interstate commerce; that defendant had no authority to promulgate its rules as to interstate commerce; that the power of the defendant was limited to State traffic; that no other power had ever been conferred on it by the State legislature; that the legislature had no authority to confer any power upon the defendant to affect demurrage; that the said act of the legislature of 1911, purporting to extend the power of the defendant, in that respect, was beyond the power of the legislature; that interstate commerce began with the loading of the property intended for interstate shipment, and continued until it was unloaded; that the Interstate Commerce Commission had complete jurisdiction over interstate commerce; that the rules promulgated by the defendant would constitute a burden upon interstate commerce; that the rules so promulgated gave an advantage to shippers in intrastate commerce; that the allowance of extra time would afford such an advantage, would increase the expense to the railroads, cause trouble and annoyance in the handling of cars, greatly increase the expense of the carriers under the interchange agreement, and delay the use of cars; and that, in such respects as the Michigan rules differ from the uniform rules, they would constitute a burden upon interstate commerce. The defendant answered the amended bill, admitting that it claimed authority to promulgate rules, but denying that the rules it had promulgated would materially extend the time within which cars would be detained. It admitted the amendment of the statute of 1911, and declared that the legislature had power [12] to confer the authority therein attempted to be conferred on the defendant; that under this amendment the defendant had authority to promulgate rules applicable to both State and interstate commerce, and denied that its rules were a burden upon interstate commerce, or would cause any inequality or discrimination.

On October 5, 1911, the defendant reissued its order directing that its demurrage rules should become effectual on both State and interstate business, and on January 31, 1912, the complainants again amended their bill of complaint, calling attention to the making of this order, and praying for an injunction, and on February 7, 1912, an injunction was issued restraining the defendant from making effectual its said order of October 5, 1912.

Under an order of reference theretofore entered, the parties proceeded to take proofs, and, these having been completed, the court entered an order, on June 22, 1912, referring to the defendant the testimony and proofs, in accordance with the provisions of the act of 1909. On July 5, 1912, the defendant entered an order which recited the proceedings that had been taken before it, and the fact that the proofs had been certified to it, and had been examined; that the demurrage rules established by the railroad companies in Michigan were unreasonable and justly discriminatory, and the defendant promulgated a new set of rules, which appear in the record and are known as the rules of July 5, 1912. Later, and on August 21, 1912, on application of complainants, the court issued an injunction against the defendant, forbidding it to enforce its new rules of July 5th. While this litigation had been progressing, the so-called uniform rules, or national car demurrage rules, had been the subject of frequent discussion by the National Association of Railroad Commissioners, by the American Railroad [13] Association, and by the Interstate Commerce Commission. The American Railroad Association had issued certain explanations of these rules and had adopted the rules themselves and had modified them from time to time. Finally, on June 3, 1912, the Interstate Commerce Commission issued its bulletin to the effect that it had tentatively indorsed such revised rules. That bulletin reads as follows:

"Interstate Commerce Commission.

"Washington, D. C. June 3, 1912.

"Revised National Car Demurrage Rules.

"The American Railway Association on May 15, 1912, adopted a revised set of national car demurrage rules, that being the designation used by the American Railway Association for the uniform demurrage code tentatively approved by the commission on December 18, 1909, and also a revised set of the explanations to the national car demurrage rules tentatively approved on April 11, 1911.

"The Interstate Commerce Commission, recognizing the great benefits to be derived from uniformity in car service rules, is

desirous of lending its influence to the movement. The commission therefore tentatively indorses the revised rules and explanations thereto adopted by the American Railway Association and recommends that they be made effective on interstate transportation throughout the country. This action is of course subject to the right and duty of the commission to inquire into the legality and reasonableness of any rule or rules which may be made the subject of complaint.

"By the Commission:

[Seal.] "John H. Marble, Secretary."

The above-mentioned rules had their explanation, and the defendant's revised rules promulgated July 5, 1912, are published in the record in parallel columns. The testimony having been returned to the court, by the defendant with its revised rules, the case came on for hearing, and the learned circuit judge found that the bill of complaint was well founded, and [14] that its prayer should be granted. A decree was entered reciting that it appeared to the court "that the State of Michigan and the defendant are without any power, jurisdiction, or authority to promulgate, establish, or enforce demurrage rules as to the transportation of property in commerce with foreign nations and among the several States, and the movement and use of cars, vehicles, and other instrumentalities therefor, referred to in said bill of complaint as interstate commerce, or to establish demurrage rule applicable to all traffic beginning or ending within the State of Michigan, and it further satisfactorily appearing that it is impossible to have two sets of demurrage rules in existence within the State of Michigan, one affecting interstate traffic as aforesaid, and the other affecting transportation for hire of property in commerce wholly between points within the State of Michigan, referred to in said bill of complaint as intrastate commerce, and materially differing from each other, without the latter becoming a material burden upon and regulation of interstate commerce, and it satisfactorily appearing to the court that the rules promulgated and proposed to be enforced by said defendant, as set forth in said amended bill of complaint, would, if enforced, constitute a material burden upon and regulation of interstate commerce," etc., the defendant was perpetually restrained from promulgating, enforcing, or attempting to establish or enforce its said demurrage rules. The defendant has appealed.

By reference to the two sets of rules, the uniform rules, as finally revised, and the Michigan Railroad Commission rules, as revised on July 5, 1912, it may be said that they differ only as follows: Three days for unloading coal allowed by the Michigan rules,

as compared with two days allowed by the uniform rules. Three days allowed for unloading lumber (except [15] cargo and lighted lumber) allowed by the Michigan rules, as against two days allowed by the uniform rules. Three days for the loading or unloading of interior finish allowed by the Michigan rules, as against two days allowed by the uniform rules. Three days for loading cars with furniture loaded by several consignors allowed by the Michigan rules, as against two days by the uniform rules. Five days' free time allowed by the Michigan rules for unloading cargo and lighted lumber as against two days allowed by the uniform rules. Five days allowed by the Michigan rules for loading, weighing, and billing coal at the mines, as against two days allowed by the uniform rules. Five days' free time allowed by the Michigan rules for unloading coal to be used for fueling transient vessels, as against two days allowed by the uniform rules. One day to fit up cars with lining for the loading of potatoes allowed by the Michigan rules, as against no allowance for this service by the uniform rules. The allowance for bunching and weather interference, to shippers operating under the average time agreement, as provided in the Michigan rules, as against the elimination of such an allowance as provided by the uniform rules.

These, as we understand it, are the particular provisions, as to which complainants contend that the Michigan rules are more liberal to the shipper than the uniform rules. In other words, they insist that the shippers would receive more time, and would that much longer detain cars, if they were operating under the Michigan rules, than if they were operating under the uniform rules. As we understand complainants' position it is that:

(1) The defendant has no power or authority to enforce demurrage rules as to shipments in interstate commerce.

(2) The defendant has no power or authority to [16] promulgate and enforce demurrage rules applicable to intrastate commerce only, which materially differ from the uniform code, or which are unreasonable in themselves, for the reason that such rules constitute a regulation of, and burden upon, interstate commerce.

Answering the foregoing propositions, we understand the claim of defendant to be:

(1) Demurrage and car service rules concern intrastate service or traffic in all instances, whether the car is to move, or has moved, from point to point within the State, or is to move, or has moved, beyond the borders of the State; and the State, therefore, can regulate this traffic, unless it be limited by the exertion of the constitutional

power of congress with respect to interstate commerce and its instruments.

(2) If it should be determined that demurrage rules do not in all instances concern intrastate traffic, nevertheless the State in the absence of Federal legislation and regulation, can make such rules and regulate such traffic, so long as its regulation does not directly burden interstate traffic.

1. Has the Michigan Railroad Commission power or authority to make and enforce demurrage rules as to shipments in interstate commerce? It may be said that Federal jurisdiction as to interstate commerce is exclusive. By the Federal Constitution, congress is given express power "to regulate commerce with foreign nations and among the several States." The nature and extent of the power conferred by this provision have been under consideration in a vast number of cases in the United States Supreme Court. A citation of the cases would cover many pages of this opinion. Many of them are referred to in the late case of *Simpson v. Shepard*, 230 U. S. 352, 33 S. Ct. 729, 48 L.R.A.(N.S.) 1151. A reading of the several acts of congress upon the subject shows that that body, in the exercise of the board and exclusive power conferred by the Constitution, has given the [17] subject of interstate commerce most careful consideration, and its legislation upon the subject is very complete and thorough.

Has congress acted upon the identical question we are considering? On June 29, 1906, the interstate commerce commission act was amended in several particulars. In that part of section 1 which defines the term "transportation," it was made to read as follows:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigerating or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes, and just and reasonable rates applicable thereto."

By the same act (section 6), which provides for the filing and publishing of rates and schedules, that part of the paragraph relating to this question was made to read as follows:

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall

also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Here we have an express recognition of the fact [18] that *terminal* and *storage* charges, and rules and regulations relating thereto, have a direct effect upon rates and charges. That demurrage is a terminal charge is, we think, beyond question. The act provides heavy penalties and liabilities for its violation. The administration of the law is expressly conferred upon the Interstate Commerce Commission.

A comparison of the language of the act of Congress with that of the Michigan Act No. 300 shows that the former was intended to control and cover every incident of interstate commerce, including receipt, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage, and handling of property transported, all terminal charges, storage charges, and rules relating thereto, just as the Michigan act was intended to cover every incident of intrastate commerce, including "all services in connection with the receipt, delivery, elevation, switching and transfer in transit, ventilating, refrigeration or icing, storage and handling of . . . property transported between points within this State."

We think that shipments for interstate commerce become impressed with the character of such commerce from the first receipt thereof, and this character continues until the final delivery thereof to the consignee. Such is the plain intent of the language of the Federal legislation, and the similarity of the language of the two acts is evidence that the Michigan legislature of 1909 had in mind the Federal legislation above referred to. It cannot be presumed that the legislature intended or attempted to invade the field covered by the Federal legislation, and thus render its own action invalid. The learned circuit judge quoted the following language found in the case of *Chicago, etc. R. Co. v. Hardwick Farmers' Elevator Co.* 226 U. S. 426, 33 S. Ct. 174, 46 L.R.A. (N.S.) 203:

[19] "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by congress, it must follow in consequence of the action of congress, to which we have referred, that the power of the State over the

subject-matter ceased to exist from the moment that congress exerted its paramount and all embracing authority over the subject."

We think that the above language is applicable to the question we are considering. Has the Interstate Commerce Commission acted? On March 16, 1908, the commission decided that demurrage rules and charges applicable to interstate shipments are governed by the act to regulate commerce, and therefore are within its jurisdiction, and not within the jurisdiction of State authorities. On May 12, 1908, the commission adopted the following rules with relation to demurrage on interstate shipments:

"Demurrage on Interstate Shipments. The act requires that carriers shall publish, post and file 'all terminal charges . . . which in any wise change, affect, or determine . . . the value of the service rendered to the passenger, shipper, or consignee,' and all such charges become a part of the 'rates, fares, and charges,' which the carriers are required to demand, collect and retain. Such terminal charges include demurrage charges."

In the case of *Wilson Produce Co. v. Pennsylvania R. Co.* 14 Int. Com. C. Rep. 170, decided June 24, 1908, this exact question was before the Interstate Commerce Commission, and it held that:

"The duty of regulating terminal charges, when related to traffic between the States, has been lodged with the Interstate Commerce Commission. A state statute fixing terminal charges is not controlling with respect to interstate transportation."

[20] This case involved demurrage charges which were held to be terminal charges, within the meaning of the interstate commerce act. Many cases are cited, and it was held that it was unnecessary to decide that the Federal authority over this subject was exclusive, inasmuch as congress had taken definite action, and removed the subject altogether from the field of State regulation. See also *Lehigh Valley R. Co. v. U. S.* 188 Fed. 879, 110 C. C. A. 513; *St. Louis, etc. R. Co. v. Edwards*, 227 U. S. 265, 33 S. Ct. 262, 57 U. S. (L. ed.) 506.

We have not referred to the action of the Interstate Commerce Commission to show necessarily that its opinion was conclusive, but to show that it has assumed to act under the law of congress. It is said by counsel for defendant that it has not adopted the revised rules of the American Railway Association, but has only tentatively indorsed them, as shown by the bulletin above quoted. To indorse is to sanction, ratify, or approve. The difference between adoption and indorsement is not very important. But it is said that it has only tentatively indorsed the national rules. It is true that the commission has only approved of these rules by way of trial.

That is probably all it would do in the adoption of any rules. They would be subject to the right of change or amendment.

We think that the pertinent question is: Has the commission so acted under the law of congress that it can be said that the subject is removed from State regulation? Such question must be answered in the affirmative. We adopt the language of the trial judge:

"When congress placed the instrumentalities and the cars and the terminal charges and the storage charges into the hands of the Interstate Commerce Commission, those who, as to interstate traffic, desired to complain must apply to that tribunal for an adjustment of their grievances. The Michigan law, [21] in so far as it attempts to give jurisdiction to a different tribunal, has invaded the domain of congress, and its enactment is of no force."

We are forced to the conclusion, therefore, that the amendments of 1911 are without force or effect in so far as interstate commerce is concerned. By the Federal Constitution the subject of interstate commerce is within the exclusive jurisdiction of congress and congress has, by its legislation, taken possession of the entire subject. Therefore it is obvious that "demurrage rules applicable to all traffic beginning or ending within this State" can only apply to traffic beginning and ending within this State. Upon this branch of the case we agree with the circuit judge.

2. This brings us to the second proposition of complainants. We are of the opinion that any car service on a car which has moved or is about to move in intrastate commerce is intrastate, and therefore within State authority. In so far as the rules promulgated by the defendant apply to cars that are moving from point to point within this State, they are valid. The mere fact that those rules differ from the uniform rules in a few instances does not render them invalid, when applied to intrastate traffic. We have read this record carefully, and are unable to say that the Michigan rules, when applied to Michigan traffic, are unreasonable in themselves, or that they constitute a regulation of, or a burden upon, interstate commerce. It should be borne in mind that by section 26 of the Michigan act of 1909 it is provided that:

"In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be." Michigan Cent. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549.

We do not think that the complainants have sustained [22] the burden of proof placed upon them by this statute. Much

more might be said upon this branch of the case, but, as this opinion is already too long, we refrain from stating our reasons at length, for the conclusion reached.

Our attention has been called to the opinion of the Supreme Court of the United States in the Shreveport Case, filed June 8, 1914. We do not think that case controlling here, for the reason that in that case the Interstate Commerce Commission had acted, and had found that the State action was unreasonable. We do not find such action here unreasonable, when applied to State traffic.

The decree of the circuit court will be modified in accordance with the views here expressed, and the injunction will be so modified that the defendant will be permitted to enforce its rules as to intrastate traffic only. No costs are awarded to either party.

McAlvay, C. J., and Ostrander, Moore, and Steere, JJ., concurred. Brooke, Kuhn, and Bird, JJ., did not sit.

#### NOTE.

#### Validity of Statute, Ordinance or Rule Providing for Reciprocal Demurrage.

The present note presents the recent cases passing on the validity of a statute, ordinance or rule providing for reciprocal demurrage. The earlier cases on this point are collected in the notes to Yazoo, etc. R. Co. v. Keystone Lbr. Co. 13 Ann. Cas. 960; Hardwick Farmer's Elevator Co. v. Chicago, etc. R. Co. 19 Ann. Cas. 1088, and People v. Wemple, 27 Am. St. Rep. 542, 559.

The reported case lays down the rule that a state has no right to promulgate demurrage rules relating to interstate commerce, and points out that this class of legislation or regulation has been assumed by the federal authorities by the 1906 Amendment of the Interstate Commerce Act (Fed. St. Ann. 1906 Supp. p. 255) which it is declared shows that Congress intended to control, through the agency of the interstate commerce commission, every incident of interstate commerce. Most of the recent cases are to the same effect, and several earlier cases to the contrary have been overruled. Thus the holding in Hardwick Farmers' Elevator Co. v. Chicago, etc. R. Co. supra, was reversed in Chicago, etc. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 33 S. Ct. 174, 57 U. S. (L. ed.) 284, 46 L.R.A. (N.S.) 203. The court after discussing the effect of the 1906 amendment to the Interstate Commerce Act said: "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject

was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power." And in *St. Louis, etc. R. Co. v. Edwards*, 227 U. S. 285, 33 S. Ct. 262, 57 U. S. (L. ed.) 506, reversing *St. Louis, etc. R. Co. v. Edwards*, 94 Ark. 394, 127 S. W. 713, it was held that the demurrage statute of Arkansas imposing a penalty on a carrier for failure to notify the consignee of the arrival of freight at the termination of an interstate shipment was an interference with interstate commerce and invalid. The court said: "The Arkansas statute is styled in the opinion of the court below 'the Demurrage Statute,' and the penalty imposed by § 3 is referred to as a 'demurrage charge.' And in the same connection it is observed 'there are other sections of the statute imposing demurrage charges on consignees for failure to remove freight, thus making the burdens of the whole statute reciprocal.' It follows that the section under consideration was but intended to subject carriers to the penalties which the section provides because of a failure to make prompt delivery of freight on arrival at destination. As applied to interstate commerce, however, we think such penalties were not enforceable because of a want of power in the state to impose them in view of the legislation of Congress existing at the time the alleged duty to give notice arose. Recently in *Chicago, etc. R. Co. v. Hardwick Farmers' Elevator Co.* 226 U. S. 426 [33 S. Ct. 174, 57 U. S. (L. ed.) 284, 46 L.R.A. (N.S.) 203], a regulation of the state of Minnesota enacted after the passage of the Hepburn Act imposing penalties on carriers for failing on demand to furnish a supply of cars for the movement of interstate traffic was held invalid because of the absence of power in a state in consequence of the Hepburn Act to provide for such penalties. While the case

before us concerns the power of a state over the delivery of cars in consummation of an interstate shipment, we nevertheless think that the *Hardwick* case is controlling because the legislation of Congress as clearly excludes the right of a state to penalize for failure to deliver interstate freight at the termination of an interstate shipment as it was found to prevent a state from penalizing for failure to furnish cars for the initiation of the movement of interstate traffic. This conclusion is necessary since the amendment to § 1 of the act to regulate commerce by which a definition is given to the term transportation and which in the *Hardwick* case was held to exclude the right of a state to penalize for the nondelivery of cars to initiate the movement of an interstate shipment, by its very terms embraces the obligation of a carrier to deliver to the consignee, and therefore by the same token excludes the right of a state to penalize on that subject." In *Sargent v. Rutland R. Co.* 86 Vt. 328, 85 Atl. 654, it was held that since a statute providing for no demurrage charge on freight received at any freight station until after the expiration of four days, applying to interstate and intrastate commerce alike, conflicted with a provision of the Interstate Commerce Commission fixing two days as a time limit for loading and unloading interstate shipments, the statute was invalid. The court said: "The plain general terms of the enactments purport to apply to demurrage charges on all freight received by consignees direct from cars at any station in this state, and upon all cars placed or held, at the request of consignors, for loading in this state, without regard to the class of commerce to which the former belongs, or in connection with which the latter are being used. The two sections are clothed in language, plain and most apt to cover the whole field. The part which is unconstitutional, if there be any such, is inseparable from that which is not. . . . There is much force in the contention that the statutory provisions in question, by the free time fixed therein which shall be allowed for loading and unloading cars in this state, directly burden interstate commerce, and are therefore an encroachment upon the exclusive power of Congress, on the principle that nothing can be done by a state which will operate as a burden on the interstate business of a common carrier engaged therein, or impair the usefulness of its facilities or instruments of interstate traffic. . . . But we do not decide this question, for conceding the subject-matter of the statute to be one within the power of the state to regulate for the comfort and convenience of its citizens, in the absence of congressional action, even though it may indirectly affect interstate commerce . . . yet by the Interstate Com-

merce Act, executed and enforced through the Interstate Commerce Commission, there had been congressional regulation of the same subject-matter, so far as it pertained to commerce among the states, and the rules thus prescribed are materially different from the provisions of the state enactments. By the former, the free time allowed is forty-eight hours (two days), while under the latter it is four days. In such circumstances the two statutes cannot both be operative; and the power of the state being subordinate to that of the nation, it must yield." And in *Fennell Infirmary v. Southern R. Co.* 101 S. C. 134, 85 S. E. 237, it was held that the statute of South Carolina regulating demurrage on interstate shipments was superseded and annulled by the amendments to the act to regulate commerce, enacted in pursuance of the interstate commerce clause of the federal constitution, placing the matter under the control of the interstate commerce commission.

However in *Yazoo, etc. R. Co. v. Greenwood Grocery Co.* 96 Miss. 403, 51 So. 450, it was declared that a statute which fixed reciprocal demurrage charges for delays in delivering interstate freight after its arrival at its point of destination was not an obstruction to interstate commerce but an aid thereto and was therefore valid, but no reference was made to the Act of Congress of 1906. The court said: "Much of the difficulty in this case is dissolved when we keep in mind the fact that the whole of the duty of a railroad company is not discharged in an interstate shipment merely by the transportation of the goods to the point of destination. The railroad company owes the further duty, under the general law of the land, to deliver the goods to the consignee. In order to do this, it is bound to so place the goods as that the consignee may get possession of them; else it fails in its duty, and the goods can be of no use to the owner of same. This being so, the order of the railroad commission fixing delayage charges is merely an order enforcing a general duty that rests upon the carrier, and is in aid of, and not an obstruction to, commerce. Such an order imposes no additional burden on the carrier. The burden is already there as a common duty. It is a part of the contract of carriage, and the consideration paid by the shipper for the transportation of the goods is paid in part for the fulfillment of this very duty. The grocer can make no use of his goods until he can unload them from the cars, the cars cannot further be used for transportation until they are unloaded, the cars cannot be unloaded until they are so placed as that they may be reached for this purpose, and it is the duty of the carrier to arrange for all these things, whether the shipment be

intra or inter state, failing in which the very purpose of transportation itself fails. In view of these facts, how can it be held that a regulation, which merely compels a performance of an already existing burden, can be said to impose any additional burden or commerce?" Likewise in *Oneida Farmers' Shipping Assoc. v. St. Joseph, etc. R. Co.* 90 Kan. 264, 133 Pac. 883, it was declared that a statute regulating the penalty for delay in the transportation of grain after it had arrived in the state was not invalid and was not an interference with the powers of the interstate commerce commission. The court said: "The court is inclined to rest its affirmance of the decision of the lower court upon the broader ground that the transaction, whatever it may be designated, is not of such a character as to deprive the state of the right to exercise its police power over that part of the transportation which took place wholly within the limits of the state." Here again it may be observed that the court seems to disregard the effect of the Hepburn Act and its result is apparently contradictory to the ruling of the Supreme Court of the United States on this question.

In *Darlington Lumber Co. v. Missouri Pac. R. Co.* 216 Mo. 658, 116 S. W. 530, it was declared that a state has the right to regulate demurrage charges within certain limits, but the court did not discuss the question whether the statute before it was an interference with interstate commerce because the question was not raised by the pleadings.

## WILLIAMS ET AL.

v.

## KIDD ET AL.

California Supreme Court—July 30, 1915.

170 Cal. 631; 151 Pac. 1.

### Deeds — Deposit for Delivery after Grantor's Death.

A grantor may place his deed in the hands of a third person for delivery to the grantee on the death of the grantor, and such a delivery is effectual to pass a present title if the intention of the grantor is to make the delivery absolute.

[See Ann. Cas. 1915C 378.]

### Same.

Where a deed is deposited by the grantor with a third person, to be handed to the grantee on the death of the grantor, there is no delivery unless accompanied by an intention of the grantor that title shall im-

mediately pass to the grantee, and where the deed is handed to the third person without any intention of a present transfer of title, but, on the contrary, with an intention of the grantor to reserve the right of dominion over the deed and the right to revoke or recall it, there is no effective delivery, and where the grantor, when depositing the deed, intends that it shall only be delivered to the grantee after the death of the grantor, and title shall vest only on delivery to the grantee, the deed is inoperative as an attempt by the grantor to make a testamentary disposition.

**Same.**

The mere fact that a deed was signed and acknowledged by the grantor and at the same time handed to the husband of the grantee, with directions to the husband to keep the deed and give it to the grantee when the grantor was dead, and that the husband did so, was not alone conclusive evidence of a delivery with intent to vest in the grantee a present title.

**Requisites of Delivery — Intent to Transfer Present Title.**

A deed, to transfer real property, must be delivered by the grantor with intent to transfer title, and the test under which delivery is to be determined is in ascertaining whether, in parting with the possession of the deed, the grantor intended to divest himself of title; if he did there was an effective delivery, and, if not, there was no delivery.

[See 53 Am. St. Rep. 544.]

**Same.**

Evidence held to sustain a finding that a deed was not delivered by the grantor with intent to transfer a present title.

**Evidence as to Delivery.**

Where a grantor delivered the deed to the notary who took the acknowledgment, with instructions to deliver to the grantee on the grantor's death, and the deed was part of a plan by the grantor to dispose of all his property, a separate deed being contemplated for each piece of property, but the plan was never fully carried out, the fact that the notary knew that the plan was abandoned and that he made no entry of the deed in his notarial record as required by Pol. Code, § 794, could be considered in determining the question of effective delivery of the deed.

[See generally 8 R. C. L. tit. *Deeds*, p. 998.]

**Same.**

The failure of a third person to whom a deed had been delivered by the grantor, with instructions to deliver to the grantee on the grantor's death, to call the grantor's attention to the fact that he could not make a sale of part of the property covered by the deed, as contemplated by the grantor, could be considered in determining whether the delivery was effective to pass title.

**Same.**

Where a grantor delivered the deed to the husband of the grantee, with instructions to deliver the same to the grantee on the grantor's death, and the issue was whether

the delivery was effective to pass a present title, the fact that the husband made no mention of the deed to the grantee until after the death of the grantor, though no secrecy was enjoined on him by the grantor, could be considered to show that there was no delivery of the deed with intent to pass a present title, and that the husband knew it.

**Declarations of Grantor as to Delivery.**

Declarations of a grantor, made after he has parted with his title and in disparagement of it, are inadmissible when made in the absence of the grantee.

[See note at end of this case.]

**Same.**

Where the issue was whether a grantor had ever parted with title, acts, conduct, and declarations of the grantor with reference to the property after the execution of a deed thereof were admissible on the issue of intent to deliver the deed.

[See note at end of this case.]

**Delivery of Deed Defined.**

Delivery of a deed is the act, however evidenced, by which the deed takes effect and title thereby passes.

**"Execution" of Deed as Including Delivery.**

"Execution," as applied to a deed, includes effective delivery.

**Stare Decisis — Rule of Evidence.**

The doctrine of stare decisis cannot apply to a mere rule of evidence in which no one has a vested right.

[See generally 78 Am. St. Rep. 99.]

**Deeds — Deposit for Delivery after Grantor's Death — Presumption.**

Where a deed was delivered by the grantor to a third person to deliver to the grantee on the grantor's death, the grantee, producing the deed, established a prima facie case of delivery, which was overcome by proof of the fact that the grantee had no knowledge of the existence of the deed, and did not come into possession of it until after the death of the grantor.

[See Ann. Cas. 1915C 378.]

**Harmless Error — Admission of Evidence Out of Order.**

The action of the court in admitting evidence as a part of plaintiffs' main case, which was but impeaching evidence, and which could be made proper by plaintiffs' adoption of a different order of proof, is not prejudicial.

Appeal from Superior Court, Colusa county: ALBERRY, Judge.

Action to set aside deed. Belle Williams, executrix, et al., plaintiffs, and Laura Belle Kidd et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Frank Freeman and Thomas Rutledge for appellants.



*S. C. Denson, Ernest Weyand, Stanley Moore, Arthur C. Huston, J. Craig, A. A. Moore and Garret W. McEnerney* for respondents.

[635] LORIGAN, J.—This action was brought to set aside a deed purporting to convey property in the town of Williams, Colusa County, known as the "W. H. Williams Brick Warehouse," and also seven lots in block 36 in said town, made by W. H. Williams to the defendant Laura Belle Kidd, under her name of Laura Miller, and prior to her marriage with the defendant, F. E. Kidd.

Plaintiff and intervenor are the daughters and residuary legatees under the will of W. H. Williams, deceased. Defendant Laura Belle Kidd is the grandniece of said Williams and the purported conveyance to her was dated September 30, 1901. W. H. Williams died May 18, 1909, and the deed in question was recorded on July 24, 1910.

The complaint alleged that defendants asserted a claim to said property adversely to estate of decedent and to plaintiff based on said deed, which deed it is alleged was never subscribed, executed, or delivered by Williams, or by any one [636] acting for him, or by his authority, and that his signature thereto was forged.

In their answer defendants disclaimed any assertion of interest in the property by defendant F. E. Kidd; denied the forgery and nondelivery of the deed, and alleged that said deed at the date it bore was signed, executed, and acknowledged by Williams and on the same day delivered by him to the defendant F. E. Kidd, with directions and instructions from said Williams to him to deliver the same to defendant Laura Belle Kidd (then Laura Miller) upon the death of said Williams; that upon the death of Williams said deed was delivered to said defendant Laura Belle Kidd, and she is now the owner of the property described in it.

The court found that the deed in question was duly signed and acknowledged by Williams on its date—December 30, 1901; "that after said deed was signed and acknowledged by said Williams, and on the 30th day of December, 1901, said Williams handed the same to F. E. Kidd, with instructions to the latter to keep the same and to give it to Laura Miller, the grantee named therein, after he (Williams) was dead; that said F. E. Kidd took said deed and kept it in his possession until the death of said W. H. Williams, and thereafter, on the — day of May, 1909, he delivered the same to the defendant, Laura Belle Miller Kidd, who is the same person named as grantee in said deed, and who, thereafter, on the twenty-fourth day of July, 1910, caused the same to be recorded in the office of the county recorder of Colusa County.

Ann. Cas. 1916E.—45.

"7. That it was not the intention of said W. H. Williams, when he delivered said deed to said F. E. Kidd, nor at any other time, to divest himself of the present title to said described premises, nor was it then, nor at any other time, his intention to vest a present title to said premises in the grantee named in said deed.

"8. That said deed was never delivered, and said W. H. Williams did not thereby part with his title in fee simple to said described real property."

As conclusions of law the court found that said Williams never parted with his title to said property; that he was the owner in fee simple thereof at the time of his death; that the deed in question was invalid and void; that defendants have no title or interest in said property and that, subject [637] to administration, plaintiff and intervenor are each the owner in fee of an undivided one-half interest therein.

Judgment was entered for plaintiff and intervenor. Defendants moved for a new trial, which was denied, and this appeal is from both the judgment and order denying their motion.

The contention of appellants is that the evidence is insufficient to justify the finding of the court that the deed in question was never delivered by Williams. It is further claimed that error was committed by the court in its rulings on the admission of testimony.

It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, and that such a delivery will be effectual to pass a present title to the property to the grantee, if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed. Where delivery is made under these circumstances and with this intention, it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property and the third party or depository holds the deed as a trustee for the grantee named in it. (*Bury v. Young*, 98 Cal. 451, 35 Am. St. Rep. 186, 33 Pac. 338; *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.)

On the other hand it is equally well settled that where a deed is deposited with a third party to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby immediately pass to the grantee, there is no delivery of the deed and consequently no title is transferred. If the deed is handed to the depository without any intention of presently transferring title, but, on the con-

trary, the grantor intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title. So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depository after the death of the grantor, and that the title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make [638] a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect.

Here the court found that the deed in question was signed and acknowledged by Williams and at the time handed to F. E. Kidd, with directions to him to keep the same and give it to Laura Miller when he (Williams) was dead, and that Kidd did so. Counsel for appellants claim that these facts as found by the court were legally conclusive to the effect, under the decisions above cited, that Williams delivered the deed with intent to immediately vest title to the property in the grantee, Laura Miller, subject only to the retention by him of a life estate therein, and that the further finding of the court that it was not the intention of Williams, when he handed the deed to the depository Kidd, to divest himself of the present title to the property and therefore there was no delivery for that purpose is merely an unwarranted conclusion of law from such facts. But this position is not tenable. It may be true that if the only evidence in the case and the only facts found were as recited above with reference to the making of the deed—the instructions of Williams and the carrying out thereof by Kidd—it might be held that these were sufficient to show that the deposit of the deed with Kidd was accompanied by an intention on the part of Williams that title to the property should thereby vest immediately in the grantee. But it does not follow that on these facts as found the conclusion must necessarily follow that the intention of the grantor was to vest a present title in the grantee and the deed delivered for that purpose. All these facts may exist and it still be a question as to what was the intention of the grantor. Here the issue made by the pleadings was whether Williams, when he handed the deed to Kidd, under the instructions he gave him, intended to vest a present title in the grantee named in it and his delivery of the deed was made to effect that purpose.

It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery

is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an [639] effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question. (*Bury v. Young*, 98 Cal. 451, 35 Am. St. Rep. 186, 33 Pac. 338; *Keniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *In re Cornelius*, 151 Cal. 552, 91 Pac. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 Pac. 544.)

The evidence in this case is made up of facts and circumstances occurring at the time of the making and delivery of the deed in question, and facts and circumstances occurring subsequent to that time forming no part of the *res gestae*, but received in evidence as tending to throw light on the intention of the grantor when he made and handed the deed to Kidd.

At the time the deed was made by Williams he was a man 70 years of age. He had a few years previously become afflicted with cataracts in both eyes, so seriously affecting his eyesight that he could hardly tell one paper from another. His faculties were not impaired. He was a man of large affairs and had a business office in the town of Williams. possessed several ranches, and owned a large number of vacant town lots in Williams, as well as some improved property. On one of these lots was a livery stable, on another a hotel and others constituted the brick warehouse property. This latter was the best paying and the most desirable of his property. Williams made his will in 1904. Laura Miller was a grandniece of Williams, of whom he had several. Kidd was a clerk in the office of Williams and had been for a number of years prior to the making of the deed. From 1900 he was the manager of the warehouse property and prepared for Williams deeds, mortgages, and releases of mortgages and papers of that nature; attended to any work that came up in the office, and, as he defines his position himself, he was the general office man for Williams, attending to any work that was required of him. He attended to the insurance business and was a notary public.

The only evidence of what occurred at about the time the deed was prepared, signed, and delivered by Williams, is that of the depository and nominal defendant, F. E. Kidd. He testified that he and Williams were the only persons present. [640] He prepared the deed and as notary took the acknowledgment of Williams; that at the request of the latter and at the same time he prepared three other

deeds—two of these in favor of Miss Belle Williams and one to Mrs. Williams; one of the deeds to Miss Williams covered the "Williams Hotel" in Williams; the other the brick livery stable; the deed to Mrs. Williams covered the residence property; all of these properties were embraced in four deeds and were signed at the same time and the acknowledgments taken by Kidd; no deed was drawn to his daughter, Marguerita Williams. As to the particular circumstances surrounding the making of all these deeds, it appears from the testimony of Kidd that during several days before their preparation Williams had spoken to him about the preparation of deeds to all his property. As he stated, Williams "spoke of leaving his property in that way—by deed" and that a separate deed should be made for each piece of property; that he and Williams collected the necessary data for doing so, and he started to carry out the instructions given him. When he started to draw the deeds in line with the instructions of Williams he told the latter that he thought the preparation of them all by him would take too much work and that he doubted his ability to do it. He, however, prepared the four deeds above referred to, but either on the day they were drawn or shortly afterwards a further talk on the subject of preparing the other deeds was had between Williams and himself, and he again told Williams that the preparation of all the deeds he contemplated would make a great deal of work, that he was not sure of his ability or knowledge in the matter; that it was too much of an undertaking, and advised Williams to get some one else to finish it. Williams made no reply to this statement of Kidd, and no further deeds were drawn nor the matter ever afterwards referred to between them. The only reason assigned by Kidd why the matter stopped with the preparation of these four deeds only was because of the statements made by him to Williams expressing a doubt of his ability to carry out the scheme and his advice to Williams to have it done by some one else. Though for some eight years afterwards he and Williams were daily together in the office, nothing was ever said by either of them about further carrying out the original scheme of Williams, nor a word said about the four deeds which had been prepared under it. The three separate deeds [641] from Williams to his wife and daughter, after being acknowledged, were put in an envelope by him and handed to Williams, who placed them in his safe. The deed to Laura Miller was delivered to Kidd as soon as it was executed in the manner and with the instructions as found by the court.

The witness also testified that he was engaged to marry Laura Miller at the time these deeds were made, though he had not informed

Williams about the matter, and it does not appear from the evidence that Williams ever knew anything about it. He further stated that it was his custom to enter up acknowledgments taken by him in his notarial register on the day or the day after they were taken; that he usually made a memorandum for that purpose and at the time of the execution of the deeds by Williams did so, but made no entry whatever in his notarial register of these deeds until several years afterwards. Nothing was further done by him respecting the deed in question until he married the grantee in 1903, when, a few days afterwards, he placed the deed to her in an envelope and indorsed it "October 23, 1903," which was the only indorsement that he had made respecting the deed up to that time. Subsequently, on November 27, 1903, he made an entry in his notarial book as follows: "W. H. Williams," leaving five blank leaves which, however, were never afterwards filled up; that after the deeds were executed nothing was ever said about any of them by either Williams or himself; that he never mentioned to Laura Miller, before or after she became his wife, the fact that this deed in question had been made in her favor, or until after the death of Williams. Williams had not asked him to keep or said anything to him about keeping the making of any of the deeds secret.

It further appears from the evidence that the three deeds other than the one in question here were never seen by anybody after their execution and were not found among the papers of Williams examined after his death. Whatever became of them is not known; at least the evidence does not disclose. They were not delivered; neither the wife nor the daughters of Williams ever saw them, nor did Kidd after they were placed in the safe by Williams. The latter never spoke of any of the deeds made, including the one in question, after they were made, nor did Kidd, until after the death of Williams. Subsequent to the execution of the deeds Williams made extensive improvements on the warehouse property, [642] aggregating some five thousand and five hundred dollars. In the fall of 1904 a party named Becker applied to Williams to purchase the warehouse property. Williams refused to sell the warehouse alone, stating that he wanted to sell the hotel with it, or that he would sell the hotel separately; that he would take forty thousand dollars for the two pieces—the warehouse and hotel—or twenty thousand dollars for the hotel. Nothing came of these negotiations. This conversation was had in the office of Williams. Kidd was present at the time and heard the conversation. The morning after the death of Williams a professional nurse—Morton—who had waited on him had a somewhat extended conversation with Kidd, in which they talked about the affairs of Williams and the estate

left by him, Kidd informed Morton of the different properties making up the estate, particularly mentioning the warehouse as one item of it, and upon a suggested possibility that there might be a contest between the heirs of Williams, Kidd stated that there would not be any, that the property would go to Mrs. Williams and her two daughters. After the death of Williams, Miss Belle Williams called on Kidd for the keys, and those, including the warehouse keys, were delivered to her by him.

These matters, in the main, make up the evidence under which the court was to determine whether, when Williams delivered the deed in question to Kidd, he intended thereby to pass a present title in the property to the grantee. The court found that he did not. This finding of the court, it is true, rests mainly upon inferences which it deduced from the facts and circumstances in evidence, but if these inferences were fairly and reasonably deducible from them, the finding must stand. This court cannot set aside the finding of the trial court unless it appears that there is no evidence to support it, or the evidence is so clearly preponderating against the finding as made that it can be said that there is no substantial evidence to sustain it. We are satisfied from a full consideration of the evidence that this cannot be said.

Taking the facts and circumstances under which the deed in question was made, we think the court was justified, from a consideration of these alone, in concluding that it was not intended by Williams that the delivery of the deed in question to Kidd should pass to the grantee a present title to the property.

[643] Williams, when the matter of the making of the deeds to his property was first broached to Kidd, while an old man, was actively engaged in his business affairs, which comprehended the care and management of a large amount of ranch property, and likewise a great many lots and blocks in the town of Williams, the latter of which he was from time to time selling off. Kidd was his confidential clerk, to whom he would naturally turn for assistance in case of any measures which involved trust and confidence, and the preparation of instruments relative to his property transactions were generally entrusted to Kidd. It was a fair inference to be made by the court that Williams, when he commenced the preparation of these deeds, had in contemplation a testamentary disposition of all his property, and that the making of the four deeds, including the one in controversy, was a part thereof. That he so intended would appear from the language he used in the several talks held between himself and Kidd before they actually commenced the preparation of the various deeds which the scheme contemplated. He spoke of "leav-

ing his property that way—by deed," which is not reasonably open to any other construction. His purpose was to make a separate deed to each piece of his property to those whom doubtless he deemed entitled thereto as the natural recipients of his bounty, although on account of the abandonment of the scheme Williams had no occasion to declare to Kidd the person whose names should be inserted in the various contemplated deeds.

It is hardly to be assumed that a man actively engaged in business, as Williams was at this time, and making sales of his property as opportunity presented, contemplated divesting himself of title to all of it by deeds previously delivered with that intent. On the contrary, under the scheme which he had in view, he believed that in making these various deeds he would not be divesting himself of title to the property; that they would not interfere with his changes in the deeds or making transfers of the property represented by them should he make a sale of any of it, or should he desire to change the transfers; that though making separate deeds would involve much labor (a moderate estimate of the number of deeds which it would be necessary to make, based on an enumeration in the record of the pieces of property held by [644] him, would require about forty deeds), yet by this means he could the more readily during his lifetime make changes as to the beneficiaries consequent on sales, or as his inclination prompted him, then he could do were many pieces of property embraced in a single conveyance. The language used by Williams and the plan he had formulated for carrying out the intention which he expressed doing, warranted an inference that his plan, which embraced the four deeds he actually made, and the others he had contemplated making, was simply to effect, as a whole, a testamentary disposition of his property; that if, in the continued activities of his business with respect to all of it, he made no sales of any portion of it, or if he concluded to make no changes in the deeds during his lifetime, then the deeds as first drawn should, upon his death, and then only, be delivered to the grantees, to take effect and vest title in them; that even as to that purpose he had abandoned it in its inception on account of Kidd's expressed inability to carry out the testamentary scheme in its entirety, and that the abandonment included a revocation of all the deeds which had been prepared pursuant to it, including the one here in question, and that Williams and Kidd both so understood. This deduction of a testamentary purpose on the part of Williams in making the deeds, which the court was fairly justified in making (independent of the inference of abandonment of such purpose) warranted the finding that the deed here in question was not delivered, because a deed delivered with the intent that

it shall take effect only on the death of the grantor, being an attempted testamentary disposition of property, is void. (Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120; Walter v. Way, 170 Ill. 96, 48 N. E. 421; Johnson v. Johnson, 24 R. I. 571, 54 Atl. 378; Schlicher v. Keeler, 67 N. J. Eq. 635, 61 Atl. 434.)

But aside from the circumstances immediately connected with the making of the deeds, there were other circumstances which were to be taken into consideration by the trial court as bearing on the question of the intention and purpose of Williams respecting them. These deeds were clearly made as part of a scheme entertained by Williams, which contemplated several separate deeds to all his property. It of course cannot seriously be questioned but that whatever his intention was in the contemplated disposition of all his property; whether it was to make a testamentary disposition of it by [645] way of deeds, or under such deeds to vest a present title in the grantees, he had the same intention as to each and every parcel of it. He certainly did not intend to make a testamentary disposition of one deed and by another vest the present title. In this connection it may be said that there was no evidence of such affection on the part of Williams for his grandniece, Laura Miller, above what naturally exists between persons of that relationship, which could raise any inference that, while his general plan was to make testamentary disposition of his property, yet, as to the deed to her, he intended it should vest a present title. In furtherance of whatever his intention was, and particularly in attempting to carry out his entire scheme as he had devised it, he made these four deeds, all of which were executed together and evidently intended by Williams to effect the same purpose. Three of these—deeds to his wife and daughter—were never delivered. This was a circumstance to be considered in determining what the intention of Williams was respecting the delivery of the deed in question. It is only reasonable to assume that if Williams intended to make an effective delivery of that deed so as to pass a present title, he also intended to deliver the other deeds executed at the same time with the same intent. If he had delivered them, that fact would have had weight as tending to show such an intention with reference to the deed in question. But as these other deeds were never delivered or ever heard of after they were executed, this circumstance, on the other hand, was properly to be taken into consideration as tending to show that Williams did not deliver the deed in question to Kidd with any such intention. In *Napier v. Elliott*, 162 Ala. 129, 50 So. 148, it is said: "As a circumstance bearing upon the question of intention as to the delivery of the deed it was competent for the defendants to show that at the time of the making

of the deed, and contemporaneous therewith, the grantor made two other deeds to Lem Walden and Josiah Hughes embracing all the lands the grantor had left after the deeds to the plaintiff and her mother, and the further fact that the deeds to Walden and Hughes were never delivered. This evidence, when taken in connection with other evidence as to the purpose of the grantor in making the deeds, . . . actual delivery of plaintiff's deed being a disputed fact, was both competent and relevant as tending to negative the [646] grantor's intention of delivery of plaintiff's deed. The weight of it, however, and as to whether, in connection with all of the evidence in the case, it was sufficient to negative such intention, was a question for the jury."

As an additional circumstance further indicating that the making of these deeds was part of a testamentary scheme which Kidd knew had been abandoned at its very inception, is the fact that Kidd made no entry respecting these deeds at the time they were acknowledged in his notarial record, as the law requires he should do. (Pol. Code, sec. 794.) He did not do this until several years after they were executed. His excuse is that he did not make an entry at the time because he did not want their execution to appear as a matter of public record. But it is not suggested why the public or any member of it would be curious enough to try to ascertain from the notarial record whether Williams had made any deeds or not. Williams had not asked Kidd to omit the entries. He had enjoined no secrecy on Kidd whatever respecting the deeds. The trial court might well question the merit of the excuse given by Kidd in view of the fact that he did make an indefinite entry two years afterward and about a month after he married the grantee in the one in question, which removed in a measure the secrecy of the transaction which he was so solicitous to keep, and which entry he could just as well have made at the time the deeds were acknowledged. The trial court may have well concluded that the failure to make the entries at the time the deeds were made did not spring from any desire to preserve secrecy in the transaction, but because Kidd knew that the deeds were part of a testamentary scheme, abandoned at its inception, and that the deeds were not intended to be effective even for testamentary purposes, and hence no entry respecting any of them needed to be made.

There were further circumstances which were proper to be taken into consideration by the trial court; the failure of Kidd to make any suggestion to Williams or call his attention to the fact that he could not make a sale of the warehouse property or of the hotel property such as Becker was negotiating for with him and which he was disposed to

make, because Kidd knew that if the deeds had the effect, as he claimed they had, of vesting a present title in Laura Miller, Williams could not convey the fee simple title to the property [647] which Becker wanted to purchase and Williams offered to sell. The fact that, in the presence of Kidd as depository of the deed to the warehouse, Williams was offering to sell the property as the owner thereof, without any protest from Kidd, or suggestion from him that Williams might not do it, and an apparent acquiescence thereby in the right of Williams to make the sale, might be considered by the court as some evidence indicating that both of them understood that the deeds were only part of an abandoned testamentary plan, and that Williams still had absolute title to the property. The fact that Kidd made no mention of the deed to the grantee, to whom he had been married, until after the death of Williams, although no secrecy respecting it was enjoined on him by Williams, was likewise a circumstance which could be considered by the court as tending to show that there was no delivery of the deed with intent to pass present title, and that Kidd knew it (*Follmer v. Rohrer*, 158 Cal. 757, 112 Pac. 544), as was likewise his statement made after the death of Williams that the warehouse property and the other property described in the three deeds was part of the estate left by Williams which would go to his wife and his two daughters. The fact that neither the deeds nor the original scheme which Williams had in view when he made them were ever mentioned by Williams or Kidd to each other, though they were together in Williams' office for a period of eight years after the deeds were made, was matter for consideration by the court as tending to warrant a similar inference.

Taking into consideration all these circumstances, it cannot be said but that they fairly warrant the inferences drawn by the trial court and on which its finding of nondelivery was based, that it was not the intention of Williams when he delivered the deed to Kidd to divest himself of present title to the premises described in the deed, nor was the deed delivered with any such intent or for such purpose; that this deed was made and handed to Kidd solely as part of a testamentary scheme which was abandoned at the inception, and this deed was intended and understood by both Williams and Kidd to be revoked by such abandonment.

There is, it is true, the circumstance that Williams never asked Kidd to return the deed in question to him. But Williams was devising his testamentary plan with his confidential clerk in his own office where the papers of both of them were [648] kept. Williams had not told Kidd to place this deed in any particular place, but simply to keep it. The papers of Williams and Kidd were

kept in Williams' safe in the office—those of Kidd in a tin box where this deed was placed (and kept by Kidd until somewhat over a year before Williams died), though no specific instructions were given by Williams to place it in this box. Williams and his daughter, Belle Williams, who also assisted her father a great deal of the time in his business affairs, particularly in the office on account of his impaired eyesight, had alone the combination to this safe. It is only reasonable to assume that Williams expected that all the papers which he intended to execute in conformity with his contemplated scheme, were to be kept in the office, and that the reason he did not actually request the return of this deed afterwards was because, as both he and Kidd understood that the whole testamentary plan and all done under it had been abandoned, this deed fell with it, and that at any time, if he desired it, Kidd would have handed it to him.

This brings us to a consideration of the assignments of error made by appellants as to the admission by the court in evidence of the conversation between Becker and Williams relative to the purchase and sale of the warehouse and hotel property; testimony as to the improvements made by Williams on the warehouse property, and other acts and declarations of Williams occurring subsequent to the making of the deeds in question.

It is, of course, well settled that acts and declarations of a grantor made after he has parted with the title to property and in disparagement of it are inadmissible when made in the absence of the grantee, and it is the claim of appellants that the conduct and declarations of Williams after the deed was handed to Kidd were inadmissible as contravening this rule.

But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case, the claim of respondents being that there had been no delivery of the deed with intent on the part of Williams to do so. The conduct and declarations of Williams covered a period subsequent to the making of the deed and while Kidd held it as a depository, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing [649] on the issue as to whether there had been a delivery of the deed. All these matters had some tendency to show that there was no intention on the part of Williams to deliver it except as a part of a testamentary scheme which he had abandoned.

In support of their contention that these acts and declarations of Williams just re-

ferred to were inadmissible reliance is had by appellants on *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338. If that case is to be construed as holding that where the issue is whether or not the grantor so delivered his deed as to convey title, the acts and declarations, in short, the conduct, of the deceased grantor cannot be given in evidence in disproof of delivery, then we think that *Bury v. Young* should be overruled as contrary to sound reason and to the great weight of authority. This may be done without interference with any vested right, since, at the most, *Bury v. Young* but lays down a rule of evidence, and as the purpose of all rules of evidence is to aid in arriving at the truth, if it shall appear that any rule tends rather to hinder than to facilitate this result, to promote rather than to repress fraud, it should be abrogated without hesitation. In its language, however, it is to be noted that *Bury v. Young* does not lay down this rule. Its sole statement is that "the grantor's declarations and acts made and done in his own interest *months after the deed was delivered* are not admissible as indicating his intention in delivering the deed." (The italics are our own.) It is said that this principle is elementary, and so it is. It is further said that there is nothing in *Dean v. Parker*, 88 Cal. 283, 26 Pac. 91, "trespassing upon that doctrine." Neither is there. But it is to be noted that all of this is based upon the assumption of an actual prior delivery of the instrument. "Delivery" is a word of well-defined meaning in the law. It is the act, however evidenced, by which the instrument takes effect and title thereby passes. Of course it is true that after such delivery no acts or declarations of the grantor in derogation of his grant will be received. But where the vital question is whether or not he did deliver the instrument, and where, as always in such cases his lips are sealed by death, and the opposing testimony of the grantee or depositary, honest or fraudulent, cannot be contradicted by him, it is but an invitation to fraud and perjury and to their success to refuse [650] admission to such evidence. While it has been stated that *Bury v. Young*, therefore, does not in terms declare for a rule excluding evidence of the conduct of the grantor when delivery is the issue, it is but fair to add that it is construed as doing so by at least one of the justices in the subsequent case of *Ord v. Ord*, 99 Cal. 524, 34 Pac. 83. But in that case again it is to be noted that the rule laid down is the unimpeachable one

that "a grantor will not be permitted to disparage his deed by declarations made or acts done by him in his own interest *subsequent to its execution*." (The italics again are ours.) Further it is to be noted that "execution" is a word of well-defined legal meaning, and is here employed with that meaning. "Execution" includes effective delivery. It is for the first time in the concurring opinion of one of the justices declared in the *Ord* case that the subsequent declarations and conduct of the grantor "denying the fact of the previous delivery of the deed" will not be received. Here, in strictness, is the first and only declaration of this rule, and it is to be noted that it is not made by the court, but by one of the justices thereof. There is, therefore, nothing in our decisions to embarrass us in declaring what we conceive to be the correct rule, and nothing, of course, in the doctrine of *stare decisis* which can apply to a mere rule of evidence in which no one has a vested right. Take for illustration the case of a forged deed, as it was charged this deed was. The grantor naturally knows nothing about its existence; indeed the instrument may not have been written until after his death. When rights under this forged deed are asserted, the heirs of the dead grantor feel equally certain, both that the instrument is a forgery and that it was never delivered, and they so plead. They are able to show that their ancestor during his lifetime treated the property as his own, offered it for sale as his own, wrote and talked to the asserted grantee after the date of the deed stating that it was his own; that he declared what disposition he proposed to make of it, and that he made such disposition by will. They are not permitted to prove any of these things because of the mere assertion of delivery by the grantee as of the date that the instrument purports to bear. The same reasoning applies to any other asserted delivery—to delivery to a depositary, and if the same rule does not follow the reasoning, then titles will pass, not in accordance with the truth, but in accordance [651] with the honesty or dishonesty of the depositary, whose testimony alone can be received. And finally, as to our own cases it may be added that the rule of evidence which we here declare is the sound one, is distinctly recognized by this court in *Bank* to be such in the very much later case of *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645, where the effectiveness by delivery of a gift of the community property from the husband to the wife was involved. This court declared: "His purpose was a matter between him and her exclusively, and was manifested and could be proved by his contemporaneous declarations, or by his

declarations made before or after delivering the orders. There is no better proof of intention than declared intention, and it is often the only means of proof." There is nothing in *In re Cornelius*, 151 Cal. 550, 91 Pac. 329, in conflict herewith. Indeed, *In re Cornelius* contains a further exposition of the meaning to be given to the language of this court in *Bury v. Young*, and the interpretation there put upon it is unobjectionable. There again there was a delivery passing title, and, expounding *Bury v. Young*, it is declared: "If after such a conveyance is so delivered that the grantor has no dominion or control over it or right to recall it, he gains possession of it and wrongfully destroys it, there can be no doubt that he cannot profit by his wrongful act nor deprive his grantees of their interest thereby without their consent." Finally may be cited *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120, where evidence of the conduct of the asserted grantor after the deed was placed in escrow was admitted. The case was discussed under this evidence. It was held to show nondelivery, and a hearing before this court was denied.

Turning elsewhere to the authorities, it will be found that there is a difference of view upon this question. Some courts, such as Illinois (*Miller v. Meers*, 155 Ill. 284, 40 N. E. 577), hold to the rule of evidence asserted to have been declared in *Bury v. Young*. *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533, is to like effect. But in the *Encyclopedia of Evidence* many cases will be found cited to the effect that (to quote the text), "The grantor's declarations, both prior to the execution of the deed and those made subsequent to the execution, are admissible." While to the further statement that they [652] may be received in proof of an intent to deliver, but not in disproof of such intent, *Bury v. Young* alone is cited. And even in Illinois it is to be noted that in *Merki v. Merki*, 113 Ill. App. 518, that court in 1904 declared that when the question whether a deed has been delivered is a doubtful or debatable one, testimony of the acts and conduct of the grantor with reference to the property subsequent to the date of the grant is admissible. *Devlin* (1 *Devlin on Deeds*, sec. 280a) adopted the rule of evidence that where the delivery of a deed to a third person, to be delivered to the grantee after the death of the grantor leaves the intention of the grantor in doubt, subsequent acts of the grantor or of the depository may be proven for the purpose of showing the intent of the grantor at the time the deed was placed in the hands of the third person. To the same effect is *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 307, where the supreme court of North Dakota reached the same conclusion after an elaborate review of the authorities, including those from this state. And further,

in support of the rule as we have declared it should be, may be cited *Johnson v. Johnson*, 24 R. I. 571, 54 Atl. 378, and *Hale v. Joslin*, 134 Mass. 310.

As to the further claim of appellants that evidence of the conduct of Kidd—including his declarations to Morton—while he claimed to be holding the deed as depository of the grantee were improperly admitted by the court. Proof of these acts and declarations of Kidd was through original and independent evidence offered by plaintiffs in their case in chief and not by way of impeachment. Conceding, without deciding, that as so offered by plaintiffs in their main case this evidence was inadmissible, we think nevertheless that such admission should not be held to be so prejudicial as to warrant a reversal. While it is a fact that Kidd was called by plaintiffs as a witness and examined by them as to the delivery of the deed to him by Williams it was not essential to the making out of a case entitling them to the relief sought that they should have called him as a witness. As pointed out by their counsel in the last argument before this court, plaintiffs by adopting a different order of proof than was pursued by them on the trial below might have thrown on defendants the burden of proving the delivery of the deed in question and might have sustained their case without calling [653] Kidd as a witness at all. It is true that in such condition of the proof made by plaintiffs defendant would make out a *prima facie* showing of delivery by the production of the deed by the grantee. (*Zihn v. Zihn*, 153 Cal. 405, 95 Pac. 868; *Phillips v. Menotti*, 167 Cal. 328, 139 Pac. 796.) But this *prima facie* showing would have been overcome by plaintiffs by proof of the unquestioned fact in the case that the grantee had no knowledge of the existence of the deed and did not come into possession of it until after the death of the grantor Williams. (1 *Devlin on Real Estate*, 3d ed. sec. 294; *Mitchell v. Ryan*, 3 Ohio St. 382; *Trask v. Trask*, 90 Ia. 318, 48 Am. St. Rep. 446, 57 N. W. 841; *Thomas v. Sullivan*, 138 Mich. 265, 101 N. W. 528; *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.) And in that state of the case defendants would have been compelled to call Kidd as their own witness to prove the alleged delivery to him of the deed to the grantee named in it. In the order of proof which we have just adverted to defendants without the testimony of Kidd, producing him as their own witness, could not make out a case of delivery of the deed and Kidd having testified to such delivery could undoubtedly have been cross-examined by plaintiffs with a view to eliciting evidence of his acts and declarations inconsistent with the delivery claimed and if he denied such acts and declarations proof thereof would have been permissible to plaintiffs



by way of impeachment. Undoubtedly, evidence of the acts and declarations of Kidd inconsistent with his testimony that the deed was delivered to him for the grantee would be highly material to plaintiffs and as plaintiffs by simply following the order of proof, as no doubt they would do if a new trial were granted, could compel defendants to call Kidd as a witness and thus inevitably be afforded an opportunity to introduce evidence of his acts and declarations as inconsistent with a claim of delivery and by way of impeachment, we cannot perceive how any prejudicial result can be attributed to their admission which could warrant granting a reversal. If improperly admitted on the trial as original and independent evidence, still, as by adopting a different order of proof they unquestionably must be admitted as impeaching evidence on another trial, the mere fact that the trial court in admitting them did not fully recognize their [654] true character as impeaching evidence could work no prejudicial injury to defendants. The judgment and order appealed from are affirmed.

Henshaw, J., Sloss, J., Shaw, J., Melvin, J., Lawlor, J., and Angellotti, C. J., concurred.

#### NOTE.

##### **Admissibility of Declaration of Grantor after Conveyance as to Delivery of Deed.**

When the issue is whether a person has divested himself of title, his declarations and acts after the signing of an instrument, in form a deed to the property in dispute, and tending to show a delivery thereof, are admissible as being admissions or declarations against interest. *Rice v. Carey*, 170 Cal. 748, 804, 151 Pac. 135, 138; *Donahue v. Sweeney*, 171 Cal. 388, 153 Pac. 708; *Scott v. Crouch*, 24 Utah 377, 67 Pac. 1068. See also the reported case. And see *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812. In *Potter v. Barringer*, 236 Ill. 224, 86 N. E. 233, it was held that the declarations of a grantor were competent only for the purpose of showing his intention as to the delivery of the deed. In *Scott v. Crouch*, supra, it was held that the statement of the grantor of an interest in a mining claim that he had deeded the property to a certain person was admissible as a declaration against interest. The court said: "The declaration of McCann, deceased, that he had deeded the property to Dickson and had received pay for the same was a declaration against his own interest, and was made at a time when he knew that Dyer and Dickson were in possession of the claim, and knew that they had been in possession for years, doing work upon it. It was an admission of the person who

made the deed. Had the declaration been made by a third party, to the effect that he had seen the deed, some evidence might be required showing the instrument to be genuine, and also showing its contents; but, when a party admits such a fact against his own interest, testimony may be received of the admission against himself. This evidence is received on the ground of the extreme improbability of its falsity, and is entitled to consideration." So, in *Union Oil Co. v. Stewart*, 158 Cal. 149, Ann. Cas. 1912C 567, 110 Pac. 313, it was held that a letter written by the grantor to a certain person and enclosing his deed to the grantee, which directed the recipient of the letter to deliver it to the grantee, was admissible to prove the delivery of the deed. In *Waller v. Eleventh School Dist.*, 22 Conn. 326, the defendant school district, claimed title to the demanded premises by virtue of a deed from the plaintiff. There was no controversy as to the execution of that deed, but the question on which the parties were at issue was whether it had been duly delivered. It was held that a record of the vote of the district based on the existence of title in it passed subsequent to the delivery of the deed at which the plaintiff was present was admissible as a recognition of the defendant's title.

It has been held that a grantor's declaration and acts in his own interest, after the deed is delivered, are not admissible to indicate his intention in delivering the deed, since they are either hearsay and made at a time too remote from the occurrence to which they relate, or are self-serving declarations. *Napier v. Elliott*, 162 Ala. 129, 50 So. 148, 177 Ala. 113, 58 So. 435; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Ord v. Ord*, 99 Cal. 523, 34 Pac. 3; *Burkholder v. Casad*, 47 Ind. 418; *Sanford v. Ellithorp*, 95 N. Y. 48; *Chase v. Woodruff*, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972. In *Napier v. Elliott*, supra, it was held that while the rule was well settled that the fact of delivery rested in intention and was to be collected from all the acts and declarations of the parties having relation to it, nevertheless, evidence as to statements and declarations made by the grantor several years after the making of the deed was not competent to show the intention of the grantor at the time the deed was made. The court said: "Here the proposed evidence related to a past and completed transaction. If the grantor were living, it would not be competent for him to testify as to what were his intentions at the time. He could only testify as to what was done and said by him at the time of the making of the deed illustrative of his intention as to a delivery." And in a later appeal of the same case, the court said: "Whether at some undefined time after the execution of

the deeds in 1895, the grantor was heard to say that he had searched for the deeds and could not find them, cannot be regarded as material to the question of an alleged delivery of the deed in 1899. To be relevant, the time of the alleged search must at least have been placed later than such delivery. But, whenever made, we think it was not material; and also that it was but hearsay, and not admissible under any exception to the hearsay rule. He might thus make evidence against himself or his successors in interest, but not in favor of either." *Napier v. Elliott*, 177 Ala. 113, 58 So. 435.

But subsequent declarations and acts by a grantor for the purpose of sustaining his deed are admissible to show his intention in delivering it. *Dean v. Parker*, 88 Cal. 283, 26 Pac. 91.

While the declarations of a grantor, made after an alleged delivery of the deed, tending to show a delivery have been held admissible as being admissions against interest, his statements and declarations tending to negative delivery are incompetent unless they form a part of the res gestae. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812. So it has been held that a conversation between one of the grantors and the agent for the grantors after the deed had been delivered to the grantee and the purchase money paid by him was inadmissible against him to show that the agent had no authority to deliver the deed. *Wilcox v. Waterman*, 113 Mass. 296. And it has been held that the declarations or acts of a grantor, made subsequently to his grant, cannot be received to the prejudice of the rights of the grantee, or persons claiming under them. *Jackson v. Aldrich*, 13 Johns. (N. Y.) 106; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170; *Vrooman v. King*, 36 N. Y. 477; *Williams v. Williams*, 142 N. Y. 156, 36 N. E. 1053; *Leary v. Corvin*, 63 App. Div. 151, 71 N. Y. S. 335. In some cases evidence of declarations by a grantor after the conveyance as to the delivery of the deed has been admitted without any question being raised as to its admissibility. *Dennis v. Dennis*, 119 Mich. 380, 78 N. W. 333; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 327; *Levester v. Hilliard*, 57 N. C. 12; *Johnson v. Craig*, 37 Okla. 378, 130 Pac. 581. For a general discussion of the admissibility of declarations in disparagement of title, see the note to *Phillips v. Laughlin*, 2 Ann. Cas. 1.

## ROWLANDS

v.

### CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Wisconsin Supreme Court—March 12, 1912.

149 Wis. 51; 135 N. W. 156.

#### Employers' Liability Act — Necessity of Pleading Federal Act.

A complaint against a railroad company for injury to its fireman sufficiently states a case within the federal employers' liability act (Act April 22, 1906, c. 149, 35 Stat. 65, Fed. St. Ann. 1909 Supp. p. 584), as amended April 5, 1910 (Act April 5, 1910, c. 143, 36 Stat. 291, Fed. St. Ann. 1912 Supp. p. 335), though that act is not specifically referred to, where it states that plaintiff was a resident of Wisconsin, and that, when injured, he was employed by the defendant as a fireman on a passenger train running from Chicago to Milwaukee.

[See Ann. Cas. 1914C 171.]

#### Judicial Notice — Federal Statutes.

State courts take judicial notice of acts of Congress.

[See 19 Ann. Cas. 395.]

#### Master and Servant — Railroads — Mail Crane near Track.

In an action against a railroad company for injury to a fireman who was struck by the arm of a mail crane standing near the track, evidence held to warrant a finding of negligence in maintenance of the crane.

[See note at end of this case.]

#### Same.

In an action against a railroad company for injury to a fireman who was struck by the arm of a mail crane standing near the track, whether he assumed the risk or was guilty of contributory negligence is held, under the evidence, a jury question.

[See note at end of this case.]

#### Damages — Personal Injury — Verdict Not Excessive.

Eight thousand seven hundred dollars is not an excessive recovery for personal injury to a locomotive fireman twenty-eight years old, who earned \$125 a month when injured, where his skull was fractured, he was wholly incapacitated for labor for a year, and his injury appears to be permanent, at least unless relief can be secured by an operation.

[See 16 Ann. Cas. 8; Ann. Cas. 1913A 1361.]

#### Appeal and Error — Presumptions — Finding on Issue Not Submitted.

If all the material issues were not submitted to the jury which found for plaintiff, and no question was requested by defendant to cure the omissions, it will be presumed on appeal by defendant that the court found in plaintiff's favor on any material issue not submitted.

Appeal from Circuit Court, Waukesha county: LUECK, Judge.

Action for damages. Hugh Rowlands, plaintiff, and Chicago and Northwestern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[52] On the morning of February 25, 1910, plaintiff was in the employ of the defendant company as a fireman on a locomotive hauling a combination passenger, baggage, express, and mail train from the city of Chicago to the city of Milwaukee. The train was a fast train and made but a few stops between the two stations above named. At Zion City, Illinois, mail was taken aboard while the train was traveling at a high rate of speed. For this purpose there was constructed at the westerly side of the railway tracks a mail crane, which consisted of an upright mast or standard placed on a foundation and standing perpendicularly some distance from the nearest rail of the track. From the upper portion of the mast, at a proper height to hold the mail sack in position, an arm extended toward the track, and from this arm the suspended mail sack was grabbed by a device attached to the side of the mail car. As the train approached the station, plaintiff, in order to get a view ahead, projected his head out of the cab window and was struck by the arm of the crane, and this action was brought to recover damages for injuries sustained. It was claimed that the defendant was negligent in maintaining the said mail crane so near its tracks as to endanger the lives of passengers and employees, and further, that the frame which inclosed the mast and which was intended to hold [53] it in a vertical position had become worn so that there was from an inch and a half to two inches play, which permitted the mast to droop toward the track when the crane was in use and likewise permitted the arm of the crane to project downward and nearer to the track than it would otherwise come; also that it was necessary for plaintiff in the performance of his duties to keep a sharp lookout ahead, and that the said crane was out of repair and so situated as to render his place of work unsafe. The answer denied generally the allegations of the complaint, alleged contributory negligence on the part of the plaintiff, and further, that, the injuries having been received in the state of Illinois, the law of that state was applicable. The case was submitted to the jury on a special verdict, which, with the answers thereto, is as follows:

"(1) At the time of the injury to the plaintiff was the mail crane in question, in its position and condition, reasonably safe as regards the safety of defendant's employees working on the train? A. No.

"(2) If you answer the first question 'No,' then answer this question: Was the working place of the plaintiff thereby made unsafe? A. Yes.

"(3) If you answer the second question 'Yes,' then answer this question: Was such unsafe working place the proximate cause of plaintiff's injuries. A. Yes.

"(4) Was plaintiff guilty of any negligence on his part which contributed proximately to produce his injuries? A. No.

"(5) What sum of money will compensate plaintiff for the damages suffered in consequence of the injuries received by him? A. \$8,700.

"(6) If you answer the fourth question 'Yes,' then answer this question: If the court shall order judgment for plaintiff, in what sum shall his damages be diminished on account of the negligence attributable to the plaintiff? A. —."

Upon such verdict judgment was entered in favor of plaintiff, from which judgment defendant appeals.

*William G. Wheeler and Edward M. Smart* for appellant.

*Holt & Coombs and E. Merton* for respondent.

[54] BARNES, J.—The complaint alleged that the plaintiff was a resident of Wisconsin; that on February 25, 1910, he was in the employ of the defendant on a passenger engine owned by it and "used and operated over and upon the lines of said defendant company at and between the city of Chicago, in the state of Illinois, and the city of Milwaukee, in the state of Wisconsin," and further, "that on the morning of the 25th day of February, 1910, the plaintiff was employed by and working for said defendant company in the capacity of a fireman of an engine which was then and there being used to haul a combined passenger, baggage, express, and mail train from the city of Chicago northward toward the city of Milwaukee." It is further alleged that plaintiff, while employed as aforesaid, was injured at Zion City.

At the close of plaintiff's case in chief a motion was made to dismiss the action because the complaint was framed under the state statutes, whereas the proof showed that the case was one "which should be properly brought under the federal Employers' Liability Act." The motion was denied and such ruling is assigned as error.

We think the facts were sufficiently pleaded to show that the case was within the federal statute and that it was unnecessary to plead the statute itself. Acts of Congress are not foreign laws and state courts take judicial notice of them. 12 Ency. of Ev. 31, and cases cited in note 2. Ordinarily if the facts alleged bring the cause of action within the terms of a federal statute, this is

sufficient. The averment that plaintiff was employed as a fireman on an engine running between Chicago and Milwaukee and hauling passengers and [55] mail shows that plaintiff was engaged in facilitating interstate commerce. This being so, his rights were referable to the federal law referred to (35 U. S. Stats. at Large, 65, ch. 149, Fed. St. Ann. 1909 Supp. p. 584, as amended April 5, 1910, Fed. St. Ann. 1912 Supp. p. 335). As to such employees, the federal statute supersedes state statutes covering the same field. In *re Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A.(N.S.) 44; *State v. Chicago, etc. R. Co.* 136 Wis. 407, 117 N. W. 686, 19 L.R.A.(N.S.) 326. It is not claimed that the state courts have not jurisdiction to try actions coming under the statute referred to. If there was any informality about the pleading, the remedy of defendant was a motion to make the complaint more definite and certain. It was not a case where one cause of action was pleaded and another was proven. The pleader seems to have attempted to state the necessary facts to bring the case within the federal law. In *Creteau v. Chicago, etc. R. Co.* 113 Minn. 418, 129 N. W. 855, relied on by appellant, the plaintiff specifically pleaded ch. 254, Laws of Wisconsin for 1907, and based his right of recovery thereon, and the court held that it was error under such a pleading to allow a recovery under the federal law. We think the cause is far afield from the one we have before us.

The contention most strenuously urged by appellant is that there was no evidence of negligence on its part. Its witness Main testified that mail cranes are erected on a uniform plan and that the standard clearance between the inside of the ball of the near rail and the catch near the end of the hook where the strap of the mail pouch is suspended is three feet nine inches. Witness Flynn testified that the regular clearance is three feet and nine inches from the inside of the ball of the rail to the end of the arm. There is a slight discrepancy between the testimony of the witnesses, as the photographs offered indicate that the hook is not attached to the extreme end of the arm. Both witnesses are agreed that the standard distance from the top of the rail to the bottom of the [56] upper arm is ten feet and one-half of an inch, and Flynn testified that the distance in the instant case was one inch less than the standard. It was also shown, and is undisputed, that the railway company is not permitted to change this standard without the consent of the United States. Defendant contends that the lateral clearance in the present case was two and one-half inches greater than the standard, and that therefore any extra play which the mast might have had did not bring the arm as close to the side of the train as it would

have come had the standard clearance been maintained. Defendant also contends that the uncontradicted proof shows that the mast was wedged back at the time plaintiff was injured. Defendant's witness Flynn made the only measurements in reference to clearance that were produced, and it is argued that, inasmuch as the other witnesses only estimated the distance, their evidence raised no issue on the question. However this may be, we think there was evidence from which the jury could find defendant negligent. The demand of the public for rapid transit and frequent mail delivery has led to the introduction of the mail crane, and it, like other obstructions close to a railway track, has made the employment of trainmen more hazardous. Having adopted a standard that may of necessity be dangerous, defendant had no right to materially increase the danger by permitting the crane to become out of repair. The evidence is undisputed that the upper arm had worked out of the mortise in the mast three quarters of an inch. This had a tendency to throw it outward and downward, and no doubt accounts for the fact that it was an inch below the standard height. In a situation of this kind the departure from the standard cannot be regarded as trivial. Even an inch might materially increase the danger to employees, and the jury might well have found in the instant case that the lowering of the arm was the sole cause of plaintiff's injury, because it might conclude from the evidence that plaintiff was struck by the lower [57] corner of the arm. The outer plate of the skull was fractured, while the inner plate, only about one sixteenth of an inch therefrom, was not broken, notwithstanding the fact that it is much more frail and brittle than the outer plate. It is reasonably certain that, had the arm been an inch farther from plaintiff's head, he would either have escaped injury or have been injured very slightly. So, regardless of whether there was any conflict in the evidence as to the amount of clearance between the side of the train and the end of the arm, we think the undisputed facts in the case were such that the jury might have found the defendant negligent.

We are satisfied that the questions of assumption of hazard and of contributory negligence were jury questions, and that the court cannot say as a matter of law that plaintiff either assumed the risk or was guilty of contributory negligence. A review *in extenso* of the evidence on these questions would serve no useful purpose. The plaintiff testified that he thrust his head out of the window to look for signals, as it was his duty to do, and that he had no knowledge of the existence of the mail crane. He had not fired on any passenger train which ran through Zion City in the daytime, until the day he was injured, and his work on freight

trains was not calculated to call his attention to the danger to be apprehended from mail cranes, inasmuch as the arms were swung away from the track when not in use and would not endanger an employee riding in the cab of an engine.

The jury awarded the plaintiff \$8,700 damages, and it is contended that the verdict is excessive. The plaintiff was about twenty-eight years of age and earning \$125 a month at the time of the injury. The injury itself was serious. The outer table of the skull was fractured for a length of four and one-half inches. Plaintiff testified that he was wholly incapacitated for labor during the year that elapsed between the time of the injury and the time of the trial. [58] There was medical testimony tending to show that the injury was permanent, at least unless relief could be secured by an operation, and it was a matter of conjecture whether an operation would afford anything more than temporary relief. The case is one where the award of the jury should not be disturbed.

It is said that the verdict is informal and insufficient because all of the material issues in the case were not submitted to the jury. No question was requested which would tend to cure the omissions complained of. Such being the case, we must presume that the court found in plaintiff's favor on any material issue not passed on by the jury.

By THE COURT.—Judgment affirmed.

#### NOTE.

##### Location of Mail Crane near Railroad Track as Actionable Negligence.

In *Denver, etc. R. Co. v. Burchard*, 35 Colo. 539, 9 Ann. Cas. 994, the court, in view of the fact that the use of mail cranes increases the dangers of railroading, recognized the rule that it constitutes negligence on the part of a railroad company to maintain such an appliance in closer proximity to its tracks than its efficient use properly demands. That rule is supported by the holding in the recent case of *Missouri, etc. R. Co. v. Williams*, 103 Tex. 228, 125 S. W. 881. In that case it appeared that an engineer was killed by striking his head against one of the beams of a mail crane while gazing ahead from the window of his engine cab. The defendant was charged with negligence "in locating the crane too near the track." The court held that there was sufficient evidence to take the case to the jury on that issue, it being shown that the crane would have performed its function equally well if located at a greater distance from the track. Apparently, it was the view of the court that the rule *res ipsa loquitur* is applicable to cases of this class, for while in that case the plaintiffs went further in their proof than merely to show the occurrence of

the accident and introduced evidence of the railroad company's negligence, the court said obiter: "The occurrence itself is sufficiently indicative of negligence on defendant's part to call for an explanation from it, freeing it from such an imputation. The killing of one of its employees, while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care and foresight in the location of the structure, in view of the reasonable presumption that it could have been made consistent with the safety of employees while rendering the ordinary service. The mere adoption of such an expedient for handling the mails would imply that its proper use would not endanger employees so engaged on passing trains, and that a collision would not likely happen, when proper care is used in constructing it to make it safe."

The question whether the defendant railroad company was negligent in having located the mail crane which caused the injuries complained of too close to its track was not raised in the reported case. Therein the negligence alleged was that the crane had been permitted to become out of repair and as a result to come in slightly closer proximity to the track than when properly maintained. All the cranes used by the defendant railroad were supposed to be at a prescribed distance and to give a standard clearance space, which could apparently be changed only with the consent of the federal government. It is held that the question was for the jury and that they might properly find that the defendant was negligent.

In *Chesapeake, etc. R. Co. v. Jesse*, 159 Ky. 450, 167 S. W. 407, it appeared that the plaintiff was working as a member of the crew of a work train on defendant's road, and that he sustained the injuries complained of by striking a mail crane while endeavoring to board one of the cars of the work train which had started up suddenly and without giving him time to get aboard safely before the crane was reached. The negligence charged was the starting of the train without giving the plaintiff proper notice to enable him to get aboard safely. The jury found for the plaintiff and the court held that there was sufficient evidence to take the case to the jury.

In *Wolf v. East Tennessee, etc. R. Co.* 88 Ga. 210, 14 S. E. 199, the evidence showed that the injured person was a front brakeman on one of the defendant's trains and that his place of duty was on the top of the train when it was in motion; that the train having stopped at a certain station, he went to a store some sixty feet distant on his own business; that when the train started he ran from the store and caught the first car he came to, putting his foot in the "stirrup" and

holding on the ladder running up the end of the car; and, that while in that position he was suddenly struck by a mail crane along the side of the track. It was held that the plaintiff was properly nonsuited, since there was no evidence that the structure which caused the injury was located so as to be dangerous to employees, and since it did appear that the injured employee was not free from fault.

**MOORE ET AL.**

v.

**ROWLETT ET AL.**

Illinois Supreme Court—June 24, 1915.

269 ILL. 88; 109 N. E. 682.

**Wills — Revocation — Subsequent Invalid Will.**

Under the Statute of Wills (Hurd's Rev. St. 1913, c. 148, § 17) providing that no will shall be revoked otherwise than by destroying it, or by other will, testament or codicil in writing declaring the same, signed by testator in the presence of two or more witnesses, and attested by them in his presence, a former will and codicil are not revoked by an instrument intended as a subsequent will which expressly revoked them, but was invalid because of the incompetency of one of the subscribing witnesses.

[See Ann. Cas. 1912D 235.]

**Wills — Revival — Destruction of Revoking Will.**

The destruction by the testator of a will whereby a former will was revoked operates to revive the former will.

[See note at end of this case.]

Appeal from Circuit Court, Cook county:  
WINDES, Judge.

Action to contest will. William H. Moore et al., plaintiffs, and Susan Ann Rowlett et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. REVERSED.

*Robert E. Pendarvis and Robert N. Holt* for appellants.

*Eastman & White and C. Van Alen Smith* for appellees.

[89] CRAIG, J.—Appellees filed their bill in the circuit court of Cook county against appellants to contest the validity of an instrument admitted to probate in the probate court of that county as the last will and testament

of Levi Moore, deceased. The grounds for the contest alleged in the bill were that the testator was not of sound and disposing mind and memory and that the will was the result of undue influence exercised over him by appellants. By a subsequent amended bill the further charge was made that by a later instrument in writing, executed by the testator as his last will and testament in the presence of two witnesses, he revoked the will in question. Appellants answered, admitting the death of Moore, the making of the will and codicil in question, their admission to probate and the appointment of John J. Lovett as executor, but denied the testator was of unsound mind and memory, that any undue influence was exercised over him by appellants or that the will and codicil in question were revoked by the later instrument. The answer further alleged that appellees were estopped from now raising this question by reason of their having had notice of the application to probate the will and codicil in question and their participation in such proceedings without raising the question now raised, and that a court of chancery had no jurisdiction of the question involved. The cause was tried before the court without a jury on a stipulation of facts, by which all questions of fraud, undue influence and incapacity to make a will were eliminated. It was agreed that the testator executed an instrument on March 20, 1900, as his last will and testament (the will in question), and on August 21, 1902, added thereto a codicil, and later, on December 12, 1903, executed another instrument in writing, in the presence of two witnesses, as his last will and testament, containing a clause expressly revoking all prior wills; that this later instrument was admitted to probate as his last will and testament, and that the order admitting [90] it to probate was subsequently vacated for want of statutory notice to all the heirs; that upon the second application probate was denied by reason of its defective execution, one of the witnesses not being a credible witness; that upon appeal to this court the order so denying probate was affirmed in *Rowlett v. Moore*, 252 Ill. 436, Ann. Cas. 1912D 346, 96 N. E. 835; that thereupon the will of March 20, 1900, and codicil of August 21, 1902, were admitted to probate as the last will and testament of Levi Moore, deceased, and Lovett was appointed executor thereof, the parties saving to themselves all questions as to the competency, relevancy and admissibility of such evidence. At the conclusion of the hearing the court held the instrument of December 12, 1903, admissible and competent evidence as a revocatory instrument, and held that it worked a revocation of the former will of March 20, 1900, and codicil thereto, and entered a decree setting aside the order admit-

ting the will of March 20, 1900, to probate as the last will and testament of the deceased. From this decree appellants have prosecuted their appeal to this court.

The principal question involved, and the only one we deem it necessary to consider, is the sufficiency of the later instrument to operate as a revocation of the former will and codicil. Appellants contend that under our statute a will can be revoked only by a later will duly executed and admitted to probate in the manner provided by law, while appellees contend that a former will may be revoked by any instrument in writing declaring such intention, executed in the presence of two witnesses, whether the same be in the form of another will defectively executed, or otherwise.

The manner in which a will may be revoked by the act of the testator is provided in section 17 of the Statute of Wills (Hurd's Stat. 1913, p. 2491), which is as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in [91] writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." This section was before this court in *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L.R.A. 258, where it was held that a former will could only be revoked by a subsequent will declaring a revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character declaring such revocation, and that as a will was ambulatory, inoperative, ineffectual and without legal existence until the death of the testator, the destruction of a subsequent duly executed will containing a revocatory clause expressly revoking all former wills would revive such former will.

Appellees attempt to distinguish this case from the *Stetson* case because in that case the later will was not found and no explanation was made of its loss from which it might be presumed that it was destroyed by the testator with the intention of reviving his former will, while in this case both instruments were preserved by the testator until his death, thus negating any presumption of intention to revive the former will by the destruction of the later will. The decision, however, in the *Stetson* case was not based upon any presumption as to the intention of the testator, but, on the contrary, it was there expressly held that the common law rule was in force in this State, by which a

former will is revived and restored by the destruction of the later one, wholly independent of the intention of the testator in destroying such later instrument, although a different rule prevailed in the ecclesiastical courts, which followed the civil law, under which it was held that the question of revivor by a destruction of a later will is a matter of intention, to be determined from a consideration of all of the facts and circumstances attending the destruction of the later instrument. The decision in the *Stetson* case was [92] not based upon the question of the testator's intention, but, on the contrary, was based solely upon the positive rules of the common law and the language of section 17 of our Statute of Wills.

In the *Stetson* case it was admitted that the second will contained a clause revoking all former wills, and the court stated the propositions presented to it for decision as follows: "If the second will made by Jesse Stetson contained an express clause of revocation, did such clause operate at once and of its own force to immediately revoke and annul the first will, made on December 3, 1897, and did the loss or destruction of the second will containing such clause of revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897?" In disposing of the two propositions presented for decision it was necessary for the court to first determine the effect of the execution of the later will with the clause revoking all former wills before proceeding to a determination of the effect of the destruction of such instrument on the former will executed by the testator, for if the mere execution of the subsequent instrument *ipso facto* worked a revocation and cancellation of all former wills, its destruction could not have been effective to revive such former will, as the act of revocation would have been completed and consummated when the instrument was executed and would have operated instantaneously to absolutely revoke such former will. In *re Noon*, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944; *Bates v. Hacking*, 28 R. I. 523, 68 Atl. 622, 125 Am. St. Rep. 759, 14 L.R.A. (N.S.) 934; *Blackett v. Zeigler*, 153 Ia. 344, Ann. Cas. 1913E 115, 133 N. W. 901, 37 L.R.A. (N.S.) 291. And in determining the effect of the execution of such subsequent will under our statute the court said, on page 612: "It being established, then, that under section 17 of the Illinois Statute of Wills a former will can only be revoked by a subsequent will declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character which declares the [93] revocation of the former will, it cannot be said that in this State the destruction of a duly executed will containing an

express revocation of a former will does not have the effect of reviving the former will." The rule announced in the Stetson case has been followed in several, if not all, of the jurisdictions where the common law rule is in force. *Bates v. Hacking*, *supra*.

In 40 Cyc. 1177, the author says: "If the instrument propounded as a revocation be in form a will, it must be perfect as such and be subscribed and attested as is required by the statute. An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will." The reason for this is that the instrument is executed as a whole and is not to be operative until the death of the testator, and the revocation clause, like every other declaration of the testator's will and intent therein, is ambulatory, and must stand or fall with the other provisions of the instrument. *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Eccleston v. Petty*, Carth (Eng.) 79. In *Bates v. Hacking*, *supra*, the court said: "The statutory provisions for revocation by will properly executed or by some writing declaring an intention to revoke, executed like a will, are neither identical nor interchangeable. They differ materially, in that the former relates to a will while the latter does not. One looks toward the future while the other regards the present. The writing declaratory of an intention to revoke is evidence of a present intention, and when executed becomes, of itself, a complete revocation, but the revocation by will takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator."

In this State the legislature has provided several ways by which a former will may be revoked by the act of the testator, and in such provision has provided that when the revocation is attempted by another instrument it must be [94] "by some other will, testament or codicil in writing, declaring the same," etc. This language is clear, plain and unambiguous, and in the Stetson case, *supra*, was held to mean what it plainly says. A further reconsideration of the matter leads us but to re-affirm what we there said.

For the reasons given, the decree of the circuit court will be reversed and the cause remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

Rehearing denied October 7, 1915.

#### NOTE.

The reported case, in passing on the disputed question whether the destruction of a will whereby a former will is revoked works

ipso facto a revival of the earlier testament, aligns itself with the minority of American jurisdictions which hold that a revival results under those circumstances. The cases discussing the revival of a will by the destruction of a revoking will are reviewed in the notes to *Williams v. Miles*, 4 Ann. Cas. 306; *Danley v. Jefferson*, 13 Ann. Cas. 242; *Blackett v. Ziegler*, Ann. Cas. 1913E 115; *Graham v. Burch*, 28 Am. St. Rep. 339, 354; and *Matter of Stickney*, 76 Am. St. Rep. 246.

#### WAGNER ET AL.

v.

#### CITY OF SEATTLE.

Washington Supreme Court—March 5, 1915.

84 Wash. 275; 146 Pac. 621.

#### Streets and Highways — Injury from Defect — Notice of Claim — Amendment.

Under the Seattle charter providing that all claims against the city for damages shall contain all items of damage claimed, where a claim for personal injuries made no claim for damages on account of the employment of a nurse, though such damage was known when the claim was filed, it is error to permit an amendment of the claim at the trial by including such damages, as the provision requiring the filing of a claim is statutory in its nature and there can be no amendment without statutory authority.

#### Cure of Error by Remittitur.

Where, in an action against a city for personal injuries, the court erroneously permitted an amendment of the claim filed with the city to include \$65 expended in the employment of a nurse, the error can be remedied on appeal without a reversal, if plaintiff will file a remittitur of \$65.

#### Scope of Notice — Injuries Provable.

While a claim against a city for personal injuries cannot be amended at the trial to include items of damage known at the time of the filing of the claim, but not included therein, injuries not specifically mentioned in the claim, but which naturally and proximately flow from the injuries described in the claim, are provable.

#### Amendment of Notice.

Under Rem. & Bal. Code, § 7995, requiring claims for damages against any city of the first class to contain a statement of the actual residence of the claimant by street and number at the date of filing the claim and for six months immediately prior thereto, in an action for personal injuries the court has no power to permit an amendment of the



claim as filed to state a different street address than that therein stated.

**Sufficiency of Notice — Address of Claimant.**

Under Rem. & Bal. Code, § 7995, a claim against a city of the first class for injuries to a person who had resided at 208 Twenty-first avenue for six years was not defective, though it stated her street address as 218 Twenty-first avenue, where she was well known to the residents of 218 Twenty-first avenue and proper inquiry there would have disclosed her residence, as the purpose of provisions requiring the filing of claims is to insure such notice to the city as will enable it to investigate the cause and character of the injury; and where there is a bona fide attempt to comply with the law and the notice filed actually accomplishes its purpose of notice, it is sufficient, though defective in some particulars.

[See note at end of this case.]

**Amendment of Notice — Harmless Error.**

In an action against a city for personal injuries, the error in permitting the claim filed with the city to be amended to include damages not specified therein is harmless, where there was no attempt to prove such damages.

Appeal from Superior Court, King county: TALLMAN, Judge.

Action for damages. Esther Wagner et al., plaintiffs, and City of Seattle, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. MODIFIED.

James E. Bradford and Melvin S. Good for appellant.

Rosenthal & Aaron and Philip Tworoger for respondents.

[275] MORRIS, C. J.—Action for personal injuries claimed to have been sustained from a fall upon a defective sidewalk. Verdict and judgment for \$325 in plaintiff's favor, the injuries being slight, from which the city appeals.

[276] The error urged against the judgment is that the trial court permitted respondents to amend the claim filed with the city so as to embrace items of damage known to respondents at the time the claim was filed, but not included therein. The injury occurred on November 19, 1911. The claim was filed December 16, 1911. It sets forth the particulars as to the place and character of the injury and the damage sustained, but makes no reference to the employment of nurses, nor any claim of damages caused by such employment. On the trial, respondents offered testimony to the effect that they had expended \$65 in the employment of a nurse. The city objected as not being within the claim filed. The lower court overruled the objection, and permitted respondents to

Ann. Cas. 1916E.—46.

amend the claim so as to include this item. The amendment also included a change in respondents' address from 218, 21st avenue, as given in the claim filed, to 208, 21st avenue.

The charter of the city of Seattle provides that, all claims for damages shall "contain all items of damage claimed." Rem. & Bal. Code, § 7995 (P. C. 77, § 133), provides that, such claims shall state the residence of the claimant at the date of the filing and for six months immediately prior thereto. Provisions of this character have uniformly been sustained, and must be complied with when, as here, the items are known at the time of the filing of the claim. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L.R.A.(N.S.) 840. The provision requiring the filing of a claim being statutory in its nature, there can be no amendment without statutory authority. There is no such authority in this state, and we must hold that such claims cannot be amended at the trial so as to include items of damage known at the time of the filing of the claim but not included therein. It was, therefore, error for the lower court to permit the amendment, but it does not follow that the judgment must be reversed, since the error can be remedied by deducting from the judgment the sum of \$65, the amount paid [277] for nursing. We do not mean to be understood in so holding, that claims of this character must be construed with such exactness as to preclude evidence of those injuries not specifically mentioned in the claim, but which naturally and proximately flow from the injuries described in the claim. Evidence of such proximate results is admissible without reference to the claim. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383.

While the lower court was not justified in allowing the amendment of the claim as to respondents' street address, it does not follow that this was error so prejudicial as to call for a reversal, since the evidence of the correct address was admissible without the amendment. The obvious purpose of these charter and statutory provisions is to insure such notice to the city as to enable it to investigate the cause and character of the injury, and where there is a bona fide attempt to comply with the law, and the notice filed actually accomplishes its purpose of notice, it is sufficient though defective in some particulars. *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

In *Fraser v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459, it was said:

"The purpose of these provisions, as applied to a claim arising from a tort is to enable the municipality to investigate both the claim and the claimant."

It is sufficient, therefore, if the notice or claim is not calculated to mislead, but con-

tains such evidence of identity of place and person as to enable the investigating officials to make proper investigation when aided by reasonable inquiry. When, therefore, there is no evident intention to mislead, but a *bona fide* attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead. 5 Thompson, Negligence, § 6330; Hammock v. Tacoma, 40 Wash. 539, 82 Pac. 893; Decker v. Seattle, 80 Wash. 137, 141 Pac. 338; Bane v. Seattle, 80 Wash. 141, 141 Pac. 339. There was no evidence of any misleading on the part of the investigating officials. On the contrary, it appears that respondents had lived at 208, 21st avenue, for six years, [278] and were well known to the residents of 218, 21st avenue. Evidence in the record as to the proximity of 208 to 218 is found in the testimony of a lady living at 218, who said she knew Mrs. Wagner, and that "She lived in the Dows house." She was then asked, "Where is that?" To which she answered, "It is the neighbor's house." It is evident that the giving of respondents' address as 218, 21st avenue, was not misleading, and that any proper inquiry at such place would have disclosed the residence of respondents.

Complaint is also made that the lower court permitted the claim to be amended so as to include damages on the part of the husband "for loss of services, comfort and companionship of the wife." We find no attempt to prove any such element of damages, and, though the amendment was improper, the error was harmless.

The judgment will be affirmed conditional upon respondents' remitting therefrom the sum of \$65, within twenty days after the going down of the remittitur. Otherwise a new trial is ordered. Costs in this court to appellant.

Crow, Main, Ellis, and Fullerton, J.J., concur.

#### NOTE.

#### Sufficiency of Statutory Notice of Claim against Municipality with Respect to Name and Address of Claimant.

Introductory, 722.

Address of Claimant, 722.

Name of Claimant, 725.

#### Introductory.

The purpose of the present note is to discuss the cases passing on the sufficiency of a statutory notice of a claim against a municipality with respect to the name and address of the claimant. Cases involving the

sufficiency of a statutory notice to a municipality with respect to the description of the place of an accident occurring in a street or highway, are collated in the note to Sollenbarger v. Lineville, 18 Ann. Cas. 991.

#### Address of Claimant.

The various statutes requiring that a notice of claim against a municipality shall contain the street and number of the residence of the claimant have been held to be mandatory, and to be a condition precedent to the bringing of the action; and while it is to be assumed that the law does not require the performance of an impossibility, it has been held that the statutes are to be complied with, at least to the extent to which it is possible to meet their requirements. In Johnson v. Troy, 24 App. Div. 602, 48 N. Y. S. 998, it was said that the object of a statute of this nature was to apprise the municipality at an early date of the existence of a claim, in order that it might have an opportunity to investigate it, and that it was frequently just as important to investigate the claimant as it was the claim, so that notice of who he was, and where he would be found, might be of just as much importance as notice of where, how, and when the injury occurred.

The Illinois statute (Hurd's Rev. St. c. 70, § 2, p. 1186) provides that "any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages for personal injury shall within six months from the date of injury file in the office of the city attorney a statement in writing, signed by such person, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident and the name and address of the attending physicians, if any." It was held in Pagan v. Highland, 152 Ill. App. 607, that an objection to a notice, that it failed to state the residence of the person injured and of the person to whom the cause of action accrued, was baseless, where it appeared that the person sustaining the injury was thereby killed instantly, the court saying that he therefore had no existence in law after the cause of action accrued and for that reason had no place of residence within the meaning of the statute, nor did the statute require that his former residence be stated. The court also held that while the statute was mandatory as to the giving of the notice, still it was not to be understood as requiring things that were impossible, or as requiring more than was therein specified.

Under a city charter (Laws N. Y. 1892, c. 670, tit. 10, § 19) providing that no civil action shall be maintained against the city

for damages for injury to person or property, unless the plaintiff shall have previously presented to the comptroller a statement "stating among other things, the residence by street and number of the claimant," it has been held that a notice was insufficient that did not state the name of the street whereon the claimant resided, it appearing that his house was on a certain street, but was not numbered. *Johnson v. Troy*, 24 App. Div. 602, 48 N. Y. S. 998.

In *Washington* the statute (Rem. & Bal. Code, §§ 7995, 7997) provides as follows: "Whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or other proper officer of such city in compliance with other valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued. Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages." The charter of the city of Seattle (art. 4, § 29) provides as follows: "All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation." Under the foregoing statutes, the presentation and filing of a statement of the plaintiff's residence is indispensable to the maintenance of the action, and therefore a notice of claim which does not contain any reference to the claimant's place of residence, either at the time of the filing of the claim or at the time when the claim for damages accrued, is fatally defective. *Cole v. Seattle*, 64 Wash. 1, Ann. Cas. 1913A 344, 116 Pac. 257, 34 L.R.A.

(N. S.) 1166; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L.R.A.(N.S.) 840; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, rehearing denied 74 Wash. 628, 135 Pac. 820; *Connor v. Seattle*, 76 Wash. 37, 135 Pac. 617. However, where there is a bona fide and substantial attempt to comply with the law, and there is no evident intent to mislead, the notice will be held sufficient in the absence of any evidence that it was in fact misleading. *Decker v. Seattle*, 80 Wash. 137, 141 Pac. 338; *Bane v. Seattle*, 80 Wash. 141, 141 Pac. 339; *Maggs v. Seattle*, 86 Wash. 427, 150 Pac. 612. And see the reported case. Thus, in *Decker v. Seattle*, supra, the question was as to the sufficiency of a notice of claim which was verified on February 12, 1913, and was presented and filed on February 15, 1913, and which contained the statement "that the claimants' residence for one year last past has been and now is No. 1122 Tenth avenue south, Seattle, Washington." The uncontradicted evidence was to the effect that the residence of the plaintiffs on February 12, 1913, when the claim was verified, was, in fact, No. 1122 Tenth avenue south, in the city of Seattle, Washington, and so continued at the time the claim was presented and filed on February 15, 1913, and for a long period subsequent thereto. The trial court held the notice of the claim to be insufficient in that it spoke as of the date of the verification, three days before it was filed, and hence did not meet the requirement of the statute that every claim shall contain, in addition to the valid requirements of the charter, "a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim." Reversing that holding the appellate court said: "In the present instance, the interval between the date of the verification and filing of the claim was so short as to constitute a substantial compliance with the statute. In such a case, it is only reasonable to permit the claim to be supplemented by proof that the place of residence was not changed in the interval. So supplemented, the claim, obviously, was not, and could not have been, misleading. It performed its true function, that of notice." In *Bane v. Seattle*, 80 Wash. 141, 141 Pac. 339, it appeared that the notice, which was verified on February 12, 1913, and filed on February 15, 1913, stated the cause of action as alleged in the complaint, and contained the following statement of residence: "That the residence for one year last past of claimant is as follows: L. C. Bane, 2134 Laurelstrade Ave.; W. V. Bane, Hotel Kennedy; Josephine Bane, 412 21st Ave." It was held, in answer to the objection that the notice was defective in

that it failed to state that the plaintiff's places of residence were in the city of Seattle. that the notice complied with the letter of the statute in that it contained "a statement of the actual residence of such claimant by street and number," and that as the venue of the jurat to the claim was laid in King county and the claim was filed with the city clerk, it was a substantial compliance with the statute, in the absence of a showing that the failure to name the city, county and state was misleading. In *Maggs v. Seattle*, 86 Wash. 427, 150 Pac. 812, wherein the notice of claim gave the residence of all the claimants at the date of the claim, and for one year prior thereto, as No. 1611 Eighth avenue north in Seattle, Wash., and it was contended that the notice spoke as of the date of the verification and not as of the date of the filing, and hence did not meet the requirements of the statute, the court said: "After mature consideration, we are firmly convinced that a claim which states the claimant's place of residence at the date of verification and for at least six months prior thereto, when both verified and filed within thirty days after the claim accrued, as provided by the charter, must be construed as reading as of the date of filing, and as making a prima facie showing of the residence as of that date, the presumption being that the place of residence remains unchanged until the contrary is made to appear. This is the general rule in all cases where a status is once established. Such a construction meets every possible useful purpose of the notice, which is to give to the city the opportunity to investigate both the claim and the claimant while the occurrence is recent and the evidence available. . . . While the statute is mandatory in its only independent requirement, namely, that the notice give the place of residence of the claimant, it contains no provision that the notice shall be verified at all. That requirement is found in the charter provision alone. We have repeatedly held that a substantial compliance with such charter provisions is all that is required. . . . It seems to us, therefore, that it would be carrying the mandatory provision of the statute farther than was ever contemplated by the legislature to hold that the claim must be verified upon the exact date of filing. Since the sole purpose of the filing of the claim is to give notice to the city and enable it to investigate both the claim and the claimant while the facts are comparatively recent, it is obvious that any bona fide effort on the part of the city to avail itself of the notice by making an investigation will, in any case, develop the fact that the claimant either did or did not reside at the place given in the notice at the time when the claim was filed. This meets every purpose of the act. . . . If it then transpires that

the claimant did not reside at the given place when the claim was filed, proof of that fact would invalidate the notice and defeat the action. On the other hand, if it be found that he did then reside at the given place, the city can reap every benefit which such a notice, whensoever verified, could confer. If the city ignore the notice and make no investigation, it is in no position to complain, whatever the fact." In *Powelson v. Seattle*, 87 Wash. 617, 152 Pac. 329, the sufficiency of the notice of claim was attacked by the city on the ground that it did not comply with the charter and statutory requirements. It appeared that the claim was by P. & W. C. Powelson, doing business as the Seaport Construction Company, that the residence address of each partner was given, and that the location of the building where the damage occurred was stated. It was held that the statement was clearly a claim by the partnership and gave the location of the partnership business, and therefore there was a full compliance with the charter and statutory requirements. In the reported case, it appears that an amendment of a notice of claim allowed by the trial court included a change of address from 218 Twenty-first avenue, as given in the claim filed, to 208 Twenty-first avenue. The court holds that, while the amendment should not have been allowed, nevertheless it did not constitute such error as to call for reversal, and that the notice was sufficient, as it appeared that the notice was not calculated to mislead, but on the contrary, contained such evidence of identity of place and person as to enable the investigating officials to make a proper investigation when aided by reasonable inquiry. The earlier cases in Washington held that an ordinance which provided that a claimant of damages due to tort must state in his notice to the city his residence for one year last past, as a prerequisite to suing on his claim for such damages, was unreasonable, and therefore not to be literally enforced. *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L.R.A.(N.S.) 938; *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743; *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143; *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144. So in *Jones v. Seattle*, supra, it was held that a statement in a notice "that during the time herein mentioned, and long prior thereto, she was a resident of Seattle, King county, Wash.," was sufficient as a strict compliance with the ordinance requiring a statement if the residence of the claimant for a year prior to the accident was unreasonable. The difference between these last cases and those heretofore discussed is stated in *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L.R.A.(N.S.) 840, wherein it was said that the real distinction lay in the fact

that the earlier cases were brought under a municipal ordinance, whereas the later ones were under a state law, and that the city did not have the power to require a claimant to state the place of his residence for any length of time prior to the filing of his claim.

#### *Name of Claimant.*

In *Terryll v. Faribault*, 81 Minn. 519, 84 N. W. 458, the question was whether the allegation of a complaint showed a substantial compliance with the Minnesota statute (Laws 1897, c. 248) with respect to the giving of a notice of claim. The complaint stated that the notice and statement was signed "S. G. <sup>her</sup> x Terryll," with two sub-  
mark

scribing witnesses, and then alleged that "the initials preceding the surname of plaintiff, as subscribed to such notice, were the initials of her husband, which she ordinarily employs in writing her name; her own Christian name being Cora V., as it appears in the entitling clause of this complaint." The court held that it clearly appeared on the face of the complaint that the party suing and the party who gave the notice were one and the same person, and that the action would not be dismissed because the plaintiff did not sign his name to the notice with strict accuracy.

In a number of instances it has been held that it is a sufficient compliance with the statute, if a claim for injuries resulting from a defective sidewalk, which is otherwise sufficient, is given by an attorney on behalf of the person injured. *Schweer v. Chicago Heights*, 168 Ill. App. 52; *McEnaney v. Butte*, 43 Mont. 526, 117 Pac. 893; *Pullen v. Butte*, 45 Mont. 46, 121 Pac. 678; *Curle v. Brandon*, 15 Manitoba 122. And see *Canon City v. Cocks*, 55 Colo. 264, 133 Pac. 1040. So, in *Sheehy v. New York*, 160 N. Y. 139, 54 N. E. 749, it was held that a notice sufficiently complied with the statute when it appeared that it was entitled in the matter of the claim of the plaintiff against the city and declared that the plaintiff claimed and demanded from the city damages for personal injuries, and was signed by the plaintiff and by her attorneys, the latter giving their post office address, as required on formal papers in legal proceedings. In *Curle v. Brandon*, 15 Manitoba 122, in answer to an objection that the notice was not given by the plaintiff as administratrix, though she had to sue in that capacity, and that it was not signed by her, the court said: "The plaintiff, though not described in the notice as administratrix, was such in fact when she gave notice. The action could not be for the

benefit of William Curle's estate, but only for that of such parties as, within the provisions of chapter 31, R. S. M. 1902, had suffered prospective pecuniary loss from his death. . . . The act does not say that the notice must be signed by the claimant personally or that it shall be signed at all. Signature by a solicitor for the claimant is quite sufficient, I think." In *Ayer v. Somersworth*, 66 N. H. 476, 30 Atl. 1119, it was held that the statutory notice might be given by an agent of the person injured.

In *James v. Seattle*, 68 Wash. 359, 123 Pac. 472, the city charter involved required that all claims against the city for damages "shall be sworn to by the claimant." It appeared that a claim presented by husband and wife was made in the names of both the claimants, but was sworn to by the wife only. The court held that the claim was sufficient, saying: "It is contended that this is sufficient; that the claim should be sworn to by both of them, or by the husband, who it is said is the real claimant. The contention is based on the case of *Hawkins v. Front St. Cable R. Co.* 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L.R.A. 808, where we held that the husband was a necessary party plaintiff in an action brought to recover for personal injuries to the wife. But the rule there announced does not necessarily require us to hold that the husband alone can verify a claim for such an injury where presentation of a verified claim is made a prerequisite to an action to enforce the same. By statute the wife is also a proper party to such an action. Rem. & Bal. Code, § 182. Being a proper party, she is also a claimant; and since the charter does not require all the claimants to join in a claim, or specify which claimant shall verify the claim where there is more than one such claimant, it would seem to follow that both or either might properly verify it; and such has heretofore been the ruling of this court." To the same effect, see *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091. Likewise, in *Church v. Westminster*, 45 Vt. 380, it was held that a notice of claim for injuries received by a married woman from a defective highway was sufficient where it was signed by the wife alone, and an objection that the husband should have signed also had no merit.

In *Dean v. Sharon*, 72 Conn. 667, 45 Atl. 963, it was held that the notice of claim by a wife was not rendered ambiguous or ineffective because her husband signed it with her, where it manifestly purported to contain only a description of the injury sustained by her.

In *Carberry v. Sharon*, 166 Mass. 32, 43 N. E. 912, involving a notice which showed that

the signer was the husband of the plaintiff, and that she had received an inquiry "for which we will be obliged to make a claim on your town for damages," it was held that it was not defective because it did not show on its face that it was signed in behalf of the plaintiff.

In *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, it was held that a statement signed by the plaintiff's wife did not fulfil the statutory requirement as to notice for the plaintiff, and in the absence of a notice on his behalf, he could not maintain the action. And in *Keller v. Winslow*, 84 Me. 147, 24 Atl. 796, wherein it appeared that a husband gave two notices in writing each signed by him, in which the only claim for damages was that of the husband, and neither of the notices stated that the wife made any claim, it was held that the wife could not maintain an action for damages in the absence of a notice on her part. So in *McKeague v. Green Bay*, 106 Wis. 577, 82 N. W. 708, an action for the loss of the services of the plaintiff's wife, wherein it appeared that the notice of the claim for damages was signed by the wife's attorneys, it was held that it was insufficient to give the husband the right to sue thereon, as it was not given in behalf of the person bringing the suit.

Where the notice conveys the required information, and the town council is in no manner prejudiced by the absence of a signature thereto, it is a sufficient notice within the meaning of the statute. *Neeley v. Mapleton*, 139 Ia. 582, 117 N. W. 981.

In *Burnette v. St. Joseph*, 112 Mo. App. 668, 87 S. W. 589, it was held that a notice of claim under the Missouri statute (Rev. St. 1899, § 5724) was sufficiently verified, it appearing that the verification was signed "Mrs. S. L. Burnette," while the plaintiff's name was "Sarah L. Burnette." And in *Place v. Yonkers*, 43 App. Div. 380, 60 N. Y. S. 171, a notice of claim for personal injuries was held to be sufficient, it appearing that the notice itself was signed by the plaintiff, but that the verification was not signed by him, although it began with his name.

Under a statute (St. Mass. 1877, c. 234) providing that the notice of claim of any person injured by a defect in a highway should be given "by the person injured or by any other person on his behalf," it has been held that the notice may be given in the behalf of infants by their parents, guardians or any other person. *Taylor v. Woburn*, 130 Mass. 494; *Madden v. Springfield*, 131 Mass. 441. And so a notice under a re-enactment of the same statute has been held to be sufficient where it was given by a guardian on behalf of a plaintiff who up to that time was incapable of giving the notice or of procuring it to be given by another. *Stoliker v. Boston*, 204 Mass. 522, 90 N. E. 927.

In *Wisconsin* it has been held that a notice of claim of damages for injuries received by reason of a defective highway, need not, under an early statute (Laws 1875, c. 86) be signed by the injured party, his agent or attorney; and such a notice, signed by the claimant's attorneys, though they did not describe themselves in the notice as his attorneys, has been held to be effectual where it appeared that the plaintiff served the notice himself. *Teegarden v. Caledonia*, 50 Wis. 292, 6 N. W. 875. A later statute (Rev. St. Wis. § 1339) requires that the notice of claim shall be signed by the plaintiff, his agent or attorney. In *McDonald v. Aahland*, 78 Wis. 251, 47 N. W. 434, wherein it appeared that a notice of the alleged injury, substantially in the form prescribed by the statute and signed by the plaintiff and her husband, was served on the city clerk within the prescribed time, it was held that inasmuch as the plaintiff had signed the notice, the statute had been complied with and that it was immaterial that her husband had also signed it. The notice of a claim for causing death need not be signed by the administrator, but it may be given by the beneficiary to whom the damages will accrue in the case of a recovery. *Carpenter v. Rolling*, 107 Wis. 559, 83 N. W. 953, wherein a notice was held to be sufficient which was signed for the widow by her attorney, and not by the administratrix who brought the action. And in *Parish v. Eden*, 62 Wis. 272, 22 N. W. 399, it was held that a notice given by the administrator, who was also one of the beneficiaries, was a sufficient compliance with the statute.

In *Hubbard v. Fayette*, 70 Me. 121, it was held that the following notice was insufficient: "Fayette, March 10, 1877. To the selectmen of Fayette, Me. Gentlemen: I hereby notify you that my wife, Sarah R. Hubbard of Fayette, sustained an injury of a broken shoulder on account of a defect in the highway in said Fayette, on the 30th day of January last near the southwest end of the Davenport road so called. I hereby enter a claim against said town of Fayette for said injury for the sum of two hundred dollars (\$200.00). John Hubbard, per B." The reasons assigned by the court for holding the notice insufficient were that it did not purport to come from the plaintiff or to be given in her behalf; that it did not set forth her claim for damages, but set forth the claim of John Hubbard for damages by reason of the injury to his wife; that there was nothing in it giving the municipal officers any notice that the plaintiff made any claim against the town on account of her injuries, and proof that her husband was authorized to act for her did not aid the notice, because by it he did not purport to act for her and set forth no claim in her behalf.

**STATE  
v.  
FOXTON.**

Iowa Supreme Court—May 16, 1914.

166 Iowa 181; 147 N. W. 347.

**False Pretenses — Giving Worthless Check.**

Under the statute, any person who, by false pretense or by any false token, obtains, with intent to defraud, any money from another, one who gives a check on a bank in which he has no account, and without reasonable expectation for believing that the check will be paid on presentation, and who delivers the check to a third person and secures money thereon from him, is guilty of obtaining money under false pretenses, though no representation was made other than that involved in the delivery of the check.

[See note at end of this case.]

**Same.**

Where accused asked prosecutor if he would cash a check or identify him at a bank, and they went together to the bank, and the officers thereof refused to give accused money on prosecutor's identification, and thereupon accused wrote a check on his home bank, payable to prosecutor, who indorsed it, and the bank thereupon paid the money to accused in the presence of prosecutor, the prosecutor was defrauded if the check was not paid for want of funds.

[See note at end of this case.]

**Indictment — Amendment — Prejudice to Accused.**

Under Acts 33d Gen. Assem. c. 227, authorizing amendments to indictments which do not prejudice the rights of accused, an indictment for false pretenses which charged that accused induced prosecutor to part with his money on receiving a check therefor, that accused falsely represented to prosecutor that he had sufficient funds in the bank on which the check was drawn to pay it when presented, that prosecutor believed the representations to be true, and was deceived thereby, and that payment of the check was refused when presented because accused did not have any money on deposit, is properly amended by the allegation that prosecutor indorsed accused's check, and that money thereon was procured from a bank which was paid to accused.

**Witnesses — Impeachment — Former Conviction — How Proved.**

Under Code, § 4613, declaring that a witness may be interrogated as to his previous conviction for felony, but no proof is competent, except the record thereof, one testifying in his own behalf may be impeached by introduction of the record of his conviction of a felony in a sister state.

[See Ann. Cas. 1914C 256.]

**False Pretenses — Proof of Other Similar Offenses.**

On a trial for obtaining money by false pretenses by means of a worthless check, evidence of the giving of other worthless checks by accused about the time of the giving of the check involved is admissible to show intent.

[See 17 Ann. Cas. 464; 25 Am. St. Rep. 387.]

**Same.**

On a trial for obtaining money by false pretenses by means of a worthless check, evidence that accused had drawn another check on another bank, unaccompanied by evidence that the check was ever presented to the bank, or that accused did not have credit there, is inadmissible.

**Same.**

Where one is charged with obtaining money by false pretenses by means of a worthless check, the state may not show that accused drew checks on other banks, unless it appears that there were no funds in the other banks, from which a fraudulent intent could be deduced, and that he intended also to defraud prosecutor.

Appeal from District court, Bremer county:  
KELLEY, Judge.

Criminal action. H. V. Foxton convicted of cheating by false pretense and appeals. The facts are stated in the opinion. REVERSED.

J. Y. Hazlett and Sager & Sweet for appellant.

George Cosson, W. H. Wehrmacher and E. A. Dawson for appellee.

[182] GAYNOR, J.—Defendant was indicted on the charge of cheating by false pretense, and it was alleged in the indictment that for the purpose of obtaining, from one Earl Dickinson, \$50 in money, the property of Earl Dickinson, and to have the said Earl Dickinson believe that the defendant had money on deposit in the Farmers' & Merchants' State Bank of Morgan, Minn., and with the intent to defraud the said Dickinson, and to induce him to part with his money, he did then and there offer to Dickinson his check for \$50 on said bank, and did designedly, falsely, and feloniously pretend and represent to said Dickinson that he had sufficient money on deposit in said bank to pay the check when presented, and that it would be paid by said bank, if the said Dickinson would take it for \$50, intending thereby that Dickinson should believe his statements and representations to be true; that Dickinson did believe [183] them to be true, and, being deceived thereby, was induced by said false and fraudulent pretenses and representations to part with and pay to the defendant \$50, and accept from defendant his check therefor, by

*indorsing defendant's check and procuring money thereon from the State Bank of Waverly, Iowa, which was thereupon paid to the defendant; that the said Dickinson believed that said defendant had sufficient money on deposit in said bank to pay said check when presented to the bank; that said check was refused by said bank when presented; that defendant did not have any money on deposit in said bank on the day of said representations or since; that defendant knew said check would not be paid by said bank when presented, and knew this at the time he made the representations aforesaid, and gave the check. To the indictment, the defendant entered a plea of not guilty. Upon the issues thus tendered, the cause was tried to a jury, and the defendant found guilty. From the judgment of conviction, defendant appeals and assigns as error:*

(1) That the court erred in holding that the mere giving of a check, without any representation that the check was good, or that there were, or would be, funds in the bank to meet the same, constituted the obtaining of money or property designedly, and by false pretense, or by privy or false token.

(2) That the court erred in allowing the state to amend the indictment over its objection.

(3) The court erred in giving instruction No. 11, given by the court on its own motion.

(4) The court erred in allowing the state to show defendant's previous conviction of the offense of cheating by false pretenses in Minnesota.

(5) That the court erred in receiving evidence of the giving of other checks by the defendant.

(6) That the court erred in holding the evidence sufficient to sustain a verdict against the defendant.

We will take up the errors in the order in which they are charged.

[184] The evidence discloses: That Dickinson had known the defendant for eighteen years. That they had considerable business transactions together during these years. That Dickinson had sold defendant a farm of one hundred and twenty acres in Clay county and later on one in Bremer county. That the defendant had lived on the latter farm for many years. That at one time Dickinson sold him a farm of two hundred and forty acres near De Smet, S. D. That Dickinson is a real estate dealer. That the defendant came to his office in January, 1913, and said to Dickinson that he had to make a trip to Dakota, which he had not expected to make, and was therefore short of money, and asked Dickinson if he would cash a check or identify him so he could draw money on his home bank. That thereupon Dickinson and the de-

fendant went to the State Bank of Waverly, and Dickinson introduced the defendant to Mr. Mohling, the assistant cashier. Dickinson told the assistant cashier that Foxton wanted to draw some money on his home bank. Mohling thereupon asked Dickinson if he would indorse the check, and he said he would. That thereupon Dickinson wrote out a check in the following words and figures: "Morgan, Minn.,—1—16—1913. Farmers' & Merchants' State Bank pay to Earl Dickinson or order \$50.00 fifty dollars. H. V. Foxton." After the check was drawn out, Foxton handed it to Dickinson. Dickinson asked him why he did not make it payable to himself, and defendant said: "Why, you will have to indorse it anyway. It makes no difference." Thereupon Dickinson indorsed the check. After it was indorsed by Dickinson, Mohling paid the money to the defendant, in the presence of Dickinson, upon the check so indorsed. The amount of the check was charged by the bank to Dickinson. Nothing was said by the defendant to either Mohling or to Dickinson as to whether he had, or had not, money in the bank on which the check was drawn, or as to whether the check would be paid upon presentation. He was asked nothing on this point, and nothing was said by him. [185] It appears that the check was never paid by the bank on which it was drawn. It appears, however, that Dickinson paid to Mohling the money obtained on the check before the check got back. It appears, also, from the testimony of the assistant cashier of the Farmers' & Merchants' State Bank of Morgan, the bank on which the check was drawn, that the defendant had no money in that bank since July, 1906, and this cashier testifies that he never consulted him as to whether he might draw checks on the bank or not; that Foxton had no funds in the bank at the time the check in question was drawn; that the check was presented and returned on account of having no funds. There is testimony from this cashier that the check would not be paid, unless there was money on deposit to meet it; that the defendant never had any money in the bank on which he had a right to draw checks. It appears that, after the defendant was arrested, he paid to Dickinson the \$50, with an additional \$5 to cover protest fees, but, as there was no protest fee, Dickinson returned the \$5 to the defendant.

The question first presented by the defendant is: Does it constitute a crime, under our statute against cheating by false pretenses, to draw a check on a bank where the drawer has no money on deposit, and no reasonable ground to believe that the check will be paid by the bank on which it is drawn on presentation to it?

It is contended that there must be some false pretense, some deceitful means or arti-



fices resorted to, at the time the person obtains the money on the check, which conveys to the mind of the person to whom the check is presented that he has money in the bank, or that the check will be paid on presentation; that it does not constitute an offense against the statute to obtain property from another upon a check drawn upon a bank in which the maker has no funds, unless there is some distinct assertion, on the part of the maker, at the time of the delivery of the check, independent of the mere drawing of the check that the maker has funds in the bank [186] to meet the check, or that the check will be paid upon presentation.

Upon this question, the authorities are somewhat in conflict; the weight of authority and reason is to the effect that the mere making of a check and delivering it to another to induce the other to deliver property or money to the maker is an assertion and pretense that the drawer has, at the time, money or credit in the bank on which the check is drawn, and that the check will be paid by the bank upon presentation.

In the case of *Rex v. Jackson*, 3 Campb. (Eng.) 370, decided in 1813, this point was considered and determined. The defendant was indicted under St. 30 George II. c. 24, for obtaining goods on false pretenses. The prosecutor was a jeweler who was defrauded of goods of considerable value by the defendant. Among other things, it appears that he purchased the goods of the prosecutor and gave him, in payment for the goods, a check upon certain bankers with whom it was shown he kept no cash and had no account. He obtained the goods upon the check. In this case the defendant contended that, so far as the check was concerned, there was no criminal liability, and reliance was had by the defendant upon the case of *Rex v. Lara*, 6 T. R. 567 (Eng.) in which it was held that an indictment could not be supported against a person for delivering a draft on a banker which he knew he had no authority to draw, and which he knew would not be paid, upon which he obtained certain lottery tickets and defrauded the prosecutor of value. The court, in passing upon the question, said: "This point has recently been before the judges, and they were all of the opinion that it is an indictable offense fraudulently to obtain goods by giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid."

The statute on which the indictment in the *Jackson* case was predicated reads as follows: "Be it enacted . . . that from and after the 29th day of September, 1757, all persons who knowingly and designedly, by false pretense or pretenses, [187] shall obtain from any person, or persons, money, goods, wares, or merchandise, with intent to cheat or de-

fraud any person or persons of the same, shall be punished," etc.

Our statute provides: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtains from another any money . . . he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding \$500.00, or imprisoned in the county jail not more than one year or both such fine and imprisonment."

This question was before the Supreme Court of California in *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681. In this case the defendant was found guilty by a jury of having obtained certain property from one Spence under false pretenses, with intent to cheat and defraud. The defendant was tried and convicted. Error was assigned on the refusal of the court to give to the jury the following instruction: "Before you can convict, you must find as a fact in this case that, before the sale and delivery of the hogs in question, the defendant represented to Mr. Spence that he had, at the time, in the Commercial Savings Bank of San Jose the sum of \$196.70, and that Mr. Spence relied solely on said representation in parting with said hogs; in other words, that he would not have parted with said hogs or delivered them to the defendant, unless the defendant had told him that he had such money in the bank, and that that representation induced Mr. Spence to part with said hogs. If you do not so find, you must acquit the defendant. 'A bank check is not a false token within the statute.'" The court, in passing upon this question, said: "A bank check may be a false token, and would be such under the statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it." The statute of California, at that time, provided that, upon a trial for having, with intent to cheat or defraud another designedly and by false pretenses, obtained from another any [188] money, personal property, or valuable thing, the defendant cannot be convicted, if the false pretense was expressed in language unaccompanied by a false token in writing. The court said in that case: "There was evidence given on the trial . . . which tended to show that the defendant did not have the money to meet the alleged fraudulent check or credit on the bank upon which he drew it which would warrant any belief on his part that it would be paid." This case holds that the giving of the check, with the other evidence in the case, was sufficient to justify a conviction under the statute, and with this other evidence, constituted a false token in writing to sustain the conviction.

In the case of *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270, the court said: "The pretense need not be in words; that is, it was not necessary for the defendant to say in so many words that he had funds to his credit with the New York firm. The pretense may be gathered from the acts and conduct of a party. It has been held that the drawing and passing of a check on a banker with whom the drawer had no account, and which he knew would not be paid, was a false pretense within the statute"—citing *Rex v. Jackson*, supra; 2 Bishop on Criminal Law, section 430; and *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681.

In the case of *State v. Hammelsy*, 52 Ore. 156, 96 Pac. 865, 17 L.R.A.(N.S.) 244, 132 Am. St. Rep. 686, the defendant was indicted for obtaining money by false pretenses; the false pretense being a check, drawn by himself to his order, on a bank, which he indorsed and fraudulently and feloniously presented to one Orr, with intent to defraud, knowing at the time that he had no funds in the bank for payment of such check, and that it was worthless. A demurrer to the indictment was sustained, on the ground that it did not allege that any false or deceitful means were used by defendant to induce Orr to accept the check, such as representing that he had money or credit at the bank, or that it would be paid upon presentation, or the like. In support of the [189] ruling it was argued that the mere drawing and passing of a check on a bank in which the drawer has no funds or credit is not a false pretense, although it may be done for the purpose of fraudulently obtaining property from another, and without the knowledge of the drawer that the check is worthless and will not be paid. The court said:

"A false pretense is a 'representation of some fact or circumstance, calculated to mislead, which is not true' (citing Anderson's Law Dictionary, 808), or, as Mr. Bishop defines it, 'a false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value' (citing 2 Bishop on Criminal Law, section 415). The pretense need not be in words, but may be implied from the acts of the party. The gist of the offense against which the statute is directed is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary, and, when one by his acts intentionally creates a belief as to an existing fact which is false, with intent to deprive another of his property, and does so, it cannot matter whether the erroneous belief was induced by words or acts, or both—citing 2 Wharton on Criminal Law (9th ed.) section 1170, as follows: The con-

duct and acts of a party will be sufficient, without any verbal assertion, and citing *Com. v. Beckett*, 119 Ky. 817, 84 S. W. 758, reported in 68 L.R.A. 638, 115 Am. St. Rep. 285. . . . The mere offering of a bill in payment of the obligation amounts to an assertion or representation by conduct, which making is as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. . . . Conduct that conveys necessarily the same idea, and intended to do so, is but a substitute for the words. . . . We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute. Now, a check is an order on a bank purporting to be drawn upon a deposit of funds, and the drawer engages that on presentation it will be paid. . . . The giving of such an instrument is therefore as much of a representation that the [190] drawer has money or credit with the bank as if he made an oral statement or declaration to that effect. And when the check is given with the fraudulent and felonious purpose of obtaining the property of another, with knowledge of the drawer that he has neither money nor credit at the bank, and that the check will not be paid, it is within the statute, although the drawer made no representation in reference thereto. . . . And the doctrine has been approved by courts and text-writers, and it is generally agreed that it is not necessary that the drawer should have told the person to whom he gave the check that he had funds or credit in the bank."

In the case of *Williams v. Territory*, 13 Ariz. 27, 108 Pac. 243, 27 L.R.A.(N.S.) 1032, Lewis, Judge, delivering the opinion of that court, said:

"The argument of counsel is addressed to the sole question: Is a check signed by the maker thereof, he never having had funds in the bank upon which said check was drawn, nor reason to believe that such check would be honored, a false and bogus check within the meaning of section 489 of the Penal Code of the Revised Statutes of 1901, providing: 'Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain from any other person or persons, any money, property, or valuable thing whatever, by means or by use of any trick or deception, or false or fraudulent representation, or statement of [or] pretense, or by any other means or instruments, or device, commonly called the "confidence game," or by means or by use of any false or bogus check, or by any other printed, written or engraved instrument,' etc? In this territory the rule of strict construction of penal statutes does not obtain. The provisions of the Penal Code are to be construed according to the fair import of their

terms, with a view to effect its object and to promote justice. . . . At common law, and until the enactment of St. 30 George II, chapter 24, section 1, making criminal the obtaining of money or property by means of false pretense, offenses somewhat analogous to these were prosecuted under the general denomination of cheats. However, the obtaining of money or property by means of a worthless check was not a cheat. If a man induces another to part with goods by drawing [191] and delivering in payment his check on a bank in which he keeps no account, he thus simply puts a falsehood into writing. The check is no token and he is not indictable (for a cheat) at common law. . . . 'Under subsequent statutes against obtaining money by false pretenses, it has been held that the obtaining of money or property by means of worthless checks was a false pretense, and was indictable as such.' 2 Bishop, Criminal Law, 421. The representation is inferred from the act, and the pretense may be made by implication, as well as by verbal declaration. In the case at bar the defendant presented his own checks on a bank with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretenses. A check, like an order on an individual, is a mere request to pay, and the most that can be inferred from passing it is that it will be paid when presented, or, in other words, that the drawer has, in the hands of the drawee, either funds or credit. If the drawer passes a check to a third person, the language of the act is that it is good and will be duly honored, and in such case, if he knew that he had neither funds nor credit, it would probably be holden to be a false pretense—citing *Com. v. Drew*, 19 Pick. (Mass.) 179-186. Under the authorities the offense of obtaining money or property by means of a worthless check might be punished under section 481 of our Penal Code, declaring the obtaining of money under false pretenses a crime. The statute, however, makes the crime a misdemeanor. It is apparent, from a consideration of the growth of the law of cheats, that it was early deemed advisable to distinguish cheats by means of forged instruments as an independent crime, more heavily punishable as such. With the increasing use of checks, as a substitute for currency, the frequency and facility with which frauds were successfully perpetrated by means of the use of worthless paper attracted the attention of legislators. The mischief resulting from its issuance was hardly less than the evil ensuing from the utterance of forged paper. So long as the crime was a misdemeanor, the temptation of its commission was great. It therefore became desirable to place a heavier penalty upon crime so perpetrated than upon

those committed by means of other false pretenses. Section 489 is one of the class of statutes enacted for the purpose of meeting this evil. It fixes the penalty therefor [192] somewhat less than that for forgery, but greater than that for obtaining money by other false pretenses. . . . A bank check may be a false token, and would be such under the statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it. . . . It is sufficient for the purposes of this case to hold that a check is false within the statute when it is a willfully untrue written order, directing a bank to pay money on demand."

The court thereupon proceeds to give definitions of sham and false token and false pretense, and says "that under these definitions, and without limiting the use of the word, we hold that a check given by a person upon a bank in which he has no funds, and which he has no reason to suppose will be honored, is bogus within the statute."

In 12 Am. & Eng. Enc. of Law (2d ed.) page 838, we find the following: "Giving a check on a bank in a representation that the maker has money on deposit in the bank, and that the check will be paid on presentation; and accordingly, if a person gives a check for the property obtained on a bank in which he has no account, or which he knows will not be paid, this is a false pretense. But it has been held that, if a person has an account and gives a check, when he has no funds in the bank, that fact in itself will not be a false pretense, if he has reason to think that the check will be paid." See authorities therein cited. See also supporting this proposition, 2 Wharton, Criminal Law, section 2107; McClain on Criminal Law, section 674; Underhill, Criminal Evidence, section 444; *Com. v. Drew*, 19 Pick. (Mass.) 179.

*Barton v. People*, 135 Ill. 405, 25 N. E. 776, 10 L.R.A. 302, 25 Am. St. Rep. 375, was a case in which the defendant purchased certain property from the prosecutor for cash to be paid at the time of delivery, and directed that the property purchased should be sent to his place of business, representing that he would at that time obtain the money with which to [193] make payment. The property was sent to his place of business by an agent. Thereupon the defendant delivered to the agent an order on the bank, drawn by himself, which the agent accepted, and then delivered the property to the defendant. It appeared that the defendant had no money on deposit in the bank on which the order was drawn, or any arrangement with the bank by which the order would or should be paid. It was there contended that the fact that the defendant drew an order on the bank, where he had

neither credit nor money, was not a false token. The court said:

"The gist of the offense . . . is the obtaining of the possession of the goods . . . by falsely representing that he had money in the bank wherewith to pay an order drawn by him upon the bank for the amount due upon the goods, . . . when, in truth and in fact, as he well knew, he did not have the money in the bank as represented." It appears that nothing was said by the defendant at the time he delivered the check or order to the agent. The court further said: "The promise to pay cash for the property upon delivery, coupled with delivery of the order without explanation, was, in our opinion, in effect, a representation that defendant . . . had the amount of money called for by the order upon deposit with the bank, which the bank would pay, . . . upon presentation of the order. He was to make a cash payment, and he delivered the order as such payment, which necessarily assumed the ownership of that much money on deposit with the bank."

In *Foot v. People*, 17 Hun (N. Y.) 218, the defendant was charged in the indictment with having obtained books of the value of \$510 by false and fraudulent pretenses, among others, that his check on the bank, which he gave in payment for the books, was a good and valuable order, and that he kept an account on said bank. It appeared that the defendant, after being introduced to the prosecutor, said, "I will buy your books if you will take my check;" that he also said, "It will be paid the 6th of July;" that he had bought a lot of property [194] and was going to build, and was rather short of money; that the money was in the business; and that he was frightened that he would not have money enough to pay the check. The check was given . . . June 26th and payable July 6th. The prisoner had no account in the bank on which the check was drawn, nor any money therein, nor, so far as it appears, in any other bank. The court said: "We are of the opinion that the testimony presents a palpable case of obtaining property by false pretenses. The giving of the check was a distinct representation that the prisoner kept an account in the bank, and his statement that the money was in the bank must be taken to have referred to the bank on which the check was drawn, and to have been what the prisoner had on deposit there. The effect of these statements was not qualified by the prisoner's promise to pay the check at his office, nor by his statement that he was frightened that he would not have money enough to pay the check. But . . . the case was submitted to the jury favorably to the prisoner, and they must have found that the making of the check payable at a future day was not a

mere promise, but that the whole transaction was a device to cheat"—and the prisoner was properly convicted.

An essential element of the offense, under our statute, is that the person who parts with his property is in fact defrauded to his injury. In addition to false pretense, there must be an intent to defraud. The pretense must be used for the purpose of perpetrating the fraud, and the fraud must be actually accomplished by means of the false pretense. The false pretense that the defendant had money in the bank with which to pay the check, where there was no money, and he had no reason to believe the check would be paid, constituted a fraud upon Dickinson. It cannot be contended that Dickinson made the defendant a loan of the money, and that therefore, if the defendant was solvent, Dickinson was not defrauded. The transaction was not a loan, or intended to be a loan. He did not ask to borrow money from Dickinson, but, by the [195] giving of the check, represented to Dickinson that he had the amount of money which he received on the check on deposit in the bank on which it was drawn. Dickinson was not buying a chose in action. The whole transaction was to the effect: "Let me have \$50. Here is a check on a bank in which I have on deposit that amount of money, which is yours, and which you will receive upon presenting the check to the bank." Dickinson accepted the check and parted with his money on the pretense, made by the defendant, that by the check he set apart a special fund in the bank for the use of Dickinson. Dickinson did not accept the check upon the faith of defendant's solvency, or upon the thought that defendant might, by civil action, be compelled to pay the money represented by the check. Defendant obtained the money from Dickinson by a false pretense in this, that, by the giving of the check to Dickinson, he represented falsely that he had the money in the bank on which the check was drawn to meet the check when presented. It appears that he had no money in the bank, and no reason to believe that the check would be paid when presented at the bank. This involved a false pretense and a fraudulent intent. The draft was taken as an equivalent for money. See *State v. Decker*, 36 Kan. 717, 14 Pac. 283.

In the case of *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341, a case in which the defendant obtained a horse from the prosecutor and delivered to him a check in payment therefor, the Supreme Court of Kansas said: "Fritz was not trading his horse for a mere chose in action, nor for the right to bring a lawsuit against the defendant, . . . but rather was selling it for money supposed to be set apart by and subject to the check."

In that case it was claimed that, if the defendant was solvent, the prosecutor could not have been defrauded by accepting his check, but the court said this was not sound; that the draft was not what it represented to be, was not drawn upon an actual bank, nor for money belonging to the drawer, or subject to the payment of the draft; that it was a [196] fraud upon the owners to attempt to procure their property, without delivering to them just such a draft as it was represented to be; that they wanted a draft which was the equivalent of money, and were not purchasing a lawsuit.

That it is not necessary to make a verbal assertion of the fact in order that it constitute a false pretense, see *State v. Goble*, 60 Ia. 447, 15 N. W. 272. That the giving of a check on a bank in which the maker has no money to meet the check, and no reasonable ground for believing that the check will be paid when presented, constitutes a false pretense, see *Taylor v. Wise* (Ia.) 126 N. W. 1126. Of course in this case there appears to have been a verbal assertion, accompanying the delivery of the check, that he had money in the bank; but, as said before, this adds nothing, because that assertion is implied in the giving of the check for money or property received for the check on a bank in which it is made to appear that the defendant had no funds, and no reasonable expectation that the check would be paid by the bank upon which it was drawn when presented.

To constitute the offense of obtaining money or goods under false pretense, four things must occur, namely: There must be an intent to defraud, actual fraud, false pretense used for perpetrating the fraud, which must be accomplished by means of the false pretense as a cause which induced the owner to part with the property for money. The crime consists in inducing the owner to part with his goods or money, either by a willful falsehood as to an existing material fact, or by assuming a character he does not sustain, or by representing himself to be in a situation he knows he is not in. The false pretenses employed are only the means by which the offense is perpetrated. The false pretense or representation is not of itself criminal, and it becomes so only by being accompanied with a fraudulent intent, which is the substance of the crime. *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. The pretense must be false and made with the design of obtaining the money or property, and it must appear that the money or property was paid or received in consequence of [197] the false pretense. *Bowler v. State*, 41 Miss. 570. The pretense, to be criminal, must relate to a past event or a present existing fact, and the party injured must have believed the pretense to be true, and in reliance thereon must have parted with the money or property.

It is true that the Supreme Court of Texas has held to the rule contended for by the defendant herein. In *Blackwell v. State*, 41 Tex. Crim. 104, 51 S. W. 919, 96 Am. St. Rep. 778, that court held that it did not constitute the crime of swindling, or any violation of law, simply to draw a check on a bank where the drawer has no money on deposit; that to constitute the crime of cheating, by false pretense, there must be some false and deceitful means resorted to at the time that the person obtained the money on the check, as representing that he has money in the bank, or that the check will be cashed, but this is against the weight of authority.

Arkansas also seems to hold to a different doctrine in *Maxey v. State*, 85 Ark. 499, 108 S. W. 1135, 14 Ann. Cas. 509, although in that case the court said:

"Now, upon an indictment for obtaining money 'by color of any false token or writing,' the proof might be deemed sufficient to warrant conviction where it tended to show that the defendant presented a check which he knew to be worthless, and would not be paid, even though there was no affirmative representation as to its validity or worth. Under that charge proof of guilty knowledge of the worthlessness of the check would be of itself obtaining money by color of false token or writing, without a positive affirmation on his part that the amount called for in the writing would be paid. . . . But where, as in this case, there is a positive averment in the indictment of a false pretense in regard to particular matter, the charge must be proved as alleged, and the mere presentation of a check is not a pretense that there is money in the bank upon which it is drawn."

In the case of the *State v. Johnson*, 77 Minn. 267, 79 N. W. 968, the defendant was convicted of the crime of grand larceny in the second degree. The indictment was based upon [198] a statute which provided that a person who willfully, with intent to defraud, by color or aid of a check, or draft, or order for the payment of money, or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, . . . although no express representation is made in reference thereto, obtains from another any money or property, he is guilty of stealing the same. The court said:

"The gist of the offense defined by this statute is the obtaining, with intent to defraud, the money or property of another by false pretenses; that is, by color or aid of a check or draft which the accused has no reason to believe will be paid. In negotiating a check, the maker does not necessarily represent that he then has with the bank funds out of which it will be paid, but he does represent, by the act of passing the check, that it is a good and valid order for this amount, and that the

existing state of facts is such that in the ordinary course of business it will be met; or, in other words, he impliedly represents that he has authority to draw the check, and that it will be paid on presentation. Such authority need not be expressed, but it may be inferred from the course of dealing between drawer and the drawee. . . . Therefore, if the defendant in this case, when he negotiated the check here in question, had good reason to believe, and honestly did believe, that he had authority to draw it, and that the then existing state of facts was such that the check would be paid in the ordinary course of business, he is not guilty of obtaining money by false pretenses, although the check was not in fact paid for want of funds. If such be this case, the intent to defraud, the gist of the alleged offense, would be wanting. On the other hand, if he did not have any reasonable cause for believing that he was entitled to draw the check, and that it would be paid, the jury would be justified in inferring, from such a state of facts, that he intended to defraud by color or aid of the check, and he was rightly convicted."

We hold, therefore, under our statute, which is broader than most of the statutes under which the cases heretofore cited were determined, that by the giving of a check on a bank in which the maker has no account, and in which he has no [199] funds to meet the check, and no reasonable expectation and no grounds for believing that the check will be paid on presentation, and by the delivery of the check secures money or property from another, though no representation is made by him at the time other than is involved in the delivery of the check, that he is guilty of obtaining property by false pretense, with intent to defraud. We do not hold, however, that the mere giving of a check upon a bank in which the drawer has no funds, in and of itself, constitutes a false pretense. There must be proof, not only that there was no funds out of which the check could be paid, in the bank, but the course of business and dealing between the defendant and the bank must be such as negatives the idea that he had any reasonable ground to believe that the check would be honored or paid upon presentation.

This disposes of the first, third, and sixth errors assigned.

It is contended, however, by the defendant that there is no proof that Dickinson was defrauded; no proof that defendant obtained any money from Dickinson upon the check. The evidence discloses that he asked Dickinson if he would cash a check or identify him at the bank; that they went together to the bank; that the officer in charge of the bank refused to give the defendant money upon Dickinson's identification of him; that there-

upon the defendant wrote a check on, what he called, his home bank, payable to Dickinson; that he delivered the check to Dickinson; that Dickinson indorsed it; that the bank thereupon paid the money to the defendant in the presence of Dickinson. Now, the evidence disclosed that the defendant gave the check to Dickinson, drew it, payable to Dickinson, and Dickinson delivered it to the bank after indorsing it; that the bank paid the money to the defendant and charged the amount of the check to Dickinson. If the bank had paid the money on the check to Dickinson, and Dickinson had delivered the money to the defendant, it could not be claimed that he did not obtain the money from Dickinson. The fact [200] that the money was paid directly to the defendant in the presence of Dickinson, on Dickinson's indorsement of the check payable to himself, amounted really to this: The defendant gave Dickinson a check. Dickinson got the check cashed at the bank. That, instead of delivering the money directly to Dickinson, the bank delivered it to the defendant in the presence of Dickinson, and charged Dickinson with the amount thus delivered to the defendant. We think clearly this was Dickinson's money, and Dickinson was alone defrauded by the action of the defendant.

It is next urged that the court erred in allowing the county attorney to amend the indictment after the jury had been impaneled, and the evidence introduced.

Chapter 227 of the Laws of the 33d General Assembly provides:

"The county attorney may, at any time before or during the trial of the defendant upon indictment, amend the indictment so as to correct errors or omissions therein as to matters of form, or to correct errors in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership of property that may be described in the indictment; but such amendment shall not prejudice the substantial rights of the defendant, or charge him with a different crime or different degree of crime from that charged in the original indictment returned by the grand jury."

The only change made in the indictment of which complaint is made is the italicized words appearing in the statement of the indictment, as hereinbefore set out, at the beginning of this opinion. This did not change the nature or degree of the crime charged against the defendant, as set out in the original indictment, nor did it prejudice the substantial rights of the defendant. It simply more particularly stated the manner in which the money was paid to the defendant by Dickinson, as charged in the original indictment.

In *State v. Mullen*, 151 Ia. 392, Ann. Cas. 1913A 399, 131 N. W. 679, the constitutional-

ity of [201] this statute was passed upon, and its constitutionality sustained, and, the constitutionality of the statute being sustained, we do not think the amendment went beyond the permissions of the statute.

There could not, under the original indictment, have been any reasonable contention that the grand jury intended to charge the defendant with having defrauded any one other than Dickinson. The amendment does not change this charge, but only shows the manner in which the fraud was consummated more in detail than was done in the original indictment. We think there was no error in permitting the amendment.

The next complaint is that the court erred in allowing the state to show the defendant's previous conviction of the offense of cheating by false pretense in a foreign jurisdiction.

Code, section 4613, of this state provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof is competent, except the record thereof."

The defendant was a witness in his own behalf. This evidence was offered by the state for the purpose of affecting the credibility of the witness. There is no contention but that, if the defendant had been convicted of a felony in this state, such evidence would be competent; but it is contended that a conviction in another jurisdiction could not be admitted for that purpose.

In the case of *Palmer v. Cedar Rapids, etc.* R. Co. 113 Ia. 442, 85 N. W. 756, this court, in passing upon the question said: "There is some suggestion that conviction in another jurisdiction should be admitted as affecting the credibility, although not operative as a disqualification [citing *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491]; but that ground is covered in this state by Code, section 4613, which evidently was intended to limit previous convictions in general as affecting credibility to cases of felony. . . . Perhaps, under [202] Code, section 4613, the conviction of a felony in another jurisdiction may be shown to affect the credibility of the witness."

In the case at bar, it was in the record that obtaining money by false pretenses, under the statutes of Minnesota, is a felony. By a properly certified record, it was shown that the defendant was convicted of obtaining property by false pretense. The record was evidence of the fact that he had been convicted by a court of competent jurisdiction of a felony. The conviction was proper to be shown, under this statute, as affecting the credibility of the witness. The statute does not limit the evidence to a conviction in this state. We think there was no error in the admission of the testimony.

It is next contended that the court erred in receiving evidence of the giving of other checks by the defendant.

This evidence was permitted by the court for the purpose of showing the intent of the defendant to defraud, for the purpose of showing a scheme to defraud. These transactions were all limited to about the time of the giving of the check in question. This court has frequently held that the proof of similar offenses is admissible for the purpose of showing the intent. See *State v. Brady*, 100 Ia. 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L.R.A. 693.

The only question on this point is the evidence touching the check given to one Anacker on a bank known as the North Western National Bank of Minneapolis; it being contended that there was no proof that the defendant did not have money in this bank to meet the check, and no proof that the check was ever presented for payment. Anacker, called as a witness, said: "I am a grocer at St. Paul. Know the defendant. Defendant bought groceries at my store of my daughter. He presented a check to my daughter. She called me up. I told her to wait until I came. I came in the afternoon. Foxton came in in a hurry and presented the check to me to pay for the groceries. The groceries amounted to \$3. I took the check for the groceries, and gave him the rest in cash. I did not ask him if he had any money in the bank. [203] I asked if the check was good, and he said, 'Yes.' I took the check to my St. Paul bank. I did not get the money on the check. The bank I deposited the check with returned it to me." This was all the evidence there was as to the Anacker check. There was no evidence that the check was ever presented to the bank on which it was drawn; no evidence that defendant did not have credit at the bank; no evidence that the check, if presented to the bank in proper time, would not have been paid by the bank.

The admission of this testimony was prejudicial to the defendant, for the reason that the defendant claimed in his testimony: That he thought he had made arrangements with the Farmers' & Merchants' State Bank at Morgan to meet the check for the passing of which he was indicted, and that he supposed he had credit at that bank at the time the check was drawn. Mr. Jackson was cashier of the Merchants' Bank. The defendant was acquainted with him; had known him for twelve years. He saw him in the summer of 1911. He was then cashier of the bank, and was the man in the bank. That the defendant had business with him prior to the giving of the check in question. Defendant testified that, prior to the giving of this check, he had written to Mr. Jackson; sent him a mortgage and a note, inclosed in an envelope, stamped and addressed to the Farmers' & Merchants' State Bank of Morgan, Minn., and had put it in the post office; that in the letter he told Mr. Jackson that he was inclosing a copy of an original invoice of a stock of goods

amounting to \$2,000, together with a note and mortgage thereon to the amount of \$500, and requested that Jackson make him a loan on this paper for thirty days; that, if he did not feel like making a loan for the full amount, to give him credit for \$250; that he supposed, at the time this check was drawn, that Jackson had received this paper, and that he had a credit at this bank for more than the amount of the check given to Dickinson. There was evidence tending to show that the bank never received this paper from the defendant, or the letter requesting a loan. [204] In the absence of other testimony upon this showing, the jury might have found that the defendant, in good faith, believed, at the time he drew the check in question, that it would be honored by the Farmers' & Merchants' State Bank, or they might have found that this was only a pretense on his part, and not a fact. To strengthen the theory that it was a pretense, and not a fact, that he had sent this paper to the bank in question, the state offered this Anacker transaction, the purpose of which was to show that he had drawn checks on other banks in which he had no funds, and no reasonable expectation that the check would be paid by the bank on which it was drawn. If the state desired this inference to be drawn from the fact, it should have proceeded further and shown that defendant had no money in the North Western National Bank of Minneapolis, or no reasonable expectation that a check on that bank would be paid on presentation.

Where one is charged with having issued a check upon a bank in which he has no funds, and no reasonable grounds for believing that the check will be paid on presentation, it is not competent to show that he drew checks on other banks, unless it is made to appear that there were no funds in these other banks on which the checks were drawn from which a fraudulent intent could be deduced that he intended, also, to defraud this other bank. In the absence of any showing that he did not have funds in the North Western National Bank of Minneapolis, proof that he issued a check upon this bank, while it might lead the jury to believe, to the defendant's prejudice, that he intended to defraud this bank also, would not justify such a conclusion, unless it was affirmatively shown that the conditions did not exist which justified him in issuing a check upon that bank. The proof, to be admissible, must tend to show the commission of an offense, like in character, to the one charged, and this proof is essential as a basis on which to predicate a conclusion that the intent to defraud existed in the mind of the defendant at the time of the issuing of the check in question.

[205] We think the court erred, to defendant's prejudice, in admitting this testimony, and the cause is therefore

Reversed.

Ladd, C. J., and Deemer and Withrow, JJ., concur.

#### NOTE.

##### Giving Worthless Check as False Pretense.

The question whether the giving of a worthless check constitutes a false pretense is discussed in the notes to *Brown v. State*, 8 Ann. Cas. 1068; *Maxey v. State*, 14 Ann. Cas. 509, and *State v. Hammelsy*, 132 Am. St. Rep. 686. The present note is confined to a review of the more recent decisions.

As is held in the reported case, the rule is that a person is guilty of false pretense who, for the purpose of inducing the delivery of property or money, makes and delivers a check on a bank in which he has no funds, knowing that the check will not be paid. *Rex v. Garten*, 29 Ont. L. Rep. 56, 13 Dominion L. Rep. 642, 4 Ont. W. N. 1324, 22 Can. Crim. Cas. 21; *Williams v. Territory*, 13 Ariz. 27, 108 Pac. 243, 27 L.R.A. (N.S.) 1032; *State v. Cooper*, 169 Ia. 571, 151 N. W. 835; *Glover v. State*, 57 Tex. Crim. 208, 122 S. W. 396. See also *People v. Russell*, 156 Cal. 450, 105 Pac. 416; *Sharp v. State*, 7 Ga. App. 605, 67 S. E. 699; *Saffold v. State*, 11 Ga. App. 329, 75 S. E. 338; *Taylor v. Wise* (Ia.) 126 N. W. 1126; *State v. Hinshaw*, 92 Kan. 1007, 142 Pac. 960; *State v. Young*, 266 Mo. 723, 183 S. W. 305. In *Rex v. Garten*, supra, the court said: "The giving of a cheque in payment for goods, . . . is a representation not necessarily that there are actual funds at the drawer's credit in the bank at the moment to meet it, but at least either that there are such funds, and that he has done nothing to interfere with the payment of the cheque thereout, or that he has then such credit arrangements with the bank, to the amount of the cheque, that it will be paid on presentation. . . . It may be also a representation that he has no intention of doing anything thereafter to interfere with the payment." In *State v. Cooper*, 169 Ia. 571, 151 N. W. 835, wherein the evidence showed that the defendant had induced a third party to cash a check dated one day ahead and drawn on a bank with which he never had an account and with which he had no account at that time, the court in sustaining the verdict of conviction said: "This is not a question of a person overdrawn his bank account by mistake, or believing the check would be paid, even though overdrawn. This defendant never had an account at this bank, and there is nothing to show that he expected the bank would pay it. The evidence was to the effect that defendant represented that he had money in this bank. It is unnecessary to determine whether the



mere giving of the check alone was of itself a false representation, though it has been held that a false pretense or representation may be made by an act, as well as by word, and that a person giving a check where there are no funds to meet it, knowing it will not be paid, is sufficient to constitute a representation. We are unable to see how the fact that the check was dated ahead one day is material under the facts of this case. As already stated, defendant did not have money at the bank, either on the 10th or the 11th, or at any other time, and there is nothing to show that he expected the bank would pay it. The representation was that at the time the check was cashed he had the money in the bank, not that he would have at a future date. Defendant did not at the time the representation was made promise to pay the check at his office, nor was there any statement that he might not have money enough in the bank to pay the check. Dating it ahead was not a mere promise, and the jury may well have found that the whole transaction was a device to cheat." In *Williams v. Territory*, 13 Ariz. 27, 108 Pac. 243, 27 L.R.A.(N.S.) 1032, the court held that a check drawn on a bank in which the drawer had no funds and under circumstances where he had no ground to believe it would be paid, was a "false and bogus check" within the meaning of the terms of a statute (Revised Statutes of 1901, Penal Code § 489) providing as follows: "Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain from any other person or persons, any money, property, or valuable thing whatever, by means or by use of any trick or deception, or false or fraudulent representation, or statement of (or) pretense, or by any other means or instruments, or device, commonly called the 'confidence game' or by means or by use of any false or bogus check, etc." The court said: "This statute [referring to section 481] however, makes the crime a mere misdemeanor. It is apparent from a consideration of the growth of the law of cheats that it was early deemed advisable to distinguish cheats by means of forged instruments as an independent crime, more heavily punishable as such. With the increasing use of checks, as a substitute for currency, the frequency and facility with which frauds were successfully perpetrated by means of the use of worthless paper attracted the attention of legislators. The mischief resulting from its issuance was hardly less than the evil ensuing from the utterance of forged paper. So long as the crime was a misdemeanor, the temptation to its commission was great. It, therefore, became desirable to place a heavier penalty upon crimes so perpetrated than upon those committed by means of other false pre-

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tenses. Section 489 is one of the class of statutes enacted for the purpose of meeting this evil. It fixes the penalty therefor somewhat less than that for forgery, but greater than that for obtaining money by other false pretenses." Conviction was had in *People v. Russell*, 156 Cal. 450, 105 Pac. 416, under a statute (Penal Code § 476a) providing as follows: "Every person who, wilfully, with intent to defraud, makes or draws, or utters, or delivers to another person any check or draft on a bank, banker or depository for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in or credit with such bank, banker or depository to meet such check or draft in full upon its presentation, is punishable by imprisonment in the state prison for not less than one year nor more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depository for the payment of such check or draft." In sustaining the conviction the court quoted with approval from the opinion of the lower court as follows: "The intent of the legislature evidently was to make it a crime to draw and utter a draft or check upon a bank or depository for the payment of money, for the reason that such drafts or checks are not usually drawn unless the drawer has funds in such bank or with such depository to meet the check or draft. Such check or draft, drawn upon such banker or depository for the payment of money, is regarded somewhat in the nature of a circulating medium. It is generally supposed, when the check is drawn upon a bank, that the drawer has funds in such bank to meet it. It was to prevent the fraudulent making and uttering of such drafts or checks that the section was enacted."

It was held in *State v. Hinshaw*, 92 Kan. 1007, 142 Pac. 960, that the defendant was guilty of obtaining property under false pretenses where he himself did not induce the acceptance of the bogus check, but only drew up the same with the intent and knowledge that it was to be used by a third party.

Express representations that the drawer of a worthless check has money or credit in the bank on which the check is drawn and that it will be paid on presentation are not necessary to establish the guilt of the drawer, since the representation can be inferred from the acts of the drawer and the pretense may be made by implication as well as by verbal declaration. *Rex v. Garten*, 29 Ont. L. Rep. 56, 4 Ont. W. N. 1324, 13 Dominion L. Rep. 642, 22 Can. Crim. Cas. 21. See also *Williams v. Territory*, 13 Ariz. 27, 108 Pac. 243, 27 L.R.A.(N.S.) 1032; *State v. Cooper*, 169 Ia. 571, 151 N. W. 835. And see the reported

case. *Compare Williams v. State*, 10 Ga. App. 395, 73 S. E. 424. In *Rex v. Garten*, supra, it was said: "Under secs. 404 and 405 of the Criminal Code, 1906, the false pretense must be a representation of a matter of fact either present or past; but it is not necessary that it shall be by words. It may be by acts, that is, by 'words or otherwise.'"

It has been held that the issuance and delivery of a worthless check to a creditor in payment of a pre-existing debt does not constitute ground for a conviction. Thus in *State v. Pishner*, 72 W. Va. 603, 78 S. E. 752, the defendant was alleged to have violated a statute (Code 1906, c. 145, § 34, as amended by chapter 76, Acts 1911), providing as follows: "If any person make, issue and deliver to another for value any check or draft on any bank, and thereby obtain from such other any credit, money, goods or other property of value, and have no funds, or insufficient funds, on deposit to his credit in said bank with which such draft or check may be paid he shall be guilty of a misdemeanor.

Provided, however, that if the person who makes, issues and delivers any such check shall, within twenty days from the time he receives actual notice, verbal or written of the protest of such check, pay the same, he shall not be prosecuted under this section, and any prosecution that may have been instituted within the time above mentioned, shall, if payment of said check be made as aforesaid, be dismissed at the cost of defendant." Holding that there was no violation of the statute, the court said: "What was the object and effect of the new section 34 added by the Act of 1911? Was it to make it an offense simply to make, issue and deliver a check when the maker had no funds or insufficient funds to his credit to meet it, regardless of its effect upon the rights and property of the recipient or payee of the check? We think not. To constitute the offense the maker must thereby obtain 'credit, money, goods or other property of value' from another. It is not pretended that defendant obtained either of these by means of the check in question, unless, as it is insisted the entry of the check as a credit on the book of De-Polla, or an extension of the time of payment, amounted to the kind of credit intended by the statute. But no extension of time was agreed upon, and though De Polla says he gave defendant credit for the check on his account, clearly that is not the kind of credit meant by the statute. It is true the word 'credit' is often applied to an entry on the credit side of an account, but the 'credit' meant by the statute clearly applies to an entry on the debit side of the ledger, or to the thing actually parted with on the faith of the false pretense. The 'credit' intended by the statute according

to the very terms thereof must be a thing 'of value,' acquired by means of the check. Of what is a mere entry on a book? Neither the check nor entry would amount to payment. The creditor could still sue on the original account. He does not lose it by accepting a bogus check; nor does the mere entry of a check on the book of a creditor amount to a thing of value to the maker of the check. But what was the purpose of enacting the new section? We think it quite clear that the object was to constitute the making, issuance and delivery of a check, and thereby to obtain credit, money, goods or other property of value of another, a crime, regardless of the intent, or knowledge of the maker of the condition of his account, and to burden him with the duty of knowing the fact, before issuing a check, but relieving him from the offense, . . . if within the time prescribed by the proviso of the act he shall actually pay or make good the check so made and issued." See also *Allen v. State*, 58 Tex. Crim. 494, 126 S. W. 571.

## STATE

v.

## AYLES.

Oregon Supreme Court—December 31, 1914.

74 Oregon 153; 145 Pac. 19.

### Adultery — Indictment — Allegation of Prosecution by Injured Spouse.

An indictment for adultery need not allege that the prosecution was instituted by the injured spouse, as required by L. O. L. § 2072.

### Necessity of Joint Criminal Intent.

One party to an illicit intercourse may be guilty of adultery and the other innocent thereof; it not being essential to the commission of such offense that there be a joint criminal intent.

[See generally Ann. Cas. 1915D 376.]

### Harmless Error — Over Favorable Instruction.

An instruction that "if one of the parties to the illicit intercourse is guilty, then both are guilty of adultery," being a statement unduly favorable to the defendant convicted, is harmless.

### Adultery — Defenses — Connivance of Injured Spouse.

That the husband of the woman connived with and abetted defendant in the commission of the act of adultery constitutes no defense.

[See note at end of this case.]

**Witnesses — Impeachment — Testimony before Grand Jury.**

In a prosecution for adultery, it is not error to admit the testimony of the clerk of the grand jury that the husband of the woman appeared before the grand jury and testified against his wife and defendant, and that the wife appeared as a voluntary witness, and testified that she had intercourse with defendant on the night of their arrest.

Appeal from Circuit Court, Multnomah county: DAVIS, Judge.

Criminal action. James G. Ayles convicted of adultery and appeals. The facts are stated in the opinion. **AFFIRMED.**

*Robert E. Hitch and John Manning* for appellant.

*Walter H. Evans, Robert F. McGuire and George Mowry* for appellee.

[154] McNARY, J.—Convicted of adultery and sentenced to pass a term of six months in the county jail of Multnomah County, defendant prosecutes this appeal, and assigns as grounds therefor the commission by the court of 11 distinct errors. On the 30th day of January, 1913, defendant and Lydia Mulloy were jointly indicted for the crime of adultery, committed as follows:

"The said James G. Ayles and Lydia Mulloy, on the 13th day of January, A. D. 1913, in the county of Multnomah and State of Oregon, not being then and there married to each other, but the said Lydia Mulloy then and there having a husband living other than the same James G. Ayles, to wit, A. C. Mulloy, had carnal knowledge together each of the body of the other, and thereby committed adultery contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

[155] The defendants were tried together, the jury returning a verdict of guilty as to the defendant, and not guilty as to Lydia Mulloy.

1. We read from Section 2072, L. O. L.:

"A prosecution for the crime of adultery shall not be commenced except upon the complaint of the husband or wife, or if the crime be committed with an unmarried female under the age of twenty years upon the complaint of the wife, or of a parent or guardian of such unmarried female, and within one year from the time of committing the crime, or the time when the same shall come to the knowledge of such husband or wife or parent or guardian. When the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery also, and be punished accordingly."

Returning to the indictment, it will be observed that no mention is made that the

action was initiated by the husband of Lydia Mulloy. The introductory part of the indictment merely recites that:

"James Ayles and Lydia Mulloy are accused by the grand jury of the county of Multnomah and State of Oregon by this indictment of the crime of adultery."

Notwithstanding the statutory command that the prosecution shall be commenced only upon the complaint of the injured spouse, the cases hold that it is not necessary to allege such facts; for evidence thereof may be introduced without the averment: *State v. Athey*, 133 Ia. 382, 108 N. W. 224; *State v. Andrews*, 95 Ia. 451, 64 N. W. 404; *State v. Maas*, 83 Ia. 469, 49 N. W. 1037; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; 1 Cyc. 956.

2, 3. It is claimed by defendant that the trial court committed a legal mistake in advising the jury that, "if one of the parties to the illicit intercourse is guilty, [156] then both are guilty of adultery." Some courts advance the doctrine that, after the acquittal of one of the defendants in a joint charge of adultery, there can be no conviction of the other. This is not in accord with the better authority, and the proper rule appears to be that the acquittal of one of the defendants is no bar to the prosecution and conviction of the other defendant. While it is true that, to constitute adultery, there must be a joint physical act, it is not necessary that there should be a joint criminal intent. One party may be guilty and the other innocent, though the joint physical act necessary to constitute adultery is complete: *State v. Eggleston*, 45 Ore. 346, 77 Pac. 738; *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 28 Am. St. Rep. 599; *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; 1 R. C. L. 644. Unquestionably, the trial court misled the law when he told the jury that, "if one of the defendants is guilty, then both are guilty." However, we fail to discern where this instruction injuriously affected the defendant, because it is a more favorable statement than the law sanctions or than defendant might expect. In a case where the court erroneously instructs the jury to the advantage of defendant, and the jury acts in accordance with the law and in disregard of the instructions, the defendant cannot be heard to say that he has been injured.

4. Defendant's strongest contention is that the court erred in refusing to admit evidence tending to show that the husband of Lydia Mulloy connived with and abetted defendant in the commission of the act of adultery. Defendant invokes the benefit of the same theory in the following requested instruction:

"I instruct you that, if you find from the evidence that the prosecuting witness, A. C. Mulloy, the husband [157] of Lydia L. Mul-

loy, one of the defendants herein, acquiesced in or assented to the act or acts of sexual intercourse between the defendants, Lydia L. Mulloy and James G. Ayles, if you find any act or acts of sexual intercourse between said defendants did occur, then you should find the defendant James G. Ayles not guilty."

An outline of the testimony proffered by defendant is: That the defendant Lydia Mulloy, when a girl under 17 years of age, was seduced by A. C. Mulloy, who subsequently married her in order to cover the infamy of the crime; that since the time of their marriage the husband has been seeking to invent grounds for a separation and divorce; that he insisted upon his wife remaining alone in the house with defendant while he (Mulloy) absented himself therefrom; that the husband connived in every imaginable way to throw his wife in the company of defendant by having defendant assist his wife in washing dishes and helping her about the kitchen and house; that during some festive occasion at Hillsboro, Mr. Mulloy entered a saloon, and, in the presence of several witnesses, stated that he had left defendant to bring his wife in from the farm, and that he "hoped to God he would run off with her;" that defendant was solicited by Mr. Mulloy "to have intercourse with his wife by inference and innuendos;" that Mulloy stated in the presence of defendant, and to him directly, that he didn't care if he caught somebody having connection with his wife, because he wanted to get a divorce from her; that the husband knew his wife and defendant were going to Portland, and that defendant had assurance that he would not be harmed.

With much pressure it is argued that, if these things were true, defendant could not be convicted of the offense, for the reason that he was induced to commit [158] the act. The books abound with much learning upon this interesting department of the criminal law. Nevertheless our steps have not been guided by the light of adjudged cases involving the crime of adultery. Still we feel no reason for hesitating to announce the rule that seems to us best adapted to the promotion of justice. In the case of *State v. Hull*, 33 Ore. 57, 54 Pac. 161, 72 Am. St. Rep. 694, this court, speaking through Mr. Justice R. S. Bean, said:

"It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it."

This was a case of larceny where the property charged to have been stolen was taken, not only by the consent and passive acquiescence of the owner, but by his express direction, and upon the advice and with the ac-

tion co-operation and assistance of his agents; and this court held, in effect, that there was no trespass committed in the taking if there was no taking without the owner's consent. Even in the larcenous class of cases we know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. If the crime originates with the accused, and the intended victim does not actually urge him on to the commission of the crime, the mere fact that he facilitates the execution of the scheme will be no defense to the accused: *Conner v. People*, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L.R.A. 341; *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *Thompson v. State*, 106 Ala. 67, 17 So. 512; *State v. Jansen*, 22 Kan. 498; [159] *State v. West*, 157 Mo. 309, 57 S. W. 1071; *People v. Krivitzky*, 168 N. Y. 182, 61 N. E. 175.

"The fact that decoys were set, or a trap laid, by means of which a person was detected in the perpetration of a crime, cannot be set up as a defense to the prosecution therefor, where the crime was conceived by the accused, and not suggested by the prosecuting witness, or those acting for him duly authorized in the premises, and the owner did not willingly part with and consent to the taking of the property." *Wharton's Criminal Law* (11 ed.) Vol. 1, § 389.

Counsel, in support of his position, attracts our attention to cases having for their purpose the dissolution of the marriage contract where the courts have held that a husband may not obtain a divorce who directly encourages his wife to commit adultery. An examination of the cases and our own statute reveals the situation that this defense is statutory. Section 510, L. O. L., reads:

"In a suit for the dissolution of the marriage contract on account of adultery, the defendant may admit the adultery, and show in bar of the suit, . . . (1) that the act was committed by the procurement or with the connivance of the plaintiff."

The reason is apparent. Plaintiff in a divorce case may with propriety watch his wife whom he suspects of adultery, in order to obtain proof of that fact, which he may use in evidence to procure a decree of divorce, but when he commits acts which have the effect of beguiling his wife to an adulterous bed, the law interposes the statute as an obstacle to the accomplishment of his purpose. We acknowledge that in those crimes where the element of trespass and intent are necessary ingredients, consent to the act relieves the party charged from liability to criminal prosecution; yet in [160] those acts which affect the public morals, and where the idea of the

sale and barter of private property is not concerned, we cannot see the application of the rule. True, in cases of this character the prosecution can only be commenced on the complaint of the outraged spouse; yet the act is an offense against the state: *State v. Donovan*, 61 Ia. 281, 16 N. W. 130; *State v. Smith*, 108 Ia. 443, 79 N. W. 115; *State v. Athey*, 133 Ia. 386, 108 N. W. 224.

The fact that the husband may have been guilty of sinful conduct which encouraged the defendant to commit the crime does not lessen or in any manner affect the wrong which society suffers, and public policy, good morals, common decency, and considerations of justice demand the punishment of the offense under such circumstances as strongly as though the crime had been committed by stealth and through the employment of agencies unknown to the husband. For these reasons the evidence was properly excluded, and instructions properly refused. Well may we add that, if the rejected testimony is true, offended justice has not yet been fully vindicated.

5. The only remaining assignment of error which we deem necessary to consider concerns the action of the trial court in admitting testimony of the clerk of the grand jury to the effect that the husband of Lydia Mulloy appeared before the grand jury and gave testimony against his wife and defendant, and that Lydia Mulloy also appeared as a voluntary witness and testified that she had intercourse with defendant on the night of their arrest. The particular ground of objection to the testimony is that the grand jury-room "is supposed to be secret, and the grand jurors are not to reveal anything that may transpire therein, except when witnesses examined before the grand jury refute [161] their testimony before the trial jury." We think counsel draws too narrowly the limitations upon the testimony of grand jurors. Public policy forbids that the jurors be allowed to state how the members of the jury voted or make public the opinions expressed by the different jurors during their deliberations, or to unbosom the fact that an indictment has been found prior to its becoming a public record. But much authority is to be found in support of the rule that testimony of a grand juror is admissible to show that a person did or did not testify before the grand jury, and testimony given by the witness before the grand jury, when otherwise competent, may be recounted by a grand juror: *State v. Moran*, 15 Ore. 262, 14 Pac. 419; *Com. v. Hill*, 11 Cush. (Mass.) 137; 20 Cyc. 1353; *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *State v. Carroll*, 85 Ia. 1, 51 N. W. 1159; *Hinsaw v. State*, 147 Ind. 334, 47 N. E. 157. There are a few additional questions presented on behalf of de-

fendant, and which we have examined, and deem them not of sufficient importance to require separate notice; therefore the judgment of conviction is affirmed.

Affirmed.

McBride, C. J., and Eakin and Bean, JJ., concur.

#### NOTE.

#### Connivance or Procurement by Other Spouse as Defense to Prosecution for Adultery.

The reported case holds that proof that the other spouse connived at or procured an act of adultery is no defense to a prosecution for the crime. The case is one of novel impression.

An analogous situation was passed on in *State v. Donovan*, 61 Ia. 278, 16 N. W. 130. In that case the defendant was indicted for having adulterous intercourse with his wife's sister. In the course of the trial he asked for an instruction to the effect that he should be acquitted if he should prove that his wife, her mother, and his victim had maliciously conspired to place on him the blame for the crime. This request, however, was refused, the court saying: "If the defendant committed the crime with which he was charged, it was the duty of the jury to convict him, without any regard to the motives which led to his prosecution."

The holding of the reported case is in accord with the well settled doctrine that consent is a defense to those crimes only of which nonconsent is an essential element. 8 R. C. L. tit. *Criminal Law* p. 126. It also finds support in the cases holding that if a husband aids and abets the ravishment of his wife by another both the husband and the third person are guilty of rape. See the note to *Frazier v. State*, 13 Ann. Cas. 497.

#### JOSEPHS

v.

#### BRIANT.

Arkansas Supreme Court—December 7, 1914.

115 Ark. 538; 172 S. W. 1009.

#### Contracts — Validity — Contract to Procure or Suppress Evidence.

A contract to procure evidence to win decedent's divorce case, or to secure the possession of letters to prevent their use against him in the divorce suit, was void for illegal.

ity; but, if the procurement of the letters by the claimant was the only service she was to perform, she being unaware of any illegal purpose on the part of decedent to suppress the letters, it is not invalid.

[See Ann. Cas. 1912A 657; 97 Am. St. Rep. 145.]

#### **Same.**

A contract with decedent to secure letters in the possession of a third person so that they may be suppressed, and not without being used in a criminal prosecution against decedent, made with knowledge of such purpose, is illegal; but, if the letters were to be secured merely to prevent the person in whose possession they were from sending them unlawfully to the writer's wife, then the contract is good.

#### **Instructions — Specific Objection Necessary.**

If an instruction for plaintiff, correct as far as it went, fails to state a certain qualification which all other instructions given for plaintiff did contain, objection to the omission should be made the subject of specific objection before it can be reversible error.

#### **Evidence — Mailing of Letter — Testimony of Postmaster.**

Where a United States postmaster testified that a person mailed a registered letter to a certain address, if the witness was testifying from personal knowledge, and not from the records, which the post office regulations forbade his taking from the post office, the evidence is admissible.

#### **Proof of Authorship of Typewritten Letters.**

Where a contract alleged to be embodied in an illiterate person's letters is in issue, testimony as to how he spelled words and wrote letters on the typewriter, and that the letters in question were his, by persons familiar with his methods of writing, is competent.

[See generally Ann. Cas. 1916D 784.]

#### **Secondary Evidence — Contents of Lost Letters.**

Where a suit was on a contract embodied in letters which were shown to have been lost, it is proper to introduce copies in evidence.

#### **Witnesses — Transaction with Deceased — Receipt of Letters.**

Where a plaintiff testified to receiving three letters from deceased, signed by him, one containing a \$20 bill, and that the letters were postmarked at a certain place, that they had on them what purported to be deceased's letter head, and that they were received by her in due course of mail, such testimony does not concern a transaction with the deceased within the meaning of Schedule, § 2, providing that in civil actions no witness shall be excluded because of interest, "provided that in actions . . . against executors . . . neither party shall be allowed to testify against the other as to any transaction with or statements of the testator . . . unless called . . . by the opposite party."

[See note at end of this case.]

#### **Instructions — Instructing Orally Harmless.**

Where the court gives two instructions, one orally over objection and one in writing, substantially identical and both correct, the party objecting is not prejudiced by the giving of the instruction orally.

Appeal from Circuit Court, Lawrence county: **JEFFERY**, Judge.

Action for services rendered. Mrs. Mai Briant, plaintiff, and Louis Josephs, executor, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[539] A. W. Shirey died at his residence at Minturn, in Lawrence County, Arkansas. On July 19, 1910, thereafter, [540] Mrs. Mai Briant presented to the probate court of that county the following claim:

"Mrs. Mai Briant v. the A. W. Shirey Estate. To legal services rendered to the said A. W. Shirey during his lifetime in the suit for divorce in which he was involved, said services being rendered at his request and solicitations.

#### **ACCOUNT.**

To trip from Hope to Minturn, Jonesboro and other places and securing evidence which was to be used in his said suit for divorce, \$10,000.

The proof will show that Shirey in his lifetime and not long before his demise employed Mrs. Briant to do certain work, and on his own motion agreed to pay her \$10,000."

This claim was sworn to by Mrs. Briant and the full amount of it was allowed by the probate court. On appeal to the circuit court, the plaintiff again obtained a judgment for the full amount, but on appeal to this court the judgment was reversed and the cause remanded for a new trial. See *Josephs v. Briant*, 108 Ark. 171.

Upon the retrial of the case in the circuit court, the plaintiff, Mrs. Briant, testified substantially as follows:

I knew A. W. Shirey in his lifetime; he was my mother's uncle; for twenty-one years before his death, I visited him every year at his home in Minturn, Lawrence County, Arkansas; somewhere about the 27th, 28th or 29th of April, 1909, while I was at Hope, Arkansas, I received a registered letter containing a twenty-dollar bill, and this was the only registered letter I received about that time; the letter was postmarked at Minturn, Arkansas, and was signed, "A. W. Shirey;" it was addressed to Mrs. Mai Sparks Briant, Hope, Arkansas, and in addition to the postmark of Minturn, there was printed on the envelope, "A. W. Shirey, General Merchant-

dise, Minturn, Arkansas;" the envelope contained a twenty-dollar bill; later on during the year I received two other letters postmarked Minturn, these letters arriving while I was [541] at Harrisburg, Arkansas, and the postmark on the letter at Harrisburg was a day later than the postmark of Minturn; these letters were received by me in due course of mail and bore the signature, "A. W. Shirey."

After I received the first letter above referred to, I made an appointment with Madame Rupert, a fortune teller of Little Rock, and procured from her some letters signed by A. W. Shirey; after securing the letters, I mailed them to Mr. Shirey at Minturn, Arkansas.

It was shown to the satisfaction of the court that the letters above referred to had been lost and copies of them were admitted in evidence. They were written on a typewriter, and are as follows:

"A. W. Shirey, General Merchandise.

"Minturn, Arkansas.

"Dear Sweet Niece May: I send you 20.00 com if you will Try what I wrote you I will pay you \$5000.00 fore your service And if you Success i Will pay you duble That. it is not A big fee.....xx..... i will pay you duble that. it is not a big fee fore I have paid that much before. I Hope the dr, Will not care fore helping me eny Thing you want To write since your Enitils and There will be no Danger i Lookk fore you at Onct Bring Hortence to i love Her like you.

yours Truly,

"A. W. Shirey."

"A. W. Shirey, General Merchandise.

"Minturn, Arkansas, Sept. 15, 1909.

"Dear May: I Received yours of the 8. I have been out on the Fars, Estimating The crops For A Week past, Is why I did not Acknowledge Receipt of your letter sooner. If it will not In convenience You I will be glad to have you Call Mabe Hortence Can Eat out of the Skillet A time or two If she Still like it i want to settle with you when you can come. We find that the cotton here wil average no more than 7. OR 800 lbs. The corne is AN average Crop.

"A. W. Shirey."

[542] "A. W. Shirey, General Merchandise.

"Minturn, Arkansas, Dec. 23, 1909.

"Dear niece: I did want you come and spend Christmas with me So we Could fix us Business but i am afrade it will note be safe for you to come. it Greaves my sould That I am fixed as I Am but it Seams to be my Destiny. It may End sometime if it dont i Will hope you are always Comefortable and hapy If i go first you will not want fore

nuthing fore you and hortence Are Like my childred you Did what no lawyer could or would do for Me It is worth more Than I tole you i Would pay, Mabe you can meet Me in St. Louis when i go to buy spring Goods and we can settle then, I Will give you \$5,000 Then any way and mabe can pay you the other \$5,000.00 too I mean for to pay much More than This when my trouble ends. The more hapiness in the world The Better is is fore The World and all in it.

Yours truly,

"A. W. Shirey."

R. E. Jones testified, in substance, as follows: Mr. Shirey, some time in April or May, 1909, told me that the plaintiff had procured some letters or papers for him, and that he was going to pay her well for it; he said, "If she had not gotten those papers I would have been a ruined man, and probably would have lost my life."

Mrs. R. E. Jones testified, in substance, as follows: "Mr. Shirey invited me over to see Mrs. Briant one afternoon while she was visiting him. When I started to leave Shirey said he had employed her to do some work for him, that an old lady had taken a bunch of letters from him, and that if they succeeded in getting them back he would give her \$10,000."

The plaintiff, being recalled, stated that the claim she filed in the probate court was sworn to by her before a notary public and was prepared by E. L. Jacobs. Other testimony will be stated or referred to in the opinion. The jury returned a verdict for the plaintiff for the full amount sued for and the defendant has appealed.

*H. L. Ponder, Stuckey & Stuckey and Campbell & Suits for appellants.*

*L. C. Going for appellees.*

[545] HART, J. (after stating the facts).—

It is contended by counsel for the defendant that the court erred in giving instruction No. 3, which is as follows: "Before you can find for the plaintiff in this case, you must find from a preponderance of the evidence that A. W. Shirey employed plaintiff to obtain possession of certain letters belonging to him which one Madame Rupert had in her possession, and that said letters were not to be used or suppressed as evidence by the said A. W. Shirey to enable him to win any suit there pending or contemplated to be brought, or, if to be used, the plaintiff had no knowledge or information of such intended use, and that said A. W. Shirey agreed to pay to plaintiff the sum of ten thousand dollars for her services in procuring or recover-

ing the possession of the said letters and delivering the same to him; and that, in pursuance of said contract, plaintiff did procure from said Madame Rupert the possession of the letters so desired by the said A. W. Shirey and did deliver the same to him."

(1) On the former appeal, which is the law of the case, the court said: "Applying that principle to this case, if, as the testimony shows, the appellee, Mrs. Briant, entered into a contract with Shirey to procure evidence to win his divorce case, or to secure the possession of the letters for the purpose of preventing their use against him as testimony in the divorce case, the contract was illegal and void and cannot be recovered upon. If, on the other hand, the procurement of the letters was the only service [546] to be performed by her, and she was unaware of any unlawful or immoral purpose on the part of Shirey in obtaining possession of the letters, and undertook for a consideration to obtain possession of the letters which he had written and delivered to Madame Rupert, then the contract was not illegal. In other words, if the only purpose was to recover the letters without any design on his part, known to her, to suppress them, and if the agreement did not embrace an undertaking to procure evidence to win the divorce case, then it was a valid contract."

"There is some testimony indicating that Shirey feared the letters might be used in a criminal prosecution against him for unlawful use of the mails, and if it was shown that it was his purpose to get possession of the letters to suppress them as evidence, and that appellee was aware of and participated in that design, then the contract would be void. But, if Shirey merely endeavored to get the letters back to prevent them being unlawfully mailed to his wife, then it would be an innocent design and would not avoid the contract." *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136.

Again, counsel for the defendant contend that the judgment should be reversed because the court gave instruction No. 4, which is as follows: "If you find from the evidence that the plaintiff agreed to procure or recover the possession of letters which Madame Rupert had in her possession, desired by said A. W. Shirey, and if you further find from the evidence that said letters were to be used in any lawsuit then pending or contemplated to be brought, then the contract between plaintiff and said A. W. Shirey was void, as against public policy, and she cannot recover, provided you further find from the evidence that at the time of her employment she knew that said letters were to be so used or suppressed."

The specific portion of the instruction to which objection was made is as follows:

"Provided, you further find from the evidence that at the time of her employment she knew that said letters were to be so used or suppressed."

[547] This instruction was in accord with the law announced in the former appeal. There the court said: "In other words, if the only purpose was to recover the letters, without any design on his (Shirey's) part, known to her (plaintiff), to suppress them, and if the agreement did not embrace an undertaking to procure evidence to win the divorce case, then it was a valid contract."

(2) It is next contended that the court erred in giving instruction No. 8, which is as follows: "If, however, you find from a preponderance of the evidence that plaintiff was employed by the said A. W. Shirey to procure possession of certain letters which were then in the possession of one Madame Rupert, and that said Shirey agreed to pay her the sum of ten thousand dollars for procuring or obtaining the possession of same and delivering same to him, and you further find that said letters were not to be used as evidence in any suit then pending or contemplated to be brought, and that she was not employed to secure evidence which would enable him to win any suit then pending or contemplated to be brought, then you will find for the plaintiff."

It is insisted that the instruction is erroneous because it does not make any reference whatever to the suppression of evidence. It will be noted, however, that the other instructions given in behalf of the plaintiff specifically told the jury that the plaintiff could not recover if she knew that the letters recovered by her for Mr. Shirey were to be suppressed as evidence by him in his divorce suit between him and his wife.

The instructions given at the request of the defendant also contain this qualification, and it is insisted that the instruction is erroneous on the ground that it is contradictory to the other instructions. If the instruction on the part of the defendant had contained a qualification in regard to the suppression of evidence and none of the instructions given on the part of the plaintiff had contained such qualification, there would be much force in the contention of counsel for the defendant. Inasmuch, however, as all the other instructions given at the request [548] of the plaintiff contained this qualification, it is evident that the omission of it in the instruction now complained of was an oversight on the part of the court, and should have been made the subject of a specific objection. No specific objection having been made to the instruction, counsel for the defendant is not now in a position to complain of it. The court's attention should have been called to it by a specific objection, and if the



court should then have refused to correct it, it would have been reversible error. They failed to make a specific objection and we are of the opinion that the judgment should not be reversed on that account.

See, to the same effect, *St. Louis, etc. R. Co. v. Carter*, 93 Ark. 589, 126 S. W. 99; *St. Louis, etc. R. Co. v. Puckett*, 88 Ark. 204, 114 S. W. 224.

(3) It is insisted that the court erred in permitting the postmaster at Minturn, Arkansas, to testify to the fact that A. W. Shirey sent a registered letter to the plaintiff at Hope, Arkansas. It was shown by the postmaster that he kept a record of all letters registered by him, but that it was against the regulations of the United States postoffice department to take these records out of the office. The postmaster was permitted to testify that A. W. Shirey sent a registered letter to the plaintiff at Hope, Arkansas, on the 26th day of April, 1909. The postmaster himself registered the letter and had personal knowledge of the fact that Mr. Shirey mailed the letter to the plaintiff at Hope, Arkansas. There was no error in permitting him to testify about matters of which he had personal knowledge.

(4) Counsel for the defendant insist that the court erred in permitting J. N. Childers and other witnesses to testify as to A. W. Shirey's method of constructing a letter on the typewriter, etc. Childers, and other witnesses on this question, testified that Shirey was an illiterate man, and had a peculiar way of spelling words and of arranging them in letters he wrote on the typewriter or otherwise. They were well acquainted with his methods [549] of writing and testified that the letters introduced in evidence and which bore his signature were written by him. This was competent evidence. It is well known that many people, especially illiterate people, have a peculiarity in spelling and in the construction of their sentences, which is noticeable. The witnesses testified that they were familiar with Mr. Shirey's method of writing and constructing his sentences, and the testimony was admissible as tending to prove that the letters examined by the witnesses were written by Shirey. Of course, the jury were the judges of the probative force to be given the testimony.

(5) Counsel next contend that it was error to permit copies of the letters to be introduced instead of the letters themselves. It was shown that the letters were not in the possession of the plaintiff or of her counsel. Counsel for the defendant also testified that they did not know what had become of the letters. It was shown that the letters were present at the first trial and were turned over to the stenographer to be copied into the bill of exceptions. Both stenograph-

ers who were used at the trial testified that they did not know what had become of the letters, and that they were not then in their possession. The evidence before the court fully established that the letters were lost and there was no error in introducing copies of them. The first and third letters introduced were signed on the typewriter and the second was signed with pen and ink. It was shown by witnesses who saw the letter at the first trial that it bore the genuine signature of A. W. Shirey.

(6) It is finally insisted by counsel for the defendant that the testimony of the plaintiff was incompetent because it involved a transaction with the deceased Shirey. This we consider the most important question in the whole case. Our Constitution, Schedule, section 2, provides that in civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried, provided that in actions by or against executors, administrators or guardians, in which judgment may be [550] rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

On the former appeal certain testimony given by the plaintiff, and which was copied into the statement of facts, was held to be erroneously admitted because it contravened this clause of the Constitution. But after a careful consideration of the testimony introduced on the retrial of the case, we are of the opinion that the testimony admitted is free from that objection. Here the plaintiff testified that she received three letters signed "A. W. Shirey," and that one of them contained a twenty dollar bill; that the letters were postmarked at Minturn, Arkansas, and that the envelopes had on them what purported to be the printed letterhead of A. W. Shirey, and were received by her in due course of mail.

If Mr. Shirey were alive, he could not contradict the fact that she received the letters and that one of them contained a twenty dollar bill; he could only testify that he did not mail the letters to her. We hold that the admitted testimony was not a transaction with the deceased within the meaning of the clause of the Constitution above quoted. It must be admitted that the question is not free from doubt, but we are of the opinion that the objection to the testimony is met by the reasoning of the court in the case of *Daniels v. Foster*, 26 Wis. 686. In that case, in regard to a precisely similar contention, the court said:

"The question is, whether, after the death of the writer, it is competent for the party who receives a letter at a distant place to

which it is addressed to testify to such receipt. The deceased party could not, from the nature of the transaction, have made any directly contradictory statement. He was a party to the transaction, but not an immediate party, at least to that part of it concerning which the proof is offered. The fact to be proved is not one of which he had any positive knowledge, [551] or which he could, if living, have positively denied. He could deny it indirectly or by inference only, by denying that he ever wrote the letter. But this would be testimony to another fact or point, as to which it is not proposed to examine the living party, and which he has no positive knowledge. It is in the nature of circumstantial evidence so far as the testimony of the living party goes; and the question is, whether he can testify to a circumstance transpiring in the absence of the deceased, and of which the deceased had no knowledge and could not disprove except by denying the principal fact which the circumstance tended to prove, or by testifying to some other distinct fact or circumstance which would have an opposing or contradictory tendency and effect. The statute forbids the examination of a party, in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, against parties who are executors, administrators, etc., of the deceased. Laws of 1868, chapter 176. The case does not seem to come within the letter of the statute, and yet the communication was in some sense personal. But the personal transaction or communication of the statute, no doubt, means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other. In every such case the statute excludes the testimony of the living party, upon the obviously wise and just ground that his adversary, whose cause of action or defense survives, and who was possessed of equal knowledge; and was equally capable of testifying to what the transaction or communication really was, has been removed by death, and so cannot confront the survivor, or give his version of the affair, or expose the omissions, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment, in such cases, is considered too great to allow the surviving party to testify in his own behalf. The law has, therefore, wisely excluded him. But this reason for the exclusion is not applicable to the present case, at least not fully applicable. Could we know that Mr. Fox, if living, would testify [552] that he never wrote the letter in question—that it was a forgery—then indeed there would seem to be strong reason for excluding the testimony. But we do not and can not know this, and it is only by assuming

the suppositious character of the letter, and that Mr. Fox would have so testified, that any appearance of hardship exists. Had Mr. Fox survived, this controversy might never have arisen. He might have acknowledged the genuineness of the letter, which is now the subject of such doubt and conflict of opinion, and might have freely forwarded the discharge therein spoken of. We can not say what he would have said or done respecting this now perplexing question; and cannot indulge in any presumption either way, which shall influence its determination. The statute does not, unless by an interpretation obviously more liberal than its language and the plain intent of Legislature will admit, exclude the testimony of these defendants; and so we must hold that it was admissible, and must be considered upon the question under consideration."

To the same effect see *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Britt v. Hall*, 116 Ia. 564, 90 N. W. 340; *Sawyer v. Choate*, 92 Wis. 533, 66 N. W. 689; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73. See also note 21 Ann. Cas. 1216, where authorities on both sides of the subject are reviewed.

After the jury had retired, but before it reached a verdict, it returned into court, and the court, over the objections of the defendant, further instructed the jury orally as follows:

"The plaintiff in this case sues on an alleged contract with the deceased A. W. Shirey. The account filed in the probate court and the affidavit thereto can only be considered by you in determining what the contract, if there was one between the plaintiff and A. W. Shirey, was . . . can only be considered in determining what the contract was. And if you find there was a valid contract between A. W. Shirey, the deceased, and the plaintiff in this case, you will have nothing at all to do with the matters [553] set forth in the account, nor to consider it, and can only be considered by you in determining what the contract really was."

The defendant requested the court to give each of the following written instruments, to wit:

"A. The itemized account is the foundation of the plaintiff's case."

"B. The itemized account is in evidence in this case and is to be considered by you with all the other evidence in the case."

"C. All of the instructions in the case are to be considered by you as a whole and as applicable to such different parts or phrases of the case as you may find from the evidence to be the facts in the case."

The court refused to give instruction A, but gave instructions B and C.

Thereupon, the court gave to the jury a written instruction No. D. It is as follows:

"The plaintiff in this case sues on an alleged written contract with the deceased, A. W. Shirey. The account filed in the probate court and the affidavit thereto can only be considered by you in determining what the contract, if there was one between the plaintiff and A. W. Shirey, was. And, if you find there was a valid contract between A. W. Shirey, deceased, and the plaintiff in this case, you will have nothing to do with the matters set forth in the account, and it can only be considered by you in determining what the contract really was."

(7-8) Counsel for defendant first insists that the court committed reversible error in giving an oral instruction when they had requested that it be reduced to writing. It will be noted that in practically the same connection the court gave instruction No. D, which was reduced to writing. The oral instruction and instruction No. D are in all essential respects the same, and we cannot see how the defendant was prejudiced by the action of the court in giving the oral instruction. The instruction was in other respects correct, and in connection with the other instructions submitted the case to the [554] jury on the principles of law decided on the former appeal. The account filed at the instance of the plaintiff was competent evidence as tending to show that the plaintiff knew that the letters which she recovered from Madame Rupert for A. W. Shirey were to be used by him in his divorce suit, or suppressed as evidence therein. The concluding part of the instruction told the jury that it might be considered by them in determining what the contract really was. By which was meant that it could be considered by them in determining whether the plaintiff knew the letters were to be suppressed as evidence or otherwise used for the benefit of A. W. Shirey in his divorce suit.

We find no prejudicial errors in the record and the judgment will be affirmed.

#### NOTE.

#### Competency of Interested Witness to Testify as to Letter Passing between Him and Person Since Deceased.

The decision in *Bryan v. Palmer*, 83 Kan. 298, 21 Ann. Cas. 1214, has been followed in a recent case in the same jurisdiction. *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878.

In that case it was held that an interested witness might testify that he received certain letters from a decedent. The court said: "The plaintiffs testified to the receipt of the letters addressed to them in Alabama, postmarked in Kansas, and that in their opinion the letters were in the handwriting of Andrew Gray. This was competent. If he had been living he could not have testified that plaintiffs did not receive letters so postmarked, or that in their opinion the handwriting was not his. This is said to be one of the tests as to whether or not the matter is a transaction within the statute. A case exactly in point is *Bryan v. Palmer*, 83 Kan. 298, 21 Ann. Cas. 1214, 111 Pac. 443." See to the same effect the reported case. But see *Kennedy v. Butler*, 16 Ga. App. 41, 84 S. E. 499, wherein it was said, in the syllabus by the court, that an interested witness could not testify that a certain letter was delivered to him by the decedent, because such testimony was prohibited by Georgia Civil Code, § 5858 (1), providing as follows: "When any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person."

It has been held that an interested witness may not testify as to the contents of a lost letter claimed to have been written by the witness to the decedent. In *re Rohrig*, 176 Mich. 407, 142 N. W. 561, wherein the court said: "The executrix was served with notice to produce a letter claimed to have been written by claimant to the deceased, and referred to in the letter of October 25th. She testified that she was unable to find such a letter, and while claimant was on the witness stand he was asked to state the contents of the letter. It was objected to as stating matters equally within the knowledge of the deceased, and, upon the objection being sustained, an exception was taken, and error is assigned upon this ruling of the court. This ruling was correct, as clearly, this would come within the terms of Act No. 30 of the Public Acts of 1903 (5 How. Stat. [2d ed.] § 12856). The claimant is testifying in support of his claim, and the cause is being defended by the personal representative of the deceased. The matter, if true, must have been equally within the knowledge of the deceased person."

**WIEBENER ET AL.**

v.

**PEOPLES.**

Oklahoma Supreme Court—August 25, 1914.

**44 Okla. 32; 142 Pac. 1036.****Contracts — Time of Essence of Contract.**

While under section 876, St. Okla. 1890 (section 968, Rev. Laws 1910), no particular form of expression is necessary to make it so, time is never considered of the essence of a contract unless expressly so provided by the terms thereof.

[See 6 R. C. L. tit. *Contracts*, p. 984.]

**Building Contract — Recovery for Substantial Performance.**

A contractor and builder who has in good faith endeavored to perform all that is required of him by the terms of his contract for the construction of a building, and has in fact substantially performed the same, is ordinarily entitled to sue upon his contract and recover the contract price, less proper deductions therefrom on account of omissions, deviations, and defects chargeable to him, especially where the owner occupies and uses such building.

[See 134 Am. St. Rep. 678.]

**Waiver of Defects — Acceptance of Building.**

Mere occupancy and use of a building by the owner does not, as a matter of law, constitute an acceptance of the work of construction and a waiver of nonperformance by the builder of the stipulations in the contract and does not ordinarily justify inference of acceptance as a fact.

[See 15 Ann. Cas. 972.]

**Same.**

Mere part payment by the owner for the construction of a building, whether with or without knowledge of the builder's failure to perform the contract, does not, as a matter of law, constitute an acceptance of the work of construction and a waiver of such failure to perform, unless, perhaps, to the extent of such payment with such knowledge where such acceptance and waiver is consistent with all the pertinent facts in the case.

**Measure of Damages for Defective Performance.**

Where a contractor and builder had breached his contract by minor and slight omissions, deviations, and defects in the construction of a building, when tested by the terms of the contract, the owner's measure of damages, under section 2620, St. Okla. 1890 (section 2852, Rev. Laws 1910), is such an amount as will compensate him for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom; but the form in which this measure is expressed or the rule by which it is made may be changed

to adapt it to the facts in the case on trial, as illustrated in the body of the opinion; and, where the facts warrant it, it is not error to instruct that such measure is the difference between the value of parts not so constructed and the same parts if they had been constructed as required by the contract. [See note at end of this case.]

**Waiver of Nonperformance.**

Where a contract for the construction of a building requires the same to be done to the satisfaction of the owner and reserves to him the right without the duty of supervision and direction, his acquiescence in or his failure to object, during the work of construction, to minor and slight omissions, deviations, and defects, of which he has knowledge, before the builder has abandoned the work to him as completed and he is occupying and using the same, will ordinarily and when not excused be regarded as a waiver of such nonperformance.

**Practical Construction of Contract.**

In a contract for the construction of a building, where there is an exception in favor of the builder of "excavations and foundations complete to joist line," which are to be "completed" by the owner, from the obligations of the builder, the builder should supply an iron railing required by the contract to be placed above the joist line on an outer retaining wall of a light and air space outside the basement, but he is not required to allow the owner in deduction from the contract price of construction the cost of stairways leading to and from such basement and voluntarily supplied by the owner, where all the conduct of the parties during the work of construction shows that they construed the contract as requiring the owner to supply the same.

[See 6 R. C. L. tit. *Contracts*, p. 852.]

**Same.**

Where the language of a contract is uncertain and the parties thereto, by their subsequent acts and conduct, have shown that they construed it alike and within the purview of the constructions permitted as possible by such language, the courts will ordinarily follow such adopted construction as the correct one.

(Syllabus by court.)

Error to County Court, Woods county: BICKLE, Judge.

Action on building contract. J. E. Peoples, plaintiff, and John Wiebener et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. MODIFIED.

A. G. Sutton and Sandor J. Vigg for plaintiffs in error.

E. W. Snoddy for defendant in error.

[33] THACKER, C.—Plaintiffs in error will be designated as "defendants" and defendant in error as "plaintiff," in accord with their respective titles in the trial court.

[34] Plaintiff, as contractor and builder, sues defendants, as owners of the property, for \$869.80, with interest thereon at the rate of 6 per cent per annum from January 13, 1910, until paid, as a balance owing for the construction of a business building at Alva, Okla., under a written contract which required defendants to pay therefor \$8,917.00 plus proper charges for "extras," which plaintiff alleges amounted to \$162.80. The contract specified July 1, 1909, as the time when a certain portion and September 1, 1909, as the time when the remainder of the building should be completed, subject to allowance for delay caused by the "act, neglect or any default of the owner," and required payment to the plaintiff of "\$1,000.00 when the second floor joists are in place, and \$1,000.00 when the building is ready for the finished roof, \$2,000.00 when plastering is done, and \$1,000.00 when the first floor business room is ready to move into," and final payment "within 30 days after this contract is fulfilled, or the work is finished as hereinbefore provided." The plans and specifications, which are separately signed by both parties, were made by the plaintiff and are referred to in the other portion of the contract, and are clearly a part of the same.

All material was to be furnished and all work to be done by the plaintiff under the supervision and to the satisfaction of defendants according to this contract, except that it provides for metal ceiling, specified portions of hardware, and a granite column to be furnished by owners, and further: "Excavations and foundations complete to joist line; will be completed to joist line by owners." Defendants, by answer, in effect admit the contract as above stated, but deny plaintiff's alleged performance and claim \$1,543.00 as damages caused by omissions, deviations, and defects in plaintiff's work of construction and by plaintiff's failure to complete the building within the time specified in the contract. Plaintiff replied by a general denial of allegations inconsistent with his petition.

The evidence for plaintiff tended to show his substantial and good-faith performance of his aforesaid contract and that he [35] is entitled to charge \$154.05 for "extras" under the contract, subject to the deductions hereinafter stated.

The evidence for defendants tended to show omission, deviations, and defects in construction which, if properly chargeable to the plaintiff, would entitle them to recoup in damages to the amount of \$161 on account of 23 vents omitted from upper rooms, also \$147 on account of omitted railing and basement steps, also showing that the portion of the building which the contract recites should have been first completed was not com-

pleted until October 25, 1909, the same being of the rental value of \$75 per month, and that the remaining portion of the building was not completed until November 1, 1909, the same being of the rental value of \$125 per month.

The evidence tended to show several delays chargeable to "the act, neglect or default of the owners;" and, although it seems doubtful if the whole delay is properly imputable to the defendants (the owners), it is possible that the state of the evidence would have warranted the court in submitting (as was done) this entire question to the jury even if time had been of the essence of the contract.

The only seriously controverted questions seem to be: (1) As to whether plaintiff should have furnished and put in the said steps and furnished and placed the said railing; (2) as to whether the building was completed within a reasonable time after allowing for such delay as is chargeable to defendants; and (3) as to whether defendants waived their right to insist on any or all of the 23 vents required by the contract—plaintiff testified they were all waived, but defendants testified that they only waived the vents upon condition of strict compliance by plaintiff with all the other requirements of the contract.

It does not appear, even from their own testimony, that defendants, who are named in the contract as owners and permissible supervisors and directors of the work of construction, made any serious, if any, complaint as to the manner in which the work [36] of construction was done during its progress or until after the building was finally left to them by plaintiff as complete and after they had commenced to use the same, or until December 20, 1909, when defendants made the last payment they have made to plaintiff, unless in respect to the said railing, which they have supplied at a cost of \$125, and their evidence seems uncertain as to when they made complaint as to this, especially as to the railing. They did complain in respect to a vent, which the contract apparently did not require, in a lower story toilet, and at a cost of \$8 made the same to their liking.

It appears that the jury may have allowed defendants \$22.51 on account of this claim of damages in the way of rentals for delay, as their verdict was apparently for that amount less than the \$954.06 which plaintiff would otherwise have been entitled to recover as principal and interest to date of verdict; and the \$161 for omitted vents should have been allowed or disallowed in whole, according as the jury may have found defendants did not or did waive their rights to them, while the item of \$125 for the iron railing involved no controverted question of

fact and was a question of law upon the contract and the undisputed facts.

The court gave the jury written instructions to which there were no exceptions which are presented for our consideration, except that it is here objected that the court should not have instructed the jury in effect: (1) That the contract in this respect was ambiguous and so as to permit it to determine from all the evidence whether said iron railing connected with the basement of the building and on the outside of the building, valued at \$125, and said two certain stairways leading from such basement, valued at \$22, all of which were omitted by plaintiff and supplied by defendants, were within the terms of the aforesaid contract between the parties; (2) that only good faith and substantial performance was required of plaintiff under said contract, and so as to permit plaintiff to recover the contract price, less the difference between the value of these omitted or faultily constructed parts if they had been constructed as required by the contract and their value [37] to the owner of the building as they were; (3) that the time specified for the completion of the building was not of the essence of the contract, and so as to not allow defendants to recover for delay in completion of the building unless the same was not completed within a reasonable time after allowing for delays occasioned or acquiesced in by defendants; (4) so as to require the jury in computing defendants' damages, if any, resulting from delay in completing the building to ignore the time for completion specified in the contract and to compute the damages resulting from such delay from such time as plaintiff was reasonably entitled to within which to complete the same; and (5) that if the defendants, or either of them, inspected the work of construction during its progress and failed to object to or acquiesced in apparent defaults in the same, the defendants should not now be heard to complain that same was not done according to contract.

The law applicable in this case seems to be as follows: While no particular form of expression is necessary to make time of the essence of a contract under section 876, St. Okla. 1890, section 968, Rev. Laws, 1910, time is never considered of the essence of a contract unless expressly so provided by the terms thereof. *Puls v. Casey*, 18 Okla. 142, 92 Pac. 388; *Standard Lumber Co. v. Miller, etc.* Lumber Co. 21 Okla. 617, 96 Pac. 761; *Cooper v. Ft. Smith, etc.* R. Co. 23 Okla. 139, 99 Pac. 785. And it seems clear that time is not expressly made of the essence of this contract by its own terms, and it thus appears that the court did not err in this respect.

A contractor and builder who has in good faith endeavored to perform all that is re-

quired of him by the terms of his contract for the construction of a building and has, in fact, substantially performed the same, although there be unintentional omissions, deviations, and defects of minor and slight importance chargeable to him, is ordinarily entitled to sue upon his contract and to recover the contract price, subject to proper deductions therefrom on account of such failures in such performance, especially where the owner occupies and uses the building; and it thus appears that [38] the instructions in this respect do not contain error. 6 Cyc. 54-59, and cases cited in notes thereto; *Foeller v. Heints*, 137 Wis. 169, 118 N. W. 543, 24 L.R.A. (N.S.) 327, and notes to same; *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L.R.A. 52; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; notes at pages 259-261 to *Ludlow Lumber Co. v. Kuhling*, 115 Am. St. Rep. 254.

Mere occupancy and use of the building by the owner does not as a matter of law constitute an acceptance of the work of construction and a waiver of the nonperformance by the builder of the stipulations of the contract and does not ordinarily justify any inference of acceptance as a question of fact. 6 Cyc. 67-69; *Pope v. King*, 108 Md. 37, 69 Atl. 417, 16 L.R.A. (N.S.) 489, and notes, 15 Ann. Cas. 970, and notes at pages 972-975; notes at pages 257-261 to *Ludlow Lumber Co. v. Kuhling*, 115 Am. St. Rep. 254.

Mere part payment by the owner for the construction of a building, with or without knowledge of the builder's failure to perform his contract, does not as a matter of law constitute an acceptance of the work of construction and a waiver of such failure to perform, unless, perhaps, to the extent of such payment with such knowledge, where such acceptance and waiver is not negated by any other facts in the case, but is consistent with all its pertinent facts. 6 Cyc. 69, and notes; *Ludlow Lumber Co. v. Kuhling*, supra, and notes thereto.

Under section 2620, St. Okla. 1890, section 2852, Rev. Laws 1910, where a contractor and builder has breached his contract by minor and slight omissions, deviations, and defects in the construction of a building, tested by the terms of the contract, the owner's measure of damages is such an amount as will compensate him for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom; but the same measure may be embodied in different forms of expression or be accomplished by one or more rules adapted under the facts to correctly ascertain the amount which [39] this statute declares to be the measure of damages, although unlike the statutory measure except in operative effect. Thus, at pages 781-784

in notes to *Lambert v. Jenkins*, 112 Va. 376, 71 S. E. 718, Ann. Cas. 1913B 778, it is shown that the rule for ascertaining the amount of damages may vary with the facts of the particular case, as by allowing (1) the sum necessary to make the building conform to the plans and specifications, where this can be done without any or considerable tearing down and reconstructing, (2) the difference between the value of the building as constructed and its value as it should have been constructed, where it cannot be made to conform to plans and specifications without considerable tearing down and reconstructing, (3) in a few jurisdictions, such sum as is required to make the building conform to the plans and specifications regardless of whether it is necessary to tear down and reconstruct part of the work already done (which, if not quite so appropriate, would seem to give the same result as the first two rules), and (4) compensation for resulting injuries to property or for deprivation or impairment of beneficial use, as where a defective roof leaks and wets the owner's hay, etc., and where, time being of the essence of the contract, there was a loss of rentals. And it thus appears that the court's instructions as to the measure of damages contain no substantial, if any, error against the defendants.

Nor does there appear to be reversible error in the instruction (which may be subject to some criticism as to form) to the effect that defendants cannot now be heard to complain of omissions, deviations, and defects in the work of construction of which they had knowledge at the time and to which they made no objection or in which they acquiesced, in view of the facts in this case. They reserved to themselves the right, without the duty, to supervise and direct the work of construction; and the contract expressly required that the same should be done to their satisfaction. A failure to object to, or an acquiescence in, a nonperformance of the contract in any respect in question here would seem to be an expression of satisfaction with faults in the work of construction, so far as the same was within their knowledge, [40] from which they could not, in the absence of excuse therefor, recede after the contractor had abandoned the work as completed and they had come into full occupancy and use of the building; and it does not appear that there was any objection until long after that time, except in respect to the omitted vent which plaintiff testified he offered to supply, but that defendants expressly waived the same, while defendants admit such waiver, but say it was upon condition that work of construction was satisfactory in all other respects.

However, the instruction that the contract was ambiguous in respect to what, if any-

thing, was required of the contractor in constructing the basement and the said outside railing appears erroneous, at least, in so far as it affects the question of who should have supplied said outside railing.

We think it clear that this railing, which defendants at all times demanded of the plaintiff, was a part of the building called for by the contract; and we think it equally clear that it is not within any contractual exception to the obligation of plaintiff to furnish all material and labor and to construct the building according to plans and specifications.

It is urged that it is a part of the basement and falls within the exception already quoted, as follows: "Excavations and foundations complete to joist line; will be completed to joist line by owners." But we cannot assent to this. If such a railing could in any case be necessary to complete "excavations and foundations," it certainly could not in a case like this, where the joist line limits such exception and where the railing appears to be above such line.

There was no evidence that any "technical" or "special meaning" is given any word in such exceptions by usage in such contracts or in the business of constructing buildings which would include such railing; and section 862, St. Okla. 1890, section 954 Rev. Laws 1910, would seem to require that these words be understood in their ordinary and popular sense in the absence of such evidence.

[41] It appears that in the construction of the building the parties to this contract mutually understood and construed it as requiring the defendants to make the excavation and foundations and to complete the entire basement of the building as required by the plans and specifications to joist line; and, in view of such construction by the parties themselves (9 Cyc. 588-590), we hold that the expression, "excavation and foundations complete to joist line," as used in this contract, refers to and means all that portion of the building within the excavations and below the joist line, i. e., the entire basement below that line, although we might be disposed to hold otherwise but for such construction by the parties, as there is no other evidence of a technical or special meaning of the language used in this exception and it would not otherwise seem to include stairways leading to and from the basement.

It thus appears that this case should be reversed and remanded for another trial, unless plaintiff should file written consent to an allowance of \$125 in reduction of the amount of his judgment (and he should be allowed fifteen days within which to do so), in which event the same may then stand as affirmed.

BY THE COURT.—It is so ordered.

Rehearing denied September 22, 1914.

**NOTE.**

It is held in the reported case that where a building contractor has broken his contract by slight omissions and defects in the construction of a building, the owner's measure of damages is such an amount as will compensate him for all the detriment proximately caused thereby or which in the ordinary course of events will be likely to result therefrom. The measure of damages for defective work under a building contract is discussed in the note to *Lambert v. Jenkins*, Ann. Cas. 1913B 778.

its inequality is so glaring that it can be judicially declared to be founded on arbitrary and capricious principles, without semblance of reason.

[See note at end of this case.]

Appeal from City Court of Birmingham: *MILLER, FERGUSON, SHARPE, and PUGH, Judges.*

Action to recover taxes. State of Alabama, plaintiff, and Alabama Fuel and Iron Company, defendant. Judgment for defendant. Plaintiff appeals. **REVERSED.**

**STATE**

v.

**ALABAMA FUEL AND IRON COMPANY.**

Alabama Supreme Court—July 25, 1914.

*188 Ala. 487; 66 So. 169.*

**Taxation — Exemption of Mortgages — Validity.**

Revenue law, providing for a tax for recording mortgages, deeds of trust, or written contracts of conditional sale, and declaring that no ad valorem tax shall be collected on any such instrument or on the debts secured thereby after such tax has been paid, but levying an ad valorem tax on all moneys lent, solvent credits, or credits of value, except such as are secured by mortgage, deed of trust, or written contract of conditional sale, on which a tax for recording has been paid, is not violative of Const. 1901, § 211, providing that all taxes shall be assessed in proportion to the value of the property; the legislature having full power to classify for taxation moneys and credits secured by written instruments and debts not so secured. [See note at end of this case.]

**Same.**

The constitutional limitation requiring property to be assessed in proportion to value, etc., is designed to secure uniformity and equality of enforcement of the ad valorem system of taxation, and to prohibit arbitrary and capricious modes of taxation without reference to value, but does not require that all property be taxed, nor prohibit exemptions from taxation or such classifications of property as are not purely arbitrary, capricious, or without semblance of reason.

[See note at end of this case.]

**Same.**

A classification of property for taxation will not be set aside by the courts unless it is not only oppressive in its operation but

[487] This is an appeal by the state of Alabama from a judgment of the city court of Birmingham dismissing an assessment levied against the defendant for escaped taxes for the tax year beginning October 1, 1913. The proceedings were instituted by the tax commissioner of [488] Jefferson county, Ala., who reported an assessment of escaped taxes to the board of revenue of Jefferson county, Ala., against the Alabama Fuel & Iron Company, upon the latter's solvent credits owned on October 1, 1913, and valued at \$45,000.

The proceedings were instituted under section 2260 and section 2151 of the Code of 1907. The case was heard, by consent, by the board of revenue, and the assessment confirmed. The defendant appealed to the city court of Birmingham, and in that court the state filed a statement or declaration setting up the proceedings before the tax commissioner and board of revenue, and asserting that the assessment was correct. The defendant demurred to the declaration or statement filed by the state, on the ground that solvent credits are not subject to assessment under the present laws of the state, upon the theory that paragraph "I" of subdivision 7 of section 2082 of the Code of 1907 is unconstitutional and void, upon the authority of *Barnes v. Moragne*, 145 Ala. 313, 41 So. 947.

Paragraph "I" of subdivision 7 of section 2082 of the Code of 1907, and above referred to, is as follows: "All money lent, solvent credits, or credits of value, except such as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid."

No other point or question of procedure, jurisdiction, or description, was presented by the demurrer, which was sustained by the city court. The state of Alabama declined to amend, and judgment was rendered for the defendant. From that judgment the state appeals, and assigns as error the judgment of the court below, sustaining the demurrer to the declaration.

The amount of the tax involved, based upon an assessment of \$45,000, and estimated on the basis of \$2.35, [489] that being the combined state, county, and municipal rate, ex-



ceeds \$1,000. The appeal is, accordingly, returnable to the Supreme Court.

*Forney Johnson* for appellant.

*Percy, Benners & Burr, Tillman, Bradley & Morrow, Richard V. Evans, P. P. Wallrop and E. C. Harris* for appellee.

[502] DE GRAFFENRIED, J.—We preface this opinion with the following excerpt from *Ex p. Bozeman*, 183 Ala. 91, 63 So. 201: "It is one of the cardinal rules governing the construction of statutes that, when the [503] question as to whether a particular statute is or is not constitutional is reasonably in doubt, then the doubt should be resolved in favor of the constitutionality of the act. *Lovejoy v. Montgomery*, 180 Ala. 473, 61 So. 597; *State v. Board of Revenue*, 180 Ala. 489, 61 So. 368. The reason for the above rule is that the Legislature which passed the act is presumed to have sat in judgment, while the act was before it upon the question as to whether the Legislature possessed the constitutional power to make such a law. That body passed the act, the law presumes that the judgment of the Legislature was that the act was constitutional. This judgment of the Legislature, while not conclusive upon the courts, is entitled to, and under the above rule must receive, great weight at the hands of the courts. It is a solemn thing for a court to strike down a statute, and, when it does so, its reason therefor should be clear and strong and should lead to the irresistible conclusion that the act is invalid."

In the case of *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128, this court said: "The Legislature has a power which is so transcendent that it cannot be confined within any bounds, either for causes or persons, except such as are written in the organic law."

From the case of *State v. Board of Revenue*, 180 Ala. 489, 61 So. 368, we quote the following: "He who assails a statute on the ground that it is unconstitutional assumes the burden of vindicating his position beyond a reasonable doubt."

We refer to the above cases for the purpose of directing attention to the fact that this court has at all times refused to exercise itself about the policy or wisdom of a statute so long as it rests within the scope of legislative authority under the state and federal Constitutions, [504] and that, when a statute is attacked upon constitutional grounds, all reasonable intendment will be resolved in favor of its validity. *State v. Greene*, 154 Ala. 254, 46 So. 268; *State v. Board of Revenue*, supra.

1. Section 211 of the Constitution of the state is as follows: "All taxes levied on property in this state shall be assessed in  
Ann. Cas. 1916E.—48.

exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution provides that: "The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate," etc.

The present revenue law requires, as the prerequisite to the recordation in the probate office of a mortgage, deed of trust, or written contract of conditional sale, the payment of a privilege tax of 15 cents for each \$100 or fraction thereof of indebtedness secured by such mortgage, deed of trust, or written contract of conditional sale, and then declares that there shall be no ad valorem tax collected upon any such instrument, or the debt secured thereby, which shall have paid said privilege tax. The revenue bill, however, levies an ad valorem tax upon "all money lent, solvent credits, or credits of value except such as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid."

It is contended by appellee, and the trial court so held, that the Legislature has not the authority, under the above-quoted constitutional provisions, to impose an ad valorem tax upon "all money lent, solvent credits, [505] and credits of value," and lawfully exempt from such ad valorem tax "money lent, solvent credits, and credits of value," when secured by a recorded mortgage, deed of trust, or written contract of conditional sale. The proposition which appellee announces on this subject was succinctly stated in a dictum in *Barnes v. Moragne*, 145 Ala. 313, 41 So. 947, and which is in the following language: "It will not be doubted that the Legislature in the exercise of its authority or power to classify the subjects of taxation, may exempt 'all moneyed capital (that is, money lent, solvent credits, and other credits of value), from an ad valorem tax. These subject may be well classified as one, but it would be an arbitrary and unjust classification to subject that species of solvent credits which are not secured by recorded instruments to a property tax and exempt those secured by recorded instruments. This, in our opinion, as said above, cannot be constitutionally done."

It is undoubtedly true that a debt secured by a mortgage is a credit. If it is owing by a solvent party or is fully secured, it is a solvent credit. Such a solvent credit is clearly within the general definition of "solvent credits," just as a horse is within the general definition of the word "animal." There

is, however, a distinct line of cleavage between debts which are secured by mortgages and debts which are not so secured. There is also a distinct line of cleavage between debts which are secured by recorded mortgages and those which are not so secured. The law recognizes the difference between debts which are evidenced by negotiable instruments and those which are not; those which are evidenced by accounts stated and those which are not; those which are evidenced by a writing and those which rest in parol. The term "solvent credits" is broad enough to cover debts which are secured and those which are unsecured; debts which [506] are negotiable and those which are non-negotiable; debts which are evidenced by writings and those which rest in parol. In other words, this term is broad enough to cover all solvent choses in action; and yet we know that embraced within this broad term are instruments of many distinct classes, and that there are many textbooks written by eminent law writers which are devoted exclusively to an elucidation of the laws which govern the distinct classes to which such instruments belong. There are volumes which are devoted exclusively to the discussion of the laws referable to negotiable instruments, volumes which are devoted to the discussion of the laws referable to mortgages, and volumes to the discussion of the laws pertaining to the general subject of bills and notes. Debts secured by recorded mortgages, deeds of trust, and written contracts of conditional sale are necessarily in a class to themselves. The recordation of the instruments securing them places them in that class. Indeed, many of the decisions of courts of last resort and many of the statutes of our various states are devoted exclusively to declaring the rights, privileges and liabilities of the holders of this class of securities.

2. We have nothing to do, as we have already said, with the wisdom or policy of the Legislature in passing this law. Money is a bird of passage, and it usually finds a resting place at those points where it feels assured of safety. The unpopularity of the tax gatherer is proverbial, and the disposition to regard taxes as a burden is inherent. The efforts of the state to attract foreign capital find expression in many of our statutes, and it may be that the Legislature, for the purpose of inducing the holders of such capital to readily lend their money to such of our citizens as desire it and to induce those of our citizens who have been accustomed to adopt [507] methods of escaping taxation to place their money in the hands of those who are willing to use it in their business, adopted this privilege tax with its accompanying exemption in subservience to a wise public policy. Indeed, the history of the state, since the adoption of

the statute, has indicated that the reasons which actuated the Legislature in adopting the act were good and sufficient. To use the language of the Supreme Court of Minnesota:

"It is a notorious fact that the owners of securities in the form of bonds and notes have not been in the habit of paying their proportionate share of the taxes. This has been due in a measure to the ease with which the existence of such property can be concealed from the tax officials. But when the owner of a note takes a mortgage on real estate as security, and places it upon the public records, he exposes his ownership—at least his ostensible ownership—and enables the assessor to reach him. The perfect security afforded by a good real estate mortgage makes it necessary for the owner to accept a low rate of interest, and the adequate net returns, after paying taxes in the ordinary way, often result in practical confiscation. The owner is thus tempted to seek some devious method for escaping taxation, in order that he may be on an equality with the owner of an unsecured note or bond, which rests undiscovered in a safety deposit vault. The mortgage is therefore taken in the name of a non-resident, or the money is sent to another state, and there loaned in the name of the true owner. Experience has shown that it is very difficult, if not impossible, to fairly and successfully tax this kind of property under the system ordinarily applied to personal property. This practical difficulty alone furnishes a basis for a classification, and justifies the Legislature in devising a special method for the taxation of [508] the subjects of that class. To a certain extent the method provided in the statute under consideration recognizes the justice of the claim that taxing mortgages according to the ordinary methods results in inequality and injustice, and constitutes a constant temptation to fraud, whereby the honest and the innocent are made to suffer. By requiring a registration tax, every mortgage security pays a moderate tax, and this, in the judgment of the Legislature, is preferable to the certain uncertainties of the old system." *Mutual Benefit L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572, 573, 574.

3. Recorded mortgages, deeds of trust, and written contracts evidencing conditional sales are exempt from taxation in the state. These instruments are required to pay for the privilege of being recorded, and they cannot be recorded without paying for the privilege. That the state has the right to exact this toll for the privilege is questioned by no one. That the state has the right to exempt all property of a particular kind from taxation is a proposition which is too firmly fixed in the jurisprudence of the state to now admit of question. What our Constitution requires

is that: "Whenever the Legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that, if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation." *State Bank v. Board of Revenue*, 91 Ala. 217, 8 So. 852.

"The purpose and scope of this constitutional limitation upon the taxing power has been frequently considered by this court, and the substance of our decisions is that it was designed to secure uniformity and equality by the enforcement of an ad valorem system of taxation and to prohibit arbitrary or capricious modes of taxation [509] without regard to value. *Moog v. Randolph*, 77 Ala. 597, 602; *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273, 275, 60 Am. Rep. 99; *Assessment Board, etc. v. Alabama Cent. R. Co.* 59 Ala. 551; *Mobile v. Stonewall Ins. Co.* 53 Ala. 570. This does not mean that all property must be taxed. *Moog v. Randolph*, supra; *State Bank v. Board of Revenue*, 91 Ala. 217, 223, 8 So. 852. Nor does it prohibit exemptions from taxation or such classification of property as are not purely arbitrary, capricious, or without the semblance of reason." *State v. Birmingham Southern R. Co.* 182 Ala. 475, Ann. Cas. 1915D 436, 62 So. 77.

"The paramount difficulty is as to when the courts can properly interpose to declare a statute void, because of its taxing a particular class of property, upon a principle which seems to violate the rule of relative uniformity designed by the Constitution. 'It is only when statutes are passed,' says Bigelow, C. J., in *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 436, 'which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed, in any just sense, proportional in their effect on those who are to bear the public charges, that courts can interpose and arrest the course of legislation by declaring such enactments void.' This proposition, in my opinion, is correct, in a modified sense; but there can be no excuse for the interference of the courts, unless this inequality—whether manifest by a system of exemptions or classifications—is not only oppressive in its operation, but is so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. In such a case, the system would cease to be taxation, and become governmental spoliation, thus trespassing on the boundary line of eminent domain, which is a right that [510] cannot be exercised under the provisions of our Constitution, without first paying to the citizen a just compensation for his property taken by the state. *New Orleans, etc.*

*R. Co. v. Jones*, 68 Ala. 48. No law can be upheld which carries on its face the patent fact that its intention was confiscation under the guise of taxation. *Cooley on Tax.* 128. Where the precise line of distinction exists, is often a question of great complexity and of difficult solution. Neither any fixed rule of reason nor the authorities furnish us any definite or clearly defined principle upon which to settle an accurate rule for all cases. *South, etc. R. Co. v. Morris*, 65 Ala. 193; *State v. Indianapolis*, 69 Ind. 875, 35 Am. Rep. 223; *Knowlton v. Rock County*, 9 Wis. 410; *Burroughs on Tax.* p. 32, § 34; *Wells v. Weston*, 22 Mo. 385, 66 Am. Dec. 627; *State v. Fosdick*, 21 La. Ann. 434; *In re Flatbush*, 60 N. Y. 398; *State v. Ogden*, 10 La. Ann. 402. Subject to the above limitation, I do not see how the courts can circumscribe the legislative power to select the proper subjects of taxation, and to classify them upon principles which to them seem just. There must, of necessity, be left a liberal scope for the free exercise of this presumably wise discretion. It is said by Judge Cooley, in his work on *Constitutional Limitations*: 'The constitutional requirement of equality and uniformity only extends to such subjects of taxation as the Legislature shall determine to be properly subject to the burden. The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department; but over all these objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment.' *Cooley, Const. Lim.* (5th ed.) p. 638 (515)." *Moog v. Randolph*, 77 Ala. 597, 603, 604.

It seems unnecessary for us to pursue this subject further. It seems plain that this statute is constitutional. [511] To use the language of the Supreme Court of the United States in *Farmers' etc. Sav. Bank v. Minnesota*, 232 U. S. 516, 34 S. Ct. 354, 58 U. S. (L. ed.) 706: "In lieu of further discussion we refer to the oft-quoted language employed by Mr. Justice Bradley, speaking for the Supreme Court of the United States in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 S. Ct. 533, 33 U. S. (L. ed.) 892, 895."

And, we cite, in support of the above conclusion, the following cases to which our attention has been called in briefs of counsel for appellant: *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 S. Ct. 459, 50 U. S. (L. ed.) 744; *New York v. Reardon*, 204 U. S. 152, 27 S. Ct. 188, 51 U. S. (L. ed.) 415, 9 Ann. Cas. 736; *Kidd v. Alabama*, 188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669.

4. While the Legislature, in the exercise of that reasonable latitude with respect to the classification of properties for taxation, and

in the exercise of its reasonable powers of exempting properties from taxation—powers which all well-considered cases concede it to possess—had the undoubted right to require a privilege tax of all mortgages, deeds of trust, and written evidences of contracts of conditional sales, for their recordation, and to exempt such recorded instruments from an ad valorem tax, the imposition by the Legislature of an ad valorem tax upon all solvent credits not included in the above classification was not only not discriminatory, but it was, in fact, an effort on the part of the Legislature to meet the letter and the spirit of our Constitution, which intends, in so far as a healthy policy will permit, equality in taxation. Success in business is not the usual attainment of the average man. While human progress, the success of commercial and industrial enterprises, the moral and intellectual development of mankind, [512] and the constant trend of human effort towards the attainment of the high purposes of the future are largely dependent upon the activities and intelligence of the average man, history indicates that success in business will probably not come to him. The property of the average man is open to the eyes of him who gathers taxes for the state. If he is a farmer, his fortune consists in his lands, his animals, and his farming utensils. If he is a merchant, it consists in his home and in the contents of his modest store. It would seem, therefore, in justice to this, the great predominating class in the state, that those who are so highly favored as to possess solvent credits, not covered by some classification which, out of respect to a policy which the Legislature has deemed wise and just, entitles them to exemption from taxation, should be required to discover them to those who assess taxes for the state and to pay an ad valorem tax on them. The law is the exponent of a square deal, and, in requiring such solvent credits to be listed for taxation, the Legislature has simply responded to the demand which the doctrine of "the equality of burden" placed upon it. This act was a legislative effort to meet the letter and the spirit of the Constitution, which the appellee, in this proceeding, claims was violated.

5. There is one case in our reports (*Barnes v. Moragne*, 145 Ala. 313, 41 So. 947), and to which we have already referred, which contains expressions which are in direct conflict with the views above expressed.

In *Hooper v. State*, 141 Ala. 111, 37 So. 662, this court, speaking through Haralson, J., said: "By the act of March 3, 1903, 'To provide for the revenue of the state' (Acts 1903, p. 184), said last-named act amended said subdivision 7 of section 3911 by providing for what is termed 'privilege taxes' on mortgages, deeds of trust, or instruments in

the nature of a mortgage, to [513] secure the payment of any debt, and made no reference to taxation of solvent credits (Acts 1903, p. 227). Said subdivision was omitted and thereby repealed."

A careful examination of the opinion in *Hooper v. State*, supra, will show that this court, in that case expressly declared that for the tax year commencing on October 1, 1903, and ending on September 30, 1904, there was no law in this state authorizing the assessment of "all money lent, solvent credits, or credits of value, except as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid." The assessment of the solvent credit which this court had under consideration in *Barnes v. Moragne*, supra, is shown by the summary of the facts set out by the reporter and by the original record on file in this court to have been made during a period when this state levied no ad valorem taxes upon solvent credits, and when it had no law authorizing such an assessment. The statement of the court in *Barnes v. Moragne*, supra, that the act which we now have under consideration was unconstitutional was a gratuity and is, of course, to be treated as mere dictum. The opinion in *Barnes v. Moragne*, supra, cannot be accepted as an authoritative declaration by this court upon the question in hand, and, while it may have been calculated to mislead, the decision does not fall within the protection of the doctrine of stare decisis. There was no necessity or occasion for a decision of the question (the question was not presented by the facts), and for that reason the opinion on the point under discussion was not a decision by this court, within the meaning of the doctrine of stare decisis. In *re Woodruff*, 96 Fed. 317, 321.

6. This opinion has been prepared after the determination of this case by the full court. The case has [514] been painstakingly and carefully briefed by counsel on both sides. We have not undertaken in this opinion to review or to cite the numerous authorities to which counsel have referred us. To do so would unduly lengthen an opinion which has been arrived at after the most careful consideration by the whole court of the cases to which we have been referred and which shed light upon the questions which we have above discussed. These authorities will be perpetuated by the reporter, and a candid examination of them will, we think, demonstrate, beyond doubt, the integrity of our position.

This opinion is written simply for the purpose (without needless review or citation of authorities) of stating in a plain way the law, to the end that our officers and people may no longer be in doubt as to the obligations of the taxpayer to the state.

The rulings of the trial court were not in accordance with the above views, and the judgment of the trial court is therefore reversed, and the cause is remanded to the trial court for further proceedings in accordance with the views above expressed.

Reversed and remanded. All the Justices concur, except Anderson, C. J., who dissents.

#### NOTE.

#### Validity of Exemption from Taxation of Money Loaned on Mortgage Security.

Legislation by which money loaned on mortgage security has been exempted from ad valorem taxation has been enacted in certain jurisdictions for two main reasons, viz.: First, to induce capital to come into the state for the benefit of landowners, and second, to make known the existence of mortgages for the purpose of a specific or registration tax. The validity of such an exemption from taxation depends primarily of course on whether it is deemed to be based on such a classification as will avoid conflict with the provisions of the various state constitutions requiring uniformity of taxation. The reported case establishes the validity of a revenue bill which levies an ad valorem tax on "all money lent," except when it is secured by a mortgage, deed of trust or written contract of conditional sale, and in those cases grants an exemption from the payment of the ad valorem tax if a recording tax has been paid and the privilege of registering the mortgage has been taken advantage of. Any contrary opinion as to the constitutionality of the statute expressed in *Barnes v. Moragne*, 145 Ala. 313, 41 So. 947, must be considered to have been made obiter, and is now absolutely overruled by the holding of the reported case.

In *Kansas* the courts have declared to be unconstitutional an act which by its terms levied a "registration fee" on mortgages, and granted an exemption from all general taxes levied on an ad valorem basis where the provisions of the act were complied with. *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977, L.R.A. 1916A 846. The constitutional provision which the act was held in that case to contravene provided as follows: "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." Const. art. 11, § 1. The court said: "The statute undertakes to classify the property of the state for the purposes of taxation, to place

real estate mortgages, or, speaking accurately, some real estate mortgages, in a class by themselves, and to subject such mortgages to a specific tax, all contrary to the express command of the constitution. . . . It is not inconceivable that a people having the information and the experience and imbued with the ideas and sentiments of those who voted for the adoption of the constitution would be amazed at a proposal to exempt from taxation an entire class of property now estimated to be worth \$300,000,000, and by the very act of exemption to be enormously increased, which is owned chiefly by capitalists and money lenders." The court commented on the statute discussed in the reported case as follows: "The supreme court of Alabama described the tax as one imposed for the privilege of recording mortgages (*State v. Alabama Fuel & Iron Co.* [Ala. 1914] 66 So. 169) and it is a genuine privilege tax. The tax itself is very low, fifteen cents per hundred dollars no matter what the duration of the instrument. The collecting officer retains a part of the tax for his services. The inducement to record and pay the tax, besides the advantages secured by recording, consists in exemption from the usual ad valorem taxes, and a mortgage holder may withhold his instrument from record if he see fit, without any kind of coercion. Stated in another way, the privilege of recording a mortgage, which as property is subject to ad valorem taxes, is denied unless a small tax is paid. If the privilege be exercised an additional privilege is extended, that of exemption from ad valorem taxation; but the mortgage holder has a free choice to take or to renounce the privilege. If he renounce the privilege he loses nothing but the benefits it affords. He is not driven to swallow his 'privilege' under pain of forfeiting his security, as section 6 of the Kansas statute . . . and statutes like it require."

In *Michigan* a statute has been enacted with the evident purpose of changing the method of taxing mortgages from the ad valorem system to a specific one. It provides as follows: "Sec. 2. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of the principal debt or obligation which is, or under any contingency may be, secured by a mortgage upon real property situated within this state recorded on or after the first day of January, nineteen hundred twelve, is hereby imposed on each such mortgage, and shall be collected and paid as hereinafter provided: Provided, that no tax shall be imposed upon any debt or obligation which is, or under any contingency may be, secured by a mortgage upon such real estate as shall be owned and occupied by library, armory, benevolent, charitable, educational and scientific institutions, in-

incorporated under the laws of this state, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated. . . . Provided, further, that no tax shall be imposed upon any debt or obligation which is, or under any contingency may be, secured by a mortgage upon any house of public worship with the land on which it stands. . . . The tax imposed by this section shall be in addition to the recording fee now provided for by law." Pub. Acts 1911, Act No. 91. The statute was declared constitutional in *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122, the court holding that the statute did not infringe the uniform tax provision of the constitution by exempting all mortgages held by various educational, charitable, and religious societies. The court reviewing the cases wherein it was held that the property of those organizations was properly exempted from taxation, said that the same reason which impelled that rule applied also to their obligations, namely, mortgages.

In *Minnesota* the courts have established the constitutionality of an act which provides for the imposition of a tax of fifty cents on each one hundred dollars, or major fraction thereof, of the principal debt or obligation secured by a mortgage of real property, and exempts from all other taxes all mortgages on which that tax shall be paid. Laws 1907, c. 328, p. 448. In 1906 an amendment to the constitution was adopted with the apparent purpose of opening the way for legislation of this character. The amendment provides that "taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes." The act has been sustained in several cases. *Mutual Benefit L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *State v. Farmers'*, etc. Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851, 232 U. S. 516, 34 S. Ct. 354, 58 U. S. (L. ed.) 706; *State v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728; *Orr v. Sutton*, 119 Minn. 193, 137 N. W. 973, 42 L.R.A. (N.S.) 146. As to the reason for and the wisdom of the legislation the court said in *Mutual Benefit L. Ins. Co. v. Martin County*, supra: "There were good and sufficient reasons why a special method should be devised for the taxation of this kind of property. It is a notorious fact that the owners of securities in the form of bonds and notes have not been in the habit of paying their proportionate share of the taxes. This has been due in a measure to the ease with which the existence of such property can be concealed from the tax officials. But when the owner of a note takes a mortgage on real estate as security, and places it upon the public records, he exposes his ownership—at least, his ostensible owner-

ship—and enables the assessor to reach him. The perfect security afforded by a good real estate mortgage makes it necessary for the owner to accept a low rate of interest, and the adequate net returns, after paying taxes in the ordinary way, often result in practical confiscation. The owner is thus tempted to seek some devious method for escaping taxation, in order that he may be on an equality with the owner of an unsecured note or bond which rests undiscovered in a safety deposit vault. The mortgage is therefore taken in the name of a nonresident, or the money is sent to another state, and there loaned in the name of the true owner. Experience has shown that it is very difficult, if not impossible, to fairly and successfully tax this kind of property under the system ordinarily applied to personal property. . . . By requiring a registration tax, every mortgage security pays a moderate tax, and this, in the judgment of the legislature, is preferable to the certain uncertainties of the old system." In *State v. Farmers'*, etc. Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851, affirmed 232 U. S. 516, 34 S. Ct. 354, 58 U. S. (L. ed.) 706, the court held that neither the state nor the federal constitutional prohibitions against class legislation were infringed, though the act while imposing the registry tax on mortgages owned by banks failed to exempt them along with persons and other corporations from being otherwise taxed. The court considered that this class of institutions enjoyed privileges of taxation that were accorded to no other person or corporation subject to taxation and that they might properly be treated as a class by themselves. In *State v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728, the court said that to hold that the law did not impose a tax on a mortgage of fifty dollars or less because the unit named therein was "one hundred dollars, or major fraction thereof," would endanger its constitutionality, for such a construction would result in taking from the class founded by the law a subject that properly belonged there.

In *Oklahoma* the validity of an act, similar in purpose and substance to the statute which is declared to be constitutional in the reported case was established by the decision in *Trustees', etc. Ins. Corp. v. Hooton* (Okla.) 167 Pac. 293. As to the motive for the enactment of such legislation the court said in that case: "The history of the adoption of this act is a matter of common knowledge. It is well claimed by relator that mortgages and like instruments had been concealed from assessing officers by putting them in the names of nonresidents, withholding them from record, and other familiar means, and it was urged that, if a special tax could be imposed upon these instruments when they were recorded, and therefore foreclosure made de-

pendent upon their having been recorded, and the tax made sufficiently low in amount, there would be an inducement to disclose mortgages to the assessing officers rather than to hide them as theretofore. . . . An additional reason sometimes given for the passage of legislation of this character is that by exempting mortgages from ordinary ad valorem taxes and placing this similar tax in lieu of all other taxes that capital would be attracted to the state and would be induced to invest in securities of this nature." The act under consideration in that case provided for a registration tax rate which increased proportionately with the number of years the mortgage had to run. While no question was raised therein that the act was unconstitutional for lack of uniformity in granting an exemption from an ad valorem tax to those who availed themselves of the recording provision, it was, however, contended that the classification as to the rate of the registration tax infringed section 5 of article 10 of the constitution which declared that "taxes shall be uniform upon the same class of subjects." It was held that the constitutional provision did not apply. But the court said that even if it had been applicable, the objection was not well taken for in its judgment the taxes imposed for registration were uniform on the various classes designated. The court expressed its views as follows: "It is admitted that a classification according to the amount of indebtedness secured by the mortgage may be made by the legislature, as has been done; and, this being true, we see no good reason why an additional classification may not be made, based upon the time for which the indebtedness secured by said mortgage is to run; in other words, regulating this additional classification by the date of maturity of the obligation secured. The act does not make the tax exacted a lien upon the mortgage affected thereby, or upon the property embraced therein, nor upon the debt or obligation which it secures, nor is any procedure provided by which same may be collected, other than denying the owner the benefits of the registration laws of the state, and denying him relief in the courts upon the instrument not recorded. The benefits to be obtained by a registration under the act are that such instrument when so recorded shall be notice to all the world of the rights of the mortgagee therein, and entitles such mortgagee to maintain an action in the courts of this state for the foreclosure of said instrument, and an exemption from ad valorem and all other taxation by the state and all of its subdivisions. . . . The difference between the exaction for registration, which is nomi-

nal as compared to the amount of taxes that would be paid upon an ad valorem basis, shows at once the value of the benefits and privileges which the act accords and the exemptions which it grants. These differences certainly justify the classification complained of. . . . The power of the legislature to distinguish, select, and classify objects of taxation has a wide range of discretion, and, while the classification must be reasonable, and not arbitrary, there is no precise application of the rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons or things. The question is, when a classification has been made, whether there is any reasonable ground for it, or whether it is only simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect. . . . We think there is such a difference in the different classes of instruments affected by the act as to justify the legislature in prescribing a different rate therefor, and that it cannot be said that such classification is arbitrary and without such distinction as to render same beyond the power of the legislature to make."

In *Virginia* a statute has been enacted which provides for the payment of a so-called privilege tax as a prerequisite to the right to record a deed of trust or a mortgage. It contains the provision that "on deeds of trust or mortgages, the tax shall be assessed and paid on the amount of bonds or other obligations secured thereby," and that "on deeds of trust or mortgages upon the works and property of a railroad or other internal improvement company, lying partly in this state and partly in another state, the tax shall be on such proportion of the consideration as the number of miles of the line of such company in this state bears to the whole number of miles of the line of such company conveyed by such deed." It was held in *Pocahontas Consol. Collieries Co. v. Com.* 113 Va. 108, 73 S. E. 446, that the exemption made in favor of internal improvement companies by exacting a tax for the value only of the property within the state, while in other cases the amount of tax was based on all the property conveyed whether located within the state or not, was not such as to render the act void as being in violation of the provision of the state constitution requiring uniformity of taxation. The court regarded the act as granting a civil privilege and said that the right of the legislature to fix the amount of a tax thereon and to classify the subjects on which the tax was imposed was well-nigh unlimited.

## NORTON

v.

DULUTH TRANSFER RAILWAY  
COMPANY ET AL.

Minnesota Supreme Court—March 19, 1915.

129 Minn. 126; 151 N. W. 907.

**Railroads — Purchase of Land for  
Right of Way — Interest Acquired.**

The conveyance of a strip of land to a railroad company for a right of way, "to have and to hold the same, . . . for and so long as the same is used for railroad purposes," held to convey an easement only, and not the absolute fee-simple title.

[See note at end of this case.]

**Abandonment of Right of Way.**

An easement so held may be lost by abandonment, and the evidence is held to support the findings of the trial court that there was an intentional abandonment of the right of way involved in this action.

[See 11 Ann. Cas. 769.]

**Rulings on Evidence Sustained.**

The court did not err in its rulings excluding certain evidence.

(Syllabus by court.)

Appeal from District Court, St. Louis county: ENSIGN, Judge.

Action to determine title to real property. George W. Norton, executor, plaintiff, and Duluth Transfer Railway Company et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

*O. W. Bunn and Washburn, Bailey & Mitchell* for appellant.

*A. L. Agatin* for respondent.

[127] BROWN, C. J.—Action to determine the title to real property in which plaintiff had judgment and defendant appealed from an order denying a new trial.

The facts are as follows:

The land in controversy was conveyed to the Duluth Transfer Railway Co. for right of way purposes, by the executors of the estate of George W. Norton, deceased, who was the owner of the larger track out of which the land in question was taken. The grantees in that conveyance was a corporation duly organized under the laws of the state in the year 1890, for the purpose of operating transfer lines of railroad within the city of Duluth and points beyond the boundaries thereof, and it was granted to use of certain streets of the city, and of West Duluth, upon condition that it serve all

railroad lines entering the city, and to permit such other railroad companies to use its tracks and facilities upon payment therefor.

The transfer company thereafter constructed its lines of road [128] within and without the city, one of which extends from within the city to West Duluth and from a point near Spirit Lake to a connection with the old Duluth & Winnipeg Railroad. The company conducted its affairs for some time but finally became insolvent, and in receivership proceedings, all its property rights, and privileges were, some time in the year 1896, transferred to a receiver of the corporation, who continued the operation of its affairs until January, 1902, when in foreclosure proceedings the property, franchises and privileges were sold to the bondholders of the company, who thereupon organized the Duluth Transfer Railroad Co., and all rights so acquired by them were transferred and set over to the new corporation. The organization of this corporation was for the sole purpose of taking over the property and affairs of the insolvent concern, and of continuing the conduct of its business, and the new company acquired the same, subject to the obligations which had theretofore become attached to the franchise and privileges so transferred. Thereafter, in May, 1902, the Transfer Railroad Co. sold and conveyed to the defendant Northern Pacific Railway Co., all lines of railroad, tracks, switches and other property previously acquired by it through the foreclosure and receivership proceedings from the insolvent Transfer Railway Co., and said Northern Pacific Co. has since owned and controlled the same. This sale included the right of way in question, which formed a part of the transfer company line, and for a considerable distance paralleled the right of way of the St. Paul & Duluth Railroad Co., the line of which extends between Duluth and St. Paul and Minneapolis. Prior to the purchase of the transfer company line the Northern Pacific Co. had acquired by purchase the St. Paul & Duluth line, and has at all times since operated trains between Duluth and Fond du Lac over a line which parallels the line of the transfer company. Subsequent to acquiring both these lines of road and in the fall of the year 1902, defendant Northern Pacific Co. abandoned the transfer line. The facts in reference to which abandonment are stated clearly in the findings of the trial court, and a stipulation of facts submitted by the parties on the trial below which, as therein stated, are substantially as follows: That upon the acquisition of said lines of road the Northern [129] Pacific Co. caused all the rails of the transfer line, together with the bridges and trestles thereof, to be taken up, dismembered and wholly removed therefrom.



through the entire length of the transfer line from a point on the main line thereof at or near Sixty-third avenue in West Duluth, to the terminal or end of the same; and the line so taken up included the right of way in dispute. The track has never been relaid, or the right of way used by defendant for railroad or other purposes. The trial court found that on or about December 1, 1912, two days prior to the commencement of the action, the defendant Northern Pacific Co. entered upon the land, not for the purpose of restoring or relaying the track thereon, but in an effort to prevent another railroad company from acquiring the same for railroad purposes in condemnation proceedings. Whether this finding is fully sustained by the evidence is not of controlling importance, for the fact remains that for 10 years the company made no use of the land for right of way or other purposes, and during that time made no attempt to relay its tracks thereon, until the appearance of the other railroad. This fact clearly appears.

The trial court found, from the facts stated, and other facts and circumstances not necessary to here repeat, that there was a complete abandonment of the land by the Northern Pacific Co., that all rights and interests acquired under and through the deed to the transfer company terminated, and that the estate of Norton, the grantor, became fully reinvested with the title to the same free and clear of any claim on the part of the defendant railroad company.

It is contended on the part of appellants: (1) That the Norton deed to the transfer company conveyed an absolute fee title limited only as to use, namely, railroad right of way purposes, and that a failure to use it for that purpose or at all would not terminate the absolute title thus granted; (2) that the findings of the court to the effect that the land was abandoned by defendant Northern Pacific Co. thereby terminating its easement and title, are not sustained by the evidence; and (3) that the court erred in excluding certain evidence, offered by defendant for the purpose of showing the intent of its officers in removing the track, ties, and bridges from the land, [130] and abandoning the use thereof for railroad purposes during the period stated, namely, from 1902 to December, 1912.

1. The first contention involves an examination of the Norton deed, its terms and provisions, for the purpose of ascertaining the intent of the parties in its execution. This intent is to be gathered, not from any particular clause or provision thereof taken by itself, but from the whole instrument, construing all its provisions together. 13 Cyc. 605; *Flaten v. Moorhead*, 51 Minn. 518, 53 N. W. 807, 19 L.R.A. 195; *Witt v. St. Paul*,

etc. R. Co. 38 Minn. 122, 35 N. W. 862. The deed, after naming and describing the parties, provides as follows:

"Witnesseth: That the said parties of the first part, in consideration of the sum of thirteen hundred and twenty-five dollars to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do, by these presents, grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, all that tract or parcel of land lying and being in the county of St. Louis, and state of Minnesota, described as follows to wit: (here follows a description of the land conveyed).

"To have and to hold the same, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, its successors and assigns, for the uses and purposes of said party of the second part for and so long as the same shall be used as a right of way for tracks and side tracks and a railroad way for its railroad cars, locomotives and trains and for proper appendages to such track or tracks and railway, and for any other uses consistent with or embraced in the purposes and general nature of the business of said grantee, as expressed in its articles of incorporation."

Aside from the names of the parties and the description of the land this quotation includes all the provisions of the conveyance. A reading of the same leaves in our minds no fair doubt of the intention of the parties. The land conveyed was taken from a larger tract and was a narrow strip 75 feet wide by about 3,000 in length. The railroad company desired it for a particular purpose, namely, as a right of way, and the grantors were willing to convey for that [131] use. The deed contains no language indicative of an intention that an absolute and unqualified title should pass to the grantee. The significant word, generally found in deeds of real property, "forever," does not follow the clause "to have and to hold the same," but instead thereof it reads "to have and to hold the same . . . for and so long as the same shall be used as a right of way." This language appears in the *habendum* clause, where usually all limitations upon the estate granted are found, if any be imposed. And no other language or clause is found which in any way impairs or detracts from the clause "for and so long as the same shall be used as a right of way." The only conclusion, as it seems to us, is that the parties intended by the deed to convey to the company an easement only, and to vest in the company the right to hold and use the land so long as it was devoted to the purpose stated, and no longer. Such seems to be the

construction given to similar deeds in other states. *Reichenbach v. Washington Short Line R. Co.* 10 Wash. 357, 38 Pac. 1126; *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208, 1 L.R.A.(N.S.) 806, 114 Am. St. Rep. 509, 6 Ann. Cas. 239; *Jones v. VanBochove*, 103 Mich. 98, 61 N. W. 342; and authorities cited in the note to the first case here cited in 1 L.R.A.(N.S.) 806; *Flaten v. Moorhead*, 51 Minn. 518, 53 N. W. 807, 19 L.R.A. 195. Such a limitation obviates the necessity of affirmative action on the part of the grantor to terminate the estate or right granted, for the intentional abandonment of the property operates to extinguish all rights of the grantee without affirmative action on the part of the grantor.

2. Are the findings of abandonment sustained by the evidence? The question must be answered in the affirmative.

No question arises as to the result and effect of an abandonment in a case of this kind. The Norton deed conveyed an easement for railroad purposes and, unlike a conveyance of the fee title, the right so granted may be lost by abandonment. This is settled law, and not here disputed. 14 Cyc. 1185; 1 *Ruling Case Law*, 4. To have the effect of divesting title and reinvesting the same in the grantor of the easement, the abandonment must amount to something more than mere nonuser, for there must appear to have been an intentional [132] relinquishment of the rights granted. There was in this case an actual nonuse of the right of way for 10 years, and the question of the intention of the company is of primary importance. Did the company take up the tracks and cease using the right of way with the purpose of abandoning and relinquishing its rights in the land? This intention need not appear by express declaration, but may be shown by acts and conduct clearly inconsistent with an intention to continue the use of the property for the purposes for which it was acquired. And it has been held that where the grant was for a public benefit, as in this case, an intention to abandon will more readily be assumed from a long continued nonuser, than where the grant was for a private use. *Jones, Easements* § 856; *Henderson v. Central Passenger R. Co.* 21 Fed. 358; *Roanoke Inv. Co. v. Kansas City, etc. R. Co.* 108 Mo. 50, 17 S. W. 1000.

In the case at bar the right of way was granted to the transfer company for and so long as it continued to occupy and use the same for railroad purposes. The grantee was a public service corporation, charged with certain duties and obligations in supplying facilities to other like corporations. By the abandonment of the road, by taking up and removing the track from the line in question the Northern Pacific Co. relieved itself from

the discharge of those duties and obligations. The line from Sixty-third avenue, West Duluth, to a point near Spirit Lake was parallel to the St. Paul & Duluth line, owned by the Northern Pacific Co., and there was, so far as disclosed by the record, no necessity or occasion for maintaining both lines; the St. Paul & Duluth line answered and supplied all the needs and requirements of defendant. The line from the point near Spirit Lake extended to a connection with the old Duluth & Winnipeg line of railroad, and when that road was in operation afforded it an entrance into Duluth over the transfer line. But the Duluth & Winnipeg line had been abandoned and the track taken up, and the extended transfer line was of no use or purpose beyond the point of divergence from the St. Paul & Duluth line near Spirit Lake. The defendant took up all this line between the points stated, removed the tracks, ties, rails and bridges, and all in connection therewith which was of any value or suitable for use elsewhere, and for 10 [133] years made no use of the right of way for any purpose. It grew up to weeds and, according to the findings of the court, not until another railway company attempted to acquire the same for a right of way did the defendant attempt to retake possession of the land. The usefulness of the right of way for the purposes for which the grant was made, had long before been completely destroyed by the removal of the track and bridges, and there was a complete cessation of the use thereof for any purpose. From these facts, about which there is no dispute, we are clear that the trial court was fully justified in finding an intentional abandonment of the right of way. The facts bring the case within *Chambers v. Great Northern Power Co.* 100 Minn. 214, 110 N. W. 1128, where a similar situation was presented. While the right of way held to have been abandoned in that case was not acquired by express grant, as in the case at bar, the facts tending to show intentional abandonment are substantially the same though not in all respects so clearly indicative of the intention as in the case at bar. The authorities elsewhere also sustain this view of the case. *Hickox v. Chicago, etc. R. Co.* 94 Mich. 237, 53 N. W. 1105; *Chicago, etc. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Gurdon, etc. R. Co. v. Vaught*, 97 Ark. 234, 133 S. W. 1019; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554.

Defendant offered evidence tending to show that the removal of the track and bridges was not with any intention of abandoning the line, or its rights therein, but for temporary purposes only. Certain maps prepared by employees of the company for the purpose of showing the rights of way, held and owned

by the company at Duluth indicated a continuing claim to this right of way. These maps were prepared, as we understand the matter, after the tracks had been taken up and removed, and the markings thereon included this particular right of way. It was not so marked out on one of the maps. These maps were proper evidence for the trial court, but are not conclusive that there was no intention to abandon permanently this part of the transfer line. The evidence was proper for the consideration of the trial court in connection with the other facts and circumstances disclosed. The effort of the representatives of the Norton estate to [134] escape taxation as to this strip of land can have no bearing upon the issue of defendant's abandonment of the same.

3. A full consideration of the whole record leads to the conclusion that there was no reversible error in the exclusion of the evidence of witness Cooper. This witness was general manager of the Northern Pacific Co. at the time of the removal of the tracks, and he was present at the time the president of the company ordered the tracks taken up. The matter of the removal was wholly within the authority of the president of the company, and defendant sought to show by witness Cooper that in ordering the removal the president stated that the purpose of the change was temporary and that there was no intention of permanently abandoning the property. While declarations of the holder of an easement tending to characterize his act in abandoning the same would be admissible against him, it is not altogether clear that such declarations may be received in his favor. 1 Jones, Ev. § 170; Hickox v. Chicago, etc. R. Co. 94 Mich. 237, 53 N. W. 1105. But we do not decide the question of the admissibility of the hearsay statement of the intention of the president of the road. We are clear that had it been received the result would have been the same. The case presented is one showing an abandonment in fact; that is, the tracks and bridges were removed, and there has been for 10 years a total failure to use the right of way for any purpose. This so clearly presents a case of intentional abandonment, that the hearsay evidence would have had no substantial probative force or effect. Its rejection was therefore not prejudicial. The same may be said of the evidence of the manager of the company, as to what his intention was in taking up the track. His intention was that of the president of the company, who had exclusive authority in the matter, and he was without authority to formulate an opinion of his own which could affect the purpose or intent of the company. The witness testified that whatever intention he had in the matter was founded upon the intention of the president of the company.

Our conclusion therefore is that the Norton deed conveyed to the transfer company an easement only, that the findings of an intentional [135] abandonment by defendant are sustained by the evidence, and that there was no reversible error in the exclusion of evidence.

Order affirmed.

#### NOTE.

#### Estate or Interest Acquired by Railroad in Land Purchased for Right of Way.

Contrary to the view taken in *Spierling v. Ohl*, 232 Ill. 581, 13 Ann. Cas. 430, the estate or interest acquired by a railroad in land purchased by it for a right of way is generally held by the recent cases to be an easement. *Louisville, etc. R. Co. v. Maxey*, 139 Ga. 541, 77 S. E. 801; *Muncie Electric Light Co. v. Joliff*, 59 Ind. App. 349, 109 N. E. 433; *Vandalia R. Co. v. Topping* (Ind.) 113 N. E. 421; *Mahar v. Grand Rapids Terminal R. Co.* 174 Mich. 138, 140 N. W. 535; *Kansas City Southern R. Co. v. Sandlin*, 173 Mo. App. 384, 158 S. W. 857; *Illinois Cent. R. Co. v. Centerville Telephone Co.* (Tenn.) 186 S. W. 90; *Right of Way Oil Co. v. Gladys City Oil, etc. Co.* 106 Tex. 94, 157 S. W. 737, 51 L.R.A. (N.S.) 268, (*affirming judgment* 137 S. W. 171); *Pacific Iron Works v. Bryant Lumber, etc. Mill Co.* 60 Wash. 502, 111 Pac. 578. See also *Cleveland, etc. R. Co. v. Simpson*, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9, and see the reported case. *Compare Stevens v. Galveston, etc. R. Co.* (Tex.) 169 S. W. 644. In *Illinois Cent. R. Co. v. Centerville Telephone Co.* (Tenn.) 186 S. W. 90, wherein it was contended that the conveyance of a right of way to a railroad company transferred the fee and not a mere easement, the court said: "McLemore v. Charleston, etc. R. Co. 111 Tenn. 639, 69 S. W. 338, settles this question. It was held in that case that the conveyance of a right of way to the railroad company through the lands of a grantor operated to convey an easement therein only, and the fee remained in the grantor." And in *Pacific Iron Works v. Bryant Lumber, etc. Mill Co.* 60 Wash. 502, 111 Pac. 578, the court said: "The right of way deed remised, released, and forever quitclaimed to the company, a right of way 100 feet in width 'to have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever, for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors, their heirs, executors, administrators or assigns.' If this were a grant in fee simple, it would, perhaps, have the effect claimed for

it by the respondent, but, in our opinion it was not. While some of the language contained in the deed might imply such a grant, when the instrument is construed as a whole and in the light of the purpose for which the grant was made, it is a grant of a right of way or easement and nothing more."

In *Texas* a statute (Rev. St. 1895, art. 4473) expressly provides that "the right of way secured or to be secured to any railroad company in this state, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands, either public or private." Right of Way Oil Co. v. Gladys City Oil, etc. Co. 106 Tex. 94, 157 S. W. 737, 51 L.R.A. (N.S.) 268 (*affirming* judgment 137 S. W. 171), wherein the court, in holding that oil beneath the surface of the granted land did not pass, said: "The manner provided by law is either by agreement with the owner or condemnation; therefore, if the owner by agreement conveys the 'right of way,' it is secured to the railroad company in the manner provided by law and will be governed by the statute, and cannot be construed to confer a fee simple title to the land."

However, the estate or interest acquired by a railroad in land purchased for a right of way is to be determined by the intention of the parties as expressed in the language of the instrument of conveyance. *Moore Planting Co. v. Morgan's Louisiana, etc. R. etc. Co.* 126 La. 840, 53 So. 22. See also *Mahar v. Grand Rapids Terminal R. Co.* 174 Mich. 138, 140 N. W. 535.

In *Moore Planting Co. v. Morgan's Louisiana, etc. R. etc. Co.* supra, the court said: "A 'right of way' may consist either of the fee, or merely of a right of passage and use, i. e., of a servitude. Whether the one or the other is meant in any particular instrument must be gathered from the instrument as a whole. As a general rule, it means only the servitude." In *Mahar v. Grand Rapids Terminal R. Co.* 174 Mich. 138, 140 N. W. 535, an instrument conveying land to a railroad company was held to show an intention of the grantors to grant simply a right of way across the premises in question, and not to convey the fee to the land, where the granting clause contained the following language: "for a right of way for a railroad;" "this grant shall be void and the said right of way herein conveyed shall revert to, and the title thereto revert in, the parties of the first part;" "this grant or conveyance of a right of way for a railroad shall at the option of the parties of the first part, their heirs, successors, or assigns, be null and void and the title thereto revert to the parties of the first part, their heirs, successors or assigns." The instrument further provided that no deviation should be made by

the party of the second part without first obtaining the consent and approval, in writing, of the parties of the first part, and also reserved to the parties of the first part the right of sewage and drainage across the premises. In *Hauselman v. Grand Trunk Western R. Co.* 163 Mich. 496, 128 N. W. 732, it appeared that the grantors conveyed to a trustee, whom the grantors knew to be buying the land for railroad purposes, the right to make use of a certain right of way to the fullest extent to which the grantors had the right to make use of the same, but without in any manner or to any extent diminishing the right of the grantors, their heirs or assigns, to continue to make use of said right of way in common with the grantee. It was held that the legal effect of the deed was to authorize the railroad to use the right of way for any of the purposes for which a right of way over such a strip of land might usually be used by a railroad company, so long as that use did not unreasonably limit the grantors' common use thereof. In *East San Mateo Land Co. v. Southern Pac. R. Co.* (Cal.) 157 Pac. 634, it appeared that a deed to a railroad company conveyed the land in question to the railroad company and its successors "during the legal existence of said company, solely upon the following conditions (here follow certain conditions); . . . and upon the breach . . . of any of the aforesaid conditions, this grant shall become void, and the estate hereby conveyed . . . shall cease and determine, and the said land shall absolutely revert to the said party of the first part (grantor), his heirs or assigns, in fee simple . . . and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary." It was held that the duration of the estate or easement granted was definite and precise, and was one limited for years and not in fee. In *Pittsburgh, etc. R. Co. v. Barth* (Ind.) 110 N. E. 574, it appeared that a grantor granted to a railroad company the right to enter on certain premises and construct, maintain and operate thereon a side track, and among other conditions it was stipulated that the right of the railroad to hold the premises should continue in existence only so long as the railroad company should maintain a certain track for the use of a certain manufacturing company. It was held that the instrument did not create a tenancy at will nor could the right be accurately described as a lease, or license coupled with an interest, but was rather "a grant to use and occupy."

While the estate or interest acquired by a railroad in land purchased for a right of way

is generally held to be an easement, yet a railroad may acquire the fee in the right of way, where the deed of conveyance is sufficient for that purpose. *Concklin v. New York Cent. etc. R. Co.* 149 App. Div. 739, 134 N. Y. S. 191. Thus where the instrument as a whole conveys the fee to the right of way it has been held that a statement in the habendum clause that the property is held for railroad purposes will not limit the fee conveyed. *Concklin v. New York Cent. etc. R. Co.* supra; *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439. In *Battelle v. New York, etc. R. Co.* 211 Mass. 442, 97 N. E. 1004, it appeared that a deed to a railroad company recited that "it is hereby intended to convey the above premises to the said railroad company to be used for a public road and depot and railroad purposes only, reserving to the grantor, her heirs and assigns, the use of said granted premises for ingress and egress to and from her land adjoining" and contained the usual habendum clause, "to the said railroad company their assigns, to their own use and behoof forever." The general warranty clause excepted from its operation the "aforesaid reservation." It was contended that the deed conveyed to the railroad only a use "for a public road and depot and railroad purposes" and reserved a resulting use in the grantor, but it was held that the title to the land described in the deed passed to the railroad company in fee simple.

Under an *Oklahoma* statute (*Wilson's Rev. & Am. Stat. § 907*) which provides that "every estate in land which shall be granted, conveyed or demised by deed or will, shall be deemed an estate in fee simple and of inheritance unless limited by express words," and a further provision (§ 1032) which by necessary implication confers the power on railroad corporations to take a fee title to land purchased for right of way or other railroad purposes, it has been held that a warranty deed in ordinary form conveying a strip of land for railway purposes transferred the title in fee. *Gilbert v. Missouri*, etc. R. Co. 185 Fed. 102, 107 C. C. A. 320.

In *South Dakota* it has been held that a railroad company acquires a title in fee and not a mere easement where land is conveyed to it for a right of way by a deed which shows that it was the intention of the parties to transfer the land to the railroad company. The ruling was based on a statute (*Comp. Laws 1887, § 2980*) which enables a railroad corporation to acquire by purchase all such real estate and other property as may be necessary for the construction, maintenance and operation of its railroad, and the stations, depot grounds, and other accommodations reasonably necessary to accomplish the object of its incorporation; and to hold and use the same, to lease or

otherwise dispose of any part or parcel thereof, or sell the same when not required for railroad uses, and no longer necessary to its use. *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439.

## LYON

v.

## MAYOR AND COMMON COUNCIL OF HYATTSVILLE.

Maryland Court of Appeals—February 10, 1915.

125 Md. 306; 93 Atl. 919.

### Equity — Submission on Bill and Answer.

Where a case is submitted on bill and answer, the answer must be taken as true so far as responsive to the bill.

[See 10 R. C. L. tit. *Equity*, p. 450.]

### Sewers — Power to Extend System.

Hyattsville charter (*Laws 1904, c. 125*) authorizes construction and maintenance of a sewerage system for the town, and the amendment thereto by *Laws 1908, c. 79, § 15*, authorizes extension of sewers as its interest demands from time to time. Held, that the power to extend sewers thereunder applied to the system, and was not confined to extending from the point at which they ended sewers constructed under the charter of 1904.

### Special Assessment — Sewer Extension — Paralleling Old Sewer.

It is not ground for objection to an assessment for a sewer that it is constructed parallel with an old sewer for a certain distance, where the duplicate sewer is not in front of the property assessed and does not affect it, and no attempt is made to assess property for the cost of duplication, which was necessary to get a proper grade and avoid expense of deepening the old sewer in extending the system.

### Necessity of Benefit to Property Owner.

It is not ground for objection to an assessment for a sewer that the abutting property owner is not benefited by its construction.

[See *Ann. Cas. 1915D 384*.]

### Front Foot Rule.

Assessment of the cost of a sewer on abutting property according to the frontage of each parcel is not a taking of property without due process of law, contrary to Const. U. S. Amend. 14.

[See note at end of this case.]

### Notice of Assessment — Necessity — Property in Name of Another.

Abutting property on which a sewerage assessment was made was assessed to the own-

er's husband. It had been carried on the tax records in his name for upwards of 13 years, and taxes paid him on bills rendered without objection or inquiry by her. In proceedings relating to the sewer he was notified with others and took part in conferences relating thereto. The owner and her husband resided together on the property assessed, and she was advised of such proceedings, and knew that he was present, and the bill for the amount of the assessment sent to him was filed with her complaint for an injunction. It is held that under the circumstances disclosed in the case, heard on bill and answer, she could not be granted relief on the ground that the assessment was not made in her name, or notice sent to her.

Appeal from Circuit Court, Prince George's county: BEALL, Judge.

Action for injunction. Emma V. Lyon, plaintiff, and Mayor and Common Council of Hyattsville, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Wm. J. Neale and H. B. Moulton* for appellant.

*Vincent A. Sheehy* for appellee.

[308] *Boyd, C. J.*—This is an appeal from a decree of the lower Court denying an injunction and dismissing the bill of complaint filed by the appellant against the appellee. The bill alleges that the plaintiff (appellant) is the owner of a tract of land in Hyattsville, beginning on the west side of the Washington and Baltimore Turnpike, now known as Maryland avenue, at the middle of Arundel avenue, and running thence west along said middle of that avenue 358 feet; thence north, at right angles to said avenue, 378 feet to the middle of Calvert avenue; thence east along the middle of Calvert avenue, and parallel with Arundel avenue, 410 feet to the west side of the turnpike, or Maryland avenue; thence south  $8\frac{1}{2}$  degrees west along said turnpike or Maryland avenue 110 feet to a corner; thence south 7 degrees along the west side of said turnpike 274 feet to the beginning, and that said property is improved by a dwelling house and other improvements. The object of the bill is to prevent the collection of an assessment of \$269.38 against the plaintiff's property for a sewer that was built by the defendant (appellee) and to have said assessment set aside and declared void.

An order to show cause why the injunction should not issue was passed, and an answer was filed by the appellee. The case was submitted on bill and answer, and hence the answer must be taken as true so far as responsive to the bill. *Miller's Eq. Proc.* 317-322, 686. The brief of the appellant relies

mainly on the claim that the assessment by the lineal foot is a taking of private property without due process of law and a violation of the Fourteenth Amendment to the Federal Constitution, but as other questions are suggested, we will consider them also.

1. Under the Act of 1904, Chapter 125, the Mayor and Common Council of Hyattsville was authorized to establish, construct and maintain a sewerage system for the town and to issue its bonds to an amount not exceeding \$30,000.00 That sewer was only constructed on Maryland avenue as far north as Arundel avenue. By section 15 Chapter 79 of [309] Acts of 1908, the corporation was given "authority to extend the water mains and sewers as the interest of the town from time to time in its opinion demands, assessing upon the land abutting such extensions the cost thereof, which assessment shall be a lien upon such abutting property, to be assessed at such time as the Mayor and Common Council may determine, and to be collected from the owners of said abutting property by said Council as taxes due the corporation of Hyattsville are collected, and the Mayor and Common Council to have power to make all necessary regulations as to the notice of such assessments to the property owners." Under the authority of that Act ordinances were passed for the construction of the sewer in question, and there was an assessment of \$269.38 on the property of the appellant, but it was assessed in the name of her husband, W. C. Lyon. That sewer was constructed on Maryland avenue to Carroll avenue, which is north of Arundel avenue, and then out Carroll avenue. It runs 366.50 feet in front of the appellant's property on Maryland avenue.

The appellant contends that this was not an extension of the present sewerage system, and that the town was only authorized to extend the sewer of 1904 from some point at which it ended. We will content ourselves by quoting from the opinion of Judge Beall as to that ground. He said: "Manifestly the law meant to give the town the power to extend the sewerage system of the town, and did not mean to confine it necessarily to adding to the length of the old sewer constructed under the Act of 1904. The purpose of the Act was to enable the town to meet the growing demands of increasing population by reaching portions of the town with sewers as it became built up."

2. The second reason assigned is equally without merit. It is contended that the new sewer is in part a duplication of an existing one, and that there was no authority for such construction. It is true that for some distance south of Arundel avenue the new sewer is parallel with the old one [310] on Maryland avenue, but the answer effectually disposes of that objection. In the first place

it denies that such duplicate sewer was in front of the appellant's property, or that said property was in any way affected thereby, or that appellee has attempted to assess any part of the cost of such duplicate sewer against the appellant's property or any other property, but it alleges that the duplication was owing to the existing conditions. In order to have a proper grade in the extension of the sewer on Maryland avenue, north of Arundel avenue, it was necessary in the opinion of the engineer in charge to begin south of Arundel avenue, and it was begun about midway between the latter and Maple avenue. After the sewer of 1904 was laid the State Roads Commission had taken over Maryland avenue and had macadamized it and made a first-class roadway out of it. The appellee found upon investigation that it would be cheaper to run a parallel sewer for the distance spoken of than to tear up the road, place the old sewer deeper and then repair the road. It therefore laid that part of the new sewer on the side of the avenue, where it was not macadamized, which was undoubtedly proper and cheaper, if the allegations in the answer are correct, as we must assume them to be.

3. In reference to the reason assigned that the property of the appellant is not benefited by the construction of the sewer it would perhaps only be necessary to refer to the case of *Hyattsville v. Smith*, 105 Md. 318, 66 Atl. 44. Judge Burke, in speaking for the Court, after referring to certain fundamental maxims in the law of taxation, stated by Judge Cooley, said: "Two others, which have been long and firmly fixed in the law of this State, may be added; first, that the Legislature has the power of taxing particular districts for local benefits or improvements; and, secondly, to authorize a municipal corporation to open, grade, pave, curb, etc., any street, or part of a street, and to assess the cost of doing such work upon the property binding upon such street or part thereof, and that in the absence of any declaration of [311] intent to the contrary, the presumption would be that the Legislature considered that the purpose for which the tax or assessment was levied was a public purpose, and that the improvement would inure to the special benefit and advantage of the adjacent owner upon whose property the assessment is laid." A number of Maryland cases are then cited by him, and we would also refer to *Bassett v. Ocean City*, 118 Md. 114, 84 Atl. 262; *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 988; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 21 S. Ct. 625, 45 U. S. (L. ed.) 879; 4 *Dillon on Municipal Corporations* (5th ed.) 2522.

4. The next objection is that the assessment of the cost of the sewer upon the abutting property, according to the frontage of

each parcel, is a taking of private property without due process of law and contrary to the Fourteenth Amendment to the Federal Constitution. In *Hyattsville v. Smith*, supra, we sustained an assessment made according to the front foot rule under a section of the charter of Hyattsville very similar to the one under which this improvement was made, as we also did in *Bassett v. Ocean City*, supra, and *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1. Unless therefore the appellant is correct in his contention that the Supreme Court of the United States has decided otherwise, the question is settled in this State.

The case relied on by the appellant is *Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 U. S. (L. ed.) 443. While there are expressions in that case which might seem to sustain the position of the appellant, the Supreme Court has explained that decision and has pointed out that it was not intended to adopt the rule which some courts thought it had established. In *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 21 S. Ct. 625, 45 U. S. (L. ed.) 879, the case of *Norwood v. Baker* was referred to at some length, and a number of authorities were considered, and it was held that (quoting from the syllabus): "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the Legislature, and this will not constitute [312] a taking of property without due process of law." The Court, quoting from and approving *Dillon on Municipal Corporations*, said: "The Courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency. (2 *Dill. Mun. Corp.* section 752, 4th ed.). This array of authority was confronted in the Courts below, with the decision of this Court in the case of *Norwood v. Baker*, 172 U. S. 269 [19 S. Ct. 187, 43 U. S. (L. ed.) 443] which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed. But

we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*." Then, after referring to *Norwood v. Baker* at some length, the Court said: "That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U. S. 45, 56 [18 S. Ct. 521] 42 U. S. (L. ed.) 943, 947, and in *Spencer v. Merchant*, 125 U. S. 345, 357 [8 S. Ct. 921] 31 U. S. (L. ed.) 763, 768."

In *Wight v. Davidson*, 181 U. S. 371, 21 S. Ct. 616, 45 U. S. (L. ed.) 900, the Supreme Court, in considering the case of *Norwood v. Baker*, said: "There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a [313] street, irrespective of the question whether the property was benefited by the opening of the street. The Legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. . . . That it was not intended by this decision to overrule *Bauman v. Ross* and *Parsons v. District of Columbia* is seen in the opinion where both those cases are cited, and declared not to be inconsistent with the conclusion reached."

Without quoting from other cases, see *Tonawanda v. Lyon*, 181 U. S. 389, 21 S. Ct. 609, 45 U. S. (L. ed.) 908; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 21 S. Ct. 644, 645, 45 U. S. (L. ed.) 914; *Webster v. Fargo*, 181 U. S. 394, 21 S. Ct. 623, 645, 45 U. S. (L. ed.) 912; *Detroit v. Parker*, 181 U. S. 399, 21 S. Ct. 624, 645, 45 U. S. (L. ed.) 917; *Wormley v. District of Columbia*, 181 U. S. 402, 21 S. Ct. 609, 45 U. S. (L. ed.) 921; *Allen v. District of Columbia*, 181 U. S. 402, 21 S. Ct. 609, 45 U. S. (L. ed.) 922; *Shumate v. Heman*, 181 U. S. 402, 21 S. Ct. 645, 45 U. S. (L. ed.) 922; *Chadwick v. Kelley*, 187 U. S. 540, 23 S. Ct. 175, 47 U. S. (L. ed.) 293. Many decisions are collected in the note to *Heavner v. Elkins*, 69 W. Va. 255, as reported in Ann. Cas. 1913A 655, 71 S. E. 184, 52 L.R.A. (N.S.) 1035. Assessments levied by the front foot are thus fully sanctioned by the Supreme Court and the cases sustaining that mode decided by that Court were not overruled by *Norwood v. Baker*.

It is said in the brief of the appellant that the cases relied on by the appellee were all from the District of Columbia, and it is attempted to point out a distinction between them and that of *Norwood v. Baker*, but without deeming it necessary to say more as to that suggestion, it will be seen that a number of those cited above were not from the Dis-

trict of Columbia, and the Supreme Court made no such distinction. An extended review of the Supreme Court decisions can be found in 4 *Dillon on Mun. Cor.* (5th ed.) section 1436, where the late cases are cited in the notes. Inasmuch, then, as we find nothing in the decisions of the Supreme Court to cause us to change our decisions on the subject, and as the latter have distinctly placed this Court in the line of cases sustaining the front foot rule, it is clear that the injunction could not have been granted upon the ground now under consideration.

[314] It may be well to add that the answer and the ordinance assessing the costs show that only one-half of the cost of the sewer on Maryland avenue in front of the appellant's property was assessed against it, and that there is no occasion to collect by general taxation any portion of the cost of constructing the sewer or to use for that purpose money in its treasury placed there for other purposes. It is also distinctly alleged in the answer that the plaintiff's property is specially benefited by the sewer.

5. The objection that no notice was given to the appellant of the meeting of the Mayor and Common Council for the purpose of making an assessment of the cost of constructing the sewer upon the abutting lands is, under the circumstances shown by this record, wholly without merit, and the bill fails to disclose material facts in reference to that question. The answer shows that this property had been carried on the tax record of the appellee in the name of W. C. Lyon, the husband of the plaintiff, for at least thirteen years, and that during that period the taxes have been paid thereon by him and in his name, upon bills rendered without objection or inquiry by the plaintiff. It is further alleged that all of the property owners, except the owner of the property now claimed by the appellant, abutting on Maryland avenue, from Arundel avenue to Carroll avenue, and on Carroll avenue to Cecil avenue, filed a petition with appellee to have the sewer constructed; that several informal conferences between the property owners and the Mayor and Common Council were held, at which the necessity for such sewer, the size thereof, character and best method of constructing the same were discussed; that as the result of the conferences the Mayor and Common Council became convinced of the necessity for such sewer and in order that it might be taken up in a formal way and in due order, although not required by law, notice was sent to all the owners whose names appeared upon the tax records that the Mayor and Common Council would on the day named hear the property owners upon the questions of the necessity for and size of such a sewer, and that on [315] that day the property owners appeared and before



any action was taken every property owner who desired to be heard was heard. An ordinance was duly passed and the sewer constructed. The Mayor and Common Council afterwards directed notices to be sent, in accordance with the terms of the original ordinance, to the owners of lands abutting said sewer, that they would meet at a time and place named for the purpose of making an assessment of the costs, and notice was sent to each of the property owners appearing upon the tax records of said town; that at the time and place appointed certain property owners, including W. C. Lyon, were present and the total costs, the number of front feet liable to be assessed and the cost per front foot were all explained to them and every one desiring to be heard was heard, but not a dissenting voice was raised. An ordinance making the assessment was afterwards passed. It is further alleged that at all of the conferences, with the exception of possibly one or two, W. C. Lyon was present, took part in the discussions and, being a civil engineer, at one of the conferences offered to prepare a plan for the construction of said sewer; that all of the notices were therefore sent to him and that at no time did he intimate that he was not the owner of the property; that the plaintiff and her said husband reside together in Hyattsville, and the sewer was constructed in front of their place of residence. The answer further avers that she well knew and was fully advised as to the proceedings being taken by the defendant, and that, if she be in fact the owner of the property, she knew that her husband was present at said meetings, and was so present as her agent and representative and she is now estopped to deny it. The assessment was "On that part of the Killian tract fronting 366.50 feet on Maryland avenue, and assessed in the name of W. C. Lyon, \$269.38," and the bill for the amount of the assessment, which was sent to W. C. Lyon, was filed by the plaintiff with her bill of complaint—being another circumstance to show that she was kept informed as to what was being done in reference to the sewer.

[316] Under such circumstances, there being no denial of the averments in the answer, which has the effect stated above, inasmuch as the case was heard on bill and answer, the plaintiff cannot be granted relief in a Court of Equity on the ground that the assessment was not made in her name, or that the notice was not sent to her. The assessment was in fact made against the property, which was correctly stated to be assessed in the name of W. C. Lyon. If authorities be necessary to show that such objection to assessments for local improvements will not under such circumstances be countenanced by Courts of justice, see *William Wilkens Co. v. Baltimore*, 103 Md. 293, 7 Ann. Cas. 1192, 63 Atl. 562; Ann. Cas. 1916E—49.

*Moffat v. Calvert County*, 97 Md. 266, 54 Atl. 960; *Parsons v. District of Columbia*, 170 U. S. 45, 18 S. Ct. 521, 42 U. S. (L. ed.) 943; *Wight v. Davidson*, 181 U. S. 377, 21 S. Ct. 616, 45 U. S. (L. ed.) 900; *Chadwick v. Kelley*, 187 U. S. 540, 23 S. Ct. 175, 47 U. S. (L. ed.) 293; *In re McLean*, 138 N. Y. 164, 33 N. E. 821, 20 L.R.A. 389; *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029; *Stetler v. East Rutherford*, 65 N. J. L. 528, 47 Atl. 489; 10 Am. & Eng. Enc. of Law (L. ed.) 230; 25 Am. & Eng. Enc. of Law (2d ed) 1205.

We do not deem it necessary to consider the additional question suggested by the appellee—whether under this statute any notice was required before the assessment was made. We are of the opinion that the lower Court was right in refusing to grant an injunction, and as there was no reason for retaining the bill, it was properly dismissed.

Decree affirmed, the appellant to pay the costs.

#### NOTE.

The validity of a special assessment assessed according to the "front foot rule" instead of according to benefits is sustained in the reported case, the decision being in accord with the majority of the earlier cases, which are collated in the note to *Heavner v. Elkins*, Ann. Cas. 1913A 653.

#### CAMERON

v.

#### PACIFIC LIME AND GYPSUM COMPANY.

Oregon Supreme Court—November 24, 1914.

73 Oregon 510; 144 Pac. 446.

#### Employers' Liability Act — Statutes Repealed.

Employers' Liability Law of 1910 (Laws 1911, p. 16) does not in terms repeal the factory inspection act (Laws 1907, p. 302), but only so much thereof as is inconsistent with the employers' liability law, the primary purpose of the factory inspection act being to safeguard dangerous machinery, the liability provided in section 8 thereof being based on the neglect of the employer to safeguard any machinery or the use of it after receipt of notice to guard it, but when the injury is the proximate result of an omission to guard, and there is a liability concerning matters in conflict with the employers' liability act, the latter controls, and the limita-

tion of liability contained in the factory inspection act has no application.

[See note at end of this case.]

#### Scope of Act.

Employers' Liability Act 1910 is not limited to construction work but applies also to factories and mills, including failure of owners to protect dangerous machinery.

#### Liability for Death by Wrongful Act — Limit on Recovery Removed.

Employers' Liability Act 1910 (Laws 1911, p. 17) § 4, removes the limitation of recovery in an action for death of a servant, brought under such act, prescribed in cases of wrongful death by L. O. L. § 380.

#### Evidence — Subsequent Installation of Safety Device.

Where, in an action for injuries to a servant by his foot and leg becoming caught in an unguarded conveyor in a gypsum mill, the complaint alleged that the conveyor could and should have been covered, without interfering with its efficiency, and would have secured protection to plaintiff, which allegation was specifically denied in the answer, and the jury during the trial visited the premises, at which time the conveyor was covered, evidence that it was covered after the accident was admissible.

#### Employers' Liability Act — Contributory Negligence.

In an action for injuries to a servant under Employers' Liability Act 1910, contributory negligence is not a defense, but may be considered in fixing damages.

[See Ann. Cas. 1914C 175, as to federal act.]

#### Indemnity Insurance — Proof on Personal Injury Trial — Prejudice.

Where, in an action for injuries to a servant, plaintiff's counsel intentionally pursued a witness on recross-examination until he obtained an answer disclosing that defendant carried employers' liability insurance covering the accident, the admission of such evidence over objection is error.

[See note at end of this case.]

Appeal from Circuit Court Baker county: ANDERSON, Judge.

Action for damages. Roy E. Cameron, plaintiff, and Pacific Lime and Gypsum Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[511] This is an action by Roy E. Cameron, against the Pacific Lime & Gypsum Company, a corporation, for personal injuries. The defendant was the owner and operator of a plaster-mill for milling a product of gypsum rock; the rock being subjected to great heat [512] and reduced to a powder. Machinery is operated in a room about 100 feet long, and the gypsum is carried from the hot-pits by means of conveyors constructed about 18 inches from the floor. A steel spiral attached to a shaft inclosed in a steel case removes the

gypsum from said hot-pits through openings regulated by sliding doors. Plaintiff's labor consisted in attending said hot-pits and the conveyor. At the time of the injury his foot and leg were caught by said revolving conveyor and crushed, bruised and burned, whereby he lost the limb. It is alleged in the complaint that said conveyor should have been covered and made safe for plaintiff's working thereat; that it was open and exposed and involved great risk and danger to him. The action was tried by a jury, and a verdict rendered for plaintiff in the sum of \$12,888. From a judgment thereon defendant appeals.

John L. Rand and William J. Claassen for appellant.

McCollock & McCollock for respondent.

EAKIN, J. (after stating the facts).—At the trial defendant moved the court for an order requiring the plaintiff to elect whether he would proceed with the trial under the factory inspection law of 1907 or under the employers' liability law of 1910. This motion was denied by the court, which is assigned as error. The purpose of the factory inspection act (Laws of 1907, p. 302) was primarily intended to effect a safeguard of all dangerous machinery through the [513] inspection thereof by the labor commissioner. A penalty is provided for disregarding its provisions or a violation thereof. It also provides for a liability against the person who neglects to safeguard any machinery or omits to comply with any of the provisions of the act, limiting the liability in such case to \$7,500. The act does not expressly provide any new defenses, but eliminates the defense of assumed risk, as decided in *Hill v. Saugested*, 53 Ore. 178, 96 Pac. 524, 22 L.R.A. (N.S.) 634, note. See also *Love v. Chambers Lumber Co.* 64 Ore. 129, 129 Pac. 492. The employers' liability law seems to cover some of the same matters provided for in the factory act, namely:

"All owners . . . engaged in the . . . operation of any machinery . . . shall see that . . . all dangerous machinery shall be securely covered and protected . . . and generally, all owners, . . . having charge of, . . . any work involving a risk . . . to the employees . . . shall use every . . . care . . . for the protection . . . of life and limb. . . ."

Evidently the purpose of that act contemplated not only the protection of laborers in construction work, but makes the law broad enough to include laborers in factories and mills wherever machinery is used. Prior to the enactment of the factory inspection act, by section 380, L. O. L., a limitation was placed upon the right of recovery of damages for personal injuries in the case of death:

but in cases of personal injury not resulting in death the amount of the recovery was unlimited, and remained the rule until the enactment of the factory inspection act of 1907. Section 8 of that act provides:

"Any person, firm, corporation or association who violates or omits to comply with any of the foregoing requirements or provisions of this act, and such violation [514] or omission shall be the approximate cause of any injury to any employee, shall be liable in damages to any employee who sustains injuries by reason thereof; provided, the amount of damages which any one person may recover . . . is hereby expressly limited to the sum of \$7,500."

Section 9 provides:

"No action for the recovery of compensation for injury under this act shall be maintained unless notice of the time, place and cause of injury is given to the employer within six months, and the action is commenced within one year from the occurrence of the accident causing the injury."

If the requirements of Section 9 are not complied with, then the failure to comply with the requirements of the act cannot be proved as a basis of recovery unless the same facts would be competent under the common law or some other statute; and, if the action is not brought thereunder, the limitation therein provided can have no application. In the Employers' Liability Act the limitation provided by Section 380, L. O. L., was expressly removed so that now, when the remedy is at common law or under the Employers' Liability Act, the amount of recovery is unlimited. The Employers' Liability Act specifically enumerates what are to be safeguarded, to wit:

" . . . In the construction . . . or operation of any machinery (the owner) . . . shall see that all . . . material (used) . . . shall be carefully selected; . . . all scaffolding . . . shall be constructed to bear four times the maximum weight to be sustained; . . . all scaffolding . . . 20 feet from the ground . . . shall be secured from swaying; . . . all dangerous machinery shall be securely covered; . . . all shafts . . . shall be inclosed; . . . all machinery . . . shall . . . be provided with a system of communication; . . . and generally, all owners . . . having charge of . . . any work involving [515] a risk or danger . . . shall use every . . . care . . . for the protection . . . of life . . ."

1. Thus we see that it not only relates to construction work, but includes mills and factories. It also eliminates the defenses of negligence of fellow-laborers, assumed risk, and contributory negligence as a complete defense, although the last may be shown in

reduction of damages. The Employers' Liability Act does not in terms repeal the factory inspection act, but so much of it as is inconsistent therewith. In the former the primary purpose of the act was to safeguard dangerous machinery, and the liability provided in Section 8 is on account of the neglect of the employer to safeguard any machinery or for using the same after having received notice to guard it. Where the injury is the proximate result of such omission to safeguard, there is liability; but in matters conflicting with the Employers' Liability Act the latter will control. The limitation under the former act can apply only to actions expressly provided for thereunder. See *Rogers v. Portland Lumber Co.* 54 Ore. 390, 102 Pac. 601, 103 Pac. 514. In this case the action was expressly brought under the Employers' Liability Act, and the defendant was not prejudiced by the denial of his motion to require plaintiff to elect under which statute he would proceed. Defendant admits in his brief that the action was not brought under the 1907 statute, nor was the complaint sufficient to maintain the action thereunder; and plaintiff's remedy was not exclusively under the common law, as insisted by defendant's counsel, nor could the common-law defenses be urged thereto, they being expressly excluded by the terms of the Employers' Liability Act, the title of which clearly indicates that it is intended to include mills and factories, reading:

[516] "An act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks, and other structures, or engaged in any work upon or about electric wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence or for injury or death to their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions of employees against employers, and prescribing a penalty for a violation of the law."

The text of the act conveys the same idea. The general clause in the last part of the first section shows a purpose to apply not only to construction work, but to the operation of permanent plants.

2. Defendant insists that the factory act relates only to mills and factories, and the Employers' Liability Act applies exclusively to construction work; that plaintiff's cause of action as shown by the complaint is for the injuries received in a mill or factory, and that no remedy exists under the employ-

ers' liability law therefor; and that the omission to make sufficient allegations to bring it under the factory inspection act necessarily makes his remedy under the common law. This construction might be tenable if he were correct in the assertion that the Employers' Liability Act applies only to construction work; but, as we have seen, this statute is broad enough to include factories and mills. The defenses pleaded by the answer are only admissible under the common law, and therefore are entitled to no consideration.

3. By section 4 of the Employers' Liability Act the limitation of recovery under Section 380, L. O. L., is [517] removed in a case resulting in death. The recovery under the factory act which is limited is for a violation or omission to comply with the requirements thereof in case the injury is the proximate cause of such omission or violation. In this case the injury is not predicated upon such violation or omission.

4. Defendant urges that error was committed in permitting the plaintiff to prove that the conveyor was covered after the accident. The evidence tended to show that the jury during the trial visited the premises where the injury occurred, and at that time the conveyor was covered, and not in the condition it was at the time of the accident. Also, the complaint alleges that the conveyor could and should have been covered and protected and made safe without any interference with the efficiency of the machine, and would have secured protection to the life and limb of plaintiff. This allegation of the complaint is generally and specifically denied in the answer, which made an issue the burden to prove which was upon plaintiff. Defendant in his brief concedes that it is admissible to prove repairs or alterations upon the machinery after the accident. "Where it is alleged by the plaintiff that the machinery could be safeguarded and denied by the defendant, then such evidence of repairs is admissible; (3) where the machinery or appliances have been inspected by the jury, for the purpose of explaining to the jury the condition of the machinery at the time of the accident; (4) where the defendant has alleged that he did provide the best appliances obtainable, then such evidence is admissible upon that issue." This case did involve these issues; and all of these exceptions make proof of repair admissible, and there is no merit in the exceptions.

[518] The proof of negligence in failing to cover the conveyor was sufficient to require that issue to be presented to the jury, and the motions for nonsuit and for a directed verdict were properly denied.

5. We having already determined that the action is properly brought under the Employers' Liability Act, contributory negligence is

not a defense, but may be taken into consideration by the jury in fixing the amount of damages.

As to exception 5, that the court erred in permitting plaintiff to give testimony that other kinds of cover for the conveyor than that provided by the defendant were practicable, such testimony was not prejudicial. The defendant having denied that any covers could be used without destroying the efficiency of the machines, and it not being contended that there were any covers in use at the time of the accident, the evidence was admissible.

6. Concerning exception 6 as to the action of plaintiff's counsel in securing from a witness a statement which disclosed that defendant carried indemnity insurance, when counsel for plaintiff asked the question and secured from the witness that statement, counsel for defendant objected, for the reason that it was incompetent, irrelevant and immaterial. The cross-examination of the witness upon this matter shows an intentional effort to gain information about the insurance:

"Recross-examination.

"Q. How did you happen to write this statement down there and sign it?

"A. I was asked for the statement.

"Q. By whom?

"A. By Mr. Claassen.

"Q. How did you happen to render him a statement?

"A. He asked me for the information.

[519] "Q. Would you have given any one a statement that came along the river in a rowboat?

"A. No, sir.

"Q. How did you happen to give him the statement?

"(Objected to as incompetent, irrelevant and immaterial.)

"The Court: He may answer.

"(Exception taken by counsel for defendant, which is duly allowed by the court.)

"A. He convinced us he was representing the insurance company.

"Q. Did he write it, or did you?

"A. Mr. Claassen wrote the statement."

This court has on several occasions criticized attorneys for purposely attempting to bring to the knowledge of the jury some information that defendant carried indemnity insurance against damages by reason of accident: *Tuohy v. Columbia Steel Co.* 61 Ore. 527, 122 Pac. 36; *Putnam v. Pacific Monthly Co.* 68 Ore. 36, 54, Ann. Cas. 1915C 256, 130 Pac. 986, 136 Pac. 835, 45 L.R.A. (N.S.) 338, L.R.A. 1915F 782. In the latter case Justice Burnett says:

"A defendant is not to be mulcted because he is prudent enough to provide in advance

by insurance against adverse contingencies in business."

Mr. Justice McBride, in *Tuohy v. Columbia Steel Co.* 61 Ore. 527, 122 Pac. 38, says:

"It has been frequently held that willful attempt by a plaintiff in a personal injury case to show that the defendant was protected by insurance constitutes reversible error. The ground of this holding is that a knowledge that the defendant has such protection might have a tendency to render jurors careless as to the amount of the verdict."

And litigants are not excusable in the face of these decisions in ignoring them. In *Shay v. Horr*, 78 Wash. 669, 139 Pac. 605, it is said:

[520] "It is evident that, notwithstanding the rulings of this court, counsel for respondent and his witnesses intended the jury should fully realize that appellant was protected by some form of insurance. That their efforts to do so constitute prejudice and reversible error cannot be denied under the previous rulings of this court."

Thus we find that plaintiff committed reversible error in persisting that the witness say that Claassen wanted the information for the insurance company.

Defendant also excepts to the refusal of the court to give the instructions requested by him. These requests are all applicable, if at all, under the defendant's theory that the case should be tried under the common law, and not under the Employers' Liability Act; and, this court having held that this case properly proceeded under the latter, the requested instructions were not pertinent, and the instructions given by the court were proper for the same reason.

For the error in producing before the jury evidence that the company was carrying insurance, the judgment of the lower court will be reversed and the cause remanded.

Reversed and remanded.

McNary, J., dissents.

Rehearing denied December 15, 1914.

#### NOTE.

#### What Statutes Are Impliedly Repealed by State Employers' Liability or Workmen's Compensation Act.

It is generally agreed that the state employers' liability acts are designed to extend the existing liability of employers for negligent injury to their employees. In accord with that purpose they are held not to repeal by implication existing statutes imposing liability, but in the absence of a direct conflict in terms are deemed, so far as they cover the same ground, to be in addition to the earlier statutes and to afford a cumulative right. *Colorado Milling, etc. Co. v. Mitchell*, 26

*Colo.* 284, 58 Pac. 28; *Sumey v. Craig Mountain Lumber Co.* 27 *Idaho* 721, 152 Pac. 181; *Chicago, etc. R. Co. v. Mitchell* (Ind.) 110 N. E. 78; *Ryalls v. Mechanics' Mills*, 150 *Mass.* 190, 22 N. E. 766, 5 L.R.A. 667; *Yost v. Union Pac. R. Co.* 245 *Mo.* 219, 149 S. W. 577 (construing Colorado statute); *Milburn Wagon Co. v. Gawronski*, 33 *Ohio Cir. Ct. Rep.* 1, *affirmed* 81 *Ohio St.* 565, 91 N. E. 1134. And see the reported case. In *Gmaehle v. Rosenberg*, 40 *Misc.* 267, 81 N. Y. S. 930, referring to a saving clause in an employers' liability act, it was said: "The defendants argue that 'existing right of action,' as there used, means an accrued cause of action. I fail to find any justification for such a construction. In my judgment, the effect of the act of 1902 was merely to extend the liability of the employer. It was not intended to take away rights of action then existing, whether the causes of action had accrued or not." And in *Rosin v. Lidgerwood Mfg. Co.* 89 *App. Div.* 245, 86 N. Y. S. 49, referring to the expressed purpose of an employers' liability act to "extend" the pre-existing liability, it was said: "The word 'extend' implies something to be extended (12 *Am. & Eng. Enc. of Law* (2d ed.) 572), and there cannot, therefore, be any inference that the legislature intended to abrogate any right of action existing under the statutes or the common law, unless such an intention is clearly to be drawn from the language of the act itself."

Thus an employers' liability act does not repeal an earlier act invalidating agreements whereby an employee, in consideration of a payment from a relief association, waives the right to damages. *Baltimore, etc. R. Co. v. Hagan*, 183 *Ind.* 522, 109 N. E. 194. So an employers' liability act, though allowing a recovery to the heirs or personal representatives of a deceased employee, does not repeal an earlier statute giving a right of action for death by wrongful act. *Chiara v. Stewart Min. Co.* 24 *Idaho* 473, 135 Pac. 245; *Bussey v. Gulf, etc. R. Co.* 79 *Miss.* 597, 31 *So.* 212; *Statts v. Twohy Bros. Co.* 61 *Ore.* 602, 123 Pac. 909; *McFarland v. Oregon Electric R. Co.* 70 *Ore.* 27, *Ann. Cas.* 1916B 527, 138 Pac. 458; *Dennis v. Atlantic Coast Line R. Co.* 70 *S. C.* 254, 49 S. E. 869, 106 *Am. St. Rep.* 746; *St. Germain v. Potlatch Lumber Co.* 76 *Wash.* 102, 135 Pac. 804. And see *Columbus, etc. R. Co. v. Bradford*, 86 *Ala.* 579, 6 *So.* 90. In *St. Germain v. Potlatch Lumber Co.* *supra*, it was said: "The latter statute does not expressly repeal the prior statute, and if there is a repeal at all, it is a repeal by implication. But repeals by implication are not favored, and the courts give such repeals effect only where there is an irreconcilable repugnancy between the earlier and the later act, or where it is clear

that the later act was intended by the legislature to supersede all prior laws relating to the subject in hand and to comprise in itself the sole and complete system of legislation on the particular subject. That there is no such repugnancy between the acts here in question is at once apparent. The first act relates to deaths caused by the wrongful act or neglect of another generally, and without regard to the relations of the parties or the circumstances and conditions giving rise to the death, and leaves the common-law rules, if they be so called, affecting the right of recovery in full force and effect. The second act relates entirely to injuries and deaths by wrongful or negligent acts occurring where the relation of master and servant exists between the parties, and makes changes in the rules of the common law affecting the right of recovery, taking away defenses that were available to the master under that procedure. The scope of the second act is, therefore, much narrower than the first one, and if it is to be held to repeal the first act in toto, there will exist many instances of death by wrongful or negligent acts for which the law of the state affords no remedy. Nor is there anything in the later act that indicates a partial repeal. True, it provides for the repeal of all acts in conflict with it, but this means simply that no prior act shall be held to render the particular act ineffective; it does not mean that all prior acts touching the same subject-matter are repealed, for these can in no manner be in conflict with it. Again, no resort to the later act is necessary to make effective the rights conferred by the first. The later act, therefore, seemingly affords a cumulative remedy for certain cases that are cognizable by the earlier act, and we think the legislature so intended it." In *Niemi v. Stanley Smith Lumber Co.* 77 Ore. 221, 147 Pac. 532, 149 Pac. 1033, it was held that a provision in an employers' liability act providing who might bring an action for death by wrongful act superseded a different provision on that subject in an earlier statute. The court said: "The two acts, being directed to one common object (that is, to provide a statutory action for the death of a person resulting from the wrongful act or omission of another), must be construed together, and, as far as possible, effect must be given to the provisions of each. A special provision for a certain class of cases will take that class out of the general terms used in either statute. Thus the Employers' Liability Act provides by whom an action for the wrongful acts or omissions enumerated therein shall be instituted, and, as to a death arising therefrom, it is exclusive of section 380, as long as any one of the beneficiaries named therein survive, since the terms of that section are general.

*Pittsburgh, etc. R. Co. v. Vining*, 27 Ind. 518, 92 Am. Dec. 269. In discussing this question in the case of *Statts v. Twohy Bros. Co.* 61 Ore. 606 (123 Pac. 909), Mr. Justice Moore says: "The act first referred to is limited in its application to certain enumerated causes, and it would appear that an action to recover damages for the death of an employee could be maintained only by a relative of the deceased." It is conceded that there can be but one recovery; and therefore to hold that the one who first appeals to the courts may thereby bar the other would be to open the gates to an indecent scramble for precedence in beginning an action, and would render it possible for a designing person to have himself appointed administrator of the decedent's estate even before the widow and orphaned children had learned of the calamity which had overtaken them."

An employers' liability act general in its scope and not requiring a notice of injury repeals a requirement of notice in an earlier statute relating to some employments only. *Carlock v. Denver, etc. R. Co.* 55 Colo. 146, 133 Pac. 1103; *Kett v. Colorado, etc. R. Co.* 58 Colo. 392, 146 Pac. 245. Compare *Lange v. Union Pac. R. Co.* 126 Fed. 338, 62 C. C. A. 48 (construing Colorado statute).

The workmen's compensation acts of the elective type are by their terms exclusive of all other remedies as to persons electing to take the benefit of their provisions. See the note to *Crooks v. Tazewell Coal Co.* Ann. Cas. 1915C 304. They do not, however, repeal any other law imposing a liability on employers. *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465 (employers' liability act); *King v. Viscoloid Co.* 219 Mass. 420, 106 N. E. 988 (death statute). In *Smith v. Western States Portland Cement Co.* 94 Kan. 501, 146 Pac. 1026, it was said: "It is maintained in behalf of the defendant that in this situation the plaintiff had no remedy outside of the workmen's compensation act—that that statute repealed the factory act. It has been determined that an injured employee has no other remedy against his employer than that given by the workmen's compensation act where both have elected to accept its provisions. (*Shade v. Ash Grove Lime, etc. Cement Co.* 92 Kan. 146, 139 Pac. 1193.) The factory act, however, is not repealed. It remains in full force, but it cannot be invoked by an employee to whom the benefits of the workmen's compensation act are available, and who has actively or passively signified his acceptance of its benefits."

The compulsory workmen's compensation act of Washington has been held to abolish absolutely all tort liability for personal injuries to a servant in the course of his em-

ployment and to repeal all statutes relating to such a liability. *Peet v. Mills*, 76 Wash. 437, Ann. Cas. 1915D 154, 136 Pac. 685, L.R.A.1916A 358; *Stertz v. Industrial Ins. Commission* (Wash.) 158 Pac. 256. And see *Northern Pac. R. Co. v. Meese*, 239 U. S. 614, 36 S. Ct. 223, reversing 211 Fed. 254, 127 C. C. A. 622, which reversed 208 Fed. 222. The view there obtaining was tersely stated in *Stertz v. Industrial Ins. Commission*, supra, as follows: "To sum up, our act positively ends the 'jurisdiction of the courts' on 'all phases' of master and servant liability." In other jurisdictions a different view has been taken. See the note to *Jacowicz v. Delaware*, etc. R. Co. Ann. Cas. 1916B 1222, as to recovery by an injured servant from a third person, notwithstanding an allowance of compensation. Thus the New York act has been held not to repeal a statute giving a right of action for death by wrongful act, *Shanahan v. Monarch Engineering Co.* 172 App. Div. 221, 159 N. Y. S. 257, and not to preclude an action for an injury outside the scope of the workmen's compensation act. *Shinnick v. Clover Farms Co.* 169 App. Div. 236, 154 N. Y. S. 423, affirming 90 Misc. 1, 152 N. Y. S. 649.

## TOWN OF CORTLAND

v.

## LARSON.

Illinois Supreme Court—June 22, 1916.

273 Ill. 602; 113 N. E. 51.

### Intoxicating Liquors — Prohibition of Possession for Personal Use — Validity.

Under charter power to "regulate, prohibit and license the selling of intoxicating liquors," a town cannot enact an ordinance prohibiting club members from receiving and keeping intoxicating liquors for their individual use in clubhouse lockers.

[See note at end of this case.]

#### Same.

The ordinance was not within the town's police power for the orderly reception, keeping, and use of intoxicating liquors by private individuals, and does not affect the public welfare or health.

[See note at end of this case.]

#### Same.

Under statutory power to declare what shall be nuisances and abate them, a town cannot, by ordinance, make the clubhouse locker system of receiving and using intoxicating liquors in an orderly way a nuisance.

[See note at end of this case.]

Appeal from County Court, De Kalb county: POND, Judge.

Prosecution for violation of municipal ordinance. Ennis Larson convicted and appeals. The facts are stated in the opinion. REVERSED.

*Alschuler, Putnam & James* for appellant.  
*J. E. Matteson and C. D. Rogers* for appellee.

[603] CRAIG, C. J.—The appellant was convicted in the county court of DeKalb county of a violation of sections 2 and 3 of a municipal ordinance of the town of Cortland and was fined \$25 for the violation of section 2 and \$30 for the violation of section 3. Propositions of law which were submitted by the defendant and refused by the trial court raised the question of the constitutionality and validity of the ordinance under which the defendant was convicted. He has appealed directly to this court on the ground that the validity of the ordinance is involved, the trial court having made the necessary certificate.

The sections of the ordinance involved are as follows:

"Sec. 2. Whoever shall within said corporate limits, directly or indirectly, keep or maintain by himself or by associating or combining with others, or shall in any manner aid, assist or abet in keeping or maintaining, any clubroom or other place in which any intoxicating liquor or spirituous, vinous, malt or fermented liquor, in any quantity whatsoever, is received or kept for the purpose of use, gift, barter, exchange or sale as a beverage, or for distribution or division among the members of any club or association [604] by any means whatever, and whoever shall use, barter, exchange, sell or give away, or assist or abet another in bartering, exchanging, selling or giving away, any intoxicating liquor or spirituous, vinous, malt or fermented liquor, or any mixture of any of the said liquors, or any drinks which contain any spirituous, vinous, malt or fermented liquor, in any quantity whatsoever, so received or kept, shall upon conviction thereof be fined not less than twenty-five dollars (\$25) nor more than fifty dollars (\$50) for each and every offense.

"Sec. 3. All places within the said corporate limits where orders are taken or agreements made for the sale or delivery of any intoxicating liquor or spirituous, vinous, malt or fermented liquor, or any mixture of said liquors, or any drinks which contain any spirituous, vinous, malt or fermented liquor in any quantity whatsoever, or where any said liquors are sold, given away, bartered, exchanged or in any manner disposed of, or are kept for sale, or are received or kept for the purpose of use or distribution or division among the members of any club or association

by any means whatsoever, shall be taken and held and are declared to be a nuisance and may be abated as such; and whoever shall keep any such place, either as principal, clerk or servant, shall on conviction thereof be fined not less than thirty dollars (\$30) nor more than fifty dollars (\$50), and it shall be part of the judgment, upon the conviction of the keeper, that the place so kept shall be shut and abated by the constable until the keeper shall give bond, with sufficient security to be approved by the court, in the penal sum of one thousand dollars (\$1,000) payable to the said town, conditioned that he will not violate or permit any violation of this ordinance at such place: *Provided*, that if the keeper refuses or neglects to abate such nuisance instantler after being notified so to do by the president or constable of said town, the president may order any such place summarily shut up and abated."

[605] The facts were stipulated as follows: "The claimed violation of said ordinance charged against defendant in this case is, that he did, within the corporate limits of said town, keep or maintain, by himself or by associating or combining with others, or assist or abet in keeping and maintaining, a certain clubroom in which intoxicating liquor was received and kept for the purpose of use as a beverage and did use intoxicating liquor so received and kept. The facts are, that the defendant is a resident of said town and a citizen of the State of Illinois and a citizen of the United States of America, and is a member and officer of a certain club having its rooms in a building situated upon the south three-fourths of lot 4 in block 11, in said town of Cortland, within the corporate limits thereof, which said building is neither the residence nor store building of defendant or any other member of said club but is used exclusively by said club; that as such member and officer, the defendant, by associating with the other members, keeps or maintains, or assists and abets in keeping or maintaining, the clubrooms; that in said clubrooms intoxicating liquor is received and kept by defendant in his individual locker, to which he alone has access, for his own individual, personal use as a beverage, and that other members of said club receive and keep their own individual liquor in individual lockers in said clubrooms for their individual personal use as a beverage. It is not contended that intoxicating liquor is sold, bartered, exchanged or given away at, in or by said club or by defendant, or any member thereof, or received or kept there for any of said last mentioned purposes. Defendant orders and purchases his own intoxicating liquor for himself, only, by United States mail, in places outside said town of Cortland where it is not unlawful to sell or purchase same, and said

liquor is forwarded and delivered to him by a common carrier and is received, kept and stored by defendant at said club for his own individual, personal use as a beverage and is there drank by [606] him only. The members of said club who keep liquor there, order, receive, keep and drink their own individual liquor in the same manner. Each orders, receives, keeps and drinks his own individual liquor, and that only. The defendant and other members of said club are men of good standing in the community and their behavior has been orderly and gentlemanly. There has been no breach or disturbance of the peace nor any fighting, brawling, carousing or drunkenness at or about said club. Only members of said club enter the clubroom. There is no 'treating' nor any distribution or division of liquor among the members."

The town of Cortland was incorporated under a special charter conferring upon it all the rights, powers and privileges granted to the town of Belvidere in the act under which the latter was incorporated, section 10 of that act being as follows:

"Sec. 10. The board of trustees shall also have power to make regulations to secure the general health of the inhabitants; to declare what shall be nuisance, and prevent and remove the same; . . . the exclusive power to regulate, prohibit or license the selling of spirituous, vinous and malt liquors of any kind within the corporate limits; . . . to make all such ordinances from time to time, and alter, amend and repeal the same, as shall be necessary to carry into effect and execution the powers specified in this act, so that the same be not inconsistent herewith nor with the laws or constitution of the United States or of this State; to impose fines, forfeitures and penalties for the breach of any ordinance of the incorporation, and to provide for the recovery and appropriation of any such fine or forfeiture and the enforcement of any such penalty; . . . to regulate the police of the town."

The appellant contends that the town of Cortland was without power to adopt the ordinance in question and that the ordinance is in violation of the constitution of the United States and of the State of Illinois. The power of [607] a municipal corporation to pass an ordinance must be found expressed in its charter or must be necessary to carry out the powers granted. By section 10 quoted above, the board of trustees of the appellee are given the exclusive power to regulate, prevent or license the sale of spirituous, vinous or malt liquors of any kind within the corporate limits, to declare what shall be a nuisance and prevent and remove the same, and to make all such ordinances as shall be necessary to carry into effect and execution the powers specified, so that the same be not



inconsistent with its charter or with the laws or constitution of the United States or of this State. Under the stipulation of facts on which appellant was convicted it is conceded that he did not sell, barter, exchange or give away any intoxicating liquors at said club. The only portion of the ordinance, therefore, of which the appellant was found guilty is embraced within the following portion: "Whoever shall within the corporate limits, directly or indirectly, keep or maintain by himself or by associating or combining with others, or shall in any manner aid, assist or abet in keeping or maintaining, any clubroom or other place in which any intoxicating liquor, . . . in any quantity whatsoever, is received or kept for the purpose of use . . . as a beverage, . . . and whoever shall use . . . any intoxicating liquor . . . so received or kept, shall upon conviction thereof be fined," etc.

Appellant, then, was convicted for assisting or aiding in keeping a clubroom, at which place he, like other members of the club, received his own liquor for his own individual use as a beverage and kept such liquor there for such purpose only, and used such liquor so kept for his own individual use as a beverage. Appellant was an officer of the club, but what office he held or what officers the organization had, or their several duties, if any, is not shown, nor is the admission in the stipulation of facts that he was an officer material, as it is the theory of counsel for appellee that his actions, as a mere member of the club, in keeping [608] and using intoxicating liquor there, were in violation of the provisions of the ordinance. And so they were. In brief, the appellant was convicted for assisting in keeping a place in which intoxicating liquor was received and kept for the purpose of use and for using such liquor.

Under its charter the town of Cortland had the exclusive power to license, regulate and prohibit the selling of spirituous, vinous and malt liquors of any kind within the corporate limits, and also had the power to regulate the police of the town. The question to be determined is, did it have any power or authority, by reason of its charter, to prevent the receiving, keeping or using of intoxicating liquors under any and all circumstances? In *People v. Oak Park*, 288 Ill. 256, this court said (p. 261) 109 N. E. 11: "If a doubt exists concerning the grant of power, the doubt is, by the authorities, to be resolved against the municipality (*Merrill v. Monticello*, 138 U. S. 673 [11 S. Ct. 441, 34 U. S. (L. ed.) 1069]; *Chicago v. Ross*, 257 Ill. 76; *Chicago v. M. & M. Hotel Co.* 248 Ill. 264), and the enumeration of the powers operates to exclude such as are not enumerated—*People v. Chicago*, 261 Ill. 16; *Cairo v. Bross*, 101 Ill. 475." The enumeration in the statute of

the powers which may be exercised by a municipal corporation excludes such powers as are not enumerated. (*People v. Oak Park*, supra.) Tested by the rule laid down in that case and supported by ample authority there is nothing in the charter of the appellee to authorize the enactment of those portions of section 2 of the ordinance above set forth which apply to the facts of this case according to the stipulation and under which appellant is convicted. It is very clear that the express words of the charter, "to regulate, prohibit or license the selling" of intoxicating liquor, do not include the power to make it an offense to receive, keep or use liquor at a club or other place for individual, personal use as a beverage, only, where there is no element of selling or even giving away or disposing of [609] the same, nor anything in the conduct or actions of those who received, kept and used the liquor that gave others any ground for complaint, except the mere fact of receiving, keeping or using it. Nor can it be fairly said that the power to make it an offense to maintain a club where liquor is received, kept or used as a beverage by the individual owner thereof for his personal use, only, is necessarily or fairly implied or incident to the power expressly granted to regulate, prohibit or license the selling of liquor. In *Decatur v. Schlick*, 269 Ill. 181, 109 N. E. 737, this court held an ordinance valid which was substantially in the same language as the Local Option act, except that it also contained the provision that intoxicating liquor should not be distributed or divided among the members of any club or association by any means whatever, when such distribution or division shall be an illegal sale or gift of such liquor. The ordinance in question contains no such qualification, and the decision of this court in the last mentioned case was based on the fact that the receiving and distribution of intoxicating liquor by means of the agency of the club, so called, was, in effect and in fact, a shift or device to evade the provisions of the ordinance against the selling or giving away of intoxicating liquor.

We have heretofore held that a club, or assembly of individuals or association as a club, cannot be used as a means to accomplish a violation of the provisions of the Dramshop law or the Local Option law or city or village ordinances of similar import. (*People v. Law*, etc. Club, 203 Ill. 127, 67 N. E. 855, 62 L.R.A. 884; *People v. Gardt*, 258 Ill. 468, 101 N. E. 687; *Decatur v. Schlick*, supra.) But the distinction in regard to those cases is that sales were there actually made, and the court held the facts in those cases showed actual sales of intoxicating liquor contrary to the law, notwithstanding the agency of the so-called club. The ordinance in question by its terms applies not only to a clubroom, but to

any other place in which any intoxicating liquor, in any quantity [610] whatsoever, is received or kept for the purpose of use, and also applies by its terms to whoever shall use any such liquor so received or kept. Under the section in question it is an offense for anyone within the corporate limits of the town of Cortland to keep any place in which any intoxicating liquor, in any quantity whatsoever, is received or kept for the purpose of using it as a beverage or to use any intoxicating liquor so received or kept. There is no law in this State which prohibits a person from receiving, keeping or using intoxicating liquor for private consumption, when such receiving, keeping or using is done in such a manner as does not interfere with the rights of others and there is no intoxication or disturbance, as was stipulated in this case, and city or village councils have no power or authority to enact ordinances prohibiting such keeping, receiving or using. *Sullivan v. Oneida*, 61 Ill. 242.

While the selling or giving away of intoxicating liquor may be regulated or altogether prohibited by municipalities and by appellee under its charter, intoxicating liquor is not contraband and is recognized as property. Under the strict terms of this ordinance, if it is constitutional and valid, a person could be penalized for keeping liquor for use or for using liquor in his private home. As far as an unlawful sale or giving away of liquor is concerned, it is the fact of selling or giving away that makes the act unlawful and a violation of the law, no matter how, where or when such unlawful selling or giving away takes place in any locality in which the Local Option law is in force or where a valid ordinance has been enacted forbidding the sale or gift of intoxicating liquor. It is just as unlawful to make such sale in a private home as it would be in a club or a store or on the street. A club is an assemblage of individuals for a common purpose and may be an entirely lawful organization, and there are many such. Clubrooms are the rooms or quarters used by a club, and the word has no other meaning. If it is still the law that a man may lawfully bring [611] liquor into or receive liquor in territory where its sale is prohibited by statute or ordinance, and may lawfully own liquor and consume or use such liquor as long as he does so in such a manner that the rights of others are not interfered with, what difference does it make whether he receives or keeps or drinks or uses such liquor at his house, or at his barn, or at his club? He would have the same right in a house that he leased as in a house that he owned. Accordingly, if he rented a room at a club and lived there he would have the right to keep liquor there and use it there; and if he rented a locker at the club instead of a room, would he not have the same right? In *Sullivan v.*

*Oneida*, supra, on page 248 of the opinion, it is said: "Spirituuous liquors, ale and beer are property,—as much so as money or lands. They are chattels—are articles of consumption and of commerce. The ordinance recognizes them as property and directs their sale on execution and permits druggists to keep them. Their abuse may be restrained and punishment inflicted upon those who sell them to the injury of others. They may, as well as other chattels, come under the designation of nuisance and to a certain extent lose their quality as property, but they cannot *per se* lose their quality as property." In *People v. Young*, 237 Ill. 196, 86 N. E. 589, in construing the effect of the Local Option law, it was held that the law, being penal in character, must be strictly construed; that its purpose was to prevent the sale, barter and exchange of intoxicating liquor in dry territory, and not to prevent one who has become the owner of intoxicating liquor in wet territory from taking it into dry territory. On page 203 of the opinion it is said: "The act does not in any of its provisions attempt to prohibit a sale and delivery of liquor in wet territory, nor is there any attempt to prevent one who has become the owner of intoxicating liquor in wet territory from bringing that liquor into dry territory. Such transactions as the two last mentioned have none of the unlawful elements of a sale, barter or exchange [612] of intoxicating liquor in dry territory. It is true that the transaction in this case enabled the purchaser to have the beer delivered to him in dry territory by a common carrier pursuant to a sale and shipment made by the brewer in wet territory and enabled him to own the beer and to have it in his immediate possession in dry territory, but these things the statute has not forbidden. We think there is no evidence of any attempt to evade any of the provisions of the act by the use of a shift or device of any kind."

As to the right of appellee to enact the ordinance in question under its police powers, conceding that the provision of its charter "to regulate the police of the town" gives it all the power counsel claim for it in this case, it could not, under the guise of the police power, assume to regulate and control the acts and conduct of a citizen by which the public or others are in no way affected in any of their rights and interests. Black, in his work on *Intoxicating Liquors* (sec. 38, p. 50) says: "But it is justly held that a provision in such a law that no person, without a State license, shall 'keep in his possession, for another, spirituuous liquors,' is unconstitutional and void. The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it or for some other improper purpose, can by no possibility injure or affect the health.

morals or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."

In *Haskell v. Howard*, 269 Ill. 550, 109 N. E. 992, L.R.A.1916B 893, in which a section of a village ordinance prohibiting signs or advertisements of intoxicating liquor was held invalid, it was said, on page 553 of the opinion: "The exercise of the police power is limited to enactments tending to promote the public health, safety, morals or general welfare. It is for the legislature to determine when an exigency exists for the [613] exercise of the police power, but what is the subject of such exercise is a judicial question. Under the guise of police regulation the personal rights or liberties of citizens cannot be arbitrarily invaded. (*Ruhstrat v. People*, 185 Ill. 133; *Bailey v. People*, 190 Ill. 28; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436.) In *People v. Chicago*, 261 Ill. 16, it was held that if a city was clothed with the whole police power of the State it would not have authority to deprive a citizen of valuable property rights under the guise of prohibiting or regulating something that had no tendency to injure the public health, safety, morals or general welfare. In *Haller Sign Works v. Physical Culture Training School*, supra, it was held the police power does not justify interference with private rights for purposes unconnected with the safety, health, morals or general welfare of the public." To the same effect is *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836, 51 L.R.A.(N.S.) 562, in which it was held that an ordinance prohibiting the smoking of tobacco in certain specified places, including public streets and parks, without reference to any particular circumstances or conditions, is invalid in so far as it applies to such streets and parks, as being an unreasonable restraint upon the personal liberty of the citizen. As stated in that case on page 511 of the opinion: "Many cases decided by this court sustaining various ordinances and statutes under the police power are cited and relied upon. None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offensive or harmful to others under certain conditions."

It has been generally held that the police power does not extend to the deprivation of a citizen of the right to have intoxicating liquor in his possession for his own use. (*Com. v. Campbell*, 133 Ky. 50, 19 Ann. Cas. 159, 117 S. W. 383, 24 L.R.A.(N.S.) 172; *Ex p. Brown*, 38 Tex. Crim. 295, 42 S. W. 554, 70 Am. St. Rep. 743; *Lincoln v. Smith*, 27 Vt. 328;

*Titsworth v. State*, 2 Okla. Crim. 268, [614] 101 Pac. 288; *Partridge v. State*, 88 Ark. 267, 114 S. W. 215, 129 Am. St. Rep. 100, 20 L.R.A.(N.S.) 321; *State v. White*, 71 Kan. 356, 6 Ann. Cas. 132, 80 Pac. 589; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L.R.A. 847; *Preston v. Drew*, 33 Me. 559, 54 Am. Dec. 639; *State v. Williams*, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61, 17 L.R.A.(N.S.) 299; *Eidge v. Bessemer*, 164 Ala. 599, 51 So. 246, 26 L.R.A.(N.S.) 394; *Henderson v. Hayward*, 109 Ga. 373, 77 Am. St. Rep. 384, 47 L.R.A. 366, 34 S. E. 590.) The only decision to the contrary to which we have been referred is that of *State v. Phillips* (Miss.) 67 So. 651, 56 L.R.A.(N.S.) 530, in which it was held that a State does not unconstitutionally deprive one of equal protection of the laws by forbidding the keeping of intoxicating liquor in any locker or other place in any social club or carrying it to such club, although a property right in such liquor is recognized by the law. The opinion in that case is based largely on the dissenting opinion in *Eidge v. Bessemer*, supra, and hence is contrary to the holding in that case, and also contrary, we think, to the great weight of authority. The court assumed that the ultimate purpose of the Mississippi law was to prohibit the use of liquor as a beverage, which is not the purpose of the Local Option law of this State nor within the powers granted to municipalities, which are limited in their power solely to regulating and suppressing the sale, and not the use, of liquor.

There can be no doubt that if it were possible by law to prevent any intoxicating liquor from being introduced into a town or kept there under any circumstances it would be most effective as a prohibition measure, as there would be no drinking if there were nothing to drink. The power of the appellee, however, extended only to licensing, regulating and prohibiting the sale of intoxicating liquor by adopting such ordinances as would be reasonably necessary to accomplish that purpose, and not to the depriving of residents or persons within the municipality of their property. The [615] ordinance in question made it unlawful to keep or use what the law recognized as property, and under circumstances in which the public and others were in no way affected or interested. It amounted to depriving appellant and others similarly situated of their property, and to the extent to which it affected appellant, under the stipulation of facts in this case, was *ultra vires* and invalid.

What has been said about the second section of the ordinance applies to the third section. The power delegated to cities to determine what are nuisances does not include the power to declare something a nuisance which is not a nuisance *per se* or recognized as a nuisance by common law or statute. (*Chicago*

v. Weber, 246 Ill. 304, 20 Ann. Cas. 359, 92 N. E. 859, 34 L.R.A. (N.S.) 306; Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831.) Whether any of the places mentioned in the third section would be nuisances in fact, would, of course, depend on the manner in which they were conducted. If it were a case of a member of a family at his own or any private home, or the member of a private club where the public are not allowed, using liquors, that would not make the place where such liquors are used a nuisance. It is not within the power of the city or of the State, nor is it the policy of the latter, to regulate the private life or conduct of a citizen in the use of his property in matters in which he, alone, is affected and others are not necessarily affected. (Haskell v. Howard, *supra*, and cases cited.) As said in Carthage v. Munsell, *supra*, on page 478 of the opinion: "Nor do we think, under the agreed state of fact, that the delivery of such liquors transported from another State to purchasers in the city of Carthage, in this State, can be held to be a nuisance. In the case of Laugel v. Bushnell, 197 Ill. 20, we had before us the question of nuisances as applied to the sale of intoxicating liquors, and on page 26 we said: 'Nuisances may thus be classified: First, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute; second, those which in their nature [616] are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed in only to declare such of them to be nuisances as are in fact so.' As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other States, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they may endanger the health, life or property of other citizens. There is nothing in intoxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is not like explosives

or dangerous drugs, that may carry with them a menace to the persons and property of others, and there is nothing in the stipulation to disclose that the business as conducted was other than the ordinary course in relation to the carrying and delivering of other articles of trade and commerce that might be, and ordinarily are, carried by such companies. In other words, there is nothing to show that in the method of delivery or in the manner of conducting the business there was anything that could be said to be offensive to the public morals or good order, or could in any way tend to disturb anybody in his tranquility of mind, health or body, [617] safety or right of property. In the absence of such showing it cannot be successfully contended that such business or transaction may be declared to be a nuisance."

Section 3 in effect declares any place a nuisance where two persons keep liquor to be divided between them. If any place is maintained within said town where persons assemble for the purpose of drinking liquor, and in so doing conduct themselves in a disorderly manner or in such a way as to interfere with the peace, comfort and rights of others,—or, in other words, if such place is, in fact, allowed to become a nuisance,—it can be abated as such, but under the stipulation in this case there was nothing of that kind.

The sections of the ordinance in question, in the particulars that have been shown, were invalid and void, and for that reason the judgment of the lower court will be reversed.

Judgment reversed.

#### NOTE.

#### Right to Prohibit Possession of Intoxicating Liquor for Personal Use.

Generally, 780.

Possession in Particular Quantities, 781.

Possession at Particular Places, 782.

Possession as Evidence of Crime, 783.

#### Generally.

The majority of the recent decisions which have ruled on the right to prohibit the possession of intoxicating liquor for personal use have been in accord with the decision in *Com. v. Campbell*, 133 Ky. 50, 19 Ann. Cas. 159, that the mere possession of intoxicating liquor kept for one's own use is not inherently injurious to the health, morals, or safety of the public; and, therefore, that legislation prohibiting such keeping in possession is not a legitimate exercise of the police power, but, on the contrary, is void as an unjustified abridgment of the privileges and immunities of the citizen. *Luera's Application*, 28 Cal.

App. 185, 152 Pac. 738; Adams Express Co. v. Com. 154 Ky. 462, 157 S. W. 908, 48 L.R.A. (N.S.) 342; Shreveport v. Hill, 134 La. 352, Ann. Cas. 1916A 283, 64 So. 137; Flowers v. State, 8 Okla. Crim. 502, 129 Pac. 81. See also State v. Rookard, 87 S. C. 442, 69 S. E. 1076. And see the reported case. The question involved in Luera's Application, supra, was the validity of a city ordinance making the mere possession of vinous, malt, and alcoholic liquors a misdemeanor. The court said: "The books abound with authorities interpreting the constitutionality and validity of statutes and ordinances having for their purpose the suppression of the liquor traffic, but our attention is directed to no authority wherein it has ever been held that the mere possession of malt, alcoholic, or vinous liquors constitutes a crime. On the other hand, there is abundant authority holding that such attempted legislation is void, as being in violation not only of constitutional rights, but of the inherent right of the individual. . . . The right being guaranteed under the constitution of the United States to have wine or beer shipped to him from a foreign state upon the theory that it is interstate commerce, the power to regulate which is vested in Congress alone, it must follow, in the absence of any legislation by Congress restricting such shipment, that such right implies the right to do all things which are necessary to the full exercise and enjoyment thereof. This would include the right to receive the possession of such goods, and, in the absence of any unlawful intent to dispose thereof, such possession, notwithstanding the provision of the ordinance, must be deemed the exercise of a legal right." In Shreveport v. Hill, 134 La. 352, Ann. Cas. 1916A 283, 64 So. 137, the court held to be unconstitutional and void a city ordinance providing as follows: "It shall be unlawful for any person who is keeper, owner, lessee, manager, inmate, employee, hiring or watcher of a house of prostitution or assignation (or any house where a prostitute lives) or who is a habitual visitor thereto, or who loafs around such place or places, to keep or have intoxicating liquors in such house, in any quantity whatever, or for any purpose whatever, except on a physician's prescription for medicinal purposes." The court said: "The ordinance is beyond the terms of any state statute in that it interferes with personal liberties. Houses of prostitution may be regulated, and they may be closed by the council; but the property of the keepers of these houses may not be confiscated, and their personal liberties be interfered with, so long as they and their property are not inimical to the public safety."

A few of the recent cases have, however, supported the opposite view, that the prohibition of the possession of intoxicating liquor,

though the possession is solely for personal use, is within the police power of the state, and is constitutional and valid. In re Crane, 27 Idaho 671; 151 Pac. 1006. See also Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050. See also dictum in concurring opinion of Clark, C. J., in Southern Express Co. v. High Point, 167 N. C. 103, 83 S. E. 254. In the case of In re Crane, supra, a section of the state prohibition act was in question which provided as follows: "It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act." The only means provided by the act for procuring intoxicating liquors of any kind for any purpose related to wine for sacramental purposes, and pure alcohol for scientific, mechanical, or medicinal purposes, so that the possession of intoxicating liquors, other than wine and pure alcohol for the specified purposes, was in effect absolutely prohibited. The court held this statute to be constitutional and valid, and in the opinion said, after quoting several opinions holding void similar statutes in other jurisdictions: "Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another. The fact is, that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate. . . . We have reached the conclusion that this act is not in contravention of sec. 1 of the 14th amendment to the Constitution of the United States, nor of sec. 13, art. 1, of the constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a reasonable exercise of the police power of the state."

#### *Possession in Particular Quantities.*

Several recent cases have held that statutory provisions regulating the quantity of intoxicating liquor which can be possessed or introduced into the state at one time, even for purely personal use, or restricting the

quantity which may be so possessed or introduced without complying with certain requisites as to packing and marking, are reasonable and valid regulations under the police power of the state. *Southern Express Co. v. Whittle* (Ala.) 69 So. 652, *distinguishing* *Eidge v. Bessemer*, 164 Ala. 599, 51 So. 246, 26 L.R.A.(N.S.) 394, and *disapproving* *State v. Willims*, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61, 17 L.R.A.(N.S.) 299; *O'Rear v. State* (Ala.) 72 So. 505; *State v. Sixo* (W. Va.) 87 S. E. 267. In *Southern Express Co. v. Whittle*, *supra*, the court said: "If the right at common law to manufacture an intoxicating liquor for one's own personal use, out of one's own materials by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kansas*, 123 U. S. 659, 8 S. Ct. 273, 31 U. S. (L. ed.) 205 it cannot be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by statute. . . . The power confirmed in *Mugler v. Kansas* must necessarily comprehend the lesser manifestation of a like power by regulating the quantity to be received or possessed at one time in 'dry territory' in the state. Furthermore, it would appear to be but the assertion of a self-evident truth to say that, since one may be validly forbidden to sell his intoxicating liquor to another, that other may be validly forbidden to buy the article from him; and, if one may be validly forbidden to sell, and necessarily validly forbidden to deliver, the article to another, that other may be validly forbidden to accept delivery. As to the seller, the prohibitions stated would operate upon him and upon his property, but not in the sense or with the effect of infringing any constitutional right or immunity; whereas, in the case of the buyer, the prohibitions would operate in anticipation, qualifying his right, in the interest of the public welfare as determined by legislative authority, to acquire a property interest in the article above a defined quantity at one time." In *State v. Sixo*, *supra*, there was involved a statute which made it a misdemeanor "for any person to bring or carry into the state, or from one place to another within the state, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the top or side of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kinds of liquors contained therein." The court, holding this provision to be valid, said: "This statute does not prohibit a person from having in his possession liquors for personal use, when properly marked or labeled. The

prohibition of the mere possession of intoxicating liquors, and a reasonable regulation, requiring them to be marked or labeled when brought into the state, or carried from one place to another within the state, are quite different things. The case of *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L.R.A. 847, is authority for the proposition that a statute prohibiting the keeping of liquors by one person for another, without a state license therefor, is unconstitutional and void, under the constitution then in force; but it does not follow that the legislature, in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be brought into the state, or carried from one place to another within the state."

But in *Ex p. Wilson*, 6 Okla. Crim. 451, 119 Pac. 596, the court held to be unconstitutional an act of the legislature making it unlawful "for any person to have or keep in excess of one quart of spirituous, vinous, fermented or malt liquors . . . upon, in or about his place of business or any place of amusement or recreation, or any public resort, or any club room, whether such liquors be intended for personal use of the person so having and keeping the same or not." The court said, after extensive quotations from other jurisdictions: "Our research has not disclosed a single case in conflict with the doctrine of the authorities quoted and cited, and none has been called to our attention, although the question has been extensively briefed and presented by the attorney general's office. The only conclusion that we can legitimately arrive at is that the act in question is not within a reasonable exercise of the police powers of the state—is unconstitutional and void. We may observe, however, that although the law cannot prevent one from having intoxicating liquors in his possession for his own use, yet this court has always held that the possession of an unusual quantity of intoxicating liquors is a circumstance which, together with other competent proof, is admissible against the defendant in the trial of cases involving violations of the prohibitory statute. But such possession alone is insufficient to sustain a conviction."

#### *Possession at Particular Places.*

It has been held recently that it is incompetent for the legislature to pass a statute restricting the possession of intoxicating liquors to the private residence of the owner. *Com. v. Smith*, 163 Ky. 227, 173 S. W. 340. L.R.A.1915D 172; *Ex p. Wilson*, 6 Okla. Crim. 457, 119 Pac. 596. In the case first cited, it was held that a statute making it illegal for any person to keep, store, or possess any

intoxicating liquors in any room, building or structure other than the private residence of such person, and which was not used as a place of public resort, was unconstitutional and void as being an unwarranted invasion of the rights of private property. The court said: "The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the constitution."

But it was held in *State v. Phillips*, 109 Miss. 22, 67 So. 651, that a statute making unlawful the possession of intoxicating liquors by or in any social or fraternal club was valid. The court said: "There was a time, not long ago, when many intelligent and virtuous citizens of this state resented any interference by the legislature whereby it undertook to prohibit the sale of intoxicating liquors. . . . We have traveled far since, until now it may be safely said that the 'preponderant opinion,' as well as 'the prevailing morality' is willing and anxious to prohibit even the possession of alcoholic liquors as a crime against peace, morality, and good government. We do not think we yield to a clamorous and unreasoning mob, when we indorse a law as within the police power of the state, when the Supreme Court of the United States says this power exists whenever the 'preponderant opinion and prevailing morality' believes this law necessary to the public welfare." The contrary was held, however, in *Ex p. Wilson*, supra; and in *Wright v. Macon*, 5 Ga. App. 750, 64 S. E. 807, it was held that a municipal ordinance making unlawful the possession of intoxicating liquor by a fraternal or social club, for the personal use of the members, was ultra vires and invalid, because in conflict with an act of the state legislature licensing such possession by clubs. See also the reported case, wherein a prohibition of the "locker system" in social clubs is held to be void.

#### *Possession as Evidence of Crime.*

In some jurisdictions statutes have been enacted which provide that the fact of posses-

sion of intoxicating liquors, under certain circumstances, may be received as evidence of the possessor's guilt of particular offenses; and those enactments have been held to be valid in a number of recent cases. *Alford v. State*, 170 Ala. 178, Ann. Cas. 1912C 1093, 54 So. 213; *Ex p. Woodward*, 181 Ala. 97, 61 So. 295; *Southern Express Co. v. Whittle* (Ala.) 69 So. 652; *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888; *State v. Russell*, 164 N. C. 482, 80 S. E. 66; *State v. Randall*, 170 N. C. 757, 87 S. E. 227; *Caffee v. State*, 11 Okla. Crim. 485, 148 Pac. 680; *Sellers v. State*, 11 Okla. Crim. 588, 149 Pac. 1071. See also *Hauser v. State*, 6 Ala. App. 31, 60 So. 549; *Ogden v. State* (Ala.) 72 So. 587; *State v. Seaboard Air Line Ry.* 169 N. C. 295, 84 S. E. 283. By an Alabama statute, known as the Fuller Bill (Acts Sp. Sess. 1909, p. 63), the possession of prohibited liquors at any place other than the home creates a presumption that they are kept for an unlawful purpose. In *Ex Parte Woodward*, supra, the court, holding the act to be valid, said: "In aid of the effectuation of the major legislative intent to prohibit the unlawful traffic in liquors, and thereby render more difficult the forbidden commerce, it was obviously reasonable to statutorily impute to the keeping of such liquors at any other place than a 'building not used exclusively for a dwelling' the presumptive, nonconclusive, result that such liquors were 'kept for sale or with the intent to sell the same,' in violation of law. . . . The sole, whole effect of the rule of evidence, in such cases, is to deny the accused the right to enter a bare denial of his intent in so keeping the forbidden liquors. The presumption is evidential only. It is not conclusive. The jury is not bound to accept it as showing guilt. The jury may disregard it and conclude to innocence. The quantity of the liquors so kept by the accused may be so inconsequential as to entirely negative any notion that it was kept with unlawful intent, or it may be the liquors so kept were for some legal, personal use manifestly inconsistent with an unlawful intent; in any of which events the accused may show, by himself or otherwise, circumstances or facts tending to refute the presence of an unlawful intent in the premises. Having such unrestricted, reasonable opportunity and means, under the laws of this state, of making defense to such a charge by showing relevant facts and circumstances in negation of the intent so imputed, no constitutional right of the accused is violated in the denial, to all of the class in which he is, to assert that in so keeping the forbidden liquors he entertained no unlawful intent in the premises." In *State v. Russell*, supra, which was a prosecution under a statute making the possession of more than one gallon of spirituous liquor prima facie evidence that it was kept for sale in violation of

law, the court said with respect to the validity of that provision: "The prisoner's counsel then fall back upon the position, which they defend with an able and learned argument, that the acts of 1907, chs. 819 and 992, making the bare possession of two and one-half gallons of liquor prima facie evidence that it is kept for sale, is invalid, as in violation of the constitutional rights of the citizen, for two reasons: (a) It is an assumption by the legislature of judicial power, and, therefore, an invasion by it of the province assigned to another and co-ordinate branch or department of the government. (b) It deprives the prisoner of the common-law presumption of innocence and of the full benefit of the doctrine of reasonable doubt; and, besides, it casts upon him the burden of showing his innocence. Without admitting that the act has the effect, in law, thus imputed to it, we must decline to enter upon a discussion of the questions thus pressed upon our attention, and for the very good reason that we have squarely decided against a similar contention in *S. v. Barrett*, 138 N. C. 630, and again in *S. v. Wilkerson*, ante, 431. In both cases, after an exhaustive consideration of the matter, we have deliberately decided that a like provision of the law (in the acts relating to Union county, and in the law of general application in the state, passed at the last regular session of the general assembly, Laws of 1913, ch. 44 the 'Search and Seizure' law) are constitutional and valid, both as to their criminal feature and the rule of evidence established by them."

But an attempt by the legislature to make the mere possession of intoxicating liquors conclusive evidence of a particular offense has been held to be unconstitutional, as depriving the accused of due process of law. *State v. Sixo* (W. Va.) 87 S. E. 267, wherein the court said: "There is no such relation between the act of having the liquors in possession, under these circumstances, and the act of unlawfully keeping, storing, and selling the same as would make such possession conclusive evidence of keeping, storing, or selling. This would be to make one act proof of the act for which the defendant was being tried, without permitting him to prove that he did not commit the unlawful act charged. Under such circumstances, a person might be convicted without due process of law. It has been truly said, that: 'Closing the mouth of a person when he comes into court has the same effect as depriving him of his day in court to vindicate his rights.' We are clearly of opinion that so much of said section 31 as relates to liquors in the possession of any person violating this section, and providing that the liquors in possession of such person 'shall be conclusive evidence of the unlawful keeping, storing and selling of the same by the person having such liquors in his possession,' is unconstitutional and void."

# ST. LOUIS LODGE NO. 9 BENEVOLENT AND PROTECTIVE ORDER OF ELKS

v.

KOELN.

Missouri Supreme Court—December 2, 1914.

262 Mo. 444; 171 S. W. 329.

## Taxation — Exemptions — Strict Construction of Exempting Statute.

Exemptions from taxation should be strictly construed, since the purpose of the state to abandon its right to tax should not be presumed, and since equality is equity in matters of taxation.

## Property Used for Charity — Elks Lodge.

A lodge building used as a club for members and their guests, in which free entertainments of various kinds were given and from which no profits were realized, the surplus funds being devoted to charity, is not a building used exclusively for purposes purely charitable within Const. art. 10, § 6, exempting such buildings from taxation, an exclusive use implying that all other uses are excluded, a "purely charitable use" being one in which the charity is unmingled with other purposes.

[See note at end of this case.]

Appeal from St. Louis Circuit Court: HITCHCOCK, Judge.

Action to cancel tax bill. St. Louis Lodge No. 9 Benevolent and Protective Order of Elks, plaintiff, and Edmund Koeln, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion AFFIRMED.

*Brownrigg & Mason* for appellant.*Edward W. Foristel* and *Frank H. Haskins* for respondent.

[444] BROWN, C.—This is a suit to cancel tax bill issued against a lot in the city of St. Louis for city and school taxes for 1912. The lot is owned by the plaintiff and occupied exclusively by a building containing its lodge room, a hall used by the members and their wives, daughters and friends for entertainments such as dancing, card or other social parties, a rathskeller, where meals and other refreshments, including liquors, are served to the members and such guests as by the rules of the lodge they are permitted to entertain there, and an auditorium in which vaudeville and similar entertainments, including on one occasion a boxing exhibition, are given for the entertainment of the members and their guests. There are also billiard and card rooms for similar use. No admission fee to the entertainments is charged.



[445] The general constitution of the order to which the lodge belongs states that it is established "to inculcate the principles of charity, justice, brotherly love and fidelity; to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself as a fraternal organization." The by-laws of the plaintiff lodge provide for the relief of destitute and unemployed Elks to the extent of ten dollars per week out of the funds of the lodge. A liberal construction has been given to this rule and by reason of the fortunate rarity of destitute Elks it has been tacitly extended to cover general charities without limit as to the amount, and in winter, and especially at Christmas time, large sums have been raised from the voluntary contributions of members to be dispensed for such purposes, and for Christmas gifts to children who, it is presumed, would not otherwise be able to partake of the pleasure of that blessed season. Their entire lodge fund, arising from membership dues and including the profits upon refreshments, except the sinking fund provided for the payment of the amount unpaid upon the property in question, has been devoted to these charities.

The lodge is incorporated under the State law providing for the incorporation of benevolent, religious, scientific, educational and miscellaneous associations.

The only question presented for our consideration is whether or not the property in question is exempt from these taxes because it is used exclusively for purposes purely charitable within the meaning of that expression as used in section 6 of article 10 of our State Constitution.

In construing this same section this court recently said: "It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the State down to the people, or from the standpoint of the people up to the State there must be unbending [446] and inviolate rules which as sure words of the law are always to be reckoned with; and those rules (from the standpoint of the State) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms (*Pacific R. Co. v. Cass County*, 53 Mo. L. c. 27); and from the standpoint of the people they are that equality is equity in taxation." [*State v. Johnston*, 214 Mo. 656, 662, 113 S. W. 1083.] The same rule is distinctly stated in the cases cited in that opinion, as well as in *State v. Casey*, 210 Mo. 235, 248, 109 S. W. 1. It is a just and reasonable one, and whatever may be the doctrine of the adjudications in other jurisdictions, must be taken as the well-settled law of this State.

Ann. Cas. 1916E.—50.

There can be no question as to the charitable character of the defendant lodge, nor of its disposition in that respect. While the property is used as the meeting place of the lodge where all its regular business is transacted, it also affords to the members and their families, free of cost, the most liberal facilities for social enjoyment and the entertainment of their guests, and to the unfortunate bachelor member and transient brother, for compensation, something like the culinary and table advantages of home. The surplus of its lodge funds, whatever that may be, together with large sums voluntarily contributed by its members, is dispensed, through the activities of the lodge organization, in the relief of the needy. Were the virtues of human sympathy and helpfulness grounds for the exemption of one's property from the common burden of taxation, the plaintiff would stand upon firm ground while urging its claim for relief. There are, however, others whom we have enjoyed the pleasant privilege of knowing, who might stand upon the same ground and urge a similar claim. For them the home has not only been the instrument and abiding place of their own personal comfort, but they have opened its doors to helpless and [447] deserted or orphaned children whom they have nurtured and educated to be good and useful citizens of the State, and have spent their income, and in some cases more, in dispensing aid to the destitute and suffering. Perhaps one of the brightest virtues of these has been the instinctive patriotism evident in their willingness to share in the burden assumed by the government in protecting them in the life they have chosen and in educating their children.

It is evident that the constitutional exemption before us has no reference to the character and activities of the owner except in so far as those activities relate to the use of the property. For instance, the same sentence of the Constitution we are considering exempts from taxation property used exclusively for religious worship; yet it is evident one might have family worship in his own residence from morning until night, except at such times as he should step out for a few moments to evangelize his neighbors, without changing in the least the character of the property as his residence, or exempting it from taxation on the ground that it was used exclusively for religious worship. The worship would be an incident to the residence in the property of a pious, God fearing man, given to the observance of such duties. If on the other hand the building were a church, devoted to public worship, and the owner should reside in it in the capacity of pastor in charge and caretaker of the premises, the condition would be reversed; for the occupation would be an incident to and a part of the religious use. This distinction is clearly

illustrated and interestingly discussed in *State v. Johnston*, *supra*, and cases cited therein at pages 663 et seq.

This house is used, as the plaintiff's secretary tells us in his testimony, for lodge and club purposes, and seems to be well and liberally calculated for that use. The constitutional exemption requires that the property be "exclusively" used for purposes "purely" [448] charitable. This "exclusive" use implies that all other uses be excluded. This exclusion naturally applies to vaudeville, boxing, dancing, billiards and cards for the amusement of the owners. It might, under some circumstances, be said that all these things may be used to raise money for charitable purposes; but here the shoe is on the other foot. We are told in the testimony that these things are all *free*. No fee is charged for entrance to the shows, or to the dances, or for billiards or cards. These must be paid for out of the funds of the lodge, and consequently constitute uses not incidental but paramount to the charities. When the lodge has used the hall for a dance, and has paid the fiddler, then charity may come for the crumbs. The exempting use must also be "purely" charitable—charity which, according to Webster, is *unmixed* with any other element. Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits; waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasure of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the dancers have tired and gone home; until the billiard rooms have been deserted to the markers; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket. She gets not the use of the premises, but what remains of income to the owners after they have used it in carrying out the injunction of their organic law, by promoting their own welfare, enhancing their own happiness, and cultivating their own good fellowship among themselves. Like the Supreme Court of Wisconsin in *Green Bay Lodge No. 259 v. Green Bay*, 122 Wis. 452, 100 N. W. 837, 106 Am. St. Rep. 984, we do not find the maintaining of a club house to be a purely charitable use. Where this true, as that court remarked in its opinion, "then any number of men may organize themselves into a corporate body to provide these privileges and [449] benefits for themselves and their guests and claim the exemption of the statute."

After what we have said it is unnecessary to notice further the Utah case of *Salt Lake Lodge No. 85 v. Groesbeck*, 40 Utah 1, Ann. Cas. 1914C 940, 120 Pac. 192, in which it was held that a law exempting property of this

character from taxation should be liberally construed. We are satisfied with our own rule in that respect.

The judgment of the circuit court for the city of St. Louis is affirmed.

Blair, C., concurs in result.

PER CURIAM.—The foregoing opinion by Brown, C., is adopted as the opinion of the court. All the judges concur, Bond, J., in result.

#### NOTE.

A club room or lodge room of the Order of Elks is held in the reported case not to be within a provision exempting from taxation property "used exclusively for purposes purely charitable." The few cases which have dealt with the status of an Elks lodge as a charitable institution are reviewed in the note to *Salt Lake Lodge No. 85 v. Groesbeck*, Ann. Cas. 1914C 940; while the cases dealing with the analogous question whether a Masonic Lodge is a charitable institution are collated in the note to *Morrow v. Smith*, Ann. Cas. 1912A 1183.

#### KANAWHA-GAULEY COAL AND COKE COMPANY

v.

SHARP.

West Virginia Supreme Court of Appeals—  
January 13, 1914.

73 W. Va. 427; 80 S. E. 781.

#### Landlord and Tenant — Condition against Assignment — Waiver of Breach.

If a lessor, with knowledge of a breach by the lessee of the restriction against assignment of the lease, permits the assignee to remain in possession of the premises and accepts subsequently accruing rents from him, the breach is waived.

[See Ann. Cas. 1913A 1202.]

#### Effect of Assignment — Liability of Lessee for Rent.

Although a lessee assigns the lease with the lessor's assent, he nevertheless remains liable on his express covenant to pay rent, notwithstanding rent is accepted from the assignee, unless the lessor expressly agrees to release him and substitute the new tenant in his stead.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Kanawha county.

Action to recover royalty. Kanawha-Gauley Coal and Coke Company, plaintiff, and C. C. Sharp, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

*Brown, Jackson & Knight, Lina & Byrne* and *Angus McDonald* for plaintiff in error.

*L. D. Vickers* for defendant in error.

[428] LYNCH, J.—The Kanawha-Gauley Coal & Coke Company, in January, 1901, leased to C. C. Sharp for coal mining purposes one thousand acres of land in Fayette county, on a stated royalty payable quarterly. The minimum royalty for the first year was fixed at \$2000, and for the second year \$5000; all of which was paid except \$625. To recover this balance, plaintiff brought assumpsit. From a judgment for defendant on the verdict of a jury, plaintiff obtained a writ of error.

But one question is presented for consideration, namely: Shall Sharp, the lessee, be required to respond in damages to the plaintiff's claim for balance due on unpaid royalties? The defendant, while admitting the validity of the debt and that it is due and correct in amount, denies liability on the ground that the lease, though taken in his name, was in fact obtained for a mining corporation not organized but then in contemplation by him, and of which plaintiff was fully advised pending negotiations for the lease, and to which arrangement and purpose it gave assent by a stipulation of the lease; that such corporation was thereafter promptly chartered and organized, and at once began to open, equip and operate the leased premises, and mined and shipped coal therefrom until January 1, 1903, when, with plaintiff's consent, the defendant Sharp and the new corporation assigned and conveyed to the Columbus Iron & Steel Company the lease and mining equipment.

[429] That defendant did cause the organization of the Raven Coal & Coke Company, and that this corporation did proceed to operate the lands under the lease is not only not denied but admitted by plaintiff, at least inferentially if not specifically; for the royalty account kept by plaintiff was charged against the Raven company, and not at any time against Sharp. Plaintiff cannot, therefore, with any degree of propriety, deny either the fact of the corporate organization of the Raven company, or of its active conduct and management of the mining operations.

Nevertheless, it insists that Sharp is liable, and must respond to its claim, notwithstanding the defense urged by him to the contrary. Its contention is based, in part,

on the clause of the lease whereby it was "mutually agreed that the lessee shall not sublet the rights acquired under this lease to third parties without the written authority of the lessor, but the lessee is not hereby prevented from forming a company to work the property under this lease." Plaintiff did not authorize an assignment of the lease by defendant to the Raven Coal & Coke Company. Whether the clause quoted does or does not, apart from the testimony, warrant the construction for which plaintiff contends, it is not necessary to determine; because its principal witness Johnson says the Raven company "was formed under this lease, which specified that he should form or could form it if he chose." The clause, construed in the light of this statement by Johnson, an active director of plaintiff, and of plaintiff's recognition of the Raven company as the active operator under the lease by its charge against that company and receiving from it payments of royalties, clearly indicates acquiescence by plaintiff in Sharp's effort to assign the lease to the Raven company.

So the conclusion is unavoidable that plaintiff knew, or had the means or source of information from which if pursued it would have ascertained, that the Raven Coal & Coke Company had or claimed some right or claim of right from Sharp by assignment or otherwise, under which it had begun and thereafter continued mining operations under the lease, thus in any event indicating a breach by Sharp of the agreement not to assign, if indeed there was a breach under a proper construction of the clause quoted. The authorities [430] hold that "if the lessor, with notice of a breach of the restriction against assigning, permits the assignee to remain in possession and accepts subsequently accruing rents from him, the breach is waived." 24 Cyc. 971; *Randol v. Tatam*, 98 Cal. 390, 33 Pac. 433; *Porter v. Merrill*, 124 Mass. 534; *Carpenter v. Pocasset Mfg. Co.* 180 Mass. 130, 61 N. E. 816; *Murray v. Harway*, 56 N. Y. 337; *Garcewich v. Woods*, 36 Misc. 201, 73 N. Y. S. 154; *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25; *Field v. Copping*, 65 Wash. 359, 118 Pac. 329, 36 L.R.A. (N.S.) 488; *Patterson v. Carrel*, 171 Mich. 296; 137 N. W. 158. Even the fact that the lessor had refused to consent to an assignment does not conclusively disprove a consent by subsequent conduct, such as accepting rent of the new tenant. *Colton v. Gorham*, 72 Ia. 324, 33 N. W. 76.

But plaintiff also insists, with more merit in our opinion, that Sharp is still liable to it, even though he assigned the lease to the Raven Coal & Coke Company, whether with or without plaintiff's assent. If the lessee assigns the lease, even with the lessor's assent, the former remains liable on his covenant to pay rent, although rent is accepted

from the assignee, unless the lessor expressly agrees to release the lessee and substitute the new tenant in his stead. *Port v. Jackson*, 17 Johns. (N. Y.) 239; *Taylor v. DeBus*, 31 Ohio St. 468; *Pfaff v. Golden*, 126 Mass. 402; *Carley v. Lewis*, 24 Ind. 23; *Jones v. Barnes*, 45 Mo. App. 590; *Wilson v. Gerhard*, 9 Colo. 585, 13 Pac. 705; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. 173; *Frank v. Maguire*, 42 Pa. St. 78; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612; 14 L.R.A. 151. The covenant to pay rent, inheres in the estate as a covenant real, and binds the assignee of the term, by reason of his privity of estate, to pay the rent accruing during his ownership and possession of the estate, so that, after an assignment of the lease, the lessor has a *double* and *several* security for the payment of his rent, either or both of which he may pursue until satisfaction is obtained. Therefore, the receipt of rent from the assignee of the lessee does not amount to a novation or release of the lessee, but is that assertion of a right which accrued to the lessor as an incident to the assignment." *Taylor v. DeBus*, supra; *Carley v. Lewis*, 24 Ind. 23; *Whetstone v. McCartney*, 32 Mo. App. 430. In the latter case, the court said: "There are two ways in which a lessee may be liable to his lessor; one arises from his express covenant to pay, whereby he is held in *privity* [431] of *contract*; the other arises, in the absence of an express covenant to pay rent, on an implied obligation, whereby he is held in *privity of estate*. In the latter case, if he parts with the estate, with consent of lessor, thereby destroying the privity, there is no further obligation to pay rent, since there is nothing upon which to base the obligation. But if he has expressly covenanted to pay, the contract lasts till discharged, and the covenant may be said to run with the land, and this is so even though the lessor has consented to the assignment by the lessee and accepted rent of the assignee. The assignee is likewise liable to the original lessor for the term he occupies, not by reason of a promise, but by reason of the privity of estate. And the lessor may pursue one, or both, at the same time, though he will be entitled to but a single satisfaction."

The assignment of the lease by Sharp to the Raven Coal & Coke Company, even with the assent of the lessor, did not impair the liability of the original lessee on his covenant to pay rent. The assignment did not annul this express obligation, or constitute an implied release therefrom. While the privity of estate between plaintiff and Sharp was terminated by the transfer, the latter nevertheless remained liable, at the option of the former, for rent thereafter accruing, because of the continuing privity of contract.

Upon the principles stated, the judgment of the circuit court is reversed, the verdict set aside, and a new trial awarded.

Reversed and Remanded.

## NOTE.

### Effect of Assignment of Lease or Sublease by Tenant on Liability for Rent.

#### I. Effect of Assignment:

##### 1. Liability of Lessee:

###### a. To Lessor:

##### (1) Under Express Covenant to Pay Rent:

- (a) Generally, 789.
- (b) Acceptance of Assignee by Lessor, 792.
- (c) Express Consent by Lessor to Assignment, 793.
- (d) Institution of Action by Lessor against Assignee, 794.
- (e) As Affected by Form of Action, 794.
- (f) Discharge or Release of Lessee, 795.

##### (2) Under Implied Covenant to Pay Rent, 796.

###### b. To Assignee, 797.

##### 2. Liability of Assignee:

###### a. To Lessor:

- (1) Generally, 797.
- (2) Extent of Liability, 800.
- (3) Joint Liability of Assignee and Lessee, 801.
- (4) Necessity that Assignee Take Possession, 801.
- (5) Necessity that Lessor Consent to Assignment, 804.
- (6) Effect of Holding Over, 804.
- (7) Effect of Abandonment, 805.
- (8) Effect of Reassignment:
  - (a) Generally, 805.
  - (b) Liability for Accrued Rent, 807.
  - (c) As Affected by Motive of Assignment or Character of Assignee, 808.

(d) Necessity of Consent of or Notice to Lessor, 808.

(e) Effect of Assignee's Agreement to Continue Liable for Full Term, 809.

(f) Fictitious or Colorable Reassignment, 810.

(9) Assignment Presumed from Fact of Possession, 811.

(10) Liability of Equitable Assignee, 812.

(11) Liability of Assignee under Verbal Assignment Void under Statute of Frauds, 813.

(12) Quasi or Constructive Assignee:

(a) Introductory, 813.

(b) Mortgagee, 813.

(c) Assignee for Benefit of Creditors, 815.

(d) Assignee or Trustee in Bankruptcy, 816.

(e) Receiver, 818.

(f) Committee of Lunatic, 819.

(g) Executor or Administrator, 820.

(h) Heir or Devisee, 820.

(i) Purchaser of Leasehold at Judicial Sale, 821.

#### b. To Lessee:

(1) After Payment of Rent by Lessee:

(a) Generally, 821.

(b) Where Lessor Has Not Consented to Assignment, 822.

(c) Liability after Reassignment, 822.

(2) Before Payment of Rent by Lessee, 822.

#### H. Effect of Sublease:

1. Liability of Lessee, 822.

2. Liability of Sublessee:

##### a. To Lessor:

(1) In Absence of Statute, 823.

(2) Under Statute, 826.

b. To Lessee, 829.

#### I. Effect of Assignment.

##### 1. LIABILITY OF LESSEE.

##### a. To Lessor.

(1) Under Express Covenant to Pay Rent.

##### (a) Generally.

It is well settled that the mere assignment of a lease containing an express covenant to pay rent does not terminate the liability of the lessee to the landlord under the covenant. His liability rests on privity of contract and the assignment of the term merely terminates the privity of estate.

*England.*—*Staines v. Morris*, 1 Ves. & B. 8, 35 Eng. Rep. (Reprint) 4; *Orgill v. Kemshead*, 4 Taunt. 642, 13 Rev. Rep. 712; *Coghil v. Freelove*, 3 Mod. 325; *Baynton v. Morgan*, 22 Q. B. D. 74, 58 L. J. Q. B. 139, 37 W. R. 148, 53 J. P. 166; *Chapman v. Cantrell*, 2 Keb. 640; *Arthur v. Vanderbank*, 2 Barn. K. B. 372; *Mills v. Auriol*, 1 Smith Lead. Cas. 839 (Vol. I, Pt. II, Eighth ed. 1255); *Devereux v. Barlow*, 2 Saund. 181; *Humble v. Langston*, 7 M. & W. 517; *Parker v. Webb*, 3 Salk. 5; *Hellier v. Casbard*, 1 Sid. 266. See also *Buckland v. Hall*, 8 Ves. Jr. 95; *Pitcher v. Tovey*, 4 Mod. 71, 1 Salk. 81, 12 Mod. 23; *Wolveridge v. Steward*, 1 Crompt. & M. 644, 3 Tyrw. 637, 3 Moo. & S. 561, 30 E. C. L. 312, 3 L. J. Exch. 360.

*Canada.*—*Boulton v. Blake*, 12 Ont. 532; *Credit Foncier Franco-Canadien v. Young*, 9 Quebec 317. See also *Stinson v. Magill*, 8 U. C. Q. B. 271.

*United States.*—*McBee v. Sampson*, 66 Fed. 416. See also *Scott v. Lunt*, 7 Pet. 596, 8 U. S. (L. ed.) 797.

*Arkansas.*—*Evans v. McClure*, 108 Ark. 531, 158 S. W. 487.

*California.*—*Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151; *Brosman v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Schehr v. Berkey*, 166 Cal. 157, 135 Pac. 41; *Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014; *Dietz v. Kucks*, 5 Cal. Unrep. 406, 45 Pac. 832; *Samuels v. Ottinger*, reported in full, post, this volume, at page 830.

*Colorado.*—*Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705.

*Illinois.*—*Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31, *affirming* 66 Ill. App. 282; *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528, *affirming* 102 Ill. App. 554, 92 Ill. App. 175; *Midland Tel. Co. v. National Tel. News Co.* 236 Ill. 476, 86 N. E. 107; *Miller v. Hawes*, 58 Ill. App. 667; *Goergen v.*

Schmidt, 69 Ill. App. 538; Laird v. Mantonya, 83 Ill. App. 327; Hoerdt v. Hahne, 91 Ill. App. 514; Bradley v. Walker, 93 Ill. App. 609; Bowman v. Powell, 127 Ill. App. 114; Jaeger v. U. S. Brewing Co. 163 Ill. App. 216; Halloran v. Hall, 165 Ill. App. 440; Manhattan Co. v. Eversz, 171 Ill. App. 449. See also St. Louis Consol. Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624.

*Indiana*.—Carley v. Lewis, 24 Ind. 23; Jordan v. Indianapolis Water Co. 159 Ind. 337, 64 N. E. 680, reversing 61 N. E. 12; Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490; Powell v. Jones, 50 Ind. App. 493, 98 N. E. 646. See also Doxey v. Service, 30 Ind. App. 174, 65 N. E. 757.

*Iowa*.—Barhydt v. Burgess, 46 Ia. 476.

*Kansas*.—See Weiner v. Baldwin, 9 Kan. App. 772, 59 Pac. 40.

*Kentucky*.—Trabue v. McAdams, 8 Bush 74.

*Maryland*.—Moale v. Tyson, 2 Har. & McH. 387; Consumers' Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086. See also Baltimore City v. Peat, 93 Md. 696, 50 Atl. 152, 698.

*Massachusetts*.—Way v. Reed, 6 Allen 364; Wall v. Hinds, 4 Gray 256, 64 Am. Dec. 64; Pfaff v. Golden, 126 Mass. 402; Greenleaf v. Allen, 127 Mass. 248; Johnson v. Stone, 215 Mass. 219, 102 N. E. 366. See also Farrington v. Kimball, 126 Mass. 313, 30 Am. Rep. 680; Mason v. Smith, 131 Mass. 510.

*Michigan*.—Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673; Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168.

*Minnesota*.—See Oswald v. Fratenburgh, 36 Minn. 270, 31 N. W. 173.

*Missouri*.—Whetstone v. McCartney, 32 Mo. App. 430; Jones v. Barnes, 45 Mo. App. 590; Charless v. Froebel, 47 Mo. App. 45; Holliday v. Noland, 93 Mo. App. 403, 67 S. W. 663.

*Nebraska*.—Bouscaren v. Brown, 40 Neb. 722, 59 N. W. 385; Missouri, etc. Trust Co. v. Richardson, 57 Neb. 617, 78 N. W. 273.

*New Jersey*.—Hunt v. Gardner, 39 N. J. L. 530; Creveling v. De Hart, 54 N. J. L. 338, 23 Atl. 611.

*New York*.—Phelps v. Van Dusen, 3 Abb. App. Dec. 604; Stoppani v. Richard, 1 Hilt. 509; Coit v. Braunsdorf, 2 Sweeny 74; Welsh v. Schuyler, 6 Daly 412; House v. Burr, 24 Barb. 525; Wilson v. Lester, 64 Barb. 431; Manley v. Berman, 60 Misc. 91, 111 N. Y. S. 711; Verschleiser v. Newman, 76 Misc. 544, 135 N. Y. S. 671; Ayen v. Schmidt, 80 Misc. 670, 141 N. Y. S. 938; Hayward v. Polisuik, 84 Misc. 79, 145 N. Y. S. 924; Kamioner v. Balkind, 93 Misc. 458, 158 N. Y. S. 310; Crowley v. Gormley, 59 App. Div. 256, 69 N. Y. S. 576; Casey v. Wheaton, 157 App. Div. 140, 141 N. Y. S. 985; Halbe v. Adams, 172 App. Div. 186, 191, 158 N. Y. S. 380, 384; Gerkens v. Smith, 11 N. Y. S. 685, 34 N. Y.

St. Rep. 59. See also Reynolds v. Lawton, 55 Hun 603 mem. 28 N. Y. St. Rep. 670; Weil v. Witte, 90 N. Y. S. 287; Faris v. Butler, 138 N. Y. S. 97.

*Ohio*.—Great Western Despatch Co. v. Nova Caesarea Harmony Lodge, 6 Ohio Dec. (Reprint) 603, 7 Am. L. Rec. 12, 7 Ohio Dec. (Reprint) 455, 3 Cinc. L. Bul. 345; Sutliff v. Atwood, 15 Ohio St. 186; Taylor v. De Bus, 31 Ohio St. 468; Smith v. Harrison, 42 Ohio St. 180; Columbus Gas, etc. Co. v. Knox County Oil, etc. Co. 91 Ohio St. 35, 369, 109 N. E. 529. See also Nova Caesarea Harmony Lodge No. 2 v. White, 30 Ohio St. 569, 27 Am. Rep. 492. Compare Worthington v. Hewes, 19 Ohio St. 66, explained in Taylor v. De Bus, 31 Ohio St. 468.

*Oregon*.—Johnson v. Seaborg, 69 Ore. 27, 137 Pac. 191.

*Pennsylvania*.—Kunckle v. Wynick, 1 Dall. 305, 1 U. S. (L. ed.) 149; Dewey v. Dupuy, 2 Watts & S. 553; Berry v. McMullen, 17 Serg. & R. 84; Frank v. Maguire, 42 Pa. St. 77; In re Thompson, 205 Pa. St. 555, 55 Atl. 539.

*Rhode Island*.—Almy v. Greene, 13 R. I. 350; Adams v. Burke, 21 R. I. 126, 42 Atl. 515.

*Vermont*.—Shaw v. Partridge, 17 Vt. 626. See also Sharon Cong. Soc. v. Rix, 17 Atl. 719.

*West Virginia*.—See the reported case.

*Wisconsin*.—Bailey v. Wells, 8 Wis. 141. 76 Am. Dec. 233; Lovejoy v. McCarty, 94 Wis. 341, 68 N. W. 1003.

In Dietz v. Kucks, 5 Cal. Unrep. 406, 45 Pac. 832, the court said: "In the absence of some agreement to the contrary, the tenant who, as in this instance, assigns his whole term, remains liable as a surety. The assignee becomes liable directly to the lessor upon all the covenants of the lease which run with the land, and his assignor remains his surety to the lessor for the performance of such covenants." And in Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979, it was said: "The lessee cannot by assigning his lease rid himself of liability under the covenants. The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants."

In Goergen v. Schmidt, 69 Ill. App. 538, the following facts appeared: The plaintiff in error was the lessee of certain premises, the lease containing a power of attorney to confess judgment for rent due, with \$20 attorney's fees. The plaintiff in error assigned the lease by the following instrument: "For value received, I thereby assign all my right, title and interest in and to the within lease unto Adam R. Brand, heirs and assigns, and in condition of the consent to this assign-

ment by the lessor I guarantee the performance by said Adam B. Brand of all the covenants on the part of the second party in said lease mentioned. In consideration of the above assignment and the written consent of the party of the first part thereto, I hereby assume and agree to make all the payments and perform all the covenants of the within lease by said party of the second part to be made and performed. Witness my hand and seal this 15th day of July, 1895. Nicholas Goergen [Seal]." The court said: "By such assignment the lessee was not absolved from any of the covenants of the lease, nor did he acquire a right to notice of default on the part of Brand, the assignee, in the payment of rent."

In *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 320, 37 Am. St. Rep. 248, it was said: "Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the guarantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee and accepted him as tenant of the premises."

In *Faris v. Butler*, 138 N. Y. S. 97, it appeared that the defendant leased an apartment from the plaintiff at a rental of \$35 per month. After occupying the apartment for a portion of the term he arranged with another lessee of the plaintiff to exchange apartments. The latter lessee occupied an apartment at a rental of \$28 per month. The exchange was made without the consent of the plaintiff and in an action to recover the rent reserved in the lease to the defendant the court held that the agreement between the lessees was not binding on the landlord and the defendant was liable for the rent at \$35 per month.

In *Miller v. Hawes*, 58 Ill. App. 667, it was held that the demise of other premises by the lessor to an assignee under a lease does not operate to discharge the lessee under the original lease of his obligation for rent to the lessor.

In *Taylor v. De Bus*, 31 Ohio St. 468, the court in holding that the liability of a lessee under a lease containing an express contract for the payment of rent, continued after an assignment of the term, said: "The liability incurred by such express covenant does not depend upon any privity of estate between the lessor and the lessee, but exists by reason of

the privity of contract between them. The ground upon which such obligation rests is essentially different from that of the liability to pay rent, where the covenant is only implied. Where rent is reserved in the deed of lease, without any express covenant on the part of the lessee to pay, the liability is founded on an implied covenant, and the implication arises on the ownership and possession of the leasehold estate; in other words, it depends solely upon the privity of estate between the reversioner and the tenant. Therefore, it matters not, as between lessor and lessee, where the covenant is express, whether or not the privity of estate between them has been severed by an assignment of the term; so long as the privity of contract exists, the liability of the lessee continues. . . . The receipt of rent from the assignee of the lessee does not amount to a novation or release of the lessee, but is the assertion of a right which accrued to the lessor as an incident to the assignment."

In *Baynton v. Morgan*, 22 Q. B. D. 74, 58 L. J. Q. B. 139, 37 W. R. 148, 53 J. P. 166, it was held that the surrender of a part of leased premises by the assignee of the term and its acceptance by the lessor does not destroy the latter's right of action on the covenant for arrears in rent against the lessee, and that where the rent can be apportioned he is liable for the pro rata amount.

In *Mills v. Auriol*, 1 H. Bl. (Eng.) 433, *affirmed* 4 T. R. 94, it was held that the bankruptcy of a defendant lessee and an assignment of the term to the bankrupt estate could not be pleaded successfully as a defense to an action in covenant.

In *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. 173, it was held that as the assignment of a lease, even with the consent of the lessor, does not relieve the lessee of his liability for rent, the guarantors of the lessee are not discharged from liability by the assignment.

However, in *Acheson v. Kittanning Consol. Natural Gas Co.* 8 Pa. Super. Ct. 477, it appeared that a corporation leased certain gas lands and subsequently assigned its interest to a third person. Thereafter the lessee corporation with two other companies was merged into the defendant consolidated company. The plaintiff by several assignments acquired the rights of the lessor under the lease and instituted an action against the consolidated company to recover the rents unpaid subsequent to the assignment. The court said: "There is no privity of contract whatever between the equitable plaintiff and the defendant, nor is there privity of estate, and, inasmuch as the law in Pennsylvania is well settled that covenants to pay rent or royalty run with the land and that the assignee of a lease is liable for the payment of all rents and royalties which accrue while

he holds the assignment of the lease, it follows that the defendant is not liable in the present action."

In *Midland Tel. Co. v. National Tel. News Co.* 236 Ill. 476, 86 N. E. 107, it was held that the fact that a lease contained an express provision that it might be assigned to a corporation thereafter to be formed did not relieve the lessee from his liability to pay rent after the assignment, as there was no provision in the lease that he should be so released (and see the reported case). However, in *Heckman's Estate*, 172 Pa. St. 185, 33 Atl. 552, affirming 15 Pa. Co. Ct. 264, it appeared that a lease was executed to an individual, with knowledge on the part of the lessor's agent in the transaction, that the lessee accepted the lease as a matter of convenience and for the sole purpose of assigning it to a corporation about to be founded. After the corporation was formed the lease was assigned to it, and the lessor subsequently collected the rent for a number of years from the corporation. Thereafter, default in the payment of rent being made, the lessor instituted suit against the individual for the accrued rents. The court held that the action would not lie as the defendant could not be considered the lessee in fact, the knowledge of the agent being imputed to the lessor.

(b) Acceptance of Assignee by Lessor.

The lessee continues liable after an assignment of the lease on his express covenant to pay rent to the lessor even though the latter accepts the assignee as such and collects the rent from him. Such acts do not constitute a novation or release of the lessee.

*England*.—*Arthur v. Vanderbank*, 2 Barn. K. B. 372; *Chapman v. Cantrell*, 2 Keb. 640; *Parker v. Webb*, 3 Salk. 5.

*Canada*.—*Boulton v. Blake*, 12 Ont. 532; *Credit Foncier Franco-Canadien v. Young*, 9 Quebec 317; *Stinson v. Magill*, 8 U. C. Q. B. 271.

*United States*.—*Kunckle v. Wynick*, 1 Dall. 305, 1 U. S. (L. ed.) 149.

*California*.—*Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151; *Brosnan v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Schehr v. Berkey*, 166 Cal. 157, 135 Pac. 41; *Samuels v. Ottinger*, reported in full, post, this volume, at page 830.

*Colorado*.—*Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705. See also *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983.

*Illinois*.—*Field v. Herrick*, 101 Ill. 110; *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31, affirming 66 Ill. App. 282; *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528; *Laird v. Mantonya*, 83 Ill. App. 327; *Hoerd*

*v. Hahne*, 91 Ill. App. 514; *Bradley v. Walker*, 93 Ill. App. 609; *Jaeger v. U. S. Brewing Co.* 163 Ill. App. 216; *Halloran v. Hall*, 165 Ill. App. 440.

*Indiana*.—*Jordan v. Indianapolis Water Co.* 159 Ind. 337, 64 N. E. 680, reversing 61 N. E. 12; *Powell v. Jones*, 50 Ind. App. 493, 98 N. E. 646.

*Iowa*.—*Barhydt v. Burgess*, 46 Ia. 476; *Harris v. Heackman*, 62 Ia. 411, 17 N. W. 592.

*Maryland*.—*Moale v. Tyson*, 2 Har. & McH. 387; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086.

*Massachusetts*.—*Wall v. Hinds*, 4 Gray 256, 64 Am. Dec. 64; *Johnson v. Stone*, 215 Mass. 219, 102 N. E. 366.

*Michigan*.—*Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673. See also *Hartz v. Eddy*, 140 Mich. 479, 103 N. W. 852.

*Minnesota*.—*Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310.

*Missouri*.—*Whetstone v. McCartney*, 32 Mo. App. 430; *Jones v. Barnes*, 45 Mo. App. 590; *Charles v. Froebel*, 47 Mo. App. 45; *Ward v. Krull*, 49 Mo. App. 447.

*Nebraska*.—*Bouscaren v. Brown*, 40 Neb. 722, 59 N. W. 385.

*New Jersey*.—*Hunt v. Gardner*, 39 N. J. L. 530; *Creveling v. De Hart*, 54 N. J. L. 338, 23 Atl. 611.

*New York*.—*Phelps v. Van Dusen*, 3 Abb. App. Dec. 604, 4 Trans. App. 399; *Damb v. Hoffman*, 3 E. D. Smith 361; *Wilson v. Lester*, 64 Barb. 431; *Casey v. Wheaton*, 157 App. Div. 140, 141 N. Y. S. 985; *Halbe v. Adams*, 172 App. Div. 186, 191, 158 N. Y. S. 380, 384; *Wallace v. Dinniny*, 11 Misc. 317, 32 N. Y. S. 159; *Manley v. Berman*, 60 Misc. 91, 111 N. Y. S. 711; *Di Caprio v. Yanaro*, 72 Misc. 385, 130 N. Y. S. 164; *Hayward v. Polisuik*, 84 Misc. 79, 145 N. Y. S. 924; *Gerken v. Smith*, 11 N. Y. S. 685, 34 N. Y. St. Rep. 59.

*Ohio*.—*Sutliff v. Atwood*, 15 Ohio St. 186; *Taylor v. De Bus*, 31 Ohio St. 468; *Smith v. Harrison*, 42 Ohio St. 180.

*Pennsylvania*.—*Kunckle v. Wynick*, 1 Dall. 305, 1 U. S. (L. ed.) 149; *Dewey v. Dupuy*, 2 Watts & S. 553; *Frank v. Maguire*, 42 Pa. St. 77. See also *Fisher v. Milliken*, 8 Pa. St. 111, 49 Am. Dec. 497; *Kerper v. Booth*, 10 W. N. C. 79.

*Rhode Island*.—*Almy v. Greene*, 13 R. I. 350; *Adams v. Burke*, 21 R. I. 126, 42 Atl. 515.

*Vermont*.—*Shaw v. Partridge*, 17 Vt. 626.

*West Virginia*.—See the reported case.

*Wisconsin*.—*Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233; *Lovejoy v. McCarty*, 94 Wis. 341, 68 N. W. 1003.

Thus in *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705, the court said: "A lessee who assigns his lease does not thereby discharge himself of his obligation under it. He remains liable upon his express covenants to



pay rent in an action by the lessor, even if the lessor has accepted the assignee as his tenant, and collected rent from him."

In *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248, it was said: "Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. . . . The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee, as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the lessor."

In *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233, the court in passing on the effect of the lessor's acts in consenting to an assignment and receiving rents from the assignee, as releasing the lessee from his obligation under the lease, said: "The authorities are clear that where the lease contains a covenant to pay the rent, the lessee continues liable therefor, notwithstanding the fact that the lease may have been assigned, and the lessor may have accepted rent of the assignee. This doctrine is founded upon the principle that the lessee having contracted or agreed to pay the rent, he is not released from his obligation, though the lease happens to have been assigned. . . . In the present case, Bailey, for a good and valuable consideration, entered into an agreement to pay the rent which might become due upon the lease, and he is bound by this agreement, though the lease may have been assigned and the lessor may have assented to the assignment, and received rent from the assignee. It was undoubtedly competent for the lessor to relieve him from this obligation, but it does not appear that he has done so. The law, therefore, cannot relieve him from the nature and extent of the contract which he has made."

In *Halloran v. Hall*, 165 Ill. App. 440, it was said: "It is the law that although the landlord may consent to the assignment of the lease by the lessee, and may have accepted the assignee as his tenant and received rent from him, still the lessee is not released from his covenant to pay rent unless the landlord has accepted the surrender of the lease and released him." And in *Powell v. Jones*, 50 Ind. App. 493, 98 N. E. 646, the court said: "In the absence of a stipulation releasing a lessee who has assigned his lease, or sublet the property from liability for rent, acceptance of rent by the lessor from the assignee or sublessee, and a mere agreement to receive

him as tenant, does not relieve the lessee from such liability. This merely indicates that the privity of estate is ended."

In *Sutliff v. Atwood*, 15 Ohio St. 186, it was said: "The liability of the lessee, arising from express contract, is so permanently fixed during the whole term, that no act of his own can absolve him from the lessor's demands in respect to it. An assignment with the lessor's concurrence, and his subsequent receipt of rent from the assignee will be ineffectual for this purpose." Likewise in *Taylor v. De Bus*, 31 Ohio St. 468, *McIlrairie, J.*, said: "The receipt of the rent from the assignee of the lessee does not amount to a novation or release of the lessee, but is the assertion of a right which accrued to the lessor as an incident to the assignment."

From the fact that the lessor did not avail himself of a clause in the lease permitting him to take back the premises in the event of an assignment of the term by the lessee, it does not follow that he accepted an assignee as his tenant and thereby released the lessee from his liability. *Broom v. Williams* [1817-1828] Newfoundland L. Rep. 17.

#### (c) Express Consent by Lessor to Assignment.

A lessee is not relieved from his express covenant to pay the rent reserved in the lease by an assignment of the term made with the lessor's express consent.

*Colorado*.—*Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31; *Jaeger v. U. S. Brewing Co.* 163 Ill. App. 216; *Halloran v. Hall*, 165 Ill. App. 440.

*Kansas*.—*Harris v. Strickler*, 86 Kan. 266, 120 Pac. 343.

*Massachusetts*.—*Pfaff v. Golden*, 126 Mass. 402.

*Minnesota*.—*Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310.

*Missouri*.—*Latta v. Weiss*, 131 Mo. 230, 32 S. W. 1005; *Jones v. Barnes*, 45 Mo. App. 590; *Charless v. Froebel*, 47 Mo. App. 45. See also *Whetstone v. McCartney*, 32 Mo. App. 430.

*New York*.—*Gilsey v. Keen*, 104 App. Div. 427, 93 N. Y. S. 783; *Verschleiser v. Newman*, 76 Misc. 544, 135 N. Y. S. 671; *Zinwell Co. v. Ilkovitz*, 83 Misc. 42, 144 N. Y. S. 815.

*Ohio*.—*Sutliff v. Atwood*, 15 Ohio St. 186; *Great Western Despatch Co. v. Nova Caesarea Harmony Lodge*, 6 Ohio Dec. (Reprint) 603, 7 Am. L. Rec. 12, 7 Ohio Dec. (Reprint) 455, 3 Cinc. L. Bul. 345. See also *Smith v. Harrison*, 42 Ohio St. 180.

*Pennsylvania*.—*Frank v. Maguire*, 42 Pa. St. 77. See also *Fisher v. Milliken*, 8 Pa. St. 111, 49 Am. Dec. 497.

*Texas*.—*Ascarete v. Pfaff*, 34 Tex. Civ. App. 375, 78 S. W. 974.

*West Virginia*.—See the reported case.

*Wisconsin*.—*Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233; *Lovejoy v. McCarty*, 94 Wis. 341, 68 N. W. 1003.

Thus in *Halloran v. Hall*, 165 Ill. App. 440, the court said: "It is the law that although the landlord may consent to the assignment of the lease by the lessee, and may have accepted the assignee as his tenant and received rent from him, still the lessee is not released from his covenant to pay rent unless the landlord has accepted the surrender of the lease and released him." So in *Great Western Despatch Co. v. Nova Caesarea Harmony Lodge*, 6 Ohio Dec. (Reprint) 603, 7 Am. L. Rec. 12, 7 Ohio Dec. (Reprint) 455, 3 Cinc. L. Bul. 345, Longworth, J., said: "A mere acceptance of a proposition by a lessor to an assignment of a term of years does not operate to release the original lessee, who remains liable. It is true the parties may agree to transfer of the lease and a substitution of one lessee for another, in which case the prior lessee would be absolved from future liability, and it makes little difference what the form of the transfer may be, provided the intention to substitute appears. . . . The lease contained a covenant that it should not be assigned without a written consent, and the writing on the lease is that 'we assent to the transfer.' The word transfer is used, but it is nothing but a consent that the lease should be assigned, and in the assignment the word used is 'assignment' instead of 'transfer.'" In *Zinwell Co. v. Ilkovitz*, 83 Misc. 42, 144 N. Y. S. 815, the court said: "No surrender of the lease was occasioned by the acceptance of rent from defendant's assignee even though the assignment was made with the landlord's consent, the defendants were not thereby discharged, there was no new lease made nor any act inconsistent with the original lease. It was nothing more than accepting payment through the hands of another of the rent reserved by the original lease and in accordance with its terms and conditions."

A fortiori, the assignment of a lease with the written assent of the lessor, does not terminate the liability of the former under his express covenant to pay rent, where the assignment is allowed by the terms of the lease. *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Ranger v. Bacon*, 3 Misc. 95, 22 N. Y. S. 551.

(d) Institution of Action by Lessor against Assignee.

The fact that the lessor has instituted proceedings against an assignee of the lease to recover possession of the property does not

prevent him from enforcing his right to collect the rent as against the original lessee. *Schehr v. Berkey*, 166 Cal. 157, 135 Pac. 41. *Bouton v. Blake*, 12 Ont. 532.

An action brought by the lessor against the assignee of a term for the collection of rent, at the instigation and request of the lessee, does not relieve the latter of his liability to the lessor, nor is it an election to treat the assignee as lessee. *Whitcomb v. Cummings*, 68 N. H. 67, 38 Atl. 503.

(e) As Affected by Form of Action.

Under the common-law forms of pleading it has been held that after the lessee has assigned the lease and the lessor has recognized the assignee as his tenant and accepted rent from him, the lessee can no longer be held liable to the lessor in an action in debt, as the assignment and acceptance of the assignee destroys the privity of estate necessary to support that action. The liability of the lessee is not terminated, however, as he still remains liable to an action of covenant or assumpsit. *Marsh v. Brace*, Cro. Jac. (Eng.) 334; *Montgomery v. Spence*, 23 U. C. Q. B. 39; *Kunkle v. Wynick*, 1 Dall. 305, 1 U. S. (L. ed.) 149; *McBee v. Sampson*, 66 Fed. 416; *Bliss v. Gardner*, 2 Ill. App. 422; *Ghegan v. Young*, 23 Pa. St. 18. See also *Arthur v. Vanderbank*, 2 Barn. K. B. (Eng.) 372; *McCulloch v. Jarvis*, 8 U. C. Q. B. 267; *Fletcher v. McFarlane*, 12 Mass. 43; *Shaw v. Partridge*, 17 Vt. 620. Thus in *Kunkle v. Wynick*, 1 Dall. (Pa.) 305, 1 U. S. (L. ed.) 149, the court said: "The distinction between actions of debt and actions of covenant . . . is too well established to be now unsettled. The action of *debt* lies upon the *privity of estate*, which is utterly extinguished between the lessor and lessee by the lessor's acceptance of rent from the assignee. The action of *covenant*, when founded upon an express covenant, lies not upon the *privity of estate*, but *privity of contract*, which cannot by the assignment of the premises, or by any act of the lessee, or by acceptance of the rent, be transferred from him. The covenant, however, must be an express covenant, not an implied one, or a covenant arising by operation of law, as by the words 'yielding and paying,' etc., in the deed."

An action in debt will lie against the lessee after he has assigned the lease if it appears that the lessor has not recognized the assignment or accepted rent from him. *Walker's Case*, 3 Coke 22a, 76 Eng. Rep. (Reprint) 676. See also *Wadham v. Marlow*, 4 Dougl. 54, 26 E. C. L. 222, 1 H. Bl. 438n, 2 Chit. 600, 18 E. C. L. 431, 8 East 314, 9 Rev. Rep. 458, 1 T. R. 91.

The action of debt does not lie against a lessee for rent accruing after an assignment of the term by the commissioners in bank-

ruptcy. *Wadham v. Marlow*, 2 Chit. 600, 18 E. C. L. 431, 4 Dougl. 54, 26 E. C. L. 222, 8 East 314n, 1 H. Bl. 437n, 1 T. R. 91, 9 Rev. Rep. 456. But it seems an action of covenant will lie, *Mills v. Muriol*, 1 H. Bl. (Eng.) 433, affirmed 4 T. R. 94; and an action of assumpsit for use and occupation will lie, *Boot v. Wilson*, 8 East 311, 103 Eng. Rep. (Reprint) 360.

#### (f) Discharge or Release of Lessee.

A lessee of a term who assigns his lease may be released from further liability by an express agreement to that effect with the lessor and the substitution of the assignee as tenant. *Dietz v. Kucks*, 5 Cal. Unrep. 406, 45 Pac. 832. And see *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983.

In many instances the acts of the parties have been held to be sufficient to warrant the conclusion that the lessor has substituted the assignee of a lease as tenant, thereby relieving the original lessee of his liability. *Fry v. Patridge*, 73 Ill. 51; *Colton v. Gorham*, 72 Ia. 324, 33 N. W. 76; *Brayton v. Boomer*, 131 Ia. 28, 107 N. W. 1099; *Stimmel v. Waters*, 2 Bush (Ky.) 282; *Hutcheson v. Jones*, 79 Mo. 496; *Page v. Ellsworth*, 44 Barb. (N. Y.) 636; *Di Caprio v. Yanaro*, 72 Misc. 385, 130 N. Y. S. 164; *Ayen v. Schmidt*, 80 Misc. 670, 141 N. Y. S. 938. See also *Bliss v. Gardner*, 2 Ill. App. 422; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394. Thus, in *Fry v. Patridge*, supra, it was held that an agreement to release the original lessees, and accept other tenants in their stead, need not necessarily be express, but may be inferred from the conduct of the parties. And in *Levering v. Langley*, 8 Minn. 107, the court held that facts going to show that the landlord has given up the lessee and treated the assignee or new occupant as his lessee may be established by parol. But see *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233, wherein the contrary rule was laid down. In *Colton v. Gorham*, 72 Ia. 324, 33 N. W. 76, there was evidence tending to prove that the lessees assigned the lease to a person, who thereupon took possession of the property and used it for the purpose of a hotel; that the lessor, with the knowledge of the assignment of the lease and the assignee's occupancy of the property, accepted payments of rent from him, and receipted to him therefor; that the assignee so occupied the property for two or three years; that the lessor, at his request, made repairs and alterations of the property, and finally, on his abandonment of the property, bought the personal property used by him in the hotel, credited the price of the same on the rent, and took possession of the premises, and occupied them for the remainder of the term of the lease, which was more than one year. The lessor

made no demand on the lessees for the rents, and gave them no notice that he proposed to look to them for payment, until after the expiration of the term. The court held that the acts of the lessor authorized the conclusion that he accepted the assignee as his tenant, thereby relieving the original lessees of their liability under the lease. In *Brayton v. Boomer*, 131 Ia. 28, 107 N. W. 1099, it was said: "It is no doubt true as a general proposition that a tenant for a term fixed continues liable on the covenants of his lease notwithstanding he may have assigned to another. . . . And if the tenancy be at will it can be terminated by one of the parties only by service of notice as provided by the statute. Code, section 2991. No one will question, however, but that the parties to a tenancy, whatever the character, may by mutual consent terminate the same at pleasure; and consent in form of words is not necessary. If the lessor, with knowledge of the assignment, so deal with the parties as that his consent to the assignment may fairly be implied—in other words, that he tacitly consented thereto—it is sufficient."

In *Di Caprio v. Yanaro*, 72 Misc. 385, 130 N. Y. S. 164, it was held that the covenant to pay the rent may be discharged by an executed parol agreement for a valuable consideration; and that the obtaining of a new tenant, where the old one is unable to pay, is a valuable consideration.

In *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394, the court said: "A mutual agreement between the lessor and the original lessee, that the lease terminates, must be shown. It is not necessary that the agreement should be express; it may be inferred from the conduct of the parties. The occupancy by some other than the lessee is, of course, a circumstance to show a surrender; but as the new occupant may enter as the tenant of the lessee or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. In short, it must be proved that the lessor and lessee mutually agreed to a surrender of the term, and that proved, the original tenant is no longer liable; but the new tenant (if there is one) is liable."

The question whether there has been such a substitution of tenants as to relieve the lessee of his liability under the terms of the lease is usually one for the jury. *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31, affirming 66 Ill. App. 282; *Golding v. Brennan*, 183 Mass. 286, 67 N. E. 239; *Hutcheson v. Jones*, 79 Mo. 496.

The surrender of a lease after an assignment by the lessee and its acceptance by the lessor discharges the former of his contract

obligation to pay the rent reserved therein. *Lyon v. Moore*, 259 Ill. 23, 102 N. E. 179, reversing 168 Ill. App. 462. See also *Weiner v. Baldwin*, 9 Kan. App. 772, 59 Pac. 40. In *Powell v. Jones*, 50 Ind. App. 493, 98 N. E. 646, it was said that an express surrender of a lease is usually required to be in writing.

The making of a new lease by the lessor with the acquiescence of the assignee, during the existence of an outstanding lease, the tenant under the original lease giving up his possession to the stranger, operates as a surrender of the term by operation of law, and the lessee is thereby discharged from all future liability under the covenants for the payment of rents and taxes although he remains liable for taxes assessed prior to the transaction. In re *Sherwoods*, 210 Fed. 754, Ann. Cas. 1916A 940, 127 C. C. A. 304.

If a lease is assigned with the knowledge and acquiescence of the lessor, the liability of the original lessee terminates with the term provided for by the lease. He is not liable for a holding over by the assignee. *Erskine v. Russell*, 43 Colo. 449, 96 Pac. 249.

In *Fifty Associates v. Grace*, 125 Mass. 161, 28 Am. Rep. 218, it appeared that the defendant leased certain premises from the plaintiff covenanting to pay a certain stipulated rent. The lease contained further covenants to the effect that the lessee would use and occupy the premises only for and as a dry goods and millinery store, and that he would neither lease or underlet the premises without the consent of the lessor. The defendant made an assignment to one M. who agreed to occupy and use the premises for a millinery business and the sale of hair goods. The lessor assented to this agreement with the express stipulation that his claims against the lessee should not be affected by the assignment. Subsequently M. with the consent of the lessor, but without the knowledge or assent of the lessee, assigned the term to one S. who was to use and occupy the premises as an office for a dye house. After the second assignment the lessor instituted the action against the lessee to recover the rents reserved in the lease and remaining unpaid. The court, in awarding judgment for the defendant, said: "The effect of the assent by the plaintiff to the assignment to [S.] for a different use and occupation was to create a new tenancy inconsistent with the terms of the lease to the defendant, and his liability for rent, while such tenancy continued, ceased."

In *Gomprecht v. Ludwig*, 65 Misc. 557, 120 N. Y. S. 986, it was held that where a lease is signed and an assignment thereof on the same instrument is executed at the same time under conditions which indicate that the assignees are to be the real tenants of the lessor,

and are so intended to be, the alleged lessee should have an opportunity to prove those facts as a defense in an action for rent under the lease.

## (2) Under Implied Covenant to Pay Rent.

Where the obligation of the lessee to pay rent is merely implied, his liability to the lessor ceases on his assignment of the term. *Fanning v. Stimson*, 13 Ia. 42; *Nova Cesarea Harmony Lodge No. 2, v. White*, 30 Ohio St. 569, 27 Am. Rep. 492; *Kimpton v. Walker*, 9 Vt. 191. And see *Samuels v. Ottinger*, reported in full, post, this volume, at page 830. See also *Fisher v. Ameers*, 1 Brownl. & Goldes (Eng.) 20; *Kunckle v. Wynick*, 1 Dall. 305, 1 U. S. (L. ed.) 149; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Clemens v. Broomfield*, 19 Mo. 118; *Whetstone v. McCartney*, 32 Mo. App. 430; *Jones v. Barnes*, 45 Mo. App. 590; *Charles v. Froebel*, 47 Mo. App. 45; *Sutliff v. Atwood*, 15 Ohio St. 186; *Taylor v. De Bus*, 31 Ohio St. 468; *Sharon Cong. Soc. v. Rix* (Vt.) 17 Atl. 719. Thus in *Fanning v. Stimson*, supra, it appeared that the only reservation of rent in the lease sued on was in the following words: "At a yearly rent of one thousand dollars for the first ten years, and twelve hundred and fifty dollars for the remaining nine years, payable at the expiration of each and every year of the lease. . . . The said lessees well and truly keeping and performing their part of these presents to be by them performed as aforesaid." The court held that the language amounted to an implied covenant only, and that the defendant lessee was discharged of his obligation by an assignment of the term. Compare *Samuels v. Ottinger*, reported in full, post, this volume, at page 830. In *Whetstone v. McCartney*, 32 Mo. App. 430, it was said: "There are two ways in which a lessee may be liable to his lessor; one arises from his express covenant to pay whereby he is held in privity of contract; the other arises in the absence of an express covenant to pay rent, on an implied obligation, whereby he is held in privity of estate. In the latter case, if he parts with the estate, with the consent of lessor, thereby destroying the privity, there is no further obligation to pay rent, since there is nothing upon which to base the obligation."

In *Nova Cesarea Harmony Lodge No. 2 v. White*, 30 Ohio St. 569, 27 Am. Rep. 492, the court said: "Since . . . the defendants' obligation to pay rent to the plaintiff was not founded upon an express agreement, but was only that implied by law from the privity of estate between the parties, the assignment of the lease and surrender of possession to the assignees, with the assent of the plaintiff, to be implied from its acceptance of rent from

the new tenant, extinguished the privity of estate between the parties, and the consequent implied liability of the defendants to pay rent."

It seems, however, that the assignment, in order to relieve the lessee of liability, must be made with the consent of the lessor. *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Jones v. Barnes*, 45 Mo. App. 590; *Charless v. Froebel*, 47 Mo. App. 45; *Sutliff v. Atwood*, 15 Ohio St. 186; *Nova Cesarea Harmony Lodge No. 2 v. White*, 30 Ohio St. 569, 27 Am. Rep. 492. See also *Mills v. Auriol*, 1 H. Bl. (Eng.) 433, affirmed 4 T. R. 94; *Orgill v. Kemshead*, 4 Taunt. (Eng.) 642, 13 Rev. Rep. 712.

Such consent may be inferred by the lessor's accepting rent of the assignee or by any other act recognizing him as a tenant. *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Nova Cesarea Harmony Lodge No. 2 v. White*, 30 Ohio St. 569, 27 Am. Rep. 492. See also *Fisher v. Ameers*, 1 Brownl. & Goldes (Eng.) 20.

#### b. To Assignee.

It has been held that an assignee of a leasehold estate may pay arrears of rent, due prior to the execution of the assignment to him, in order to protect his right of tenancy, and thereby become subrogated to the claim of the landlord against the lessee, his assignor. *Hull v. Stevenson*, 13 Abb. Pr. N. S. (N. Y.) 196. But in *Ballou v. Orr*, 14 Misc. 402, 35 N. Y. S. 1040, it was held that where the assignment contains no covenant that the back rent has been paid, the assignee has no claim against his assignor for a payment of back rent made to the lessor, even though the payment was made in order to retain his possession of the premises.

Payment by the assignee of a lease to the lessor of the current rent is a defense to an action brought to recover the same rent by the assignor. *Dreyfuss v. Phillips*, 121 N. Y. 378.

An assignee of a lease who subsequently becomes the owner of the fee has no right of action against his assignee, the original lessee, for the rent reserved in the lease. By the conveyance of the estate in fee simple to the assignee, who was at the time owner of the unexpired leasehold estate therein, the latter and less estate was, *eo instanti*, merged in the former and greater estate in the premises. *Liebschutz v. Moore*, 70 Ind. 142, 36 Am. Rep. 182.

## 2. LIABILITY OF ASSIGNEE

#### a. To Lessor.

##### (1) Generally.

The assignment of a term by the lessee creates a privity of estate between the lessor

and assignee, rendering the latter liable to the lessor for the rents accruing subsequent to the assignment and during his ownership of the term.

*England*.—*Valliant v. Dodemede*, 2 Atk. 546; *Midgley v. Lovelace*, 12 Mod. 45; *Williams v. Bosanquet*, 1 Brod. & B. 238, 5 E. C. L. 72, 21 Rev. Rep. 585, 3 Moo. C. Pl. 500; *Devereux v. Barlow*, 2 Saund. 181; *Treackle v. Coke*, 1 Vern. 165, 23 Eng. Rep. (Reprint) 389. See also *Richmond v. London*, 1 Bro. P. C. (Toml. ed.) 516; *Stevenson v. Lambard*, 2 East 575, 6 Rev. Rep. 511, 15 Eng. Rul. Cas. 704; *Humble v. Langston*, 7 M. & W. 517.

*Canada*.—*Ontario Bank v. McAllister*, 43 Can. Sup. Ct. 338, 17 Ont. L. Rep. 145, 10 Ont. W. Rep. 109, 694; *Selby v. Robinson*, 15 U. C. C. P. 370.

*United States*.—*McBee v. Sampson*, 66 Fed. 416. See also *In re Sherwoods*, 210 Fed. 754, Ann. Cas. 1916A 940, 127 C. C. A. 304.

*California*.—*Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151; *Baker v. J. Maier, etc. Brewery*, 140 Cal. 530, 74 Pac. 22; *Dietz v. Kucks*, 5 Cal. Unrep. 406, 45 Pac. 832.

*Connecticut*.—*Benedict v. Everard*, 73 Conn. 157, 46 Atl. 870. See also *Stillman v. Harvey*, 47 Conn. 26.

*Georgia*.—See *Mallette v. Hillyard*, 117 Ga. 423, 43 S. E. 779.

*Illinois*.—*Prettyman v. Walston*, 34 Ill. 175; *Babcock v. Scoville*, 56 Ill. 461; *Webster v. Nichols*, 104 Ill. 160; *Sexton v. Chicago Storage Co.* 129 Ill. 18, 21 N. E. 920, 16 Am. St. Rep. 274; *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248; *Lyon v. Moore*, 259 Ill. 23, 102 N. E. 179 (reversing 168 Ill. App. 462); *Peck v. Christman*, 94 Ill. App. 435; *Petteys v. Anheuser-Busch Brewing Assoc.* 150 Ill. App. 378; *Hoover v. Weber*, 154 Ill. App. 263. See also *Farnam v. Hohman*, 90 Ill. 312; *St. Louis Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624; *Landt v. McCullough*, 218 Ill. 607, 75 N. E. 1069.

*Indiana*.—*Carley v. Lewis*, 24 Ind. 23; *McDowell v. Hendrix*, 67 Ind. 513; *Jordan v. Indianapolis Water Co.* 159 Ind. 337, 64 N. E. 680, reversing 61 N. E. 12; *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N. E. 196. See also *Gordon v. George*, 12 Ind. 408.

*Iowa*.—*Barhydt v. Burgess*, 46 Ia. 476; *Kean v. Rogers*, 118 N. W. 515.

*Kentucky*.—*Cox v. Fenwick*, 4 Bibb. 538; *Trabue v. McAdams*, 8 Bush 74; *McCormick v. Young*, 2 Dana 294; *Muldoon v. Hite*, 6 Ky. L. Rep. (Abstract) 663.

*Maryland*.—*Myers v. Silljacks*, 58 Md. 319; *Reid v. Wiessner Brewing Co.* 88 Md. 234, 40 Atl. 877. See also *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Baltimore City v. Peat*, 93 Md. 606, 50 Atl. 152, 698.

*Massachusetts*.—Blake v. Sanderson, 1 Gray 332; Howland v. Coffin, 9 Pick. 52; Collins v. Pratt, 181 Mass. 345, 63 N. E. 946. See also Patten v. Deshon, 1 Gray 325; Howland v. Coffin, 12 Pick. 125; Daniels v. Richardson, 22 Pick. 565; Farrington v. Kimball, 126 Mass. 313, 30 Am. Rep. 680; Mason v. Smith, 131 Mass. 510.

*Michigan*.—Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. 1014. See also Lee v. Payne, 4 Mich. 106.

*Minnesota*.—Trask v. Graham, 47 Minn. 571, 50 N. W. 917; Dickinson Co. v. Fitterling, 69 Minn. 162, 71 N. W. 1030; Weide v. St. Paul Boom Co. 92 Minn. 76, 99 N. W. 421. See also Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L.R.A. 236.

*Missouri*.—Smith v. Brinker, 17 Mo. 148, 57 Am. Dec. 265; Willi v. Dryden, 52 Mo. 319; Gray v. Clement, 12 Mo. App. 579. See also Fontaine v. Schulenburg, etc. Lumber Co. 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; Hicks v. Martin, 25 Mo. App. 359; Whetstone v. McCartney, 32 Mo. App. 430; Tyler v. Giesler, 74 Mo. App. 543, 85 Mo. App. 278.

*Montana*.—Edwards v. Spalding, 20 Mont. 54, 49 Pac. 443.

*Nebraska*.—Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522.

*New Hampshire*.—See McMurphy v. Minot, 4 N. H. 251; Dartmouth College v. Clough, 8 N. H. 22; Trustees of Donations v. Streeter, 64 N. H. 106, 5 Atl. 845.

*New York*.—Hobbsman v. Gray, 6 Abb. Pr. 79; Childs v. Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164; Graves v. Porter, 11 Barb. 592; Jacques v. Short, 20 Barb. 269; Main v. Feathers, 21 Barb. 646; Van Rensselaer v. Bonesteel, 24 Barb. 365; Main v. Green, 32 Barb. 448; Tyler v. Heidorn, 46 Barb. 439; McKeon v. Whitney, 3 Denio 452; Journeay v. Brackley, 1 Hilt. 447; Stoppani v. Richard, 1 Hilt. 509; Marshall v. Lippman, 16 Hun 110; People v. Loomis, 27 Hun 328; McKeon v. Wendelken, 25 Misc. 711, 55 N. Y. S. 626; Schlesinger v. Perper, 70 Misc. 250, 126 N. Y. S. 731; Ayen v. Schmidt, 80 Misc. 670, 141 N. Y. S. 938; Equitable Trust Co. v. King, 83 Misc. 450, 145 N. Y. S. 94; Kamioner v. Balkind, 93 Misc. 458, 158 N. Y. S. 310; Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394; Stewart v. Long Island R. Co. 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Frank v. New York, etc. R. Co. 122 N. Y. 197, 25 N. E. 332; Constantine v. Wake, 1 Sweeny 239; Sayles v. Kerr, 4 App. Div. 150, 38 N. Y. S. 880; Tate v. Neary, 52 App. Div. 78, 65 N. Y. S. 40; Crowley v. Gormley, 59 App. Div. 256, 69 N. Y. S. 576; Marone v. Hinkel Brewery Co. 126 App. Div. 554, 110 N. Y. S. 601; Seventy-Eighth St. etc. Co. v. Purssell Mfg. Co. 166 App. Div. 684, 152 N. Y. S. 52; Dreyfuss v. Phillips, 121 N. Y. S. 378. See

also Welsh v. Schuyler, 6 Daly 412; Martin v. O'Connor, 43 Barb. 514; Mason v. Breslin, 40 How. Pr. 436, 2 Sweeny 386, 9 Abb. Pr. N. S. 427; New York v. Wylie, 43 Hun 547 affirmed 122 N. Y. 663, 26 N. E. 754; Dolph v. White, 12 N. Y. 296; Reynolds v. Lawton, 55 Hun 603 mem. 28 N. Y. St. Rep. 670.

*North Carolina*.—See Krider v. Ramsay, 79 N. C. 354.

*Ohio*.—Sutliff v. Atwood, 15 Ohio St. 186; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L.R.A. 62. See also Worthington v. Hewes, 19 Ohio St. 66; Taylor v. De Bus, 31 Ohio St. 468.

*Oklahoma*.—See Tyler Commercial College v. Stapleton, reported in full, post, this volume, at page 837.

*Oregon*.—Johnson v. Seaborg, 69 Ore. 27, 137 Pac. 191; Moline v. Portland Brewing Co. 73 Ore. 532, 536, 144 Pac. 572.

*Pennsylvania*.—Weidner v. Foster, 2 Pen. & W. 23; Royer v. Ake, 3 P. & W. 461; Adams v. Beach, 1 Phila. 99, 7 Leg. Int. 178; Berry v. McMullen, 17 Serg. & R. 84; Morgan v. Yard, 12 W. N. C. 449; McClaren v. Citizens' Oil, etc. Co. 14 Pa. Super. Ct. 167; Oil Creek, etc. Branch Petroleum Co. v. Stanton Oil Co. 23 Pa. Co. Ct. 153; Hannen v. Ewalt, 18 Pa. St. 9; Fennell v. Guffey, 139 Pa. St. 341, 20 Atl. 1048; Fennell v. Guffey, 155 Pa. St. 38, 25 Atl. 785; Johns v. Winters, 251 Pa. St. 169, 96 Atl. 130. See also Lloyd v. Cozens, 2 Ashm. 131; Goss v. Woodland Fire Brick Co. 4 Pa. Super. Ct. 167.

*South Carolina*.—Bowdre v. Hampton, 6 Rich. L. 208.

*Tennessee*.—State v. Martin, 14 Lea 92, 52 Am. Rep. 167. See also McLean v. Caldwell, 107 Tenn. 138, 64 S. W. 16.

*Texas*.—Le Gierse v. Green, 61 Tex. 128; Campbell v. Cates, 51 S. W. 268; Martin v. Stires, 171 S. W. 836. See also Davis v. Didal, 106 Tex. 444, 151 S. W. 290, 42 L.R.A. (N.S.) 1084.

*Vermont*.—Vermont University v. Joslyn, 21 Vt. 52; Overman v. Sanborn, 27 Vt. 54; Sharon Cong. Soc. v. Rix, 17 Atl. 719. See also Kimpton v. Walker, 9 Vt. 191; Pingry v. Watkins, 17 Vt. 379.

*Washington*.—See Tibbals v. Inland, 10 Wash. 451, 39 Pac. 102; Harvard Invest. Co. v. Smith, 66 Wash. 429, 119 Pac. 864.

*Wisconsin*.—Cross v. Button, 5 Wis. 600; Martineau v. Steele, 14 Wis. 272; De Pere Co. v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

Thus in *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917, the court said: "The foundation of this liability of the assignee is the privity of estate that exists between him and the lessor. . . . The assignee, being liable solely in privity of estate, is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and

not for those which occurred before he became assignee or after he ceased to be such." In *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151, it was said: "The assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment." In *Sexton v. Chicago Storage Co.* 129 Ill. App. 318, 21 N. E. 920, 16 Am. St. Rep. 274, the court said: "The general principle, as held by all the authorities, is, that where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee on the covenants running with the land, one of which is that to pay rent. . . . The relations of landlord and assignee of a term, . . . do not result from contract, but from privity of estate, and, therefore, when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term." In *Lyon v. Moore*, 259 Ill. 23, 102 N. E. 179, it was held that by subletting leased premises for the whole term the sublease operated as an assignment, and a privity of estate was created between the lessor and the undertenant thereby making the latter liable for the rent of the premises. See to the same effect *Sexton v. Chicago Storage Co. supra*.

In *Kean v. Rogers (Ia.)* 118 N. W. 515, it was held that the assignee of a term is liable to the lessor for the rent reserved in the lease and he cannot derive any benefit from the fact that the lessor had accepted less than the agreed sum from the assignor. The concession being of a voluntary character it was competent for the lessor to withdraw the favor and thereafter to demand rent at the original contract price. In *Constantine v. Wake*, 1 Sweeny (N. Y.) 239, it appeared that the plaintiff leased certain premises for the term of eleven years and ten months at the yearly rent of one thousand dollars; and, in addition thereto, it was provided that if the premises should at any time during the continuance of the term thereby granted be rented for or yield to the lessee, his executors, administrators, or assigns, more than one thousand dollars per annum, in addition to the taxes and assessments, then one-half of the excess should be paid to the lessor. The lessee subsequently granted and demised the premises to his brother, the defendant, for the whole of the then unexpired term,

at the annual rent of one thousand dollars, with taxes and assessments. The defendant then made a lease for the balance of the original term with a third person who agreed to pay the defendant in addition to one thousand dollars of rent per year, the sum of twelve thousand dollars payable in instalments. This sum was designated as a "bonus" for the lease. Four thousand dollars, part of the "bonus," was paid to the defendant and this action was instituted by the lessor to recover of the defendant as assignee of the lease one-half of the same. The plaintiff claimed that the twelve thousand "bonus" was an increase of rent, or yield for the said premises and that under the covenant of the original lease she was entitled to one-half of such "bonus." The court in sustaining a judgment in favor of the plaintiff held that a covenant for rent runs with the land; that the defendant was in law an assignee of the term and as such liable to the lessor for the rent reserved; and that the twelve thousand dollars, although designated as a "bonus," constituted a part of the rent of the premises of which the plaintiff was entitled to recover one-half.

In order to render the assignee of a lease liable for the rent to the lessor, the entire term must be transferred to the assignee. *Davis v. Morris*, 36 N. Y. 569, *affirming* 35 Barb. 227.

While the assignee of a lease is liable on all covenants that run with the land he is not liable on mere personal or collateral covenants made by the lessor and assignor prior to the assignment and of which he had no notice. Thus in *Coit v. Braunsdorf*, 2 Sweeny (N. Y.) 74, it appeared that the lessee of certain premises made a verbal agreement with the lessor to pay additional rent for an extra story erected on the premises after the execution of his lease. Subsequently the lessee assigned his term and the assignees without notice of the verbal agreement accepted the assignment and entered on the premises. The court held that while the assignees or their undertenants could occupy the entire premises under the lease, they and their undertenants were not liable to the lessor for the additional rent; that the parol promise to pay the extra rent was wholly independent of the lease and formed no part of it and the lessee alone was liable under the promise.

In *Meister v. Birney*, 24 Mich. 435, it was held that if the lessor relying on the statement of the defendant that he was assignee of a lease of certain premises and supposing him to be in possession, and in default in the payment of rent instituted suit for the recovery thereof, the defendant would not be permitted to deny the truth of his statements and thereby evade liability.

In *Morrow v. Camp* (Tex.) 101 S. W. 819, it was held that neither the lessor nor the assignee of a term was liable to the other on the covenants of a lease, where it appeared that the assignment was made without the consent of the lessor.

In *Fell v. Betz*, 5 Pa. Dist. 310, the court held that the alleged assignees of a lease might plead as a defense an agreement made with the lessor by which they were to have the option to occupy the leased premises and become his tenants, and that they did not so elect.

In *Hamilton v. House*, 6 Ala. App. 86, 60 So. 429, it was held that a person in possession of property under a contract with a lessee was not liable to the owner for the rent as the lessee's assignee where it appeared that he had expressly refused to agree to pay the amount of rent which the lessee had promised to pay.

If, after the lessee has assigned his term with the consent of the lessor, the latter agrees with the assignee that he will regard and treat the lessee alone as his tenant, the assignee is not liable for the rent. *Benedict v. Everard*, 73 Conn. 157, 46 Atl. 870.

The assignee of a paid-up lease cannot be held liable to the lessor for rent of the premises during his possession, even though the lease contained an express covenant against assigning. The violation of such a provision does not work a forfeiture of the lease in the absence of a declaration to that effect. *El-dredge v. Bell*, 64 Ia. 125, 19 N. W. 879.

## (2) Extent of Liability.

As the assignee is liable to the lessor solely on reason of privity of estate, he is responsible only for the rents accruing while he holds the estate as assignee and not for the rents accruing before he became assignee or after he ceases to be such. *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Cohen v. Todd*, 130 Minn. 227, 153 N. W. 531, L.R.A.1915E 846; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164; *Wright v. Kelley*, 4 Lans. (N. Y.) 57; *Wolf v. Gluck*, 24 Misc. 763, 53 N. Y. S. 874; *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. S. 626; *Columbus Gas, etc. Co. v. Knox County Oil, etc. Co.* 91 Ohio St. 35, 369, 109 N. E. 529; *Schwartz v. Williamson*, 29 Ohio Cir. Ct. Rep. 78; *Washington Natural Gas Co. v. Johnston*, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Fennell v. Guffey*, 139 Pa. St. 341, 20 Atl. 1048; *McClaren v. Citizens' Oil, etc. Co.* 14 Pa. Super. Ct. 167. See also *Richmond v. London*, 1 Bro. P. C. (Toml. ed.) 516, 1 Eng. Rep. (Reprint) 727; *Sutliff v. Atwood*, 15 Ohio St. 186. Compare *McQuesney v. Hiester*, 33 Pa. St. 435 (under statute). Thus in *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49

Am. Dec. 164, the court said: "It is perfectly well settled, however, that the assignee of a lease is only liable as such assignee for the rent which accrued or became payable, or for other covenants broken, while he was such assignee; and that he may discharge himself from all further liability by assigning his interest in the premises to a stranger, even if the assignee is a beggar; provided he actually relinquished the possession of the premises and all interest therein, so that the assignment is not merely colorable or fraudulent. For as there is no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rent which accrued and became payable after such privity of estate commenced, and before it terminated; that is, while he enjoyed, or had the right to enjoy, the premises, or some part thereof, as an assignee of the lease." And in *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917, the court, in holding that where rent became due at the end of a quarter, the assignee was liable for the whole quarter within which he became assignee, said: "The foundation of this liability of the assignee is the privity of estate that exists between him and the lessor. . . . The assignee, being liable solely in privity of estate, is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such."

A verbal agreement between the assignee of a lease and the lessor to pay rent which had accrued prior to the assignment does not bind the assignee. It is a collateral undertaking and as such voidable under the statute of frauds. *Fowler v. Moller*, 4 Bosw. (N. Y.) 149.

An assignee of a part of leased premises is liable to the lessor only for the aliquot part of the rent reserved by him from their assignor. *Babcock v. Scoville*, 56 Ill. 461; *Harris v. Frank*, 52 Miss. 155; *St. Louis Public Schools v. Boatmen's Ins. etc. Co.* 5 Mo. App. 91; *Hogg v. Reynolds*, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164; *Van Rensselaer v. Bonesteel*, 24 Barb. (N. Y.) 365; *Van Rensselaer v. Gallup*, 5 Denio (N. Y.) 454; *Astor v. Miller*, 2 Paige (N. Y.) 68 (reversed on other points 5 Wend. 603); *Weidner v. Foster*, 2 Pen. & W. (Pa.) 23; *Pingrey v. Watkins*, 15 Vt. 479. In *St. Louis Public Schools v. Boatmen's Ins. etc. Co.* supra, it was said: "Where a lease is made to two, the lessor and lessees are privies in estate as well as privies in contract. Each lessee is in privity of estate with the lessor as to one undivided half of the lease-



hold, and no more, because the two halves together make the whole estate. Where one of these lessees assigns, the other lessee remains in privity of estate with the landlord for his half, and it follows that the assignee can be privy in estate with the landlord only for the half which remains. As he is liable by virtue of this privity, it would seem that he should be liable only in proportion to it. As he is privy as to one-half, he should pay rent for one-half, and no more." And in *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164, the court said: "The privity of estate exists between the landlord and the assignee of the lessee, pro tanto, where the lessee only assigns a part of the premises, if the assignment is of his whole interest and estate in that part; the distinction between an assignment and an under tenancy, depending solely upon the quantity of interest which passes by the assignment, and not upon the extent of the premises transferred thereby." However, in *Damainville v. Mann*, 32 N. Y. 197, 88 Am. Dec. 324, it was held that the assignee of an individual two-thirds of a possession of the entire estate was liable for the entire rent reserved in the lease, the decision being based on the view that the liability of an assignee for the rent of premises depended on the fact of actual possession. And in *Van Rensselaer v. Bradley*, 3 Denio (N. Y.) 135, 45 Am. Dec. 451, the court held that if the rent is of such a character that it is indivisible, such as the performance of one day's service with horse and carriage, the assignee of a part of leased premises may be held liable for the entire rent.

In *Ohio* it seems that an assignment of a part of leased premises is considered an underleasing, and for that reason it has been held that the lessor has no right of action for rent as against the assignee of a part of the premises, due to the absence of both privity of estate and contract. *Fulton v. Stuart*, 2 Ohio 215, 15 Am. Dec. 542. Likewise, in *Canada* it has been held that a lessor was not entitled to recover an action against an assignee, where he could prove an assignment of a portion only of the leased premises. *Annis v. Corbett*, 1 U. C. Q. B. 303. And in *England* it has been held to be a fatal variance, if the plaintiff in an action in debt against an alleged assignee of the term avers that the whole interest of the lessee came to the defendant, while it appears from the evidence that he was assignee of a part only. *Curtis v. Spitty*, 1 Bing. N. C. 756, 27 E. C. L. 563, 1 Hodges 153, 4 L. J. C. Pl. 236, 1 Scott 737. But the assignee of a part is liable in an action in covenant on every covenant running with the land affecting that part. *Wollaston v. Hakewill*, 3 M. & G. 297, 42 E. C. L. 161.

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### (3) Joint Liability of Assignee and Lessee.

Where there has been an assignment of a lease containing an express covenant to pay rent, the lessor may sue at his election either the lessee or the assignee, or both at the same time, though he can have but one satisfaction. *McBee v. Sampson*, 86 Fed. 416; *Whetstone v. McCartney*, 32 Mo. App. 430; *Sutliff v. Atwood*, 15 Ohio St. 186; *Ayen v. Schmidt*, 80 Misc. 670, 141 N. Y. S. 938. See also *Devereux v. Barlow*, 2 Saund. (Eng.) 181; *Crowley v. Gormley*, 59 App. Div. 256, 69 N. Y. S. 576; *Taylor v. DeBus*, 31 Ohio St. 468. Thus in *McBee v. Sampson*, supra, it was said: "The lessor may sue, at his election, either the lessee or the assignee, or may pursue his remedy against both at the same time, though, of course, with but one satisfaction. In such case the liability of the original lessee depends upon privity of contract, and continues during the whole term, while the liability of the assignee depends upon privity of estate created by the assignment, and continues only during the time he holds legal title to the leasehold estate during the assignment." In *Whetstone v. McCartney*, 32 Mo. App. 430, the court said: "The assignee is . . . liable to the original lessor for the term he occupies, not by reason of a promise, but by reason of the privity of estate. And the lessor may pursue one, or both, at the same time, though he will be entitled to but a single satisfaction." However, in *Bowdre v. Hampton*, 6 Rich. L. (S. C.) 208, it was said that no joint action on a covenant in a lease can be sustained against the lessee and his assignee.

The fact that the lessor has sued and recovered a judgment for rent against the lessee does not preclude an action by the lessor against the assignee of the lease for the same rent where it appears that the judgment is unsatisfied. *People v. German Bank*, 126 App. Div. 231, 110 N. Y. S. 291; *Schlesinger v. Perper*, 70 Misc. 250, 126 N. Y. S. 731.

### (4) Necessity that Assignee Take Possession.

As a general rule, actual possession or occupation of leased premises is not necessary to render an assignee of the lease liable for the rent. The privity of estate on which the liability of the assignee rests is created by the acceptance of an absolute assignment of the term and no further act on his part is required, the right to enjoy the premises being sufficient.

*England*.—*Williams v. Bosanquet*, 1 Brod. & B. 238, 3 Moo. C. Pl. 500, 5 E. C. L. 72, 21 Rev. Rep. 585; *Burton v. Barclay*, 7 Bing. 745, 20 E. C. L. 315, 5 M. & P. 785, 9 L. J. C. Pl. 231. See also *Walker v. Reeve*, 3 Dougl. 19; *Flight v. Bentley*, 7 Sim. 149, 58 Eng. Rep. (Reprint) 793, 4 L. J. Ch. 262.

*Canada*.—See Magrath v. Todd, 26 U. C. Q. B. 87.

*Connecticut*.—Benedict v. Everard, 73 Conn. 157, 46 Atl. 870.

*Illinois*.—Babcock v. Scoville, 56 Ill. 461; St. Louis Consol. Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624; Chicago Attachment Co. v. Davis Sewing-Mach. Co. 25 N. E. 669.

*Indiana*.—Edmonds v. Mounsey, 15 Ind. App. 399, 48 N. E. 196.

*Kentucky*.—Trabue v. McAdams, 8 Bush 74.

*Minnesota*.—Weide v. St. Paul Boom Co. 92 Minn. 76, 99 N. W. 421. See also Trask v. Graham, 47 Minn. 571, 50 N. W. 917.

*Missouri*.—Smith v. Brinker, 17 Mo. 148; 57 Am. Dec. 265; St. Louis Public Schools v. Boatmen's Ins. etc. Co. 5 Mo. App. 91; Grinzburg v. Claude, 28 Mo. App. 258; Hynes v. Ecker, 34 Mo. App. 650. See also Willi v. Dryden, 52 Mo. 319; Lindsley v. Joseph Schnaide Brewing Co. 50 Mo. App. 271.

*Nebraska*.—Dewey v. Payne, 19 Neb. 541, 26 N. W. 248.

*New Hampshire*.—Dartmouth College v. Clough, 8 N. H. 29. See also Trustees of Donations v. Streiter, 64 N. H. 106, 5 Atl. 845.

*New York*.—Childs v. Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164; Journeay v. Brackley, 1 Hilt. 447; Marshall v. Lippman, 16 Hun 110; Tate v. Neary, 52 App. Div. 78, 65 N. Y. S. 40; Seventy-Eighth St. etc. Co. v. Pursell Mfg. Co. 166 App. Div. 684, 152 N. Y. S. 52; Ayen v. Schmidt, 80 Misc. 670, 141 N. Y. S. 938. See also Siefke v. Koch, 31 How. Pr. 383.

*Oklahoma*.—See Tyler Commercial College v. Stapleton, reported in full, post, this volume, at page 837.

*Oregon*.—Johnson v. Seaborg, 69 Ore. 27, 137 Pac. 191; Moline v. Portland Brewing Co. 73 Ore. 532, 536, 144 Pac. 572.

*Pennsylvania*.—Weidner v. Foster, 2 Pen. & W. 23; Berry v. McMullen, 17 Serg. & R. 84; Hannen v. Ewalt, 18 Pa. St. 9; Fennell v. Guffey, 155 Pa. St. 38, 25 Atl. 785. See also Oil Creek, etc. Branch Petroleum Co. v. Stanton Oil Co. 23 Pa. Co. Ct. 153.

*Vermont*.—Pingry v. Watkins, 17 Vt. 379; Vermont University v. Joslyn, 21 Vt. 52.

Thus in *St. Louis Public Schools v. Boatmen's Ins. etc. Co.* 5 Mo. App. 91, the court said: "There can be no question that the assignee of a lease is liable only by the privity of estate between himself and his landlord. . . . It has not, we believe, ever been held that an actual entry under the assignment is necessary to make the assignee liable in respect of assignments by deed, which are regarded as effecting a transfer, not only of title, but also of the legal possession. The acceptance of the assignment creates the liability, and the legal possession

which ownership implies is all that is required. . . . The lessor looks for his rent, not to the person in possession, but to the lessee; and if he rents to two, and by agreement between themselves, or otherwise, one of them has exclusive possession, or if they choose to keep the premises vacant, this in no way concerns the lessor. The relation of landlord and tenant does not exist between the landlord and the mere occupier; nor can one merely occupying land be sued for rent in an action of debt or covenant. On the other hand it is nowhere intimated in the books that the assignee is liable on a quantum meruit, as for use and occupation. He is liable at the rate fixed by the lease of which he is the assignee. . . . What is the privity of estate out of which alone, as all the cases hold, the liability of the assignee of a leasehold springs? It is the title and possessory right. If these pass, the assignee becomes possessed, in law, of the term, and the actual possession is not a question in the case." And in *Seventy-Eighth St. etc. Co. v. Pursell Mfg. Co.* 166 App. Div. 684, 152 N. Y. S. 52, the court, in passing on the question of the necessity of possession by an assignee of a lease in order to render him liable for the rents reserved, said: "The appellant contends that it, being a mere assignee of the lease, and never having assumed or agreed to carry out any of its covenants, was liable only for the rent while it remained in possession, or, in other words, it was liable only by reason of the privity of estate created by the assignment of the lease to it, which liability was dependent upon its remaining in possession. This contention finds support in the case of *Fechter v. Schonger*, 53 Misc. 648, 103 N. Y. S. 738, which held that the assignees of a lease were liable for rent only for the period during which they remained in possession. This view of the law is contrary to the view of the appellate term, from which the present appeal is taken, and in my opinion is erroneous. When an assignee accepts an assignment of a lease of real property, he thereupon, by virtue of the assignment, becomes liable to the lessor for the rent stipulated to be paid. The acceptance of the assignment creates a privity of estate between the lessor and the assignee, and it is not material that such acceptance be followed by the assignee's entering into possession of the premises." In *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill.) 25 N. E. 669, it was said: "We understand that the liability of the assignee to the lessor or reversioner is by reason of the privity of estate, which, by the assignment, has been transferred from the lessee to the assignee. The fact of actual possession is frequently of vital importance as affording a link which, in connection with the further

fact such possession is derived from the lessee, will raise the presumption that there is privity of estate between the party in possession and the lessor, or even estop such party from denying such privity; but, after all, it is the privity of estate which imposes the liability." In *Hannen v. Ewalt*, 18 Pa. St. 9, Chambers, J., in delivering the opinion of the court, said: "The liability of the assignee is created by the acceptance of an assignment and the taking possession of the premises, or having the right of possession, where there was no actual possession by another. The privity of estate which induces personal liability is the actual or beneficial enjoyment of the premises, or the right of possession; where there is neither, no personal liability can arise. . . . Under an absolute assignment the assignee is liable for the rent before actual possession, for by the assignment the title and possessory right pass, and the assignee becomes possessed in law."

In *Massachusetts* it has been held that a person who accepts an assignment of a lease, under seal, becomes liable for the rent subsequently accruing whether he enters into possession or not. *Collins v. Pratt*, 181 Mass. 345, 63 N. E. 946. See also *Blake v. Sanderson*, 1 Gray 332. However, the contrary rule seems to obtain where the assignment of a term is not under seal. See *Sanders v. Partridge*, 108 Mass. 556. In passing on the question of the necessity of entry into possession in order to render the assignee liable the court in *Collins v. Pratt*, supra, said: "The right of the plaintiff to recover in this action depends upon whether the lessor of the plaintiff could have maintained an action against the defendant's intestate, who was the assignee of the lessee by an assignment under seal, and who did not enter upon the land. It must be considered as settled law in England that an assignee of a lease who has accepted it is liable for rent, whether he has entered into possession or not. . . . The English rule seems generally to have been followed in this country. . . . In this Commonwealth, the precise question in the case before us has not been much considered; but we find nothing in the cases in which the liability of an assignee for rent has been discussed which leads us to suppose that an entry is necessary. Thus in *Howland v. Coffin*, 12 Pick. 125, where an action of debt for rent was brought by an assignee of the lessor against one who had 'purchased' all the rights which the lessee had in the premises, it was said by Mr. Justice Wilde: 'The action is founded on a privity of estate between the parties. The defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of rent

ran with the land and by the assignment of the term became binding on the defendant.' In *Blake v. Sanderson*, 1 Gray 332, the action was by the lessors against the assignee of a lease, and it was said by Mr. Justice Thomas: 'By such assignment and acceptance of the lease, the defendant is bound to the performance of its conditions; and his liability for rent is to be governed by the terms of the lease, and not restricted to actual occupation.' *Simonds v. Turner*, 120 Mass. 328, is cited in some textbooks as authority for the position that an entry by the assignee is not necessary. The action was brought by the lessor against an assignee to recover a betterment assessment paid by the lessor. It does not appear from the case as reported nor from the plaintiff's exceptions, which we have examined, whether the assignee had made an entry or not. The defendant took the point on his brief, that, as this fact did not appear, the defendant was not liable. The opinion of the court was delivered by Chief Justice Gray, who, after holding that the betterment assessment was included in the covenant of the lease, and that the assignment had been accepted, held the assignee liable, citing *Williams v. Bosanquet*, 1 Brod. & B. 238 [5 E. C. L. 72] and *Weidner v. Foster*, 2 Pen. & W. (Pa.) 23, in both of which cases an entry by the assignee was held not necessary to be proved in order to bind him. We are of opinion that these cases show that an entry by an assignee need not be proved; and we should reach the same result, were the question an entirely new one here. An examination of the English cases shows that the difficulty there arose from the fact that the old forms of a declaration in such a case set forth an entry, and the question was whether this must be proved. We do not think, after the long discussion of this question in *Williams v. Bosanquet*, ubi supra, that the matter is one of substance. The case on which the defendant chiefly relies is *Sanders v. Partridge*, 108 Mass. 556. But in that case the assignment was not under seal, and while this was held to operate as a transfer of the lease, and to render the assignee liable for rent during possession, it was further held that he could not escape liability by making a formal assignment without changing possession. The case differs essentially from the one at bar."

In some instances, however, entry and possession has been held necessary to render the assignee of a lease liable for the rent reserved and accruing subsequent to the assignment. But the cases so holding usually have in them some other controlling circumstance which dominates the decision. Thus in *Tate v. Neary*, 52 App. Div. 78, 65 N. Y. S. 40, Spring, J., in delivering the opinion of the court, said. "So far as I have been able to

find, the cases which make the liability of the assignee of a lease dependent upon possession have in them some other controlling circumstance. There exists either a reservation of part of the demised estate in the assignor, the inability of the assignee to obtain possession, or the instrument was merely designed as collateral security, or a kindred significant fact dominates the decision. I have been unable to find any authority to the effect that where there is an assignment of the entire estate ratified by the lessor, and where actual occupancy rests wholly with the lessee, he must in fact go into possession before he can be made to pay rent to the lessor. The moment he accepts an absolute assignment of the entire estate, he is liable to the lessor on the covenants in the original lease." So in *Damainville v. Mann*, 32 N. Y. 197, 88 Am. Dec. 324, it was held that the assignee of an undivided two-thirds interest in a term was liable for the entire rent of the premises, where it appeared that he had been in exclusive possession of the premises, while the assignee of the other undivided third was held to be under no obligation to pay the rent as the material element of possession was wanting in respect to him. *Brown, J.*, in delivering the opinion of the court, said: "I am led to the following conclusions: That there is no privity of estate, where the assignee is not in the actual possession; constructive possession is not enough." In commenting on that decision the court in *Tate v. Neary*, 52 App. Div. 78, 65 N. Y. S. 40, said: "In that case the defendant, Mann, was the assignee of an undivided two-thirds of the demised premises, while one Hatch was the assignee of the remaining one-third, but had never been let into possession. The assignee of the larger share occupied the entire leased land to the exclusion of Hatch, enjoying all the fruits of the premises, and the court held that the occupant alone was chargeable with the payment of the rent. In that case Hatch got a mere naked right, and the possession which it was incumbent upon his assignor to vest in him did not accompany the assignment. He could not oust the occupant, as he was confessedly in lawful possession, for his tenancy extended to an undivided two-thirds of the land. An important distinction in the present case lies in the fact that here the assignment was for the entire term, and where that is its character possession is not essential for liability to be incurred on the part of the assignee. He stands for his predecessor in interest, and that creates the requisite privity." In *La Dow v. Arnold*, 14 Wis. 458, it was held that where there are no covenants by the lessee, a complaint in an action to recover rent from an assignee of the term is insufficient unless

it alleges that the assignee entered the premises under and by virtue of the lease. And in *McKeon v. Whitney*, 3 Denio (N. Y.) 452, the court held that in the old action of debt for use and occupation brought by the lessor against the assignee of a lease not under seal, the defendant is charged in respect to his occupation merely. Also in *Sanders v. Partridge*, 108 Mass. 556, stated *supra*, it was held that an assignee of a lease not under seal was liable only for the rent reserved during his actual possession of the premises.

#### (5) Necessity that Lessor Consent to Assignment.

The fact that a lease has been assigned without the consent of the lessor or that an assignment is forbidden by the express terms of the lease is no defense in an action for rent brought against the assignee. *Devereux v. Barlow*, 2 Saund. (Eng.) 181; *Webster v. Nichols*, 104 Ill. 160; *Blake v. Sanderson*, 1 Gray (Mass.) 332; *Saylis v. Kerr*, 4 App. Div. 150, 38 N. Y. S. 880; *Oil Creek, etc. Branch Petroleum Co. v. Stanton Oil Co.* 23 Pa. Co. Ct. 153; *McGhee v. Cox*, reported in full, post, this volume, at page 842. Compare *Hynes v. Ecker*, 34 Mo. App. 650. Thus in *Saylis v. Kerr*, 4 App. Div. 150, 38 N. Y. S. 880, the court said: "The single question presented is whether the plaintiff, who became the assignee of the lease of the premises of which the defendant was the lessor, was liable to pay the rent during the time for which he was in actual possession of the premises under the assignment. That question must be answered in the affirmative. The rule is well settled that the assignee of the lease, who enters under the assignment, becomes liable to pay the rent, and that liability arises by reason of the privity of the estate which is created because of his taking possession under the assignment. . . . It seems that this lease contained a provision that the lessee should not assign or sublet without the consent of the lessor; and the plaintiff insists that, that covenant being in the lease, no privity arose between himself and the landlord, because the landlord refused to recognize him as tenant, lest that should release the lessors. But that fact is of no importance. The liability to pay rent arose by operation of law, and from the fact of possession as assignee under the lease; and, as long as that existed, the liability to pay rent followed as a necessary incident."

#### (6) Effect of Holding Over.

Assignees of a term, who continue to occupy the premises after the expiration of the lease, in the absence of a new agreement are bound by the same terms under which they

formerly occupied the premises. *Webster v. Nichols*, 104 Ill. 160.

An assignee of a lease, containing a provision giving to the lessee an option to extend the term, who remains in possession of the premises after the fixed term has expired, paying the rent thereafter as it becomes due, is liable to the lessor for the rent reserved for the full period of the extended term. And he cannot escape such liability by a subsequent assignment as he is bound not only by privity of estate but also by privity of contract for the renewed term. *Probst v. Rochester Steam Laundry Co.* 171 N. Y. 584, 64 N. E. 504.

#### (7) Effect of Abandonment.

In accord with the principle that the assignee's liability to the lessor for rent rests on his right to enjoy, as distinguished from his actual possession of the premises (see *supra*, the subdivision *Necessity that Assignee Take Possession*), it is generally held that the mere abandonment of the premises does not relieve an assignee of his liability to the lessor for rent. *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151; *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill.) 25 N. E. 669; *Blake v. Sanderson*, 1 Gray (Mass.) 332; *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248; *Seventy-Eighth St. etc. Co. v. Purcell Mfg. Co.* 166 App. Div. 684, 152 N. Y. S. 52; *Tyler v. Commercial College v. Stapleton*, reported in full, post, this volume, at page 837; *Moline v. Portland Brewing Co.* 73 Ore. 532, 144 Pac. 572; *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16. See also *Muller's Estate*, 14 W. N. C. (Pa.) 308. Compare *Pascal v. Slavin*, 144 N. Y. S. 354; *Fechter v. Schonger*, 53 Misc. 648, 103 N. Y. S. 738 (*disapproved* in *Seventy-Eighth St. etc. Co. v. Purcell Mfg. Co.* 166 App. Div. 684, 152 N. Y. S. 52). Thus in *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16, the court said: "As a general rule, the assignee of a lease is only liable for rents while in possession, provided he reassigns the lease to the lessor or any other person; and it does not matter that such assignment is made to a beggar, a minor, a married woman, a prisoner, or an insolvent, or to one hired to take the assignment, or made, expressly, to rid himself of liability. . . . The reason is that such reassignment and surrender of possession terminates the privity of estate existing between him and the landlord. If the assignee, to whom such second or later assignment is made, takes possession, the relation of privity in estate with the assigning assignee is transferred to him, and the assignment, with surrender or transfer of possession, ends it in the acting assignee.

It therefore follows that the assignee can always make his liability continue only during his possession. But it does not follow that he cannot by his own acts or omissions make it extend beyond actual possession. If he wishes it to extend only during possession, he must reassign his lease, as well as abandon possession. . . . And he can only thus escape liability for subsequent, but not for previous, breaches. . . . If he omit such reassignment he continues liable. 'He cannot escape liability by merely abandoning possession, however brief.' . . . Such an abandonment during the term does not release the lessee, nor work a surrender of the premises unless it is assented to by the lessor, and such acceptance must be shown by words or acts." In *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill.) 25 N. E. 669, the court, in passing on the effect of the abandonment of leased premises by the assignee of a term without a reassignment, said: "The title and the absolute ownership of the leasehold estate and the right of immediate possession were vested in the assignee; and, moreover, here the assignee was for a year in the actual and undisturbed possession of the premises. The legal title was vested in appellant, and it could not, by voluntarily abandoning the actual possession of the leased premises, and leaving them vacant and unoccupied, without at the same time divesting itself of its legal title and ownership, release itself of its liability as assignee." And in *Moline v. Portland Brewing Co.* 73 Ore. 532, 144 Pac. 572, the court said: "The assignee of the lease becomes liable for the rent by reason of the privity of estate, and not by reason of the occupancy of the premises; and by mere abandonment thereof he cannot escape liability."

#### (8) Effect of Reassignment.

##### (a) Generally.

An assignee of a lease may relieve himself from all subsequent liability to the lessor for the rent of the premises by reassigning the term and thereby terminating the privity of estate.

*England*.—*Valliant v. Dodemede*, 2 Atk. 546, 26 Eng. Rep. (Reprint) 728; *Taylor v. Shum*, 1 B. & P. 21, 4 Rev. Rep. 759, 15 Eng. Rul. Cas. 503; *Odell v. Wake*, 3 Campb. 394, 14 Rev. Rep. 763; *Wolveridge v. Steward*, 1 Crompt. & M. 644, 3 Tyrw. 637, 3 Moo. & S. 561, 30 E. C. L. 521, 3 L. J. Exch. 360; *Barnfather v. Jordan*, 2 Dougl. 452; *Chancellor v. Poole*, 2 Dougl. 764; *Walker v. Reeve*, 3 Dougl. 19, 26 E. C. L. 19, 2 Dougl. 461, note; *Fagg v. Dobie*, 2 Jur. 681, 3 Y. & C. Exch. 96; *Rowley v. Adams*, 3 Jur. 1069, 2 Jur. 915, 9 L. J. Ch. 34, 4 Myl. & C. 534, 41 Eng.

Rep. (Reprint) 206; *Onslow v. Corrie*, 2 Madd. 330, 56 Eng. Rep. (Reprint) 357; *Paul v. Nurse*, 8 B. & C. 486, 15 E. C. L. 273, 2 M. & R. 525, 7 L. J. K. B. 12; *Pitcher v. Tovey*, 4 Mod. 71, 1 Salk. 81, 12 Mod. 23. See also *Richmond v. London*, 1 Bro. P. C. 516, 1 Eng. Rep. (Reprint) 727.

*United States*.—*McBee v. Sampson*, 66 Fed. 416.

*California*.—*Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Dengler v. Michelsen*, 76 Cal. 125, 18 Pac. 138. See also *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151.

*Colorado*.—*Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. 296.

*Illinois*.—*St. Louis Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624, reversing 59 Ill. App. 595; *Readey v. American Brewing Co.* 60 Ill. App. 501. See also *Voigt v. Resor*, 80 Ill. 331; *Hoover v. Weber*, 154 Ill. App. 263.

*Kentucky*.—*Muldoon v. Hite*, 6 Ky. L. Rep. (Abstract) 663. See also *Trabue v. McAdams*, 8 Bush 74.

*Maryland*.—*Reid v. John F. Wiessner Brewing Co.* 88 Md. 234, 40 Atl. 877; *Hartman v. Thompson*, 104 Md. 389, 10 Ann. Cas. 92, 65 Atl. 117, 118 Am. St. Rep. 422. See also *Donelson v. Polk*, 64 Md. 504, 2 Atl. 824; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086.

*Massachusetts*.—*Mason v. Smith*, 131 Mass. 510; *Donaldson v. Strong*, 105 Mass. 429, 81 N. E. 267. See also *Patten v. Deshon*, 1 Gray 325.

*Minnesota*.—*Cohen v. Todd*, 130 Minn. 227, 153 N. W. 531, L.R.A. 1915E 846.

*Missouri*.—*Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126. See also *St. Louis Public Schools v. Boatmen's Ins. etc. Co.* 5 Mo. App. 91; *Tyler v. Giesler*, 85 Mo. App. 278.

*New York*.—*Childs v. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 164; *Stoppani v. Richard*, 1 Hilt. 509; *Van Schaick v. Third Ave. R. Co.* 25 How. Pr. 446; *Siefke v. Koch*, 31 How. Pr. 383; *Stern v. Florence Sewing Mach. Co.* 53 How. Pr. 478; *Tate v. McCormick*, 23 Hun 218; *Johnston v. Bates*, 48 Super. Ct. 180; *Dassori v. Zarek*, 71 App. Div. 538, 75 N. Y. S. 841; *Adams v. Koehler*, 136 App. Div. 623, 121 N. Y. S. 390, reversing 65 Misc. 192, 119 N. Y. S. 761; *Seventy-Eighth St. etc. Co. v. Purcell Mfg. Co.* 92 Misc. 178, 155 N. Y. S. 259; *Durand v. Curtis*, 57 N. Y. 7. See also *Armstrong v. Wheeler*, 9 Cow. 88; *Welsh v. Schuyler*, 6 Daly 412; *Journeyay v. Brackley*, 1 Hilt. 447; *Wright v. Kelley*, 4 Lans. 57; *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. S. 626; *Ayen v. Schmidt*, 80 Misc. 670, 141 N. Y. S. 938; *Seventy-Eighth St. etc. Co. v. Purcell Mfg. Co.* 166 App. Div. 684, 152 N. Y. S. 52.

*Ohio*.—See *Sutliff v. Atwood*, 15 Ohio St. 186.

*Oklahoma*.—See *Tyler Commercial College v. Stapleton*, reported in full, post, this volume, at page 837.

*Pennsylvania*.—*Wickersham v. Irwin*, 14 Pa. St. 108; *Goss v. Woodland F. Brick Co.* 4 Pa. Super. Ct. 167. See also *Walker v. Physick*, 5 Pa. St. 193; *Hannen v. Ewalt*, 18 Pa. St. 9.

*Tennessee*.—*McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16.

*Vermont*.—See *Sharon Cong. Soc. v. Rix*, 17 Atl. 719.

*Washington*.—*Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102. See also *Harvard Invest. Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

Thus in *Cohen v. Todd*, 130 Minn. 227, 153 N. W. 531, L.R.A. 1915E 846, the court said: "This is an action to recover from an assignee of a lease rent which accrued after he had made a reassignment and delivered up possession to a second assignee. The action cannot be maintained. The assignment to defendant was a naked assignment. Neither by the terms of the assignment, nor in any other manner, did defendant assume any contract obligation to pay rent. As long as he held the property under his assignment the law required him to pay rent according to the terms of the lease. But when he again assigned the term and delivered up possession to a second assignee, his liability for rent thereafter to accrue ceased. This has been the rule of the common law consistently followed for more than 200 years. . . . The rule is founded on sound reason. The assignee having assumed no contract obligation cannot be sued on contract. His liability during the time he holds under the lease is founded on privity of estate. After he has surrendered the premises either to the lessor or to another assignee there is no longer privity of estate. There is then no principle of law or equity upon which to predicate liability for rent to accrue, and liability no longer exists. This is but an application of the general principle that an assignee of a lease is liable on covenants running with the land, but, being liable solely in privity of estate, he is liable only for obligations maturing or breaches occurring while he holds that estate as assignee, and for those which occurred before he became assignee or after he ceased to be such." And in *St. Louis Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624, it was said: "Where there are express covenants in a lease which run with the land, such as to pay rent, the lessee is bound to their performance by reason of his being both in privity of contract and privity of estate with the lessor, and the privity of contract continues to the end of the term, but by an assignment of the term he terminates

the privity of estate. Between the lessor and the assignee of the term there is privity of estate, and by the reason of such privity the assignee is liable for breaches of any express covenant of the lease which runs with the land or term and which occur while such privity continues to exist. . . . The rule is, that as the liability of the assignee grows out of privity of estate, and that only, it ceases when that privity ceases to exist, and each successive assignee is liable for only such breaches of covenant as occur while there is privity of estate between him and the lessor." In *Reid v. John F. Weissner Brewing Co.* 88 Md. 234, 40 Atl. 877, the court said: "The liability of an assignee of a term to the original lessor for rent grows out of and is founded on the privity of estate, in the absence of an independent agreement; and such liability continues, when dependent upon privity of estate alone, just so long as that privity exists. During the continuance of that privity the assignee is liable upon all covenants that run with the land, such as covenants for the payment of rent and the like, and for any breach of such covenants the lessor may sue the assignee during the continuance of the assignment. As his liability, in the absence of an independent agreement, arises wholly from his relation to the land, it results and is everywhere held that when he severs that relation, he puts an end to his liability for any future breaches of covenants contained in the lease." In *Fagg v. Dobie*, 2 Jur. (Eng.) 681, 3 Y. & C. Exch. 96, it was said by Alderson, B.: "An assignee of a term is liable to the covenants only by reason of his privity of estate. The lessor has made no covenant with him, has given no trust to him. The law, therefore, which imposes on him the liability, directs that it shall continue so long as the privity of the estate continues, and no longer. Any real assignment, therefore, puts an end to it. There is no doubt that a fraudulent assignment is as no assignment at all. In that case, both at law and in equity, the act is altogether void. But it is a mistake to call an assignment to a beggar a fraudulent assignment. If a party assign nominally only, retaining the beneficial possession all the time, it is fraudulent; because, whilst he assumes to do one thing, he really does another. He retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. The decisions both at law and in equity concur in this point. But though this be so, yet equity will give relief as to antecedent rent due, or ante-

cedent breaches of covenant committed at the time the party was liable for them, although by his subsequent assignment the remedy at law is gone." In *Johnston v. Bates*, 48 Super. Ct. 180, it was said: "The liability of the assignee to perform the covenants of the lease depends wholly on the privity of estate which is established by the assignment of the lessee's whole interest to the assignee, followed by actual possession. But since there is no privity of contract between the lessor and assignee, the privity of estate may, at any moment, at the option of the assignee, be severed by assigning over, and possession is presumed to follow the assignment to the new assignee. Attornment is not required. The objects or motives of the assignment, or the character of the new assignee, do not concern the lessor, as he has the lessee still liable upon all the covenants."

An assignee of a lease containing an option to renew cannot terminate his liability by assignment after the original term has expired and he has remained in possession and attorned to the lessor. He is bound not only by privity of estate but also by privity of contract for the renewed term. *Probst v. Rochester Steam Laundry Co.* 171 N. Y. 584, 4 N. E. 504.

An assignee in bankruptcy may terminate his liability after accepting an assignment of a term by making a reassignment of the same. *Onslow v. Corrie*, 2 Madd. 330, 56 Eng. Rep. (Reprint) 357. But an assignee of a leasehold estate is not discharged by a general assignment of his personal estate in bankruptcy as the leasehold does not vest in the assignee unless he elects to accept the term. *Copeland v. Stephens*, 1 B. & Ald. (Eng.) 593.

In order to terminate the liability of an assignee by reassignment it is not necessary that the person to whom he assigns should take actual possession of the premises. *Walker v. Reeve*, 3 Dougl. 19, 26 E. C. L. 19, 2 Dougl. 461, note; *Tate v. McCormick*, 23 Hun (N. Y.) 218. Compare *Sanders v. Partridge*, 108 Mass. 556 (second assignment not under seal).

#### (b) Liability for Accrued Rent.

By reassigning the lease, an assignee thereof does not relieve himself from liability for rents which have already accrued. *Valliant v. Dodemede*, 2 Atk. 546, 26 Eng. Rep. (Reprint) 728; *Harley v. Rex*, 2 C. M. & R. (Eng.) 18; *St. Louis Consol. Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937, affirming 39 Ill. App. 453; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 16 Atl. 799, 108 Am. St. Rep. 553; *State v. Martin*, 14 Lea (Tenn.) 92, 52 Am. Rep. 167. See also *McBee v. Sampson*, 66 Fed. 416; *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16; *Sharon*

*Cong. Soc. v. Rix* (Vt.) 17 Atl. 719. Thus in *St. Louis Consol. Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937, the court said: "Even if it was admitted that the assignment . . . discharged appellant from liability for subsequent breaches, yet it did not, and could not, have the effect of discharging it from liability for the breaches of covenant that had already taken place, and at times when there was a privity of estate between it and appellees, and an implied promise to pay the damages occasioned by such breaches."

In some instances, however, it has been held that after a reassignment of the term the lessor must seek his remedy for accrued rents against the assignee in equity as an action at law does not lie after the privity of estate has been broken. *Fagg v. Dobie*, 2 Jur. (Eng.) 681, 3 Y. & C. Exch. 96; *Treackle v. Coke*, 1 Vern. 165, 23 Eng. Rep. (Reprint) 389; *Hintze v. Thomas*, 7 Md. 346; *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824. See also *McBee v. Sampson*, 66 Fed. 416; *Reid v. John F. Weissner Brewing Co.* 88 Md. 234, 40 Atl. 877.

(c) As Affected by Motive of Assignment or Character of Assignee.

The object or motive of a reassignment of a lease, or the character of the new assignee, does not, in the absence of fraud, alter the effect of the reassignment.

*England*.—*Valliant v. Dodemede*, 2 Atk. 546, 26 Eng. Rep. (Reprint) 728; *Barnfather v. Jordan*, 2 Dougl. 452; *Fagg v. Dobie*, 2 Jur. 681, 3 Y. & C. Exch. 96; *Rowley v. Adams*, 3 Jur. 1069, 2 Jur. 915, 9 L. J. Ch. 34, 4 Myl. & C. 536, 41 Eng. Rep. (Reprint) 206; *Taylor v. Shum*, 1 B. & P. 21, 4 Rev. Rep. 759, 15 Eng. Rul. Cas. 503.

*United States*.—*McBee v. Sampson*, 66 Fed. 416.

*California*.—*Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481.

*Maryland*.—*Hartman v. Thompson*, 104 Md. 389, 10 Ann. Cas. 92, 65 Atl. 117, 118 Am. St. Rep. 422.

*Massachusetts*.—*Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267. See also *Patten v. Deshon*, 1 Gray 325.

*Missouri*.—*Tyler v. Giesler*, 74 Mo. App. 543.

*New York*.—*Childs v. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 164; *Tate v. McCormick*, 23 Hun 218; *Johnston v. Bates*, 48 Super. Ct. 180.

*Pennsylvania*.—*Goss v. Woodland F. Brick Co.* 4 Pa. Super. Ct. 167. See also *Hannen v. Ewalt*, 18 Pa. St. 9; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553.

*Tennessee*.—See *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16.

*Washington*.—See *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102.

In *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164, the court said: "It is perfectly well settled, however, that the assignee of a lease is only liable as such assignee for the rent which accrued or became payable, or for other covenants broken, while he was such assignee; and that he may discharge himself from all further liability by assigning his interest in the premises to a stranger, even if the assignee is a beggar: provided he actually relinquishes the possession of the premises and all interest therein, so that the assignment is not merely colorable or fraudulent. For as there is no privity of contract between the lessor and the assignee of the lease, the latter is personally liable only in respect to his privity of estate in the land, or in respect to covenants running with the land, for the rent which accrued and became payable after such privity of estate commenced, and before it terminated: that is, while he enjoyed, or had the right to enjoy, the premises, or some other part thereof, as an assignee of the lease." And in *Hannen v. Ewalt*, 18 Pa. St. 9, Chambers, J., in delivering the opinion of the court, said: "The assignee being liable upon the covenants merely in respect of the privity of estate, and no privity of contract existing between them and the original lessor, his liability lasts only so long as he remains possessed of the estate. An assignment to a mere pauper will not be deemed fraudulent, and an assignment to a feme covert will discharge the assignee." In *Rowley v. Adams*, 3 Jur. 1069, 2 Jur. 915, 9 L. J. Ch. 34, 4 Myl. & C. 536, 41 Eng. Rep. (Reprint) 206, it was held that where the executors of an estate found that a lease, which the testator held as assignee, was a burden, it was not only their right but their duty to terminate their liability by making an assignment if the landlord refused to accept a surrender. In *Hartman v. Thompson*, 104 Md. 389, 10 Ann. Cas. 92, 65 Atl. 117, 118 Am. St. Rep. 422, the court said: "It is not a fraud upon the owner of the reversion, if the owner of the term assign it to another for the express purpose of terminating his future liability for rent, provided the conveyance is designed by both parties to divest the estate of the grantor and vest it in the grantee. There is no principle of law or morals which can require the termor to retain the term for the protection of the owner of the reversion, if he thinks it to his advantage to dispose of it, and it is not material that his grantee has no financial responsibility."

(d) Necessity of Consent of or Notice to Lessor.

In the absence of an express agreement, consent of the lessor to a reassignment of the term by an assignee is not necessary, even though the original lease contains a covenant



forbidding an assignment without the lessor's consent. *Paul v. Nurse*, 8 B. & C. 486, 15 E. C. L. 273, 2 M. & R. 525, 7 L. J. K. B. 12; *McCormick v. Stowell*, 138 Mass. 431; *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267; *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126; *Tyler v. Giesler*, 74 Mo. App. 543; *Meyer v. Alliance Invest. Co.* 84 N. J. L. 450, 87 Atl. 476, *affirmed* 86 N. J. L. 694, 92 Atl. 1086. See also *Sanders v. Partridge*, 108 Mass. 556. Thus in *Paul v. Nurse*, *supra*, it was held that the fact that a lessee in his lease covenanted for himself, executors, assigns, etc., that no assignment would be made without the consent of the lessor, does not estop an assignee of the lease from setting up a reassignment as a defense to an action on the covenants. And in *McCormick v. Stowell*, 138 Mass. 431, it was said: "The covenant by the lessee, that he or others having his estate in the premises will not assign this lease without the written consent of the lessor, does not by its true construction extend so far as to prohibit a reassignment to the lessee himself without a new and special consent of the lessor. By the lease itself, the lessor consents to take the lessee as his tenant for the full term mentioned in the lease. This consent is available for any reassignment to the original lessee during the term. There was therefore no breach of the covenant. The statement in the bill of exceptions, that the reassignment has never been consented to, means only that no special consent has been given; and this was unnecessary." In *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126, the action was founded on a parol contract to pay rent reserved in a lease from the plaintiff to the defendant's assignor. The lease was in writing and contained a covenant that it was not to be assigned without the consent of the lessor. The lessee assigned the term to the defendant and subsequently the defendant desiring to assign the lease to one G. requested the consent of the plaintiff thereto. The assent was given on the express condition that the defendant would assume the prompt payment of the rent reserved. The court said: "The plaintiff proceeds upon the assumption that the assignee could not himself assign the lease without the consent of the lessor, but it is not made to appear by anything contained in the petition that such consent was at all necessary, nor that the giving of it was any advantage to the defendant or any detriment to the plaintiff. It may be presumed that the parties acted under a mistaken impression concerning it; they may have supposed that the consent was required when in reality it was not. A promise of this nature is without any valuable consideration, and merely nudum pactum." However, in *Springer v. Chicago Real Estate Loan, etc. Co.* 202 Ill. 17, 66 N. E. 850, the

court held that the defendant, the assignee of a lease, could not terminate his liability to the lessor by making a reassignment of the term without the latter's consent where it appeared that the lessor in giving his consent to the first assignment, which was required under the provisions of the will, had expressly stipulated with the assignee in consideration of his consenting to the assignment, that the assignment was "to be subject wholly to each and every of the covenants, conditions and provisions of said lease" and "that no further assignment of said lease shall be made without" the written consent of the lessor. See to the same effect *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25; *Lindsley v. Joseph Schnaide Brewing Co.* 59 Mo. App. 271. As to the effect of the assignee's agreement to assume the covenants of the lease see the following subdivision.

It is not essential that the lessor should receive notice of a reassignment in order to terminate the assignee's liability. *Pitcher v. Tovey*, 4 Mod. (Eng.) 71, 1 Salk. 81; *Donaldson v. Strong*, 195 Mass. 429, 81 N. E. 267; *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102. See also *Mason v. Smith*, 131 Mass. 510 (holding that it is not necessary to record a reassignment).

(e) Effect of Assignee's Agreement to Continue Liable for Full Term.

On the theory that a person can sue on a contract made for his benefit, it has been held that where an assignment of a lease contains an express condition that the assignee shall pay the rents reserved for the term, his liability to the lessor so to pay is not terminated by an assignment to a third person. *Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. 296; *Springer v. DeWolf*, 194 Ill. 218, 62 N. E. 542, 88 Am. St. Rep. 155, 56 L.R.A. 465, *affirming* 93 Ill. App. 260; *McConnell v. General Roofing Mfg. Co.* 187 Ill. App. 99; *Lee v. Perlberg*, 190 Ill. App. 13. See also *Thoms v. Meader*, 9 Ohio Dec. 490, 6 Ohio N. P. 242.

Where it is necessary to obtain the lessor's consent in order to make a valid assignment of the term, and in consideration of his consenting thereto, the lessor stipulates with the assignee that the latter shall assume all the covenants of the lease, a privity of contract is created, and the liability of the assignee for the rents reserved is not terminated by a reassignment without the consent of the lessor. *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25; *Springer v. Chicago Real Estate Loan, etc. Co.* 202 Ill. 17, 66 N. E. 850, *affirming* 102 Ill. App. 294; *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086; *Lindsley v. Joseph Schnaide Brewing Co.* 59 Mo. App. 271; *Edwards v. Spalding*, 20 Mont. 54, 49

Pac. 443; *Zinwell Co. v. Ilkovitz*, 83 Misc. 42, 144 N. Y. S. 815. *Zinwell Co. v. Adams*, 144 N. Y. S. 817, wherein it was held that a lessor may sue both the original and subsequent assignees where both have assumed the covenants, but can have but one satisfaction.

Such agreements are supported by a valid consideration. *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443.

But when it is not necessary to obtain the lessor's consent to the original assignment, an agreement by the assignee to continue liable for the payment of the rent reserved for the full term is unenforceable as being without consideration and he may terminate his liability by reassignment. *Stern v. Florence Sewing Mach. Co.* 53 How. Pr. (N. Y.) 478; *Seventy-Eighth St. etc. Co. v. Purssell Mfg. Co.* 92 Misc. 178, 155 N. Y. S. 259.

Likewise, when it is not necessary to obtain the lessor's consent to a reassignment, an agreement made by the assignor with the lessor to continue liable for the rents accruing subsequent to the reassignment is without valuable consideration and merely nudum pactum. *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126; *Harvard Invest. Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

A clause in the assignment to the effect that it is made "subject to the terms" of the original lease does not constitute such an assumption of the covenants as to render the assignee liable for the rents after he has re-assigned his interest. *Wolveridge v. Stewart*, 1 Crompt. & M. (Eng.) 644; *St. Louis Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L.R.A. 624, *reversing* 59 Ill. App. 604; *Meyer v. Alliance Invest. Co.* 84 N. J. L. 450, 87 Atl. 476, *affirmed* 86 N. J. L. 694, 92 Atl. 1086; *Van Schaick v. Third Ave. R. Co.* 25 How. Pr. (N. Y.) 446, *reversing* 8 Abb. Pr. 380; *Dassori v. Zarek*, 71 App. Div. 538, 75 N. Y. S. 841. See also *Walker v. Physick*, 5 Pa. St. 193.

On the other hand the "assumption" of the covenants of the lease by the assignee of a term is regarded as an agreement to perform those covenants, thereby rendering him liable for the full term regardless of reassignment. *Springer v. DeWolf*, 194 Ill. 218, 62 N. E. 542, 88 Am. St. Rep. 155, 56 L.R.A. 465, *affirming* 93 Ill. App. 260; *Springer v. Chicago Real Estate Loan, etc. Co.* 202 Ill. 17, 66 N. E. 850, *affirming* 102 Ill. App. 294; *McConnell v. General Roofing Mfg. Co.* 187 Ill. App. 99; *Lee v. Perlberg*, 190 Ill. App. 13; *Lindale v. Joseph Schnaide Brewing Co.* 59 Mo. App. 271; *Zinwell Co. v. Ilkovitz*, 83 Misc. 42, 144 N. Y. S. 815; *Zinwell Co. v. Adams*, 144 N. Y. S. 817.

#### (f) Fictitious or Colorable Reassignment.

A merely fictitious or colorable reassignment of a lease which does not accomplish an

actual transfer of the interest of the assignor in the demised premises but leaves him in the rightful or beneficial possession and enjoyment thereof is a nullity and the liability of the assignor is not terminated thereby. *Springer v. Chicago Real Estate Loan, etc. Co.* 202 Ill. 17, 66 N. E. 850; *Sanders v. Partridge*, 108 Mass. 556; *Tate v. McCormick*, 23 Hun (N. Y.) 218; *Adams v. Koekler*, 136 App. Div. 623, 121 N. Y. S. 390, *reversing* 65 Misc. 192, 119 N. Y. S. 761; *Negley v. Morgan*, 46 Pa. St. 281; *McClaren v. Citizens' Oil, etc. Co.* 14 Pa. Super. Ct. 167. See also *Fagg v. Dobie*, 2 Jur. 681, 3 Y. & C. Exch. 96; *Taylor v. Shum*, 1 B. & P. 21, 15 Eng. Rul. Cas. 503, 4 Rev. Rep. 759; *McBee v. Sampson*, 66 Fed. 416. In *Sanders v. Partridge*, 108 Mass. 556, it was held that a formal reassignment of a lease by an assignee of the term without a change of possession was not sufficient to relieve him of liability where he continued to collect the rents. In *Negley v. Morgan*, 46 Pa. St. 281, the court held that a reassignment which did not put an end to the assignee's actual or beneficial possession did not terminate his privity of estate and his consequent liability for rent.

Equity gives relief to a lessor for his rent where a reassignment is merely colorable and fictitious, the possession remaining with the assignor. *McBee v. Sampson*, 66 Fed. 416.

A contract to reassign does not amount to a present reassignment, and the assignee continues liable for the rent of the premises. *Simonds v. Turner*, 120 Mass. 328. However, in *Odell v. Wake*, 3 Campb. 394, 14 Rev. Rep. 763, wherein it appeared that the term had been actually sold and the original assignee had executed his reassignment and placed it in the hands of his solicitor to be delivered, he was held not to be liable for the rent which accrued subsequent to the execution of the assignment but before the instrument was actually delivered.

Where an assignee of a lease held the same in trust for another and has surrendered possession to the beneficiary, his liability is terminated as the privity of estate is thereby dissolved. *Astor v. L'Amoreux*, 4 Sandf. 524 (*reversed* on other grounds 8 N. Y. 107).

A reassignment of the term to the lessee without his knowledge, consent or acceptance, does not relieve the assignee of his liability to pay the rents reserved. *Beattie v. Parrott Silver, etc. Co.* 7 Mont. 320, 17 Pac. 451.

However, in *Taylor v. Shum*, 1 B. & P. 21, 4 Rev. Rep. 759, 15 Eng. Rul. Cas. 503, it was held that where assignees do not continue in possession of leased premises they have the right to divest themselves of their interest in the premises by the mere form of an assignment although the person to whom they assign neither takes possession nor receives the lease.

## (9) Assignment Presumed from Fact of Possession.

When a person is in possession of leased premises under the leasee, the law presumes that the lease has been assigned to him, and in the absence of other proof he is liable as assignee of the term.

*Minnesota*.—*Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030; *Weide v. St. Paul Boom Co.* 92 Minn. 76, 99 N. W. 421.

*Missouri*.—*Ebling v. Fyulein*, 2 Mo. App. 252; *Ecker v. Chicago*, etc. R. Co. 8 Mo. App. 223. See also *Guinzburg v. Claude*, 28 Mo. App. 258.

*New Hampshire*.—*Adams v. French*, 2 N. H. 387; *Dartmouth College v. Clough*, 8 N. H. 22. Compare *Austin v. Thomson*, 45 N. H. 113 (occupation under tenant at will no presumption).

*New York*.—*Carter v. Hemmett*, 12 Barb. 253; *Welsh v. Schuyler*, 6 Daly 412; *Kernochan v. Whiting*, 10 Super. Ct. 490; *Kain v. Hoxie*, 2 Hilt. 311; *Durando v. Wyman*, 2 Sandf. 597; *Williams v. Woodard*, 2 Wend. 487; *Provost v. Calder*, 2 Wend. 517; *Lansing v. Van Alstyne*, 2 Wend. 561; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Frank v. New York*, etc. R. Co. 122 N. Y. 197, 25 N. E. 332; *Benoliel v. New York*, etc. Brewing Co. 144 App. Div. 651, 129 N. Y. S. 606; *Reynolds v. Lawton*, 55 Hun 603 mem. 28 N. Y. St. Rep. 670; *Dey v. Greenebaum*, 82 Hun 533, 31 N. Y. S. 610; *Foster v. Oldham*, 8 Misc. 331, 28 N. Y. S. 559; *Kernochan v. Whiting*, 42 Super. Ct. 490; *Armstrong v. Wheeler*, 9 Cow. 88. See also *Wright v. Kelley*, 4 Lans. 57; *Mason v. Breslin*, 40 How. Pr. 438, 2 Sweeny 386, 9 Abb. Pr. N. S. 427.

*Rhode Island*.—*Washington Real Estate Co. v. Roger Williams Silver Co.* 25 R. I. 483, 56 Atl. 686.

*South Carolina*.—See *Bowdre v. Hampton*, 6 Rich. L. 208.

*Wisconsin*.—*Cross v. Upson*, 17 Wis. 618; *Wittman v. Milwaukee*, etc. R. Co. 51 Wis. 89, 8 N. W. 6. See also *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

Thus in *Washington Real Estate Co. v. Roger Williams Silver Co.* 25 R. I. 483, 56 Atl. 686, the court said: "The rule is well settled that when a party is found in the possession of leased premises, having succeeded to the tenant's occupation, without the knowledge or consent of the landlord, he is presumed to have taken an assignment of the lease; but this presumption is *prima facie* only, and the party may show that he is a subtenant or merely a licensee of the tenant, and so not bound by the terms of the lease." In *Wittman v. Milwaukee*, etc. R. Co. 51 Wis. 89, 8 N. W. 6, it appeared that the de-

fendant entered in possession of land as purchaser of the property of a corporation at foreclosure sale. The old corporation had occupied the land of the plaintiff with the latter's assent. In speaking of the liability of the defendant in an action for use and occupation of the premises, the court said: "The present defendant, having come into possession by purchase from the old corporation, must be presumed to know that as to the possession of this lot the old corporation was in as tenant of the plaintiff, and when they took the possession thereof from such tenant they did so as tenant also of the plaintiff. They cannot, therefore, dispute the title of the plaintiff, nor can they allege that they are holding in hostility to his title, without showing affirmatively that the plaintiff's title has terminated, or that they in fact took and held the possession in hostility to the plaintiff's right. The law treats the present defendant as the assignee of the old corporation. If the old corporation was in possession as the tenant at will of the plaintiff, or as tenant from year to year, the present corporation is presumed to be in possession as the assignee of such tenant, and holds under the same tenancy until it is in some way terminated. . . . The assignee of the tenant is liable to the landlord for the rent stipulated for in the lease, if any particular sum be agreed upon. And when the tenant is in without any agreement as to the amount of rent he shall pay, the plaintiff can recover under the statute, in an action for use and occupation, what the use of the premises is reasonably worth."

The fact that the original lease contains a condition of forfeiture in case of an assignment without the consent of the lessor does not alter the rule. *Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030. See also *Cross v. Upson*, 17 Wis. 618. Thus in *Dickinson Co. v. Fitterling*, *supra*, the court said: "The fact that such an assignment will forfeit the lease is a strong motive for concealing the fact of assignment and the character of the possession of the assignee. Then the existence of such a condition of forfeiture in the lease is, if anything, an additional reason why such a third party in possession should be presumed to be an assignee of the lessee, and compelled to explain the character of his possession." However, a contrary rule was laid down by the court in *Dey v. Greenebaum*, 82 Hun 533, 31 N. Y. S. 610, wherein it was said: "The lease prohibits an assignment or underletting, and since the presumption is that the defendant occupied lawfully . . . it would seem to be proper to assume, in the absence of evidence to the contrary, that he occupied under both tenants in common pursuant to a license." And see *Kernochan v. Whiting*, 10 Super. Ct. (N. Y.) 490.

However, the alleged assignee is entitled to prove the character of his holding and that he is not in fact, an assignee of the lease. *Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030; *Ebling v. Fuylein*, 2 Mo. App. 252; *Ecker v. Chicago*, etc. R. Co. 8 Mo. App. 223; *Dartmouth College v. Clough*, 8 N. H. 22; *Benoliel v. New York*, etc. Brewing Co. 144 App. Div. 651, 129 N. Y. S. 606; *Reynolds v. Lawton*, 55 Hun 603 mem. 28 N. Y. St. Rep. 670; *Dey v. Greenebaum*, 82 Hun 553, 31 N. Y. S. 610; *Williams v. Woodard*, 2 Wend. (N. Y.) 487; *Quakenboss v. Clarke*, 12 Wend. (N. Y.) 555; *Welsh v. Schuyler*, 6 Daly (N. Y.) 412; *Mason v. Breslin*, 40 How. Pr. (N. Y.) 436, 2 Sweeny 386, 9 Abb. Pr. N. S. 427; *Durando v. Wyman*, 2 Sandf. (N. Y.) 597; *Kain v. Hoxie*, 2 Hilt. (N. Y.) 311; *Washington Real Estate Co. v. Roger Williams Silver Co.* 25 R. I. 483, 56 Atl. 686; *Cross v. Upson*, 17 Wis. 618; *Mariner v. Crocker*, 18 Wis. 251. See also *Bowdre v. Hampton*, 6 Rich. L. (S. C.) 208. Thus in *Ebling v. Fuylein*, 2 Mo. App. 252, it was said: "Though it should be held that defendant, being found in possession by the owner who had given a written lease to a third person, was bound to explain his possession, and, in the absence of any such explanation, incurred a prima facie liability as assignee of the lease, yet it is always open to a tenant to prove the character of his tenancy, and that he is not in fact in as assignee of a lease." And in *Mariner v. Crocker*, 18 Wis. 251, wherein it appeared that the defendant entered into possession of leased premises as a receiver under an order of the court and had not been informed of the lease until the rent was demanded of him by the lessors, it was held that those facts overcame the presumption arising from possession that the occupant was holding as an assignee of the term. In *Reynolds v. Lawton*, 55 Hun 603 mem. 28 N. Y. St. Rep. 670, it was held that the refusal to permit the defendant to answer a question showing that he did not hold as an assignee was reversible error.

The presumption may be rebutted by proof of the fact that no assignment of the term was ever made. *Ebling v. Fuylein*, 2 Mo. App. 252; *Welsh v. Schuyler*, 6 Daly (N. Y.) 412; *Kain v. Hoxie*, 2 Hilt. (N. Y.) 311; *Mason v. Breslin*, 40 How. Pr. (N. Y.) 436, 2 Sweeny 386, 9 Abb. Pr. N. S. 427; *Quakenboss v. Clarke*, 12 Wend. (N. Y.) 555; *Benoliel v. New York*, etc. Brewing Co. 144 App. Div. 651, 129 N. Y. S. 606; *Cross v. Upson*, 17 Wis. 618; *Mariner v. Crocker*, 18 Wis. 251. See also *Bowdre v. Hampton*, 6 Rich. L. (S. C.) 208. Proof that the party is in possession of the premises as a subtenant will also defeat the presumption that he holds as assignee. *Dartmouth College v. Clough*, 8 N. H. 22; *Kain v. Hoxie*, 2 Hilt. (N. Y.) 311;

*Williams v. Woodard*, 2 Wend. (N. Y.) 487. See also *Washington Real Estate Co. v. Roger Williams Co.* 25 R. I. 483, 56 Atl. 686; *Ecker v. Chicago*, etc. R. Co. 8 Mo. App. 223; *Dey v. Greenebaum*, 82 Hun 533, 31 N. Y. S. 610. Likewise the fact that the party sought to be charged as an assignee is in possession as licensee under the original lease may be shown to rebut the presumption. *Washington Real Estate Co. v. Roger Williams Silver Co.* 25 R. I. 483, 56 Atl. 686; *Dey v. Greenebaum*, 82 Hun 533, 31 N. Y. S. 610; *Kain v. Hoxie*, 2 Hilt. (N. Y.) 311. Proof that the term created by the lease declared on had expired before the defendant entered will also be sufficient to rebut the presumption that he is in possession as assignee of the lease. *Williams v. Woodard*, 2 Wend. (N. Y.) 487. See also *Ecker v. Chicago*, etc. R. Co. 8 Mo. App. 223. And in *Durando v. Wyman*, 2 Sandf. (N. Y.) 597, the court held that the presumption was rebutted by proof that the lessor received a surrender of the term from the lessee while the defendant was in possession.

#### (10) Liability of Equitable Assignee.

An equitable assignee of a lease who has entered as such into possession and occupied the demised premises is liable for the payment of rent accruing during his occupancy. *Astor v. Lent*, 6 Bosw. (N. Y.) 612; *Grauer v. Rudinsky*, 111 N. Y. S. 530; *Rothschild v. Hudson*, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752; *Berry v. McMullen*, 17 Serg. & R. (Pa.) 84. See also *Fontaine v. Schulenburg*, etc. Lumber Co. 109 Mo. 55, 18 S. W. 1147, 32 Am. St. Rep. 648; *Carter v. Hammett*, 12 Barb. (N. Y.) 253; *Astor v. L'Amoreux*, 4 Sandf. 524 (*reversed* on other grounds 8 N. Y. 107); *Mead v. Madden*, 85 App. Div. 10, 82 N. Y. S. 900. However, in *Mason v. Breslin*, 40 How. Pr. 436, 2 Sweeny 386, 9 Abb. Pr. N. S. 427, the court held that where an action for rents is based on a written instrument, the plaintiff cannot travel outside of it, or contradict or alter it by parol proof and consequently cannot recover against a party not named in the writing, such as an equitable assignee.

In England it has been held that until an assignment is actually executed, the parties who have contracted with the original lessee for an assignment, and on the faith of the contract had entered into possession and enjoyment, are not liable on the lessee's covenants for rent accruing due or for breaches of covenant committed while they are in possession as equitable assignees. *Cox v. Bishop*, 8 De G. M. & G. 815, 26 L. J. Ch. 389, 3 Jur. N. S. 499, 5 W. R. 437. The foregoing rule has been quoted with approval by the Canadian courts. See *Magrath v. Todd*,

26 U. C. Q. B. 87; *Herring v. Wilson*, 4 Ont. Rep. 607. However, in *Electric Tel. Co. v. Moore*, 2 F. & F. (Eng.) 363, it was held that where an assignment of a lease was not executed by all of the lessees but the two proposed assignees had executed the same and one had entered on the premises with the consent of the other they were liable in an action for use and occupation as assignees of the lease. And in *Magrath v. Todd*, 26 U. C. Q. B. 87, the court said: "The assignee who takes the estate is, we apprehend, by his acceptance of the assignment, though he has not executed it, subject to and bound to perform the lessee's covenants which are annexed to the estate, and he may even be sued upon them before he has taken actual possession."

One who asserts to the lessor of premises that he is an assignee of the lease, and exercises a control over the leased property, as by collecting the rents of the subtenants, is thereafter estopped to deny his liability as an assignee. *Ireland v. Hall*, 148 App. Div. 833, 133 N. Y. S. 577.

Where a person goes into possession of property under a contract with a tenant and expressly agrees to pay the rental money to the original lessor, he is liable for the rent to the lessor; the latter's action being maintained on the theory of a promise made to another for his benefit. *Foucar v. Holberg*, 85 Ark. 59, 107 S. W. 172; *McConnell v. General Roofing Mfg. Co.* 187 Ill. App. 99.

However, a person in possession of premises under a contract with the lessee cannot be held liable for the rent to the owner, as assignee of the lease, where it appears that he has refused to accept an assignment and never agreed to be bound by the terms of the lessee's agreement with the landlord. *Hamilton v. House*, 6 Ala. App. 86, 60 So. 429.

#### (11) Liability of Assignee under Verbal Assignment Void under Statute of Frauds.

An assignee of a lease who occupies leased premises under a verbal assignment void under the statute of frauds is liable to the lessor for the rent of the premises during the period he is in possession. *Webster v. Nichols*, 104 Ill. 160. See also *Chicago Attachment Co. v. Davis Sewing Mach. Co.* 142 Ill. 171, 31 N. E. 438, 15 L.R.A. 754; *Sanders v. Partridge*, 108 Mass. 556. In *Carter v. Hammett*, 12 Barb. (N. Y.) 253, the court said: "The occupant being thus in possession, in a way that the landlord cannot disturb, and having all the benefits of an actual assignee, is estopped from setting up that he is assignee only by parol agreement and not by a valid written instrument. But if he is in only as undertenant, he may show

that fact." And see to the same effect *Mead v. Madden*, 85 App. Div. 10, 82 N. Y. S. 900.

Likewise where a person takes possession of leased premises under a verbal agreement with the tenant and agrees to pay the rent to the lessor, he is liable for the rents subsequently accruing even though the agreement is void under the statute of frauds. *Baker v. J. Maier, etc. Brewery*, 140 Cal. 530, 74 Pac. 22; *Livingston County Telephone Co. v. Herzberg*, 118 Ill. App. 599; *Marks v. Chumos*, 82 Kan. 562, 109 Pac. 397; *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248.

An assignee of a lease under a verbal assignment void under the statute of frauds is not liable in an action at law for the rent of the premises during the entire period but only for the time he was in possession. *Chicago Attachment Co. v. Davis Sewing Mach. Co.* 142 Ill. 171, 31 N. E. 438, 15 L.R.A. 754; *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978.

In *Tyler v. Stapleton*, reported in full, post, this volume, at page 837, it was held that an assignment of a lease although void under the statute of frauds may be relieved from its operation by the doctrine of part performance. So where an assignee enters into possession of leased premises under such an assignment and attorns to the lessor, the assignment is thereafter binding on him, and the statute cannot be effective as a defense. See to the same effect, *Baker v. J. Maier, etc. Brewery*, 140 Cal. 530, 74 Pac. 22; *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443. See also *Grant v. Ramsey*, 7 Ohio St. 158; *Browder v. Phinney*, 30 Wash. 264, 70 Pac. 264. Compare *Durand v. Curtis*, 57 N. Y. 7.

#### (12) Quasi or Constructive Assignee

##### (a) Introductory.

In the present subdivision of this note various decisions are treated wherein the personal liability of a receiver, executor or administrator, mortgagee, assignee for the benefit of creditors, assignee or trustee in bankruptcy, and the like, is considered on the principle that he is in law an assignee of a leasehold interest. The treatment is confined strictly to decisions involving that view; no attempt being made to discuss their general liability in regard to leasehold estates.

##### (b) Mortgagee.

In those jurisdictions wherein the title to property passes by a mortgage, the mortgagee of a term, whether or not he takes actual possession of the premises, is liable under the covenants for the payment of the rent as an assignee of the lease. *Williams v. Bosanquet*, 1 Brod. & B. 238, 5 E. C. L. 72, 3 Moo. C. Pl.

500, 21 Rev. Rep. 585; *Burton v. Barclay*, 7 Bing. 745, 20 E. C. L. 315, 5 M. & P. 785, 9 L. J. C. Pl. 231; *Stone v. Evans*, Peake Add. Cas. (Eng.) 94; *Pilkington v. Shaller*, 2 Vern. (Eng.) 374; *Todd v. Cameron*, 2 U. C. Err. & App. 434, *affirming* 22 U. C. Q. B. 390; *Jones v. Todd*, 22 U. C. Q. B. 37; *Magrath v. Todd*, 26 U. C. B. 87; *Mayhew v. Hardesty*, 8 Md. 479; *Abrahams v. Tappe*, 60 Md. 317; *McMurphy v. Minot*, 4 N. H. 251, *questioned* in *Lord v. Ferguson*, 9 N. H. 380. And see *Gibbs v. Didier*, reported in full, post, this volume, at page 833 (by the terms of the mortgage title vested after forfeiture). See also *Haig v. Homan*, 4 Bligh. N. S. (Eng.) 380; *Flight v. Bentley*, 7 Sim. 149, 58 Eng. Rep. (Reprint) 793, 4 L. J. Ch. 262; *Sparkes v. Smith*, 2 Vern. (Eng.) 275. *Compare* *Eaton v. Jaques*, 2 Dougl. (Eng.) 455. Thus in *Williams v. Bosanquet*, supra, *Dallas, C. J.*, in passing on the liability of an assignee of a lease by way of mortgage, who had not actually entered into possession of the premises, said: "The assignment of a lease for the whole term, whether absolute, or subject to a proviso for reassignment in a certain event, is, as far as concerns the interest, to be transferred precisely the same; and the assignment, as in the present case, is of all the right, title, and interest of the assignor in the lease assigned. So completely does the interest pass from the one, and vest in the other, that there is a covenant to reassign when the money shall be repaid. The whole interest is therefore assigned, and the whole is to be reassigned. It vests then absolutely, till such reassignment, in the party who is to reassign; and is not less absolute, because, by agreement between the immediate parties to which the lessor is no party, the assignor may, in an event which may or may not happen, entitle himself to a reconveyance by the money being repaid. In the intermediate time, or till such reassignment, the assignee stands in the situation of the assignor, and is, as against the lessor, subject to all the liabilities created by the lease; and, if the one were liable without entry and possession, the other is equally so; and, that the former would be liable, has, I conceive, been fully shown."

A fortiori, in such jurisdictions if an assignee of a leasehold interest by way of mortgage enters into possession of the premises he is liable under the covenants for the payment of rent. *Traherne v. Sadleir*, 5 Bro. P. C. (Toml. ed.) (Eng.) 179; *Trustees of Donations v. Streeter*, 64 N. H. 106, 5 Atl. 845. See also *Valliant v. Dodemede*, 2 Atk. 546, 26 Eng. Rep. (Reprint) 728.

But a mere pledgee of a lease to secure a sum of money due him from the lessee cannot be compelled by the lessor to take an assignment of the term. *Moore v. Greg*, 2

Phil. (Eng.) 717, 8 L. J. Ch. 15, 12 Jur. 952; *Moore v. Choat*, 8 Sim. (Eng.) 508, 8 L. J. Ch. 128, 3 Jur. 220; *Robinson v. Rosher*, 1 Y. & C. Ch. 7. *Compare* *Flight v. Bentley*, 7 Sim. 149, 58 Eng. Rep. (Reprint) 793, 4 L. J. Ch. 262 (disapproved in the later cases).

Where an assignment of a leasehold interest by way of mortgage reserves one day of the term to the mortgagor, the residue of the term does not vest in the mortgagee so as to render him liable as an assignee of the lease, even though he has taken possession of the premises. *Pilkington v. Shaller*, 2 Vern. (Eng.) 374; *Jameson v. London*, etc. Loan, etc. Co. 23 Ont. App. 602, 27 Can. Sup. Ct. 435. Likewise a mortgagee in possession of leased premises under an assignee of the same is not liable in an action brought to indemnify the lessee for a payment of rent to the lessor which accrued while the mortgagee was in possession, where it appears that the assignment by way of mortgage under which the mortgagee entered reserved the last day of the term to the mortgagor. Between the lessee and mortgagee there exists neither privity of contract or estate, the possession being considered that of an undertenant. *Bonner v. Tottenham*, etc. Permanent Invest. Bldg. Soc. [1899] 1 Q. B. (Eng.) 161.

An assignee by way of mortgage of an agreement to lease for a period of fifteen years, which is not under seal, cannot be held liable as an assignee of the term unless he enters into possession, as the original lease being for a term longer than three years is void under the statute of frauds and no privity of estate can be created thereunder without possession. *Purchase v. Lichfield Brewery Co.* [1915] 1 K. B. (Eng.) 184, 111 L. T. N. S. 1105, 84 L. J. K. B. 742.

A mortgagee cannot be held liable as an assignee of the term if the mortgage has not been properly acknowledged and recorded, as no interest passes until it is duly recorded. *Lester v. Hardesty*, 29 Md. 50.

In some jurisdictions wherein a mortgage is considered as a mere security for a debt, and no title passes, the mortgagee of a term even though he takes possession of the premises is not liable for the rent to the lessor as an assignee of the tenant. *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638. See also *Engels v. McKinley*, 5 Cal. 153.

In other jurisdictions although the mortgage is regarded as a mere security the courts have laid down the rule that the mortgagee of a lease is not liable *unless* he takes actual possession of the leased premises. *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164; *Astor v. Miller*, 2 Paige (N. Y.) 68 (*reversed* on other grounds 5 Wend. 603); *Walton v. Cronly*, 14 Wend. (N. Y.)

73 W. Va. 427.

62; *Prather v. Foote*, 1 *Desney* (Ohio) 434; *Wetherell v. Hamilton*, 15 Pa. St. 195. See also *Sibley v. Walton*, 2 Ohio Cir. Ct. 69, 1 Ohio Cir. Dec. 367. Likewise an assignee of a lease as security for a debt is not liable for the rent of the property where he does not take possession of the premises. *McKee v. Angelrodt*, 16 Mo. 283; *Levy v. Long Island Brewery*, 26 Misc. 410, 56 N. Y. S. 242. Thus in *McKee v. Angelrodt*, supra, the court said: "In the case before us, the lease was assigned by way of mortgage; it was a mere security for the payment of money. The assignee never took possession; it never entered into the heads of the assignees that the mortgage to them, in order to secure the money due to them, made them liable to pay the rent under the lease. We hold, therefore, that possession in the assignee is necessary in order to create a liability to payment; that the assignee must be in a situation to receive the benefits before he can be made to suffer the burden. Possession is the mother of his liability."

However, in the latter jurisdictions the assignee of a lease as security for a debt is liable for the rent reserved under the lease while he is in possession of the premises as a privity of estate is thereby created. *Olcese v. Val Blatz Brewing Co.* 144 Ill. App. 597; *Knox v. Bailey*, 4 Mo. App. 581; *Talley v. James Everand's Breweries*, 116 N. Y. S. 657; *Cockrell v. Houston Packing Co.* 105 Tex. 283, 147 S. W. 1145. Thus in the case last cited the court said: "The mortgagee of a lease who takes possession of the leased premises is in the attitude of an assignee of such lease and is therefore liable to the landlord for the rent. It seems to be a well-settled rule applicable to our law that the mortgagee of a lease not in possession of the leased property cannot be considered as an assignee, but if he takes possession of the leased premises he becomes in law the assignee of the lease and is liable for the rents to the landlord." However, in *Tallman v. Bresler*, 65 Barb. 369, affirmed 56 N. Y. 635, it was held that entering on the premises for the purpose of making repairs is not such possession as to render the mortgagee liable.

#### (c) Assignee for Benefit of Creditors.

The mere acceptance of an assignment for the benefit of creditors does not render the assignee liable for the rents reserved as the assignee of a lease held by his assignor. There must be an acceptance of the term or some act indicating an intention to accept it. *Smith v. Ingram*, 90 Ala. 529, 8 So. 144; *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621; *Rand v. Francis*, 168 Ill. 444, 48 N. E. 159; *Boyce v. Bakewell*, 37 Mo. 492; *Lewis v. Burr*, 8 Bosw. (N. Y.) 140; *Dennistoun v. Hubbell*,

10 Bosw. (N. Y.) 155; *Johnston v. Merritt*, 10 Daly (N. Y.) 308; *Journey v. Brackley*, 1 Hilt. (N. Y.) 447; *Judd v. Bennett*, 28 Misc. 558, 59 N. Y. S. 624; *Wilder v. McDonald*, 63 Ohio St. 383, 59 N. E. 106; *Pratt v. Levan*, 1 Miles (Pa.) 358; *In re Weinmann*, 164 Pa. St. 405, 30 Atl. 389. See also *Wales v. Chase*, 139 Mass. 538, 2 N. E. 109. In *Smith v. Goodman*, supra, the court said: "There is not entire uniformity of decisions as to when the assignee will be held to have accepted the lease and bound himself to perform its covenants, and no general rule can be laid down as to the effect of specific acts of the assignee in determining whether there has been an election to take the leasehold as a part of the assigned property. An examination of the adjudged cases is valuable only as fixing the general principle by which the case is to be governed, which would seem to be, that the assignee will not be held to have accepted the lease, unless it be shown that he has done so expressly, or, by unequivocal acts inconsistent with the right of entry by the landlord, has indicated an election to appropriate the leasehold estate." Thus in *Lewis v. Burr*, 8 Bosw. (N. Y.) 140, the assignee was held not to be liable under the covenants of the lease, it appearing that the lease was not mentioned in the assignment and that he had been in possession of the property only for the purpose of making an inventory. And in *Dennistoun v. Hubbell*, 10 Bosw. (N. Y.) 155, the assignee was held not to be liable under the lease where it appeared that he had collected rents from various under-tenants not knowing them to be such, the lease not having been mentioned in the assignment.

It has been held not to constitute an election for the full term where the assignee enters on leased premises merely to take possession of and remove the goods located thereon, *Johnston v. Merritt*, 10 Daly (N. Y.) 308; or is in possession for only six days, *Judd v. Bennett*, 28 Misc. 558, 59 N. Y. S. 624; or is in possession for eleven days for the purpose of inventory and sale and pays the rent for that quarter, *Pratt v. Levan*, 1 Miles (Pa.) 358; or takes bare possession for the purpose of disposing of the assignor's stock. *In re Weinmann*, 164 Pa. St. 405, 30 Atl. 389.

But where a lessee of property makes a general assignment for the benefit of creditors the assignee becomes liable for the rent reserved in the lease if he elects to accept the term or exercises such control over the property as will constitute an election. *Carter v. Warne*, 4 C. & P. 191, 10 E. C. L. 336; *Lazier v. Armstrong*, 5 Ont. W. Rep. 596; *Donance v. Jones*, 27 Ala. 630; *Smith v. Ingram*, 90 Ala. 529, 8 So. 144; *Horwitz v. Davis*, 16 Md. 313; *Boyce v. Bakewell*, 37 Mo. 492; *Astor*

v. Lent, 6 Bosw. (N. Y.) 612; Morton v. Pinckney, 8 Bosw. (N. Y.) 135; Jones v. Hausmann, 10 Bosw. (N. Y.) 168; Cameron v. Nash, 41 App. Div. 532, 58 N. Y. S. 643; Thoms v. Meader, 9 Ohio Dec. 490, 6 Ohio N. P. 242. See also People v. German Bank, 126 App. Div. 231, 110 N. Y. S. 291. See also Morris v. Parker, 1 Ashm. (Pa.) 187. And this is true even though the assignment is subsequently declared to be void as an act of bankruptcy. Stein v. Pope [1902] 1 K. B. (Eng.) 595, 71 L. J. K. B. 322, 86 L. T. N. S. 283, 50 W. R. 374, 9 Manson 125; Mead v. Madden, 85 App. Div. 10, 82 N. Y. S. 900.

However, an assignee for the benefit of creditors even though he has occupied leased premises for a certain period may show that he has never accepted an assignment of the term, in which case the lessor cannot collect from him under the terms of the lease. Bagley v. Freeman, 1 Hilt. (N. Y.) 196.

The liability of an assignee who has taken possession of leased property is limited to the rent which actually accrues while he holds the leasehold estate. Young v. Peyser, 3 Bosw. (N. Y.) 308; Anderson v. Hamilton, 16 Daly (N. Y.) 18; Pilzemayer v. Walsh, 2 City Ct. (N. Y.) 244; Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92. In Young v. Peyser, *supra*, it was held that where an assignee for the benefit of creditors entered the leased premises of his assignor during the middle of a quarter and continued to occupy the premises until the rent for that quarter became due he was liable for the rent of the entire quarter. In the same case it appeared that he continued to occupy the premises for fourteen days over the quarter, and for that period he was held not to be liable, the rent being payable at the end of the quarter. In Anderson v. Hamilton, *supra*, it appeared that an assignor for the benefit of creditors was lessee of certain premises under a written lease requiring payment of rent in monthly instalments in advance. The assignment was made on January 5th and the assignee took possession and occupied the premises on and after January 15th. The action was instituted by the lessor to recover the rent for the entire month of January or at least from January 5th the date of the assignment. The court held that inasmuch as the rent was due and payable under the terms of the lease on the 1st of the month, the assignor was liable therefor and while it was a provable claim against the estate, the assignee could not be held liable. In Pilzemayer v. Walsh, 2 City Ct. (N. Y.) 244, it was said: "Where an assignee for the benefit of creditors is by his acts deemed to have accepted the transfer of a lease held by the assignor, he will not be personally liable for rent which became due before he en-

tered. Thus, when the rent is payable monthly in advance, and the assignee enters in the middle of the month, he is not liable for any portion of the rent of the current month, but only under the covenants of the lease for rent subsequently falling due."

In Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, it appeared that the lessee of certain premises made an assignment for the benefit of premises on the 2nd day of January and the assignee went into possession of the leased premises on that day and continued in possession of the premises until the 28th day of January at which time a warrant in dispossession proceedings was issued and he thereupon surrendered possession to the lessor. Under the terms of the lease the rent was due and payable in advance on the first day of each month and in an action brought by the assignee against the lessor for certain property sold to the latter, he pleaded as a counterclaim against the assignee the amount of the rent for the month of January. The court held that although the first of January was a legal holiday the rent became due and payable on that day and inasmuch as the assignee did not take possession until the second of the month and vacated on the 28th no rent became due and payable during his occupancy and as a result he owed nothing to the lessors, nor was he liable for the use and occupation of the premises as the lease was in full force and effect during his period of occupancy.

The liability of an assignee for the benefit of creditors who has accepted a lease of the assignor may be terminated by reassigning the term and relinquishing possession, or by any act which works the dissolution of the privity of estate. Smith v. Ingram, 90 Ala. 529, 8 So. 144; Donaldson v. Strong, 195 Mass. 429, 81 N. E. 267; Magill v. Young, 10 U. C. Q. B. 301. Thus in Smith v. Ingram, 90 Ala. 529, 8 So. 144, the court said: "The liability of the assignee is founded on the privity of estate existing between him and the lessor, not on a privity of contract. His liability is co-existent with the privity of estate; when the latter terminates, the former ceases as to rent subsequently accruing. He may exonerate himself from further liability by assigning to a stranger, and relinquishing possession."

But the assignee cannot be discharged from his liability by a mere abandonment of the premises, where he retains the title to the term. Thoms v. Meader, 9 Ohio Dec. 490, 6 Ohio N. P. 242.

#### (d) Assignee or Trustee in Bankruptcy.

An assignee or trustee in bankruptcy who elects to accept a leasehold estate held by the bankrupt becomes personally liable on



the covenants for the payment of rent as assignee of the town. *Hanson v. Stevenson*, 1 B. & Ald. (Eng.) 305; *Welch v. Myers*, 4 Campb. (Eng.) 368; *Ansell v. Robson*, 2 Crompt. & J. (Eng.) 610; *Hastings v. Wilson*, Holt N. P. (Eng.) 290; *Clark v. Hume*, Ry. & M. (Eng.) 207; *Thomas v. Pemberton*, 7 Taunt. 206, 2 E. C. L. 206; In re Commercial Bulletin Co. 2 Woods 220, 3 N. Y. Wkly. Dig. 12, 14 Nat. Bankr. Reg. 286, 6 Fed. Cas. No. 3,060; Ex p. Faxon, 1 Lowell 404, 4 Nat. Bankr. Reg. 32, 8 Fed. Cas. No. 4,704; *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889; In re Otis, 101 N. Y. 580, 5 N. E. 571, approved In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 33 L.R.A.(N.S.) 745. See also *Williams v. Bosanquet*, 1 Brod. & B. 238, 5 E. C. L. 72, 3 Moo. C. Pl. 500, 21 Rev. Rep. 585. See also *Carter v. Warne*, 4 C. & P. 191, 19 E. C. L. 336; *Crowe v. Baumann*, 190 Fed. 399; In re Metals Extraction, etc. Bank, 195 Fed. 226, 115 C. C. A. 178. Thus in the case of In re Commercial Bulletin Co. 2 Woods 220, 3 N. Y. Wkly. Dig. 12, 14 Nat. Bankr. Reg. 286, 6 Fed. Cas. No. 3,060, the court said: "A landlord cannot prove against a bankrupt's estate for rent which accrues after the bankruptcy; and neither the bankrupt nor the assignee can claim to occupy the leased premises thereafter without paying the rent in full, unless it has been prepaid by the bankrupt. If they continue to occupy the premises they are liable personally for the rent; and the landlord has his lien on their goods on the premises the same as against other tenants. For rent thus accruing after the bankruptcy, the landlord has nothing to do with the expenses of the estate. They are nothing to him. They cannot be deducted from his rent. If an assignee continues to occupy leased premises of the bankrupt, he ought always to make some definite arrangement with the landlord, unless he expects and is willing to pay the accruing rent." In the case of In re Otis, 101 N. Y. 580, 5 N. E. 571, the court of appeals in holding that a committee of a lunatic did not become liable as assignee of a lease by the fact of their occupation of the premises, for the reason that such a committee takes no title to the real or personal estate of the lunatic, said: "It is well settled that a receiver, or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor, or assignor, becomes by such election assignee of the lease and personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender.

. . . This doctrine proceeds on the ground that on the election being made, the receiver or assignee becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver or assignee, by virtue of which

the latter becomes liable on the covenants running with the land." The foregoing was cited and approved by Circuit Judge Noyes, In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 33 L.R.A.(N.S.) 745. In *Brooklyn Imp. Co. v. Lewis*, 136 App. Div. 861, 122 N. Y. S. 111, 24 Am. Bankr. Rep. 122, it was held that a receiver in bankruptcy who had elected to accept a lease held by the bankrupt, and continued to occupy the premises, made himself personally liable for the payment of such rent as accrued under the terms of the lease during the period he was in possession.

However, assignees or trustees in bankruptcy do not by accepting the trust, become assignees of the lease. There must be some positive and unequivocal act of acceptance of the term, as distinguished from acceptance of the trust, before they can be held liable. *Copeland v. Stephens*, 1 B. & Ald. (Eng.) 593; In re Ives, 18 Nat. Bankr. Reg. 28, 13 Fed. Cas. No. 7,116; In re Washburn, 11 Nat. Bankr. Reg. 66, 29 Fed. Cas. No. 17,211; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Hays, etc. Co. 117 Fed. 879, 9 Am. Bankr. Rep. 144; In re J. Frank Stanton Co. 162 Fed. 169, 20 Am. Bankr. Rep. 549; In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 33 L.R.A.(N.S.) 745, 24 Am. Bankr. Rep. 903; In re Criblier, 184 Fed. 338; In re Sherwoods, 210 Fed. 754, Ann. Cas. 1916A 940, 127 C. C. A. 304; In re Ten Eyck, 7 Nat. Bankr. Reg. 26, 23 Fed. Cas. No. 13,829; In re Yeaton, 1 Lowell 420, 30 Fed. Cas. No. 18,133. See also *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 Moo. C. Pl. 500, 21 Rev. Rep. 585, 5 E. C. L. 72; *Goodwin v. Noble*, 8 El. & Bl. 587, 92 E. C. L. 587. Thus in the case of In re Washburn, 11 Nat. Bankr. Reg. 66, 29 Fed. Cas. No. 17,211, wherein it appeared that the assignee in bankruptcy had no knowledge of the fact that certain premises formerly occupied by the bankrupt were held under a lease and that as soon as such fact was made known to him he rejected the lease, it was decided that he could not be held liable under the covenants, especially as he had received no benefits from his occupation. And in the case of In re Ten Eyck, 7 Nat. Bankr. Reg. 26, 23 Fed. Cas. No. 13,829, it was held that mere occupation of leased premises with an understanding that the occupancy was independent of the lease was not evidence of an election on the part of the assignees so as to render them liable for the full term in the character of assignees of the lease. In the case of In re J. Frank Stanton Co. 162 Fed. 169, 20 Am. Bankr. Rep. 549, the court held that the occupation of a part of the leased premises of the bankrupt for a short time in disposing of his stock would not constitute an election to accept the lease by the trustee. In the

case of *In re Yeaton*, 1 Lowell 420, 30 Fed. Cas. No. 18,133, the court said: "There is no evidence that the assignee has done any act looking to an acceptance of the premises, excepting that a part of the bankrupt's goods not included in the mortgage remained, and still remain, in the building. This circumstance alone does not prove an acceptance, especially when the keys were sent back to the lessor, which was an unequivocal act of renunciation. . . . It cannot be contended, therefore, that the assignee is personally bound for the rent."

For such time as the trustee is compelled to occupy the leased premises of the bankrupt, in order properly to carry out his trust, he must of course pay a reasonable rent, which is treated as being a part of the expense of administering the estate. *In re Butler*, 6 Nat. Bankr. Reg. 501, 19 Pittsb. Leg. J. 146, 3 Pittsb. Rep. 369, 4 Fed. Cas. 2,236; *In re Jefferson*, 93 Fed. 948, 2 Am. Bankr. Rep. 206; *In re Grimes*, 96 Fed. 529, 2 Am. Bankr. Rep. 730; *Bray v. Cobb*, 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re Hays*, etc. Co. 117 Fed. 879, 9 Am. Bankr. Rep. 144; *In re Luckenbill*, 127 Fed. 984, 11 Am. Bankr. Rep. 455; *In re J. Frank Stanton Co.* 162 Fed. 169, 20 Am. Bankr. Rep. 549; *In re Adams Cloak*, etc. House, 199 Fed. 337; *In re Sherwoods*, 210 Fed. 754, Ann. Cas. 1916A 940, 127 C. C. A. 304. Thus in the case last cited the court said: "It is well settled that upon the bankruptcy of the tenant, provided this does not by the express terms of the lease terminate the tenancy, the leasehold interest passes to the trustee in bankrupt if he elects to accept it. He has a reasonable time within which the lease may be accepted. If in the meanwhile he occupies the premises, he is liable for merely the reasonable rent while so occupying, and not for the rent stipulated in the lease itself. Nevertheless the rent so stipulated should be accepted as the reasonable worth of the use and occupation, in the absence of clear showing of unreasonableness."

An assignee in bankruptcy may terminate his personal liability, incurred after electing to accept an assignment of a lease held by the bankrupt, by making a reassignment of the same. *Onslow v. Corrie*, 2 Madd. 330, 56 Eng. Rep. (Reprint) 357.

As a general rule the courts in passing on the question whether the relation of landlord and tenant is severed by an adjudication of the latter in bankruptcy, have confined themselves to a discussion of the construction of the bankruptcy acts and the effect of an adjudication in bankruptcy as terminating all of the contractual relations of the bankrupt (see *In re Sherwoods*, 210 Fed. 754, Ann. Cas. 1916A 940, 127 C. C. A.

304; and *In re Roth*, 181 Fed. 667, 104 C. C. A. 649, 31 L.R.A.(N.S.) 270, 24 Am. Bankr. Rep. 588). Those cases are obviously without the scope of this note. In some instances however the courts have held that where a trustee in bankruptcy assumes the lease, the bankruptcy operates like any other assignment and the principles of landlord and tenant are applied. See *In re Scruggs*, 205 Fed. 673; *Witthaus v. Zimmermann*, 91 App. Div. 202, 86 N. Y. S. 315, 11 Am. Bankr. Rep. 314. The value of the application of those principles, which logically follows the decisions holding the assignee or trustee in bankruptcy personally liable as assignee of the lease on his election to accept the term, is evidenced by the decision of Lord Ellenborough, C. J., in *Copeland v. Stephens*, 1 B. & Ald. (Eng.) 593, an action to recover rent from the assignee of a lease which accrued subsequent to his adjudication in bankruptcy. The question raised was whether the privity of estate, which once existed between the plaintiff lessor and the defendant assignee, of a lease for years, had been destroyed by the legal effect and operation of the actual execution of a deed of general assignment of the personal estate of the defendant made under a commission of bankrupt against him. It was admitted, however, that the assignee in bankruptcy had not accepted the lease or term or entered into or become possessed of the demised premises and the defendant was held liable for the rent. The court said: "We are of opinion that the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate; and upon this ground alone, our judgment in the present case is given."

#### (e) Receiver.

As a general rule a common-law or chancery receiver appointed by order of the court does not, by taking possession of leased premises, become personally liable for the rents reserved, as assignee of the lease. He holds as a mere custodian of the court and the title to the leasehold does not vest in him. *Quincy, etc. R. Co. v. Humphreys*, 145 U. S. 83, 12 S. Ct. 787, 36 U. S. (L. ed.) 632; *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; *Bell v. American Protective League*, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L.R.A. 452; *Stokes v. Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L.R.A. 870. See also *Com. v. Franklin Ins. Co.* 115 Mass. 278. Compare *U. S. Trust Co. v. Wabash W. R. Co.* 150 U. S.

287, 14 S. Ct. 86, 37 U. S. (L. ed.) 1085, explained in *Stokes v. Hoffman House*, supra. Thus in *Gaither v. Stockbridge*, supra, the court said: "The ordinary receiver of a court of chancery is supposed to be an indifferent person as between the parties to the cause, whose function or office it is to receive and preserve the property or fund in litigation *pendente lite*, when it is made apparent to the court that the rights of the parties concerned require such protection. He is an officer of the court, and the fund or property entrusted to his care is regarded as being *in custodia legis*, to await the ultimate disposal thereof by the court, according to the rights and priorities of the parties concerned. The court itself has the care of the property, by its receiver, and that officer, being the mere creature of the court, has no powers other than those conferred upon him by the court, or derived from its established practice. His appointment does not change the title to the property, or create any lien upon the same, in favor of any of the parties interested; his holding being for the benefit of the party who may be ultimately determined to be entitled. . . . Such, then, being the nature of the office and duty of a receiver, and his relation to the court, it is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of a lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term, as being without benefit to the creditors. But not so in the case of a receiver, unless it be, as in New York and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. . . . The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term." And in *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481, it was held that if a receiver of an insolvent corporation

takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term, and is not liable on the covenants of the lease.

However a statutory receiver, in whom title to the property vests, becomes liable for the rent of leased premises as assignee of the term where he elects to accept the lease. *Martin v. Black*, 9 Paige (N. Y.) 641, 38 Am. Dec. 574; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Frank v. New York, etc. R. Co.* 122 N. Y. 197, 25 N. E. 332. See also *Stokes v. Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L.R.A. 870. The foundation and nature of his liability was defined by the court in *Woodruff v. Erie R. Co.* supra, wherein it was said: "He could not take possession of the property and enjoy its use and occupation without incurring a liability for the payment of the rent under the lease by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised. While it is competent for him at any time to negotiate a new and secure a modification of the terms of the lease with the consent of the various parties interested, or to repudiate the lease and surrender the property, yet not having done so he must be held to have continued his acceptance under the terms and conditions of the existing lease as to the payment of rent thereon. His position has been said to be analogous to that of an executor who takes possession and enjoys the occupation of property held under a lease by his testator. He thereby becomes liable for the payment of the rent accruing during his occupation of the premises according to the terms of the lease under which it was acquired."

#### (f) Committee of Lunatic.

As the committee of a lunatic takes no title to the real or personal estate of a lunatic, he does not by taking possession of licensed premises render himself personally liable as assignee of the term. In *re Otis*, 101 N. Y. 580, 5 N. E. 571, wherein the court in passing on the liability of such a committee for the rent of leased premises, said: "The rent accruing after the appointment of the committee became a charge upon his estate, and was a demand which the petitioners could present and have adjusted in the ordinary course of administration. A claim for rent under a lease, whether accruing before or after the appointment of a committee, has no intrinsic preference over other debts of the

lunatic. The lessor has his remedy by re-entry in case of default in payment of the rent, or he may forego his right to terminate the term, and come in as a general creditor of the estate for the rent unpaid. There may be equitable reasons upon which the court in a particular case ought to give a preference for rent accruing after the appointment of the committee. If the leased premises are occupied by the committee, and such occupation is to the advantage of the estate, as where it was necessary in order to carry on or close up the business of the lunatic, the rent accruing during such occupation would justly be regarded as a reasonable expense incurred by the committee to be paid before the claims of general creditors. But we perceive no equitable principle upon which a demand for rent takes preference of other debts, in the absence of a special equity growing out of the circumstances of a particular case. It is claimed that the occupation of the premises for a time by the first committee was an acceptance of the lease by him, and that he thereby became liable as assignee of the term, and that the present committee succeeded to his situation and responsibility. If this claim was well founded, it would be material only as bearing upon the general equity of the committee, to be protected against liability, by charging the fund in his hands with the rent before paying the general creditors. But we are referred to no authority which sustains the proposition that the committee of a lunatic becomes chargeable as assignee of a lease held by the lunatic, by reason of his occupation of the premises after his appointment."

(g) Executor or Administrator.

An executor or administrator of a lessee who enters on the leased premises and holds possession of the estate after the death of the lessee is chargeable personally as assignee and is liable for the rents *de bonis propriis*. *Hopwood v. Whaley*, 6 C. B. 744, 60 E. C. L. 744, 6 Dowl. & L. 342, 18 L. J. C. Pl. 43, 12 Jur. 1088, 12 Eng. Rul. Cas. 50; *Hargrave's Case*, 5 Coke 31a, 77 Eng. Rep. (Reprint) 100, 12 Eng. Rul. Cas. 47; *Reid v. Tenterden*, 4 Tyrw. (Eng.) 111; *Jevens v. Harridge*, 1 Saund. (Eng.) 1 note; *Tremeere v. Morison*, 1 Bing. N. Cas. 89, 27 E. C. L. 315; *Rubery v. Stevens*, 4 B. & Ad. 241, 24 E. C. L. 50, 1 N. & M. 183, 2 L. J. K. B. 46; *Inches v. Dickinson*, 2 Allen (Mass.) 71, 79 Am. Dec. 765; *Montague v. Smith*, 13 Mass. 405; *In re Galloway*, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177; *Pugsley v. Aiken*, 11 N. Y. 494; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1. See also *Williams v. Heales*, L. R. 9 C. P. (Eng.) 177; *Lyddall v. Dunlapp*, 1 Will. K. B. (Eng.) 5; *Traylor v. Cabanne*, 8 Mo. App. 131. Thus in *Inches*

*v. Dickinson*, 2 Allen (Mass.) 71, 79 Am. Dec. 765, it was said: "The rule of law is well settled that an executor or administrator of a lessee is liable for rent of demised premises only to the extent of the assets in his hands, and cannot be held personally therefor, unless he enters and holds possession of the estate after the death of the lessee. In the latter case, he is chargeable as assignee, in respect of the perception of the profits, and liable for the rent *de bonis propriis*. Inasmuch as in law the profits of an estate under a demise are deemed to be appropriated to the lessor, if an executor or administrator enters during a current quarter, and takes the profits from an under-tenant or otherwise, the rent becomes his personal debt, and he is liable for the rent for that quarter, to the extent of the value of the premises, although it commenced before the death of the lessee."

In *Tremeere v. Morison*, 1 Bing. N. Cas. 89, 27 E. C. L. 315, the court said that the general rule was that the executor of a lessee is liable as an assignee, but with respect to the rent, his liability does not exceed what the property yields. In *Rubery v. Stevens*, 4 B. & Ad. 241, 24 E. C. L. 50, 1 N. & M. 183, 2 L. J. K. B. 46, the court held that where the yearly value of deceased's premises is less than the rent reserved the executors are liable as assignees for only so much as the premises are worth. And in *Billingham v. Speerman*, 1 Salk. (Eng.) 297, it was held that in a debit and detinet against an executor of a lessee he may plead that he has no assets and that the land is of less value than the rent reserved.

In order to render the executor or administrator personally liable as assignee of the term it is essential that he should enter on or take possession of the leased premises. *Wollaston v. Hakewill*, 3 M. & G. 297, 42 E. C. L. 161, 3 Scott N. R. 595; *Tilney v. Norris*, 1 Ld. Raym. 553, 12 Eng. Rul. Cas. 49; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177.

It seems, however, that the personal liability of an executor or administrator of a lessee may be terminated by his making an assignment of the term. Thus in *Rowley v. Adams*, 3 Jur. 1069, 2 Jur. 915, 9 L. J. Ch. 34, 4 Myl. & C. 536, 41 Eng. Rep. (Reprint) 206, it was held that where the executors of an estate find that a lease which the testator held as assignee was a burden, it was not only their right but their duty to terminate their liability by making an assignment if the landlord refused to accept a surrender of the term.

(h) Heir or Devisee.

An heir or devisee of a lessee to whom a leasehold interest has descended is held liable for the rents reserved as assignee of the term

where he enters into possession of the property. *Mackin v. Haven*, 187 Ill. 480, 58 N. E. 448; *Howard v. Heinerschit*, 16 Hun (N. Y.) 177; *Noble v. Thayer*, 19 App. Div. 446, 46 N. Y. S. 302.

He cannot be charged as an assignee in law, however, unless he takes possession of the premises or signifies his acceptance of the lease. *Whitcomb v. Starkey*, 63 N. H. 607, 4 Atl. 793; *Noble v. Thayer*, 19 App. Div. 446, 46 N. Y. S. 302.

(i) Purchaser of Leasehold at Judicial Sale.

A purchaser of a leasehold interest at a judicial sale is bound to perform the covenants of the lease for the payment of rent as an assignee of the term. *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889; *D'Aquin v. Armant*, 14 La. Ann. 213; *Lehman v. Dreyfus*, 37 La. Ann. 587; *People v. Dudley*, 58 N. Y. 323; *Sutliff v. Atwood*, 15 Ohio St. 186; *Conrad v. Smith*, 12 Phila. (Pa.) 306, 35 Leg. Int. 144; *Herbaugh v. Zentmyer*, 2 Rawle (Pa.) 159; *State v. Martin*, 14 Lea (Tenn.) 92, 52 Am. Rep. 167; *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16. See also *McBee v. Sampson*, 66 Fed. 416; *Methot v. O'Callaghan*, 2 L. C. Rep. 331. *Compare Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381 (wherein it appeared that the right of occupancy was sold as distinguished from a sale of the lease itself).

And this is true whether or not he enters into actual possession of the leased premises. *Smith v. Brinker*, 17 Mo. 148, 57 Am. Dec. 265.

However, the purchaser of a leasehold interest at a judicial sale cannot be held liable for the rent of the premises as assignee of the lease until he receives a deed, as the title does not pass until that time. *Bartlett v. Amberg*, 92 Ill. App. 377, *appeal dismissed* in 190 Ill. 15, 60 N. E. 84; *Thomas v. Connell*, 5 Pa. St. 13. See also *Schwartz v. Williamson*, 29 Ohio Cir. Ct. Rep. 78.

The liability of a purchaser of a leasehold at a judicial sale as an assignee of the term may be terminated by making an assignment of the lease but not by mere abandonment of possession. *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16. And in *Snowden v. Memphis Park Ass'n*, 7 Lea (Tenn.) 225, it was held that a purchaser of a leasehold interest at a judicial sale may be permitted to disclaim all interest under his purchase and thereby avoid liability for the rents subsequently accruing.

b. To Lessee.

(1) After Payment of Rent by Lessee.

(a) Generally.

It is generally held that where the lessee of a term who has assigned the same pays

to the lessor the rents subsequently accruing, he is entitled to recover them from his assignee. *Moule v. Garrett*, L. R. 5 Exch. (Eng.) 132 (*affirmed* L. R. 7 Exch. 101); *Lloyd v. Dimmack*, 7 Ch. D. (Eng.) 398; *Stone v. Evans*, Peake Add. Cas. (Eng.) 94; *Staines v. Morris*, 1 Ves. & B. 8, 35 Eng. Rep. (Reprint) 4; *Brown v. Lennox*, 22 Ont. App. 442; *Ashford v. Hack*, 6 U. C. Q. B. 541; *McDowell v. Hendrix*, 67 Ind. 513; *Rawlings v. Duvall*, 4 Har. & McH. (Md.) 1; *Fletcher v. McFarlane*, 12 Mass. 43; *Collins v. Pratt*, 181 Mass. 345, 63 N. E. 946; *McKeon v. Wendelken*, 25 Misc. 711, 55 N. Y. S. 626; *Crowley v. Gormley*, 59 App. Div. 256, 69 N. Y. S. 576; *Bender v. George*, 92 Pa. St. 362. See also *Burnett v. Lynch*, 5 B. & C. 589, 11 E. C. L. 327; *Groon v. Bluck*, 2 M. & G. 567, 40 E. C. L. 516; *In re Russell*, 29 Ch. D. (Eng.) 254. Thus in *Moule v. Garrett*, L. R. 5 Exch. (Eng.) 132 (*affirmed* L. R. 7 Exch. 101) it was said by Channell, B., that "the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of each assignee to indemnify the lessee against liability for breaches of covenant whilst he is assignee."

Likewise it has been held that when there is no apparent danger that he may be compelled to pay again, an assignee of a lease is liable to his assignor for the rent of the premises. Thus in *Trabue v. McAdams*, 8 Bush (Ky.) 74, the court said: "As the lessees, W. C. Trabue and Looney, by their covenants, recognized H. J. Trabue as their landlord, they cannot be permitted to deny it in this suit, nor can their assignee be permitted to do so, in the absence of any apparent danger that they may be compelled to pay again to some one else. Such danger, if made apparent, would entitle them to an equitable defense, and a transfer of the case to the equity court, where the rights of all the parties and all claimants of the rents might be heard and adjudicated."

However one who is a colessee of premises having assigned his interest in the lease to his cotenant has no right of action under the original lease, for use and occupation against his cotenant or a sublessee of the latter even though he has paid the rent for the entire term to the lessors and taken an assignment of their interest under the lease. He is placed in the light of acquiring the interest of the lessors for the purpose of suing himself, or, what is equivalent, his co-obligor, on the lease, after he had discharged the obligation; the other parties being tenants of his co-obligor, and not of his assignors, the lessors. *Holman v. DeLin-River Finley Co.* 30 Ore. 428, 47 Pac. 708.

Payment by the assignee of a lease to the lessor of the rent due is a valid defense in an action brought by his assignor to recover

the same rent. *Dreyfuss v. Phillips*, 121 N. Y. S. 378.

(b) Where Lessor Has Not Consented to Assignment.

Where the lessee has paid the accrued rent to the landlord he may recover the same from his assignee and the fact that the lessor never consented to the assignment is immaterial. *Brown v. Lennox*, 22 Ont. App. 442.

But where the lessors have not consented to an assignment, and have refused to recognize the assignee as tenant, the lessee cannot recover rent from his assignee after the latter has abandoned the premises, either by way of implied indemnity or for use and occupation, as no valid relation of landlord and tenant exists between the parties. *Crouch v. Tregonning*, L. R. 7 Exch. (Eng.) 88.

(c) Liability after Reassignment.

In the absence of an express agreement, the liability of the assignee terminates by a reassignment and he is not liable to the lessee for defaults in the payment of rent accruing subsequent to his reassignment. *Wolveridge v. Steward*, 1 C. & M. 644, 30 E. C. L. 521, 3 Tyrw. 637, 3 Moo. & S. 561, 3 L. J. Exch. 360; *Mason v. Smith*, 131 Mass. 510.

Likewise a judicial sale of the interest of an assignee of a term, and the subsequent execution of a deed therefor terminates the privity of estate existing between the lessee and the assignee and the latter is not answerable to the lessee in an action for the rent accruing subsequent to the date of the sale. *Baltimore City v. Peat*, 93 Md. 698, 50 Atl. 152, 698, wherein the court said: "There is no doubt that the covenant to pay rent in a lease like the one now under consideration not only binds the lessee personally throughout the entire term but also runs with the land, and each successive assignee of the leasehold term becomes liable upon the covenant to the lessor for such rent as matures, while the title to the leasehold remains in him, provided the action against him for the rent be instituted before he parts with the legal title to the term. It is equally clear that as the assignee's liability for the rent springs entirely from his relation to the land that liability extends only to such rent as matures while the title to the term remains vested in him. . . . The mere assignment of the equitable title of the assignee to the leasehold whether accomplished by his own act or through the agency of a judicial proceeding if not consummated by the transfer of the legal estate will be insufficient to discharge him from liability under the covenants of the lease. . . . In the case at bar it is admitted that there was not only a divesting of the equitable title of the appellee to the leasehold by the trustee's sale to Bran-

conveyance of the legal estate from the trustee to the purchaser. . . . Upon the final ratification of the sale the equitable and substantial title to the lot was divested out of her and into the purchasers and when the trustee's deed conveying the lot to the purchaser was duly executed, acknowledged and recorded the same transmutation of the legal title occurred. The order of ratification and the trustee's deed did not however operate to pass the equitable and legal title respectively merely from their several dates, but being made under a judicial sale, they, upon the principle of relation, operated retrospectively and divested the equitable and legal estates out of the appellee and vested them in the purchasers from the date of the trustee's sale."

However if the assignee has undertaken to pay the rent reserved for the term he continues liable even after a reassignment. *Harris v. Strickler*, 86 Kan. 266, 120 Pac. 343, wherein the court said: "An assignment does not annul the lessee's obligation on his covenant to pay rent, although the lessor has consented to the assignment and collected rent from the assignee. . . . The same principle applies to an assignee of a term who has undertaken to pay rent to his assignor." And in *Willson v. Leonard*, 3 Beav. (Eng.) 373, it was held that an assignee of a lease who has been held liable on his covenant to the lessee to indemnify him for any subsequent breaches of covenant in the payment of rent may recover of his assignee in an action on covenant, although the latter never signed the assignment to him but occupied the premises and later assigned by an instrument containing a similar covenant indemnifying him from like breaches.

(2) Before Payment of Rent by Lessee.

A lessee cannot ordinarily recover from his assignee until he has paid to the lessor the rent for which he is suing. *Farrington v. Kimball*, 126 Mass. 313, 30 Am. Rep. 680. But where the assignee has covenanted with the lessee that he will perform and keep all the covenants mentioned in the lease he is liable to the lessee in an action for accrued rent although the latter has not paid the lessor. *Jackson v. Port*, 17 Johns. (N. Y.) 479, affirming 17 Johns. 239. And where the lessors have not consented to an assignment of the lease and have never recognized the assignee as such, the lessee may recover the rent from the assignee, although he has not paid the lessor. *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N. W. 1014.

## II. Effect of Sublease.

### 1. LIABILITY OF LESSEE.

A subletting of premises by the tenant with or without the consent of the landlord does not discharge the tenant from his obligation

to pay the rent. *Brosinan v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983; *Schacter v. Tuggle Co.* 8 Ga. App. 561, 70 S. E. 93; *Kenyon v. Young*, 48 Neb. 890, 67 N. W. 886; *Rosenwasser v. Amusement Enterprises*, 88 Misc. 57, 150 N. Y. S. 561; *Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013; *Pressler v. Barreda* (Tex.) 157 S. W. 435; *Agen v. Nelson*, 51 Wash. 431, 98 Pac. 1115. See also *Stone's Succession*, 31 La. Ann. 311; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Decker v. Hartshorne*, 65 N. J. L. 87, 46 Atl. 755; *Moffat v. Smith*, 4 N. Y. 126; *Conrady v. Byuatus* (Tex.) 24 S. W. 961.

Nor is a tenant who has sublet premises discharged from liability by the fact that the lessor accepts rent from the undertenant. *Brosman v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983; *Amenicus Mfg. etc. Co. v. Hightower*, 3 Ga. App. 65, 59 S. E. 309; *Schacter v. Tuggle Co.* 8 Ga. App. 561, 70 S. E. 93; *Powell v. Jones*, 50 Ind. App. 493, 98 N. E. 646; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Rosenwasser v. Enterprises*, 88 Misc. 57, 150 N. Y. S. 561; *Agen v. Nelson*, 51 Wash. 431, 98 Pac. 1115. See also *Bacon v. Brown*, 9 Conn. 334. Thus in *Schacter v. Tuggle Co.* 8 Ga. App. 561, 70 S. E. 93, the court said: "In the present case the original tenant agreed to pay the rent, and there was an express agreement that he might sublet the premises without the landlord's consent. Hence, for the landlord's agent to accept payment from the undertenant did not, in the absence of further contract, have the effect of substituting the undertenant as the primary debtor, or of releasing the original tenant from liability." In *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983, in a syllabus by the court it was said: "A landlord does not waive his right of action against his tenant merely by allowing a subtenant or assignee of the original tenant to remain in possession of the premises, even though he accept payment of the rents from the subtenant or assignee, with knowledge of such subletting or assignment. The original tenant may be released from liability by an agreement with the landlord for the substitution, or by the landlord's electing to proceed against the subtenant as his own tenant." And in *Rosenwasser v. Amusement Park Enterprises*, 88 Misc. 57, 150 N. Y. S. 561, it was said: "The mere fact that the person to whom the defendant claims to have sublet the premises paid rent to plaintiffs does not establish a surrender. The defendant could not thus force a new tenant on the owner and himself escape the payment of rent. A subletting would not discharge the original lessee from liability for the rent." In *Agen v. Nelson*, 51 Wash. 431, 98 Pac. 1115, it appeared that the rent for a greater part of

the term of an original lease executed by the parties to the action had been paid to the lessor by subtenants of the lessee. The receipts however at all times had been given in the name of the original tenant and nothing further was shown tending to establish a substitution of tenants. The court after setting forth the foregoing facts held that the lessee was not discharged from his obligation to pay the rent which he assumed in his original lease, either by operation of law or by any act of his landlord.

After the expiration of a lease if the lessee permits his undertenant to continue in possession, the law considers the lessee responsible as on a hiring for another term, on the same conditions as before, the possession of the undertenant being considered equivalent to his personal occupancy. *Bacon v. Brown*, 9 Conn. 334; *Wilson v. Cincinnati*, 10 Ohio Dec. (Reprint) 123, 18 Cinc. L. Rul. 10. *Compare Waters v. Banks*, 10 Mart. O. S. (La.) 94 (where lessor elected to look to undertenant for his portion of the rent). In Canada however it has been held that the continued occupation of leased premises by a sublessee after the expiration of the original term does not of itself signify a renewal of the term by the lessee but is sufficient to render the latter liable in an action for use and occupation. *Lindsay v. Robertson*, 30 Ont. Rep. 229. Likewise in England it has been held that where an undertenant continued in possession after the expiration of the original term, even against the lessee's will, the latter is liable to the lessor in an action for use and occupation, but only for such time as the undertenant continued to occupy the premises. *Ibbs v. Richardson*, 9 Ad. & El. 849, 36 E. C. L. 301, 3 Jur. 102, 8 L. J. Q. B. 126, 1 Pen. & Dav. 618; *Harding v. Crethorn*, 1 Esp. 57, 5 Rev. Rep. 719.

When the landlord elects to substitute the undertenant as his tenant, and accepts him as such he releases his claim on the original tenant. *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178; *Stimmel v. Waters*, 2 Bush (Ky.) 282. And in *Waters v. Banks*, 10 Mart. O. S. (La.) 94, the court held that where a tenant underlets a portion of the premises during the lease but on the expiration of the term he signifies his intention to the landlord to continue in possession only of the part actually occupied by him, and the lessor receives his portion of the rent from him, and the other portion from the second tenant he cannot thereafter hold the original lessee liable for the entire rent.

## 2. LIABILITY OF SUBLESSEE.

### a. To Lessor.

#### (1) In Absence of Statute.

In the absence of a statute, an undertenant incurs no liability for rent to the original

lessor as the subletting creates no privity of contract or estate between the sublessee and the lessor.

*England*.—*Holford v. Hatch*, 1 Dougl. 183, 99 Eng. Rep. (Reprint) 119.

*Canada*.—*Lawler v. Sutherland*, 9 U. C. 205.

*Connecticut*.—*Camp v. Scott*, 47 Conn. 366, 377.

*Illinois*.—*Sexton v. Chicago Storage Co.* 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274.

*Massachusetts*.—*Campbell v. Stetson*, 2 Metc. 504. See also *Dunlap v. Bullard*, 131 Mass. 161; *Haley v. Boston Belting Co.* 140 Mass. 73, 2 N. E. 785.

*Michigan*.—*Williams v. Michigan Cent. R. Co.* 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458. See also *Lee v. Payne*, 4 Mich. 106.

*Minnesota*.—See *Crosby v. Horne, etc. Co.* 45 Minn. 249, 47 N. W. 717.

*Mississippi*.—*Ashley v. Young*, 79 Miss. 129, 29 So. 822.

*New Hampshire*.—*Dartmouth College v. Clough*, 8 N. H. 22. See also *Austin v. Thomson*, 45 N. H. 113.

*New Jersey*.—See *Field v. Mills*, 33 N. J. L. 254.

*New York*.—*Martin v. O'Conner*, 43 Barb. 514; *Jennings v. Alexander*, 1 Hilt. 154; *Coles v. Marquand*, 2 Hill 447; *Coit v. Braunsdorf*, 2 Sweeny 74; *McFarlan v. Watson*, 3 N. Y. 286; *Stillman v. Van Beuren*, 100 N. Y. 439, 3 N. E. 671; *Eagan v. Trust Co.* 163 App. Div. 504, 148 N. Y. S. 651. See also *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Kiersted v. Orange, etc. R. Co.* 69 N. Y. 343, 25 Am. Rep. 199, reversing 54 How. Pr. 29; *Van Rensselaer v. Gallup*, 5 Denio 454; *Reynolds v. Lawton*, 65 Hun 603, 8 N. Y. S. 403, 28 N. Y. St. Rep. 670; *Rehm v. Weiss*, 8 Misc. 525, 28 N. Y. S. 772.

*North Carolina*.—*Krider v. Ramsay*, 79 N. C. 354.

*Oklahoma*.—*Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013.

*Oregon*.—*Moline v. Portland Brewing Co.* 73 Ore. 532, 536, 144 Pac. 572.

*Vermont*.—See *Way v. Holton*, 46 Vt. 184.

*Washington*.—See *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123.

Thus in *Krider v. Ramsay*, 79 N. C. 354, the court said: "It is well settled that as between the original lessor and the undertenant there is neither privity of estate nor contract, so that between these parties no advantage can be taken of the covenants in the lease, and therefore the lessor cannot sue an undertenant upon the lessee's covenant to pay rent, nor can he maintain an action for use and occupation against the undertenant unless under an agreement, as the relation of landlord and tenant does not subseist be-

tween them. . . . The material distinction between an assignment of a term and an underlease of a part of the term is, that while the assignee is liable to the original lessor for all the obligations of the lessee by virtue of the privity of estate between them, no action lies by the lessor against an undertenant upon any covenant in the lease, because there is no privity of contract or estate between the lessor and the sublessee." And in *Sexton v. Chicago Storage Co.* 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274, it was said: "If the lessee sublets the premises, reserving or retaining any reversion, however small, the privity of estate between the sublessee and the original landlord is not established, and the latter has no right of action against the former, there being neither privity of contract nor privity of estate between them." In *Johnson v. Wild*, 44 Ch. D. (Eng.) 146, 59 L. J. Ch. 322, 62 L. T. N. S. 537, 38 W. R. 500, the court held that where an assignee of a part of leased premises in order to avoid distress by the lessor pays the entire rent reserved, he cannot enforce contribution by an undertenant of another portion of the premises who holds under a sublease from the original lessee. In *Fifty Associates v. Howland*, 5 Cush. (Mass.) 214, it was held that a tenant and his undertenant who was recognized as such by the lessor cannot be liable jointly for the mesne profits of the whole premises in an action by the lessor. In Ohio as the assignee of a part of leased premises is considered a subtenant the lessor has no right of action against him to recover the rent reserved in his lease as there is no privity of estate or contract. *Fulton v. Stuart*, 2 Ohio 215, 15 Am. Dec. 542.

A fortiori, a lessor cannot maintain an action against a sublessee for use and occupation of the premises during the term of the lease. *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204; *Dartmouth College v. Clough*, 8 N. H. 22; *Jennings v. Alexander*, 1 Hilt. (N. Y.) 154. See also *Williams v. Michigan Cent. R. Co.* 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394. Thus in *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204, it appeared that the defendant was in possession of certain premises as a subtenant of the assignee of a valid lease. The action was instituted to recover against the defendant for use and occupation of the premises. The court said: "Upon the facts proved at the trial, the plaintiff cannot maintain this action. During the time for which he now seeks to recover against the defendant for use and occupation, the term of years, created by the lease of the whole estate by his father, was still outstanding. So long as this lease remained in force, the plaintiff's sole remedy for rent of the premises was either by an action on the cove-



nant for its payment against the original lessees, or of debt against their assignees.

The defendant stood in neither of these relations. He occupied a part of the demised premises under a verbal agreement with the assignees of the lessees. There was no privity of contract or of estate between him and the plaintiff. The defendant was only an undertenant of the assignees, holding that part of the estate occupied by him as tenant at will."

However it has been held that an action for rent may be maintained by the lessor against a sublessee on the latter's promise, express or implied, to pay the rent to the lessor. *McFarlan v. Watson*, 3 N. Y. 286.

But in *Martin v. O'Conner*, 43 Barb. (N. Y.) 514, it was held that the lessor cannot recover on a promise by the sublessee to pay the rent reserved in the original lease, such promise being made to the lessee.

The fact that a lessee who has made a valid sublease of the premises, subsequently surrenders his lease to the lessor without the consent of the undertenant, does not terminate the interest of the latter so as to render him liable to the original lessor in an action for use and occupation of the premises subsequent to the surrender by the lessee. *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Buttner v. Kasser*, 19 Cal. App. 755, 127 Pac. 811; *Krider v. Ramsay*, 79 N. C. 354. Thus in the case last cited the court said: "Such an effect even is given to a surrender that although a tenant who has made an underlease cannot by a surrender prejudice the subtenant's interest, yet he will himself lose the rent he had reserved upon the underlease; for since rent is an incident to the reversion, the surrenderor cannot collect it, because he has parted with his reversion to the lessor; nor can the lessor collect it, because although the reversion to which rent was incident has been conveyed to him, yet as soon as it was so conveyed, it merged in the greater reversion of which he was already possessed, and the consequence is that the underlessee holds without the payment of any rent, except where otherwise it may be provided by statute." And in *Buttner v. Kasser*, 19 Cal. App. 755, 127 Pac. 811, it was said: "By the demurrer to the complaint the question is thus presented: May a lessor, to whom his lessee has surrendered his term, ignore the conditions of a valid sublease, under which a subtenant is in possession, at the time of the surrender, to which he does not consent, and compel him to pay the reasonable value of the use and occupation of his tenement regardless of the conditions of his sublease? . . . One of the rights of the subtenant is to hold his term upon compliance with the conditions of his lease. He can be compelled to pay only such

rental as was reserved in his lease, and may be entitled to a discharge from such rental on such conditions and for such breaches of his lease by his lessor as are provided for in his lease. None of his rights in these regards may be defeated or affected, without his consent, simply by the consent of his lessor and the overlord. To permit the subtenant to be charged for the value of the use and occupation, without regard to the terms of his lease, because his lessor had surrendered to the overlord, would be to permit his rights to be defeated by the voluntary action of his lessor. As before stated it is not doubted but that the subtenant may be defeated of his term by a forfeiture of the lease under which his lessor holds. No such condition exists in this case. It is simply a case of the cancellation of a lease by the mutual consent of the lessor and lessee after such lessee had made a valid sublease to a subtenant. While such cancellation is effectual as between the lessor and lessee, it cannot affect the rights of the subtenant."

Nor does the surrender of the original lease constitute an assignment of the subleases so as to render the undertenants liable in an action by the lessor on the covenants contained in the subleases. *Williams v. Michigan Cent. R. Co.* 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458.

However if the lessor, in consideration of his accepting a surrender of the term from the lessee takes an assignment of the lessee's interest in a sublease of the same premises, he may sue for the rent subsequently accruing under such sublease as assignee thereof. *Beal v. Boston Car Spring Co.* 125 Mass. 157, 28 Am. Rep. 216.

If a sublessee attorns to the original lessor, after a surrender of the principal term, such act is considered an election on his part to recognize the lessor as his landlord and he is thereafter liable for the rent of the premises under the terms of his sublease. *Shalet v. Rauch*, 50 Misc. 311, 98 N. Y. S. 883.

An undertenant whose landlord has surrendered his lease to the original lessor cannot maintain an action against his landlord for an increase in rent paid by him to a new lessee of all the premises, as he was under no legal obligation to so pay. *Ritzler v. Raether*, 10 Daly (N. Y.) 286.

However it has been held that an undertenant of a sublessee is liable to the assignee of the latter for rent subsequently accruing and this regardless of a surrender of the original lease to the grantee of the original lessor. *Weiss v. Mendelson*, 24 Misc. 692, 53 N. Y. S. 803.

Where there has been a legal forfeiture of the lessee's term, a sublessee who unlawfully continues in possession of the premises is liable to the owner in an action for reason-

able use and occupation subsequent to the date of the forfeiture. *Pierce v. Minturn*, 1 Cal. 470; *Schilling v. Holmes*, 23 Cal. 227.

Where the original lessee is insolvent a court of equity, having jurisdiction of all the parties, may direct the payment of rents due from a sublessee for the benefit of the lessor. *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388; *Otis v. Conway*, 114 N. Y. 13, 20 N. E. 628. See also *Haley v. Boston Belting Co.* 140 Mass. 73, 2 N. E. 785. And see the Missouri cases cited *infra* in the subdivision *Under Statute*. Thus in *Otis v. Conway*, 114 N. Y. 13, 20 N. E. 628, the court said: "Technically, rent is something which a tenant renders out of the profits of the land which he enjoys. Equitably, it is a charge upon the estate, and the lessee, on good conscience, ought not to take the profits thereof without a due discharge of the rent. . . . The creditors of an insolvent lessee can have no moral or equitable claim to the profits issuing from leased land, until after the landlord's claim for rent is satisfied."

## (2) Under Statute.

Under the *Alabama* statute the landlord is given a lien for rent on the crops grown on leased land, and while the undertenant incurs no personal liability to the lessor, his crops may be levied on for the payment of rent due to the lessor. *Simmons v. Fielder*, 46 Ala. 304; *Robinson v. Lehman*, 72 Ala. 401; *Bain v. Wells*, 107 Ala. 562, 19 So. 774. Thus in *Simmons v. Fielder*, *supra*, the court said: "There is no privity of contract between the undertenant and the landlord of the tenant or his assignee. And before the landlord can sue the undertenant on his contract of rent, it must be transferred or assigned to him by the tenant, so as to make him the party really interested therein. . . . Notwithstanding this, there can be no doubt that the landlord or his assignee, who stands in his shoes, has a lien on all the crop grown on rented land, for rent, for the current year, whether such crops are made by the tenant or the undertenant or by a trespasser, and he is entitled to process of attachment for the recovery of the same. But the attachment must be issued against the tenant, and not against the undertenant, unless the contract for rent of the undertenant has been assigned or transferred to the plaintiff." In *Robinson v. Lehman*, *supra*, it was held that the purpose of the statute is not to fix on the underlessee a personal liability for the rent owing by his immediate landlord, but the primary appropriation of all crops grown on the rented lands, to the payment of the rent accruing for the current year, without regard to the ownership of the crops or the agencies employed in producing them.

In *Arkansas* by statute the landlord is given a lien on crops grown on demised premises in any year for the rent that shall accrue for that year. The lien is effective for six months after the rent becomes due and payable and an undertenant can be held responsible for the rent of such lands as are cultivated or occupied by him. *Jacobson v. Atkins*, 103 Ark. 91, 146 S. W. 133; *Storthz v. Smith*, 109 Ark. 552, 161 S. W. 183. Thus in *Jacobson v. Atkins*, *supra*, the court said: "Thus it appears that the landlord has a lien upon all the crop grown on the demised premises in any year for the rent, without regard to whether such crop shall be raised by the tenant, and without regard, also, to any contract or agreement between the tenant and a subtenant for rent. The statute limits the liability of the subtenant to the landlord for rent of such lands as are occupied by him, which liability the subtenant can discharge only by payment of the pro rata amount of rent for the lands occupied by him directly to the landlord, or to the tenant upon the landlord's written direction."

Under a *Georgia* statute it is held that a subtenant may become the tenant of the landlord if the latter elects to recognize him as such, in which event the undertenant is personally answerable to the landlord for the rent of the premises. *McBurney v. McIntyre*, 38 Ga. 261; *McConnell v. East Point Land Co.* 100 Ga. 129, 28 S. E. 80. See also *Smith v. Turnley*, 44 Ga. 243. Thus in *McBurney v. McIntyre*, *supra*, the court said: "Under the 2253d section of the Revised Code, the tenant has no right to impose a subtenant upon the landlord without his consent; and if it is attempted, we hold that the subtenant becomes the tenant of the landlord, if he elects to recognize him as such, and not the tenant of the tenant who placed him upon the premises, without the consent of the landlord." However, until the landlord elects to make a sublessee his tenant, he has no right to proceed against him for the rent of the premises. Thus in *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178, the court said: "As there is no privity of contract between the landlord and the subtenant in the first instance, the former has no claim on the latter for rent unless he elects to accept him as his immediate tenant. When such election is made and the undertenant continues to occupy the premises, then the election and the continued occupancy create a liability on the part of the subtenant to pay rent, and establish in a legal manner the relation of landlord and tenant between them." At all events the landlord may enforce his lien for the rent agreed to be paid by the principal tenant, against the crops of an undertenant. *Andrew v. Stewart*, 81 Ga. 53; *Thompson v. Commercial Guano Co.* 93 Ga. 282, 20 S. E. 209.

See also *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178.

An *Iowa* statute provides as follows: "A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant, which has been used or kept thereon during the term, and not exempt from execution for the period of one year after a year's rent, or the rent of a shorter period falls due. But such lien shall not in any case continue more than six months after the expiration of the term." Under that statute the landlord may enforce his lien against the crops of a sublessee which were grown on the demised premises. *Beck v. Minnesota, etc. Grain Co.* 131 Ia. 62, 107 N. W. 1032, 7 L.R.A. (N.S.) 930.

By a *Kentucky* statute relative to landlord and tenant it is provided that the personal estate of a subtenant found on rented premises shall be liable to distraint by the landlord, and that he shall have "a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property of the tenant, or undertenant, owned by him after possession is taken under the lease; but such lease shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days." *Rudd v. Ford*, 91 Ky. 183, 15 S. W. 179; *Sutton v. Perkins*, 2 Ky. L. Rep. (abstract) 233. However in *Rudd v. Ford*, supra, it was held that a subtenant is entitled to the exemption allowed by statute as against the claim of the landlord for rent owing by the original tenant, which he is enforcing against the crops of the undertenant. In *Cox v. Fenwick*, 4 Bibb 538, it was held that an undertenant is not responsible to the original lessee in an action of covenant to recover accrued rent, as there is no privity of contract or estate between the parties.

Under a *Louisiana* statute it has been held that the lessor's lien against the movables of an undertenant is only enforceable so far as the latter is indebted to his principal at the time when the proprietor chooses to exercise his right. *Weatherly v. Baker*, 25 La. Ann. 229; *Franek v. Flynt*, 132 Ia. 327, 61 So. 390. Thus in the case last cited, the court in an official syllabus said: "Under article 2706 of the Civil Code, the lessor's pledge on the effects of the sublessee does not give rise to a personal and direct action in his favor to recover rent due by the sublessee to the lessee but the remedy of the lessor is by provisional seizure of the effects of the sublessee to the extent of his indebtedness to the principal lessee at the time of the seizure." And in *Sanarens v. True*, 22 La. Ann. 181, it was held that the property of a sublessee

situated on the leased premises is not liable to seizure by the landlord for rent that is not due and owing at the time of the assertion of the claim.

In *Maryland* it seems that the goods of an undertenant are liable to be distrained for accrued rent, during the continuance of the original lease. Thus in *Howard v. Ramsay*, 7 Har. & J. (Md.) 113, the court said: "A perfect privity between plaintiff and defendant is not to be dispensed with in an action of covenant for rent arrear; and for the want of it the decisions have been that covenant could not be sustained against an underlessee. . . . The same degree of privity, it would seem, is not necessary to render a person's goods liable to a distress for rent as a tenant. A distress is rather a remedy upon the land, than on the person of a tenant, although some tenancy must be shown to sustain it. . . . It is said that for the purpose of distraining, a tenancy in effect should subsist, without reference to the manner in which it is created; the only question being, whether the relation between the parties does really constitute a tenancy; that the occupation of the undertenant to the lessee must indeed, in general, be considered with respect to the lessor, as the possession of his lessee, and therefore, that the goods of such undertenant are liable to be distrained during the continuance of the original lease."

Under the *Missouri* statute the landlord may maintain an action against an undertenant for the enforcement of his lien against the crops grown on the demised premises. *Garrouette v. White*, 92 Mo. 237, 4 S. W. 681; *Hulett v. Stockwell*, 27 Mo. App. 328. See also *St. Joseph, etc. R. Co. v. St. Louis, etc. R. Co.* 135 Mo. 173, 36 S. W. 602, 33 L.R.A. 607; *Glasner v. Fredericks*, 73 Mo. App. 424; *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059. Thus in *Garrouette v. White*, supra, the court said: "We are of the opinion that the proceeding by attachment for rent . . . was intended to be a provision for the enforcement of the landlord's lien on the crop grown on the demised premises, for the rent of the year in which such crop was grown, and that such proceeding can be maintained by the landlord not only against his immediate lessee, but also against the tenant of such lessee, provided the rent accrued during the term of such lessee, and in this case the plaintiff, having a lien on the wheat grown by the defendant, on the premises of the plaintiff, for rent thereof, accruing during the term of the defendant, could proceed against him to enforce such lien and to recover the rent due him for the premises upon which such wheat was grown, whether, under the facts of the case, the defendant be regarded as the tenant of the plaintiff, or as the tenant of his father, the plaintiff's lessee, provided he had

good grounds for an attachment under the act." However, the landlord is not entitled, by the statute, to maintain a personal action at law against the undertenant for rent due. His right of action is limited to the enforcement of his lien. *St. Joseph, etc. R. Co. v. St. Louis, etc. R. Co.* 135 Mo. 173, 36 S. W. 607, 33 L.R.A. 607; *Glasner v. Fredericks*, 73 Mo. App. 424. See also *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059. Compare *Hicks v. Martin*, 25 Mo. App. 359; *Hulett v. Stockwell*, 27 Mo. App. 328. Likewise the doctrine is recognized that from the fact of the subletting itself no privity of contract or estate is created or exists between the underlessee and the original lessor, on which to sustain an action for rents. *St. Joseph, etc. R. Co. v. St. Louis, etc. R. Co.* 135 Mo. 173, 36 S. W. 607, 33 L.R.A. 607; *Glasner v. Fredericks*, 73 Mo. App. 424. See also *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059; *Geer v. Boston Little Circle Zinc Co.* 126 Mo. App. 173, 103 S. W. 151. Where the original lessee is insolvent and the lessor cannot collect from him, and a court has ordered the funds paid to a receiver, thereby preventing an action at law by the original lessor, the court will collect the rents from undertenants for the benefit of the original lessor. *Kemp v. San Antonio Catering Co.* 118 Mo. App. 134, 93 S. W. 342. See also *Glasner v. Fredericks*, 73 Mo. App. 424. But even though the original lessee is insolvent the lessor cannot enforce the payment of the undertenant's rents to him in an action at law. *Glasner v. Fredericks*, 73 Mo. App. 424. The rights of an undertenant are not destroyed or impaired by a surrender of the main lease, and yet the surrenderee may not sue the undertenant for rent or on any other covenant. *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059.

In *Pennsylvania* it seems that the subtenant's goods found on demised premises are liable to distraint for rent due by the tenant. Nor is the rule altered by the fact that the lessee has goods on the premises sufficient to satisfy the landlord's demand. *Smoyer v. Roth (Pa.)* 13 Atl. 191. However, it has been held that the landlord's right to distraint against an undertenant is extinguished by his accepting a surrender of the principal lease under which the sublessee holds. And where the lessee continues in possession under his original sublease, his goods cannot be distrained for arrears in rent which accrued under a subsequent lease of the property as the sublessee holding is not in subordination to such new lease but in hostility to it. *Hessel v. Johnson*, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. Rep. 716, 5 L.R.A. 851. See same case on second appeal, 142 Pa. St. 8, 21 Atl. 794, 11 L.R.A. 855.

Under a *Texas* statute denying to the tenant the power or right to sublet without

the consent of the landlord, it is held that in the absence of such consent all produce raised on the leased premises, whether by the tenant or an undertenant, is subject to the statutory lien for rent and advances. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Stokes v. Burney*, 3 Tex. Civ. App. 219, 22 S. W. 126; *Horton v. Lee*, 180 S. W. 1169. Thus in *Stokes v. Burney*, supra, it was said: "There are decisions of this state holding, that a subtenant, in the absence of a contract between him and the landlord, is not responsible to the landlord, and the crop raised by him cannot be distrained for rent. *Lea v. Hogue*, 1 White & W. Civ. Cas. Ct. App. § 607; *Knight v. Old*, 2 Willson Civ. Cas. Ct. App. § 79; *Harvey v. McGrew*, 44 Tex. 412; *Gibson v. Mullican*, 58 Tex. 432; *Giddings v. Felker*, 70 Tex. 176. Of the three decisions by the supreme court, all, except the last one, are founded upon transactions prior to the amendment to our landlord and tenant statute of March 14, 1876, which prohibits a tenant subleasing the rented premises without the consent of the landlord. *Sayles' Civ. Stats. art. 3122*. In the opinion in the case in 58 Texas attention is called to the fact that the rights of the parties in that case accrued prior to the passage of the amendment we have alluded to, restricting the right of the tenant to sublet the rented premises. In the case in 70 Texas, it would seem that this amendment was entirely overlooked, as it is not referred to in the opinion. Prior to the enactment of this statute, a tenant could, unless otherwise stipulated in the contract with his landlord, subrent the premises; and as the sublease contract created no privity between the landlord and subtenant, there may have been some reason for holding that the crop raised by the subtenant was not liable to the landlord for rent. But when the legislature, for the protection of the landlord, and apparently to avoid the effect of such a holding, enacted a law denying to the tenant the power or right to sublet without the consent of the landlord, we think, in the absence of consent to subleasing, it must be held that all produce raised on the rented premises, whether by the tenant or a so-called subtenant, is subject to the statutory lien for rent and advances. To hold otherwise, would render nugatory the statute referred to." Compare the following earlier decisions wherein a contrary rule was laid down: *Harvey v. McGrew*, 44 Tex. 412; *Gibson v. Mullican*, 58 Tex. 430; *Giddings v. Felker*, 70 Tex. 176, 7 S. W. 694; *Lea v. Hogue*, 1 White & W. Civ. Cas. Ct. App. § 607; *Knight v. Old*, 2 Willson Civ. Cas. Ct. App. § 77. However, if the lessor accepts a payment of rent from the undertenant for his portion of the leased premises, he is not thereafter entitled to enforce the landlord's lien against the crop of

the undertenant for rent due from the lessee. In the event of his so doing, he will be held liable to the undertenant for the damages sustained. *Smith v. Price*, 22 Tex. Civ. App. 296, 54 S. W. 254. The landlord, however, is not entitled to maintain a personal action against an undertenant for accrued rent as there exists no privity of contract or estate between the lessor and sublessee. *Davis v. Vidal*, 105 Tex. 444, 151 S. W. 290, 42 L.R.A. (N.S.) 1084. See also *Harvey v. McGrew*, 44 Tex. 412; *Gibson v. Mullican*, 58 Tex. 430; *Giddings v. Felker*, 70 Tex. 176, 7 S. W. 694; *Ft. Worth Fair Ass'n v. Ft. Worth Driving Club*, 56 Tex. Civ. App. 167, 121 S. W. 213; *Lea v. Hogue* (Tex.) 1 White & W. Civ. Cas. Ct. App. § 307; *Knight v. Old* (Tex.) 2 Willson Civ. Cas. Ct. App. § 77.

#### b. To Lessee.

Where a lessee transfers the whole term, reserving a rent to himself, the transfer is an underlease, as between the parties thereto, so far as to allow the lessee to have an action of debt for rent against the underlessee or any assignee under him. *Adams v. Beach*, 1 Phila. 99, 7 Leg. Int. 178.

The fact that the lessee is in default in his payment of rent to the lessor is no defense in an action for rent brought by the lessee against his undertenant, as long as the latter's possession has not been disturbed. *Dyett v. Harney*, 53 Colo. 381, 127 Pac. 226. See also *Hoxie v. Lyons*, 145 Mo. App. 125, 129 S. W. 716.

An undertenant is liable for the rent to the lessee under whom he holds, regardless of whether the lessee's contract of renting contained a provision against subletting, or whether he has failed to renew his lease. *Fordyce v. Young*, 39 Ark. 135. See also *Boyd v. Kinzy*, 127 Ga. 358, 56 S. E. 420.

An undertenant is estopped to deny the title of his landlord, and in an action instituted by the latter to recover the rent reserved in the sublease, the undertenant cannot plead as a defense the fact that he has surrendered his sublease to the original lessor and re-rented the premises from him. *Hammond v. Dean*, 8 Baxt. (Tenn.) 193.

Where a lessee has underlet the premises under an agreement with the sublessee that he will pay the rent reserved to the lessor, and the latter refuses to recognize the sublessee and collects the rent direct from the lessee, the latter may sue in his own name and collect the rent reserved from the sublessee. *Heard v. Lockett*, 20 Tex. 162.

Where a lessee has underlet the premises under an agreement that the sublessee is to pay the rent reserved to the original lessor, the undertenant will not be allowed to set off a

claim against the lessee in an action by the latter to recover the rent as the rent is due the lessor and not the lessee. *Brett v. Sayle*, 60 Miss. 192.

Where the undertenant in order to protect his possession of the property discharges his landlord's obligation to the lessor he may successfully set up the payment as a defense to an action instituted by his landlord for failure to pay rent. *Peck v. Ingersoll*, 7 N. Y. 528; *Raubitscheck v. Semker*, 4 Abb. N. Cas. (N. Y.) 205 note; *Collins v. Whilldin*, 3 Phila. 102, 15 Leg. Int. 93. See also *Kedney v. Rohrbach*, 14 Daly (N. Y.) 54.

Likewise, where an undertenant, in order to avoid the enforcement of the landlord's lien against his crop, applies so much of his crop or its proceeds, as amounts to the rent due from himself to the principal tenant, to the payment of the rent due from the latter to the original landlord, the subtenant thus discharges his own rent obligation to the principal tenant. *Taylor v. Zannia*, 6 Taunt. 524, 1 E. C. L. 472, 2 Marsh. 220, 16 Rev. Rep. 668; *Sapsford v. Fletcher*, 4 T. R. (Eng.) 511; *Thompson v. Commercial Guano Co.* 93 Ga. 283, 20 S. E. 309.

An undertenant cannot plead as a defense to an action brought by his landlord for the recovery of rent, the fact that there was a technical merger of his landlord's and the owner's estate, subsequently to the time that the rent became due. *Townsend v. Read*, 13 Daly (N. Y.) 198.

The obligation on the part of the undertenant to recognize the lessee ceases on the termination of the latter's estate regardless of whether he continues in possession of the property. *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Grundin v. Carter*, 99 Mass. 15. And where an undertenant, subsequent to a surrender of his landlord's term by operation of law, attorns to a new lessee of the premises, he is discharged of all liability to the former landlord. *Kedney v. Rohrbach*, 14 Daly (N. Y.) 54.

A tenant who has been dispossessed can recover from his undertenant only the rent which accrued prior to the institution of the summary proceedings, and though by the terms of the sublease the rent is payable in advance he is not entitled to an instalment falling due after the institution of the summary proceedings though prior to the issuance of a warrant. *Rainier Co. v. Smith*, 65 Misc. 560, 120 N. Y. S. 993.

Under a Tennessee statute (Shannon's Code 5299) it has been held that a tenant is with respect to his undertenant entitled to the lien secured to landlords on the crops grown on the rented land. *Willis v. Manufacturing Co.* 4 Tenn. Civ. App. 247.

**SAMUELS**

v.

**OTTINGER ET AL.**

California Supreme Court—February 8, 1915.

169 Cal. 209; 146 Pac. 638.

**Landlord and Tenant — Implied Contract to Pay Rent.**

An obligation to pay rent, without an express agreement thereto, arises from the mere occupancy of the premises as tenant.

**Effect of Assignment — Liability of Lessee for Rent.**

A lessee, who has not agreed to pay rent on assignment with the landlord's consent, is relieved of further obligation to pay rent, which is thereafter due from the assignee who has come into privity of estate with the landlord, but the liability of a lessee who expressly agrees to pay rent remains, notwithstanding an assignment with the landlord's consent, since there is no privity of contract between the landlord and the assignee, and he is a surety for the assignee's payment of rent; the term "express agreement" meaning, not merely a promise in exact words to pay a given sum as rental, but language necessarily importing the lessee's undertaking to pay the rent.

[See note at end of this case.]

**Same.**

Under a lease for the term of ten years at a monthly rental payable in advance, providing that the lessee shall pay all bills for water, gas, and electricity and all taxes on improvements, and requiring the lessee to insure for the joint benefit of himself and the lessor to secure payment of rent; that improvements shall be security for rent, that the lessee holding over shall be a tenant from month to month paying rent as under the lease and with the right to sublease, there is a contract or covenant to pay a stipulated rental from the obligation of which the lessee is not released by his assignment, so that he is liable for the rent with interest from the day it fell due.

[See note at end of this case.]

**Provision in Lease for Attorney's Fee — Amount Allowed.**

Under a lease providing that, if the lessor prevailed in any suit for violation of any covenant of the lease, the lessee should be liable to a reasonable attorney fee in each suit not exceeding \$75, the lessor, entitled to recover rent from the lessee after a sublease, is entitled to an attorney's fee of \$75 in each of three suits for instalments of rent, consolidated in one suit.

**Same.**

In such suit, where there is no denial of the averment that a reasonable attorney's fee was in excess of \$75, the question of reasonableness is settled by the admission of the pleadings.

Appeal from Superior Court, city and county of San Francisco: CABANISS, Judge.

Actions to recover rent. Louis T. Samuels, plaintiff, and Adolph Ottinger et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Henry U. Brandenstein, Charles W. Slack and Grover O'Connor for appellant.

Leon Samuels for respondents.

[210] Sloss, J.—The plaintiff appeals from a judgment in favor of the defendant. The judgment disposed of three separate actions, which, with the consent of the parties, had been consolidated for trial. The appeal is on the judgment-roll.

The actions were brought to recover installments of monthly rent accruing under a written lease of real property. The three proceedings differed only in the months for which rental was claimed.

A jury trial having been waived, the court made findings as follows: On December 20, 1906, D. Samuels Realty Company, a corporation, as lessor, leased to the defendants, as lessees, a certain lot in the city of San Francisco. A copy of the lease is set out in the answers and referred to by the findings. The term of the lease was ten years, commencing [211] on the twentieth day of December, 1906. The rent of the premises was one hundred and fifty dollars per month, payable in advance, for the first five years of the term, and one hundred and seventy-five dollars per month, payable in advance, for the next five years. Other provisions of the lease will be mentioned in the course of the discussion to follow.

The defendants went into possession of the premises under the lease, and paid the monthly installments of rent to and including the nineteenth day of May, 1908. On that day they sold and assigned the lease to one Altschular. The lessor was, at the same time, notified of the assignment. Altschular paid the rent for the month commencing May 20, 1908, and said payment was received and accepted by the lessor. The monthly installments of rent payable on the twentieth days of the successive months from June, 1908, to March, 1910, have not been paid. D. Samuels Realty Company, the original lessor, has conveyed the premises, and assigned its claim against the defendants, to the plaintiff.

The single question presented for decision is whether the defendants, the original lessees, are absolved from liability to pay rent by their assignment to Altschular, and the payment by Altschular to the lessor of one month's rent. The general rule of law governing the controversy is settled beyond the

possibility of dispute. A lease has a dual character—it presents the aspect of a contract and also that of a conveyance. (Pollock on Contracts, 3d Am. ed. p. 531. "Consequently the lease has two sets of rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate,' and the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract.'") (Tiffany on Real Property, sec. 46.) An obligation to pay rent, without an express agreement to that end, arises from the mere occupancy, as tenant, of the premises. A lessee who has not agreed to pay rent is, by his transfer to an assignee, with the consent of the landlord, relieved of any further obligation to pay rent. Such obligation is thereafter upon the assignee who has come into "privity of estate" with the landlord. But where the lessee has expressly agreed to pay rent, his liability under his contract remains, notwithstanding an assignment with the consent of the lessor. "The lessee cannot by assigning his lease rid himself [212] of liability under the covenants." (Brosnan v. Kramer, 135 Cal. 36, 39, 66 Pac. 979, 980.) "The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants." (Id; Wood on Landlord and Tenant, 2d ed. sec. 347; Bonetti v. Treat, 91 Cal. 223; 14 L.R.A. 151, 27 Pac. 612; Sutliff v. Atwood, 15 Ohio St. 186; Sexton v. Chicago Storage Co. 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920.)

The test of the assigning lessee's liability is, then, whether he has, in the lease, agreed to pay rent during the term. The rule of law is sometimes phrased thus: The obligation to pay rent remains on the lessee, after his assignment, when the obligation was created by his express agreement. It does not survive an assignment with the lessor's consent when the obligation is implied. By "express agreement," in this connection, is meant not merely a promise, in exact words, to pay a given sum as rental; any language necessarily importing an undertaking on the part of the lessee to pay the rent will satisfy the requirement of the rule. For the distinction to which we have referred rests on the nature of the lessee's obligation. If that obligation arises solely from the fact that he occupies the premises as tenant, if, in other words, it is based on the "privity of estate" alone, the assignee who succeeds to that privity becomes the party to whom the landlord must look. But if the obligation be one arising from the tenant's contract to pay rent, it is not ended by the assignment. Whether there be a contract to pay rent must depend on

whether such contract is to be found in the words of the lease, giving such words a fair and reasonable interpretation. (Tiffany, on Landlord and Tenant, sec. 50.)

The lease in question was executed by the lessees, as well as by the lessor. It begins by stating that the lessor leases the premises to the lessees, for the term of ten years, at the monthly rental above stated, "payable in advance on the twentieth day of each and every month." By subsequent clauses the lessees agree to pay all bills for water, gas, and electricity furnished to the premises, and all taxes on improvements to be erected by said lessees. The privilege of subleasing is expressly given, as is permission to erect buildings, which, if they comply with certain conditions, are to be [213] purchased by the lessor at the expiration of the term. The lessees agree to insure the improvements, "and said insurance shall be made payable to the lessor and the lessees jointly, for the purpose of securing the said lessor in the payment of the rents herein stipulated. . . ." By another clause it is agreed that the improvements to be erected "shall be security for the rent herein stipulated to be paid. . . ." Finally, it is agreed that if the lessees hold over beyond the term provided in the lease, such holding over shall be deemed merely a tenancy from month to month, "and at the same monthly rental that shall have been payable hereunder by said lessees immediately prior to such holding over."

If it is possible to express a contractual obligation to pay rent by any form of words other than a direct promise, in exact terms, to pay such rent, the language we have quoted from the lease before us, imposes that obligation on the lessees. The lessor agrees to lease the premises to the lessees at a given rental, "payable" at stated times. The writing is signed by the lessees as well as by the lessor. Where both parties sign an agreement whereby one agrees to sell to the other a tract of land at a certain price, and to convey a good title upon payment of that price, the writing, as has been held in this court, imposes upon the vendee the obligation to buy and pay for the land, although he has not in words agreed to buy or to pay. (Preble v. Abrahams, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99; see, also King-Keystone Oil Co. v. San Francisco Brick Co. 148 Cal. 87, 82 Pac. 849.)

But beyond this, there are various other provisions in the lease plainly indicating the intention and understanding of the parties that the lessees were bound to pay the rent. Insurance is to be taken out for the purpose of securing the lessor in the "payment of the rents herein stipulated." Improvements are to be security for the rent "herein stipulated to be paid." A holding over shall be deemed

a tenancy from month to month at the same monthly rental as shall have been "payable hereunder by said lessees" prior to such holding over. We find, first, a reference to the payment of "rents herein stipulated," then a provision for security for "rent herein stipulated to be paid," finally a clause which speaks of "rents payable hereunder by said lessees." These expressions afford a convincing showing that the parties to [214] the lease believed and understood that the writing embodied a "stipulation" for the payment of rents, and that it made such rents payable by the lessees. The obligation to pay rent is not implied from the relation of landlord and tenant but is expressed by the words used by the parties in their writing.

There are decisions to the effect that a lease which merely provides for a letting upon a certain rental, "payable at the expiration of each and every year of the lease" (*Fanning v. Stimson*, 13 Ia. 42), or which demises the premises to the tenant, he "yielding and paying" certain rents (*Kimpton v. Walker*, 9 Vt. 191), creates only an implied obligation, which does not survive an assignment of the leasehold interest and acceptance of rent from the assignee. On the other hand, a contrary view has been declared in cases involving the liability of a lessee to pay rent notwithstanding the destruction of the buildings by fire. The obligation to pay rent in the event of such destruction rests upon the lessee where the lease contains a covenant on his part to pay rent during the term, and the underlying principle is therefore the same as that governing the case at bar. A covenant to pay rent was held to be expressed in a lease, signed by both parties, in which the lessor let the premises to the lessee for two years, "for \$300.00 per annum, payable quarter-yearly." (*Linn v. Ross*, 10 Ohio 412, 36 Am. Dec. 95.) So of a lease of land with a building, "at the rent of six hundred dollars per annum, until the first day of April, 1869, and thereafter, for the term of five years, at the rate of eight hundred dollars per annum, the rent to be paid monthly." (*Bussman v. Ganster*, 2 Pa. St. 285.)

But if it be held that mere words of demise, "at" or "subject to" a given rental, "payable" at stated times, will not import an agreement by the lessee to pay rent, the other provisions of the lease are certainly sufficient to establish such agreement. In this aspect the case is very similar to *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086, where the court reached the conclusion just expressed by us.

On the facts found, the plaintiff was, therefore, entitled to recover the amount claimed as rent, with interest at the legal rate on each monthly installment from the date upon which it fell due. The appellant asks, also, that judgment be entered in his favor for

attorneys' fees in the three consolidated [215] actions. The lease contained a provision that "in case the lessor prevails in any suit against the lessees for violation of any of the covenants of this lease . . . the lessees shall be liable to the lessor for a reasonable attorney fee in such suit, not exceeding the sum of seventy-five dollars." Each of the three complaints counts upon this clause, and alleges that "a reasonable attorney's fee in this action exceeds the said sum of seventy-five dollars." The answer in each of the actions denies, merely, that defendants "have violated any of the covenants of said lease, or that plaintiff is entitled to any attorney's fee in this action." The only finding on the subject is "that the plaintiff is not entitled to any attorney's fee in this action."

As we have seen, the plaintiff was entitled to recover for a violation of the covenant to pay rent. This being so, his right to a reasonable attorney's fee, not exceeding seventy-five dollars in each suit, necessarily followed from the express agreement of the lessees to pay such fee, in case the lessor should prevail in a suit for violation of any covenant of the lease. The only question of fact in this connection was the amount which would constitute a reasonable fee. Since there was no denial of the averment that a reasonable fee was in excess of seventy-five dollars, this question was settled by the admission of the pleadings. The finding that plaintiff is not entitled to an attorney's fee is no more than a conclusion of law, and it is a conclusion that must be held to be erroneous in view of the finding of facts showing that plaintiff was entitled to recover for a breach of the covenant of the lessees to pay rent. There can, therefore, be no obstacle to a direction on this appeal taken on the judgment-roll alone, that judgment be entered in favor of the plaintiff for the attorney's fees demanded.

The judgment is reversed, with directions to the court below to enter judgment in favor of the plaintiff as prayed in the three several complaints.

Shaw, J., Lorigan, J., Melvin, J., and Angellotti, C. J., concurred.

Rehearing denied.

#### NOTE.

The decision of the court in the reported case affirms the well-settled doctrine that where a lease contains an express covenant to pay rent, the lessee is not absolved from his liability thereunder by an assignment of the term and the acceptance of rent from the assignee by the lessor, as the privity of contract continues between the lessee and the lessor even though the privity of estate is terminated by assignment. For a discussion



of the effect of an assignment of a lease, or a sublease by the tenant, on the liability for rent, see the note to *Kanawha-Gauley Coal and Coke Co. v. Sharp*, reported ante, this volume, at page 786.

## GIBBS

v.

## DIDIER ET AL.

Maryland Court of Appeals—April 7, 1915.

125 Md. 486; 94 Atl. 100.

**Landlord and Tenant — Assignment — Liability for Rent — Mortgagee as Assignee.**

While the mortgagee of a term after foreclosure is regarded as the assignee and is liable on the real covenants, the right to hold him on such covenants should be clearly established, since otherwise great hardship may be imposed on the mortgagee, and this is especially true in a suit in equity, which is the landlord's only remedy on such covenants after the assignee has gone out of possession.

[See note at end of this case.]

**Same.**

Where a mortgage of a leasehold which required the lessee to pay taxes left the title in the mortgagor until default, and there was no default until the taxes for a certain year became legally payable, the landlord cannot hold the mortgagee, as assignee of the lease, for those taxes.

[See note at end of this case.]

**Effect of Re-entry by Lessor — Rents Subsequently Accruing.**

Under Code Pub. Civ. Laws, art. 75, § 73, providing that where there is one-half year's rent in arrears and the lessor has the right to re-enter for the nonpayment, he may, without formal demand or re-entry, serve a copy of a declaration in ejectment for the recovery of the premises, the landlord cannot, in an action thereunder, recover as rent instalments falling due after the copy of the declaration was served, but the right to the rent and taxes due prior to that time is not extinguished by the action.

**Judgment in Ejectment — Res Judicata as to Rent.**

Code Pub. Civ. Laws, art. 75, § 73, provides that, when there is one-half year's rent in arrears and the landlord has the right to re-enter for the nonpayment, he may, without formal notice of re-entry, serve a copy of a declaration in ejectment for the recovery of the premises. Section 71 of the same article provides what a declaration in ejectment shall contain, the effect of the plea of not guilty, and that the plaintiff shall also

Ann. Cas. 1916E.—53.

recover as damages in that action the mesne profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case. The provision allowing recovery of mesne profits was added in 1872 after the enactment of what is now section 73. Held, that the action in ejectment referred to in section 73 was the one provided for by section 71, including the right to mesne profits and damages, and a judgment in such action, awarding only nominal damages to a landlord who recovered possession of the premises from the assignee of the tenant, is *res judicata* as to the landlord's right to recover rent and taxes from the assignee, the nonpayment of which was alleged as damages in his declaration in ejectment.

**Recovery in Ejectment — Damages for Detention.**

A landlord can recover in ejectment against the assignee of his tenant damages for the detention of the premises pending the action, if it is delayed by the defense; and, though the rent cannot be recovered as rent, it may, in a proper case, be considered as fixing the amount of such damages.

**Judgment as Res Judicata.**

A judgment in ejectment, in which damages for the detention were claimed, is conclusive against the landlord's right to recover such damages, though the court erroneously refused to allow the claim, the landlord's remedy being by appeal to reverse the erroneous judgment.

Appeal from Circuit Court No. 2 of Baltimore city: *AMBLER*, Judge.

Action of ejectment. John S. Gibbs, plaintiff, and Louise N. Didier et al., defendants Judgment for defendants. Plaintiff appeals The facts are stated in the opinion. *AFFIRMED*.

*Rignal W. Baldwin* and *Richard M. Duvall* for appellant.

*Charles F. Stein* and *R. Contee Rose* for appellees.

[490] *BOYD*, C. J.—On August 20th, 1909, Jacob Goldstein executed a lease to Jackson Q. Force for the term of 99 years of a lot of ground on Madison avenue, in the City of Baltimore, which contained the usual covenants and provisions in such leases, amongst others a covenant by the lessee for himself, his heirs, executors, administrators and assigns, to pay the rent reserved, taxes and assessments when legally demandable. The rent reserved was \$500.00 per annum, payable in equal quarterly instalments on the first days of September, December, March and June. By *mesne* conveyances the reversion became vested in John S. Gibbs (the appellant) and the leasehold [491] in Thomas McGreevy. On February 1st, 1910, McGreevy executed a

mortgage to Louise N. Didier (the appellee), for \$1,200.00. The mortgage being in default, proceedings were instituted to foreclose it, and R. Contee Rose was by a decree dated October 3, 1912, appointed trustee to sell the property. The trustee sold it on October 29th, 1912, to the appellee, but the sale was set aside on exceptions filed by her.

On October 17th, 1913, the appellant instituted an action of ejectment against Louise N. Didier, Evan W. Hood and Jackson Q. Force—the latter being the original lessee and Mr. Hood being the assignee of the lease, subject to the mortgage. On April 3rd, 1914, there was a verdict in favor of the plaintiff for the property and one cent damages and costs. The plaintiff filed a motion for a new trial, which was subsequently dismissed, and judgment was made absolute on May 22nd, 1914, against the appellee. On March 21st, 1914, the appellee conveyed to R. Victor Hedican all her interest in the mortgage, together with her interest and estate in the property.

The appellant filed a bill in equity against the appellee (Louise N. Didier) and R. Contee Rose, trustee, to compel them to pay the ground rent alleged to be due him and money expended by him for taxes and sewerage charges levied against the property. The lower Court sustained a demurrer filed by R. Contee Rose, and dismissed the bill as to him, and the case then proceeded against Louise N. Didier, resulting in a decree in her favor, from which this appeal was taken. In her answer she relied on the defense of *res adjudicata*, claiming that the judgment for the plaintiff for the property mentioned in the declaration and one cent damages in the ejectment case was conclusive. The decree recites that "The Court being of opinion that all the matters in issue in this cause were in issue, and were settled and determined in the action of ejectment between the same parties of which the [492] record was offered in evidence in this proceeding," etc. That was the main question argued before us.

It may be helpful to us to recall some of the decisions of this Court in reference to the liability of the assignee of a lease on the covenants contained therein. In *Heintze v. Thomas*, 7 Md. 346, it was held that "A suit *at law* cannot be maintained against the assignee of a lessee *after* he has assigned over for rent falling due subsequent to the assignment to him, and before the assignment over, the remedy of the lessor in such case being in equity alone." That was followed by *Mayhew v. Hardesty*, 8 Md. 479, where it was held that "The mortgagee of a term, *after forfeiture*, has the whole estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not." In

*Donelson v. Polk*, 64 Md. 501, 2 Atl. 824, it is said: "The principle of law is a familiar one, that the liability of an *assignee* of a term to the original lessor, or those claiming under him, grows out of the privity of estate, and that such liability continues only so long as such privity of estate exists. So long as the privity of estate continues, the assignee is liable upon all covenants that *run with the land*, such as covenants for the payment of rent, and of taxes assessed upon the premises (*Lester v. Hardesty*, 29 Md. 50), and for any breach of such covenants the lessor may sue him during the continuance of the assignment." Judge Alvey, after reviewing some cases, and intimating that but for the decision in *Heintze v. Thomas* the Court might have held otherwise, held that such action *at law* could not be maintained after assignment for breaches of covenant committed by the assignee during the time of his holding, but the remedy was *in equity*.

Other cases might be cited to the same effect, but while the rule is well established that *after forfeiture* a mortgagee is regarded as the assignee of the term, and hence is liable on the real covenants, there is danger of great hardship being imposed on a mortgagee, and the right to hold one liable on [493] such covenants should be very thoroughly established before recovery is permitted—especially should this be so in a court of equity. No more striking illustration of the possible hardship of the rule need be given than this case. The appellant has by the ejectment proceedings not only deprived the appellee of the security she presumably supposed she had when she took the mortgage, but now seeks to hold her liable for about \$2,000.00, which the mortgagor ought to have paid, merely because she held the mortgage on the leasehold interest, although she was not in actual possession of the property. That a party can have any standing in a court of equity to make such claim is suggestive of the desirability of having some legislation on the subject.

Before coming to the question of *res adjudicata* it will be well to pass on some of the items sought to be recovered. There is nothing to show a default in the mortgage until the taxes for 1910 were "legally payable" (to use the language of the mortgage), and therefore the appellee could not be held for the taxes for that year, as there must have been such default in the mortgage as vested the term in her before she could be liable. Without quoting them, we will only say that the terms of the mortgage were such as to leave the title to the leasehold in the mortgagor until default.

The appellant contends that the ejectment proceeding referred to was under section 73. and not under section 71, of Article 75 of the

Code, and he argues that he therefore could not have recovered in that proceeding the taxes, rent and sewerage charge now sought to be recovered. If that be conceded, *ex gratia argumenti*, it would seem to be clear that the appellant cannot recover the quarterly instalments of rent due December 1st, 1913, and March 1st, 1914.

The lease contained a provision that if the rent should be in arrear, in whole or in part, for sixty days, it should be lawful for said Jacob Goldstein, his heirs or assigns, to re-enter upon the demised premises and hold the same until all the arrearages of rent and expenses incurred by reason of [494] such non-payment should be fully paid. "And provided further that if said rent shall be in arrear for six months, then the said Jacob Goldstein, his heirs or assigns, may re-enter upon the premises hereby demised and hold the same as if this lease had never been made." Section 73 of Article 75, which is in substance the same as section 2 of 4 Geo. 2, Ch. 28, which was in force in this State, provides that between landlord and tenant when there is one-half year's rent in arrear and the landlord or lessor hath the right by law to re-enter for the non-payment thereof, "such landlord or lessor shall and may, without any formal demand or re-entry, serve a copy of a declaration in ejectment for the recovery of the demised premises," etc. "The service of the declaration in ejectment is substituted for the niceties of demand of rent and entry required at common law," 2 Alex. Br. Stat. 958, or as stated in *Campbell v. Shipley*, 41 Md. 94, the statute "dispenses with a previous demand of rent and re-entry, substitutes therefor service of a copy of the declaration in ejectment in all cases where the landlord or lessor has right by law to re-enter." It is also stated in 2 Alex. Br. Stat. 962, that "The landlord by service of a declaration in ejectment makes his election to determine the lease and cannot, though there has been no judgment in the ejectment, sue for rent due or covenants subsequently broken." *Jones v. Carter*, 15 M. & W. (Eng.) 718." Understanding it to mean that he cannot sue for rent subsequently due, that is, in our judgment, a correct statement of the law, and hence the rent falling due subsequent to the filing of the declaration cannot be recovered, *qua* rent. As the record does not satisfactorily show when the taxes for 1913 were due and payable, we cannot say whether they could be recovered. We will only add on this branch of the case that under the decision in *Mackubin v. Whetercroft*, 4 Har. & McH. (Md.) 135, the right to rent and taxes due prior to the time of the filing of the declaration is not extinguished by an action of ejectment.

But as there are still some items in the appellants' claim which are not affected by

what we have said, we must determine [495] whether the ejectment suit was a bar to the recovery of the rent, taxes, etc., which might have been recovered in that suit. We cannot agree with the appellant in the contention that that must necessarily depend upon whether the ejectment was brought under section 71 or section 73 of Article 75, but assuming that it was brought under section 73, we will first see whether the items sued for could have been then recovered, if they had been shown to be due.

Section 73 does not provide for what shall be included in the declaration, but it only says "such landlord or lessor shall and may, without any formal demand or re-entry, serve a copy of a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served"—it then makes provision for that contingency. That section is under the sub-title of "Ejectment," in Article 75, and in order to ascertain what is necessary in a declaration in ejectment we must look to section 71, as that is the only one which directs what shall be included in such a declaration. It says: "The action of ejectment shall be commenced by filing a declaration in which the real claimant shall be named as plaintiff and the tenant in possession or the party claiming adversely to the plaintiff shall be defendant; it shall be sufficient to state in the declaration that the plaintiff was in possession of the land or premises described in the declaration, and that the defendant ejected him therefrom and retains possession thereof, and the amount of damages claimed by the plaintiff." It then provides for service of the process and for the defendant, or for any other person with leave of Court, appearing and filing the plea of not guilty, "which plea shall be held a confession of the possession and ejectment, and shall only put in issue the title to the premises and right of possession and the amount of damages claimed by the plaintiff." It further provides that "the plaintiff shall also recover as damages in this action the *mesne* profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case." The declaration filed in the ejectment case referred [496] to in these proceedings was in exact compliance with the requirements of section 71, and in it the plaintiff claimed the recovery of the land and \$2,500.00 damages. Inasmuch as section 73 makes no provision for any other kind of declaration, it was proper to follow section 71 in that respect, and it is difficult to understand why it should not be done. Section 73 provides that in case of judgment against the defendant, the lessee or his assignee, or other person claiming or deriving under the said lease, in

order to redeem the property the rent arrears shall be paid as therein provided, and that section concludes by saying that nothing therein contained shall bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, if such mortgagee "within six calendar months after such judgment obtained and execution executed, pay all costs *and damages* sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee are and ought to be performed." There is nothing in that section to suggest that all damages which the plaintiff has sustained cannot be recovered in the ejectment suit. In 2 Poe on Pl. & Pr. sec. 492, it is said, in referring to ejectment under section 73, "The practice in these cases, as authorized originally by the Statute of 4 George 2, Chapter 28, section 2, which is substantially re-enacted in our Code, does not differ from that in the ordinary action of ejectment, so far as the declaration and plea are concerned." That learned author then went on to show that although there was no actual eviction of the landlord by the tenant in such cases, yet the non-payment of rent according to the covenant of the lease and the continued holding of the tenant after its breach are, in contemplation of law, an eviction which gives to the landlord a right of action without a previous demand for the rent due, and justifies the averment that the tenant has ejected him. Then in section 485 of that volume, it is said, in speaking of the plea to be filed in ejectment by the landlord against the tenant, "This is the [497] usual general issue plea of 'not guilty,' and its effect is precisely the same as in the ordinary action of ejectment—that is to say, it admits the possession by the plaintiff and his ejectment by the defendant, and puts in issue the title and right of possession to the premises *and the damages*. As, however, in this class of cases the defendant, as tenant, is estopped to deny his landlord's title, the question to be tried is simply the plaintiff's right of possession *and his damages*." In the absence of some provision in section 73, limiting the recovery to the possession of the property, we can see no reason why damages cannot be recovered, as they can be in an ejectment brought under section 71. If one entitled to redeem within the six months provided for in the statute desires to take advantage of that right, it would often relieve the parties of controversies as to the amount necessary, by having a judgment for the damages. Indeed the provision for a mortgagee redeeming would not be the protection for him without such judgment, as it would be with it, as the amount would then be judicially determined—he is required

to "pay all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid."

The Act of 1872, Chapter 346, made a radical change in this State in ejectment proceedings. Prior to that only nominal damages were allowed in such cases, and if the plaintiff desired to recover *mesne* profits and substantial damages, another action was necessary. What is now section 73 of Article 75 was section 2 of the Act of 1872, Chapter 346, and inasmuch as the first section of that Act amended the law so as to authorize the recovery of *mesne* profits and damages in ejectment cases, there can be no reason why it should not be held to apply to section 73. The right to recover *mesne* profits and damages in a case brought under section 73 cannot be denied on the ground that only nominal damages were recoverable under 4 George 2, Chapter 28, if that be conceded. The question here is whether when the Act of 1872 was passed it was intended to limit the right to recover *mesne* profits and substantial damages to ejectment [498] suits other than those between landlord and tenant, notwithstanding what we have pointed out as to the form of the declaration, etc. As we can see no valid reason for so limiting the statute, we hold that the provision as to damages is applicable to section 73 as well as to section 71, as stated by Mr. Poe. Of course, the damages that may be recovered under section 73 may differ from those that are recoverable under section 71 by reason of provisions in the lease or other reason.

It is proper to add that although we have said above that the plaintiff in an ejectment case of this kind cannot recover rent falling due after the declaration is filed, because the plaintiff has made his election to determine the lease, yet if by the defendant's defense the plaintiff is delayed in recovering the property, there can be no reason why he should not recover damages for the detention of the premises up to the time of the determination of the case, in accordance with the provisions of section 71, and while rent becoming due after the declaration is filed cannot be recovered *as rent*, it can in proper cases be considered in fixing the amount of damages.

Being of the opinion that the Court had the right to determine in the ejectment case the claims of the plaintiff for the taxes, ground rent and sewerage assessment, which are now sought to be recovered, and being satisfied from the record that they were attempted to be recovered in that case, it would seem clear that the appellant cannot now recover them in this case. The plaintiff claimed \$2,500.00 damages in his *warr.* in the ejectment case, evidence was admitted of the ground rent due, the taxes and the bill

for sewerage connection paid by the plaintiff, and prayers were offered by him as to his right to recover all of these items. His second and third prayers, as printed in the record, conclude as to his right to recover the ground-rent, but as that was covered by the first prayer and the second refers to taxes and the third to the sewerage charges apparently there was an error, either in writing the conclusion of the prayers or in the [499] record, but the fourth refers to the ground-rent, the taxes and the sewerage charge. It is true that certain evidence admitted subject to exception was stricken out and the prayers of the plaintiff were refused, but if there was error in the Court's ruling it should have been corrected by appeal. In *Beall v. Pearre*, 12 Md. 550, it was said (quoting from syllabus): "The decision of a Court upon a claim in a former action is as effectual a bar to a recovery in another suit, upon the same cause of action, as that of a jury; and the fact that the Court's decision was *wrong* does not give the injured party the right to bring another suit upon the same claim, for he might have *appealed* and had the error corrected." See also *Thomas v. Malster*, 14 Md. 382; *State use State v. Ramsburg*, 43 Md. 325.

"The law is adverse to multiplying suits; and if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule, he will not be permitted to resort to the other." *Walsh v. Chesapeake, etc. Canal Co.* 59 Md. 423.

Without deeming it necessary to discuss the question whether a landlord or lessor can now institute an action of ejectment and recover the property, without claiming in that suit rent or other profits he may be entitled to, and then afterwards sue to recover such rent and profits, we have no hesitation in holding that he cannot claim them in the ejectment suit, and, upon failure to recover them, afterwards sue for them as was done by this appellant. Without further discussing the subject, we will affirm the decree dismissing the bill.

Decree affirmed, the appellant to pay the costs.

**NOTE.**

The reported case holds that after forfeiture, a mortgagee of a lease containing such covenants as to leave the title to the leasehold in the mortgagor until default is regarded as the assignee of the term and liable on the covenants for the payment of rent although she has never been in actual occupation of the property. However a de-

cree in favor of the mortgagee is affirmed on the ground that the lessor in a previous action of ejectment having failed to recover the rents and profits claimed could not thereafter maintain a separate action for their recovery. The cases discussing the effect of an assignment of a lease or a sublease by a tenant on the liability for rent are reviewed in the note to *Kanawha-Gauley Coal & Coke Co. v. Sharp*, reported ante, this volume, at page 786.

**TYLER COMMERCIAL COLLEGE**

v.

**STAPLETON.**

Oklahoma Supreme Court—July 23, 1912.

33 Okla. 305; 125 Pac. 443.

**Landlord and Tenant — Assignment — Liability of Assignee for Rent.**

The owner of a building leased same to a corporation for a period of three years at a stipulated rental of \$75 per month. The lessee, after the expiration of about one year, by parol agreement, assigned the lease. The assignee took possession of the demised premises, paid the purchase price for the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor, as provided in the lease contract; but, before the expiration of the lease, the assignee abandoned the premises and refused to pay the rents for the unexpired term. Held, that the assignment of the lease was in violation of the statute of frauds, and void (section 1089, Comp. Laws 1909), but that the acts of the assignee relieved it from the operation of the statute, and that the assignee was liable to the lessor for the full term of the lease.

[See note at end of this case.]

**Same.**

The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues.

[See note at end of this case.]

**Same.**

An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents.

[See note at end of this case.]

(Syllabus by court.)

Error to District Court, Logan county: HUSTON, Judge.

Action to recover rent. Alta Z. Stapleton, plaintiff, and Tyler Commercial College, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

*Tibbetts & Green* for plaintiff in error.  
*C. G. Hornor* for defendant in error.

[306] HAYES, J.—Defendant in error, hereinafter called plaintiff, brought this action in the court below against plaintiff in error, hereinafter called defendant, to recover the balance due her as rents on a certain building located in the city of Guthrie. She alleges in her petition and amendments thereto that she leased to the Capital City Business College, a corporation, certain rooms in her building, in the city of Guthrie, for a period of three years, beginning on January 1, 1904, and expiring January 1, 1907; that the Capital City Business College took possession of said rooms under the lease, and retained them and paid the rents thereon until the month of October, 1904, at which time it sold, assigned, and delivered to defendant said lease contract and possession of said rooms. She further alleges that defendant assumed said lease contract, and agreed with the Capital City Business College, for a good and valuable consideration, to pay the rent thereunder to the plaintiff in the sum of \$75 per month for the full, unexpired term of said contract. She alleges that defendant occupied said premises and paid the rents thereon until September 27, 1905, at which time it vacated the premises and thereafter refused to pay the rents. She alleges that after the premises had been vacated by defendant, and it had refused to pay further rents thereon, she took possession of the premises, and, after making certain repairs, was able to re-rent the premises only at a reduced rent. She prays judgment for the amount of the rents at the rate of \$75 per month, as stipulated in the contract, for the time the building stood vacant after the same was vacated by defendant, and for the difference in the rental provided for in the contract and the amount she was able to re-rent the building for, after [307] the same was vacated by defendant, for the remainder of the term.

After answer of defendant, admitting several of the allegations of the petition, but denying that it assumed the lease, or that it agreed to pay the rents to plaintiff thereunder for the remainder of the term, the cause was tried to the court, without a jury, who made findings of fact and conclusions of law in part as follows:

"(1) Upon a consideration of the evidence, the court finds that on and prior to the 28th day of November, 1903, the plaintiff was the

owner of the real estate described in her petition and the lease attached thereto, and that on said date she executed and delivered to the Capital City Business College, a corporation, a lease for said premises to continue for the term of three years from the 1st day of January, 1904, until the 1st day of January, 1907, and for which said corporation was to pay her the sum of \$2,700, payable in monthly installments of \$75 each at the beginning of each month.

"(2) That on or about the 1st of November, 1904, the Capital City Business College sold out all of its assets to certain individuals, who immediately transferred the same to the defendant, the Tyler Commercial College, a corporation, and that the Capital City Business College was by said transfer of all of its assets in effect dissolved, and it ceased to exist as a corporation thereafter, and that the defendant, Tyler Commercial College, succeeded to all of its assets, property, contracts, rights, and good will.

"(3) That the defendant, the Tyler Commercial College, continued to carry on business in the city of Guthrie under the name of the Capital City Business College, and continued to operate the business college and to occupy the premises of the plaintiff up until the 30th day of September, 1905, and paid to her the rent stipulated in the lease.

"(4) That on the 17th day of August, 1905, the defendant served a written notice upon the plaintiff that it would terminate its tenancy and would vacate the premises on or about the 30th day of September, 1905, and that it did vacate the premises described on the 30th day of September, 1905.

"(5) That in payment of the September, 1905, rent, the defendant sent to the plaintiff a check, upon which was written in small letters, 'House rent, in full of implied contract;' and the court also finds that the plaintiff did not see or observe the same before cashing the check.

[308] "(6) That after said premises were vacated by the defendant the plaintiff expended the sum of \$500 in rearranging the interior of the building for another tenant.

"(7) That on the 15th day of December, 1905, the plaintiff re-rented said premises to another tenant for the sum of \$40 per month, and has continued to receive from such other tenant the sum of \$40 per month on and through the remainder of the term fixed in the lease."

#### CONCLUSIONS OF LAW.

"(1) From which the court concludes that the original lease from the plaintiff to the Capital City Business College was a valid lease, and binding upon the Capital City Business College, and that the defendant, Ty-

ler Commercial College, in succeeding to all of the assets, property, and good will of the Capital City Business College, and under its rights under the lease, became liable for its contracts, and liable to perform its contract to pay the rent stipulated under this lease."

Other conclusions of law were made by the trial court; but it is not necessary to set them out here. The judgment was for the plaintiff, as prayed for, except that she was not allowed for money expended in repairing the building and remodeling it, in order to rent it after it had been vacated by defendant.

There was a motion for a new trial by defendant, urging as one of the grounds for a new trial that the findings of the court were not supported by the evidence; and the overruling of this motion is assigned as error in the petition in error. But in defendant's brief this assignment is not set out; nor is it pointed out in the brief what findings of the court are without sufficient evidence to support them. It therefore must be taken by this court that the finding of the court upon the facts is correct.

There is no specific finding of the court that the Capital City Business College, by any written contract, ever assigned the lease to defendant; and there is absence of any evidence in the record to that effect. Nor is there any separate, specific finding that the Capital City Business College otherwise sold and assigned the lease to defendant; but we construe finding of the court, numbered 2, in which it is found that all the assets of the Capital City Business College were transferred to certain [309] persons, and that those persons transferred same to defendant, to be in effect a finding that there was a parol assignment of said contract; and counsel for defendant, in their brief, have dealt with the case upon the theory that there was a parol assignment to defendant by the Capital City Business College of its lease with plaintiff. Defendant contends, first, that such parol assignment is within the statute of frauds, and therefore void; second, that the taking of possession of the demised premises by defendant, and the payment of rents thereon for the portion of the term defendant occupied the premises, does not relieve the parol assignment from the operation of the statute of frauds; and, third, that if such performance does relieve the parol assignment of the statute, an assignee of a leasehold interest is liable for the rents only for the time he occupied the premises; and that, as it has paid all rents maturing before it vacated the premises, no recovery by plaintiff can be had against it.

Some of the cases support the last of defendant's foregoing contentions; but the decided weight of authority, consisting both of decided cases and the text-books, does not

support this rule. At page 1087, Underhill on Landlord and Tenant, it is said:

"Where the lessee makes an absolute assignment of the whole term, the assignee thereby becomes responsible, after he has accepted the assignment, for rent subsequently accruing, and for the subsequent breach of covenants running with the land, though he never takes possession of the premises. The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of occupation of the premises. This is the general rule, and is well supported by the authorities. The apparent exceptions to it, which make the liability of the assignee of the lease to the lessor depend upon the possession, are usually distinguished by some other element than the possession."

The liability of the assignee to the lessor is based upon privity of estate, and, so long as that privity of estate continues to exist, the assignee's liability continues; and it cannot be terminated by removal from the premises and refusal to pay rents. It may be terminated by a valid assignment of the entire unexpired term to any other person; for a valid assignment terminates the privity of estate between the first assignee and the lessor. *Bonetti v. [310] Treat*, 91 Cal. 223, 27 Pac. 612, 14 L.R.A. 151, where the cases supporting this doctrine are well collected in a note. See also section 181b, and section 158c, *Tiffany on Landlord and Tenant*.

*Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013, is relied upon by defendant as deciding favorably to it its contention that it is not liable to the plaintiff lessor for the rents; but that case has no application. One of the questions decided in that case was that the lessor could not recover from the sublessee the rents, and that the lessor must look to the original lessee. The distinction between the relation and liability of an assignee and a sublessee to the lessor is well defined by the authorities. There is neither privity of estate nor privity of contract between the sublessee and the lessor; but between the assignee and the lessor there is privity of estate, and the assignee is liable upon the covenants that run with the land. Section 449, *Taylor on Landlord and Tenant*; section 651, *Underhill on Landlord and Tenant*.

It follows in the instant case that, if any valid assignment was made to defendant by the Capital City Business College, defendant is liable; for the privity of estate created by such assignment was never terminated before the expiration of the term.

Section 780, subd. 5, *Wilson's Rev. & Ann. St.* (section 1089, subd. 5 *Comp. Laws 1909*), provides:

"An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, . . .

is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Section 880, *Id.*, provides:

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors."

Whether, under the foregoing statutes, a lease for a term of less than one year may be assigned otherwise than in writing need not be determined; for in this case both the original term of the lease and the unexpired term at the time of the transfer of the lease to defendant was for a longer period than one year; and these statutes include such an assignment and require it to [311] be in writing. 20 Cyc. 218; Taylor on Landlord and Tenant, sec 427. There was no written assignment to defendant, and the parol assignment and transfer to it of the lease is therefore void, unless the doctrine of part performance applies and takes the contract out of the operation of the statute. This exact question has not often been considered by the courts of this country.

Welsh v. Schuyler, 6 Daly (N. Y.) 412, Polk v. Reynolds, 31 Md. 106; Nally v. Reading, 107 Mo. 350, 17 S. W. 978; Chicago Attachment Co. v. Davis Sewing Mach. Co. 142 Ill. 171, 31 N. E. 438, 15 L.R.A. 754, have been cited by defendant as supporting the rule that part performance does not take a parol assignment of a lease out of the statute of frauds, so as to authorize a lessor to recover rents in an action at law against the assignee. Neither Polk v. Reynolds, *supra*, nor Welsh v. Schuyler, *supra*, is in point. All that was decided in the Polk case was that a verbal agreement or understanding to transfer a leasehold interest in land falls within the statute of frauds, and is therefore void. In Welsh v. Schuyler, *supra*, the plaintiff lessor sought to recover rents from a person who had occupied the demised premises with the permission of the original lessee, and had paid a part of the rents to the plaintiff lessor. It was held by the court that defendant being in possession and paying rents to the lessor was presumptive evidence that he had accepted and held an assignment of the lease, but that he was not estopped to show that he never accepted a valid assignment of the lease; and that, where the lease was for a period greater than three years, an assignment, not in writing, is invalid, because in violation of the statute of frauds. The rule of part performance was not invoked by plaintiff nor considered by the court. The other two cases cited by defendant, however, are in point, and hold that the doctrine of part performance has no appli-

cation in an action for rents by the landlord against the assignee under a parol assignment; but the court in each of those cases based its decision upon the rule prevailing in the respective states in which those cases arose, that, whatever might be the rule in equity as to such doctrine, it has no place in an action at law. That plaintiff may invoke the doctrine of part performance in this action is supported by the following [312] cases; Dewey v. Payne, 19 Neb. 540, 26 N. W. 248; Baker v. J. Maier, etc. Brewery, 140 Cal. 530, 74 Pac. 22; Edwards v. Spalding, 20 Mont. 54, 49 Pac. 443; Grant v. Ramsey, 7 Ohio St. 158; Browder v. Phinney, 30 Wash. 74, 70 Pac. 264.

The rule supported by these last-mentioned cases we believe to be based upon the sounder reason, and more conducive to justice under the Code of Procedure in force in this state. The contract here involved, and which it is charged, infracts the statute, does not create any estate in real estate, as does the lease contract. Whether the contract of assignment stands or falls does not affect the leasehold estate, which was granted by the original lease contract to the lessee; for that contract was in writing, and is valid. What was undertaken by the parol assignment was not to create an estate, but to convey an interest in real estate that had been created by the original lease contract and held by the lessee. This contract of assignment was capable of immediate performance by the execution thereof by the lessee and acceptance thereof by the assignee and payment of the consideration. The consideration was paid by the assignee to the extent that it paid for all the assets transferred by the Capital City Business College, the original lessee, to it, including the lease in controversy; and it had also performed the covenants of the lease for part of the time thereafter by payment of the rents, and had been in possession of the property, using and enjoying same. By our Code the distinction between actions at law and suits in equity is abolished, and all actions in which a civil remedy is sought are denominated civil actions. Section 5542, Comp. Laws 1909. Plaintiff, in his petition, is required to set up therein only a statement of the facts constituting his cause of action in ordinary and concise language, and make demand for the relief to which he thinks himself entitled (section 5627, Comp. Laws 1909); and defendant may set forth in his answer as many grounds of defense as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Section 5634, Comp. Laws 1909. Under these provisions of the Code, defendant in the instant case could plead, in any action of ejectment that might be [313] brought against it, either by the lessor



or the original lessee, any equitable defenses it may have. *Meadors v. Johnson*, 27 Okla. 544, 112 Pac. 1121; *Talley v. Kingfisher Imp. Co.* 24 Okla. 472, 103 Pac. 591, 20 Ann. Cas. 352. And an equitable estate in land may, under our Code, be made the basis of an action for possession. *Shy v. Brockhouse*, 7 Okla. 35, 54 Pac. 306; *McClung v. Penny*, 12 Okla. 303, 70 Pac. 404.

It would therefore follow, if the doctrine of part performance cannot be applied in the case at bar, that under the procedure in this state, if plaintiff, or if the lessee, brought an action to eject defendant from the premises, defendant could set up its equitable defense, its right to a specific performance of the contract, to defeat the action of ejectment, and secure the performance of the assignment to the extent that it could enjoy the full unexpired term of the original lease. This protection would be given to defendant in an action that, in the absence of our Code provisions, would be denominated an action at law; and yet, in a similar action, the court would refuse to enforce the covenants of the contract against defendant by requiring it to pay the rents. There is nothing in the statute that requires such a construction as will permit this inconsistent and inequitable administration of the law. In *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565, from which state our Code was adopted, a plaintiff lessor sought, by an action of forcible entry and detainer, to eject his lessee under a parol lease for a term of six years from the demised premises. The lessee had been in possession of the land for a period of five years, had planted and cultivated crops thereon, built fences and houses, and made other improvements, and, in addition thereto, had paid the rents and taxes thereon. The court held that defendant might invoke the doctrine of part performance in his defense to the action, and that his acts had been sufficient to take the contract out of the statute and make it valid for the full term of the lease. In the opinion, written by Mr. Justice Valentine, concurred in by Mr. Justice Brewer, it was said:

"Mere possession or mere payment of rent will not, as a general rule, make a parol lease for more than one year valid for the full term. But parol leases exceeding one year, as well as [314] other parol contracts with regard to real estate, may sometimes be taken out of the statute of frauds by a part performance of the contract, and by such part performance be made valid to their full extent. *Taylor's Landlord and Tenant*, sec. 32; *Grant v. Ramsey*, 7 Ohio St. 157. But parol leases for more than one year, in order to become valid by a part performance, should generally be such as would, by such part performance, become substantially a purchase of an interest in the real estate"

In *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608, there was a parol agreement to execute a written lease of land for a term of more than one year. After the lessee had gone into possession and expended labor, money, and material in making improvements on the land, and getting it into condition to enjoy, the landlord refused to execute the lease and ousted the lessee from possession. In an action by the lessee against the landlord to recover damages, it was held that the lessee's acts constituted such a part performance of the contract as to take it out of the statute sufficiently to enable him to recover for the time, labor, money, and material expended thereon as his damages.

In *Bard v. Elston*, supra, the equitable doctrine of part performance was invoked by the defendant; while in *Deisher v. Stein*, supra, it was invoked by the plaintiff, and constituted a part of his cause of action. In the latter case, it was said by the court in the opinion:

"It must be remembered that in Kansas all the old forms of action, and all distinctions between actions at law and suits in equity, are abolished, and in their stead only one form of action is recognized, called a civil action; and in this form of action all that a plaintiff needs to do in stating his cause of action is to state the facts of his case; and if such facts would entitle him to recover in any form of action, either at law or in equity, he will be entitled to recover under such statement."

Speaking of what performance is necessary to relieve a contract for the sale of real estate or interest therein of the operation of the statute, this court, in *Collins v. Lackey*, 31 Okla. 776, Ann. Cas. 1913E 507, 123 Pac. 1118, 40 L.R.A. (N.S.) 883, said:

"The authorities are practically unanimous that payment of the purchase price and taking possession under the contract and making valuable improvements on the granted premises constitute such a performance of the contract as will warrant a decree [315] of specific performance. There is some division in both the English and the American authorities as to whether taking possession alone under the contract, without making valuable improvements, is sufficient to take the contract out of the operation of the statute. The weight of authority, both in England and in this country, however, supports the rule that possession alone of land under a verbal contract, when delivered to the vendee, is sufficient performance to take the case out of the statutes of frauds, without the additional circumstances of payment of consideration, or the making of valuable improvements."

See also *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; and *Sutherland v. Taintor*, 17 Okla. 427, 87 Pac. 900.

Defendant had gone into possession, paid the purchase price, and performed on its part every obligation of the contract of assignment, except the covenant of the original lease to pay rents, part of which, however, it had paid.

It follows from the foregoing views that plaintiff was entitled to recover, and the judgment of the trial court should be affirmed.

After the first hearing in this cause, this court prepared and filed an opinion, affirming the judgment of the trial court upon a question of practice; but, after a rehearing upon a petition therefor, it appears to the court that the question considered in the first opinion was not presented by the briefs of plaintiff in error sufficiently in compliance with the rules of the court so as to entitle it to consideration; and, without at this time determining whether we were correct in our conclusion on the question then decided, we have considered the case upon its merits, and on a theory upon which it was presented to the trial court. The trial court appears to have held the defendant liable, because the assignment to it by the Capital City Business College of all of its assets effectually worked a dissolution of the latter corporation. We entertain some doubts whether, under the facts found by the court, and under the facts which the evidence in the record in any way tends to support, liability of defendant can be sustained upon this theory; but the theory upon which we have sustained the judgment of the trial court was one of the theories presented by the pleadings, and upon which the case [316] was tried; and, if the trial court gave a wrong reason for the judgment rendered, such fact constitutes no ground for reversal.

The judgment of the trial court is affirmed.

Turner, C. J., and Williams and Kane, JJ., concur; Dunn, J., absent, and not participating.

#### NOTE.

The court in the reported case lays down the rule that a verbal assignment of a lease, although void under the Statute of Frauds, may be relieved from the operation of the statute by the doctrine of part performance. So, it is held, where an assignee under a void assignment occupies the leased premises and attorns to the lessee, he becomes liable as under a valid assignment for the full term, and while he may terminate his liability by a reassignment he is not relieved of his obligation by a mere abandonment of the premises. The decisions passing on the effect of an assignment or sublease by a tenant on

the liability for rent are discussed in the note to *Kanawha-Gauley Coal and Coke Co. v. Sharp*, reported ante, this volume, at page 786.

McGHEE ET AL.

v.

COX ET AL.

Virginia Supreme Court of Appeals—  
September 7, 1914.

116 Va. 718; 82 S. E. 701.

#### **Trial — Agreed Statement — Inferences.**

Where a case is heard on an agreed statement of facts, the court may only draw inferences of law and of legal construction and not inferences of fact.

[See generally Ann. Cas. 1915D 256.]

#### **Landlord and Tenant — Covenant against Assignment Waived.**

Where a lease was assigned without the consent of the lessor, in violation of a covenant therein, but the lessor, with knowledge of the assignment, thereafter received rents due from the lessee for several months, and until it elected to terminate the lease by giving notice according to its terms, and made no objection to the subletting or assignment, the covenant was waived.

[See Ann. Cas. 1913A 1202.]

#### **Liability of Assignee for Rent.**

Since a covenant against assignment of a lease without the lessor's consent is for the sole benefit of the lessor and his assigns, a breach of the restriction by the lessee is not available to an assignee of the lease in defense to an action for rent.

[See note at end of this case.]

#### **Duty to Put Tenant into Possession.**

Where, at the time plaintiffs leased certain premises to defendants, plaintiffs were in actual possession of the whole, being owners in fee of a portion and holding over as lessees of the residue, they were not bound to put defendants into actual possession, but it was sufficient that they had the premises open to entry without any obstacle in the form of a superior right to prevent defendants from obtaining actual possession.

#### **Defense to Claim for Rent — Disturbance of Possession.**

Plaintiffs, being lessees of a quarry on a railroad right of way, assigned the same to defendants, and shortly thereafter the railroad company refused to permit further operations, unless defendants paid the wages of a watchman while work was being done in the quarry. This defendants refused to do, and thereupon ceased operating the quarry, and alleged such fact as a breach of plaintiffs'

contract in defense of an action for rent. Held, that defendant's rights as to the operation of the quarry with or without a watchman depended on the construction of the written contract between plaintiffs and the railroad company, and not on the contention of either party with reference thereto, and hence the railroad company's claim constituted no defense to defendant's liability for rent.

Error to Law and Chancery Court of city of Roanoke.

Action to recover rent. Cox et al., plaintiffs, and McGhee et al., defendants. Judgment for plaintiffs. Defendants bring error. The facts are stated in the opinion. Affirmed.

*Hart & Hart* for plaintiffs in error.

*Jackson & Henson* and *J. H. Stuart* for defendants in error.

[719] BUCHANAN, J.—This case, which is an action of assumpsit to recover rent, was heard upon a written statement of the facts in the case as "a case agreed." It appears that the plaintiffs were the owners of a stone quarry adjoining the right of way of the Virginian Railway Company. They also had a lease or agreement with that company for working stone on its right of way. In April, 1911, the plaintiff entered into a contract with the defendants for the leasing of the quarry owned by it at a minimum rent or royalty of \$600 *per annum*, payable in equal monthly installments. The lease or contract further provided that the defendants were "to have the right to operate on the line of the Virginian Railway Company, according to the terms of the lease" of the plaintiffs with that company. Within a month after the lease between the [720] plaintiffs and defendant had been made, and after the latter had made preparations to begin operations, they were notified by the railway company not to operate on its right of way. After some correspondence between the parties and the railway company the latter agreed that the rock upon its right of way might be quarried upon certain conditions—not contained in its lease to the plaintiffs. One of these conditions, and the only one that is material to the consideration of this case, was that the defendants should pay the expense of keeping a watchman to be furnished by the railway company. This the defendants were unwilling to do. They insisted that if such expense had to be incurred it should be borne by the plaintiffs. This the latter declined to pay, claiming that they had only transferred or assigned to the defendants such rights as they (the plaintiffs) had under their contract or lease with the railway company. The defendants did not oper-

ate the quarry after the railway company notified them not to operate on its right of way.

After the rental year expired, the plaintiffs demanded the minimum rent or royalty provided for in the lease, and afterwards instituted this action to recover the same, no part of which had been paid. The defendants filed a plea of non-assumpsit and two special pleas, and their grounds of defense. Upon a hearing of the case upon the agreed statement of facts, the court rendered judgment for the rent demanded. To that judgment this writ of error was awarded.

The contention of the defendants in their petition for this writ of error is "that without fault or neglect on their part, they did not derive benefit from the contract of lease, on which plaintiffs instituted their suit and recovered their judgment; that they did not obtain possession of the leased premises and that it was not possible for them to have obtained such possession; that in [721] making the lease to defendants plaintiffs violated the terms of the lease under which they themselves held, and were therefore unable to deliver possession to defendants; and, lastly, that by acquiescing in the conditions imposed by the railway company, plaintiffs themselves raised a barrier which effectively prevented defendants acquiring possession and which in effect amounted to a withholding of possession by the plaintiffs."

The case, as before stated, was heard upon an agreed statement of facts as "a case agreed." A case agreed, being a substitute for a special verdict, is subject to like rules. *Sawyer v. Corse*, 17 Grat. (Va.) 230, 248-249, 94 Am. Dec. 445. In considering a special verdict, no inference whatsoever as to a matter of fact, but only inferences of law and of legal construction are allowable. 4 Minor's Inst. (1st ed.) 752-3, and cases cited; *Sawyer v. Corse*, supra.

Tested by the rules applicable to the case, the court is of opinion that neither of the defenses or contentions relied on by the defendants can be sustained. The agreed statement of facts shows that when the lease between the plaintiffs and defendants was entered into, the plaintiffs had good title to that portion of the land which they described in the lease as owned by them, and that they only undertook to assign such interest in the land of the railway company as they had acquired by their lease from it. In the lease of the railway company to the plaintiffs there was a provision that the plaintiffs should not assign or sublet the leased premises without the written permission of the railway company. The plaintiffs did not have such written permission, but after the lease between the plaintiffs and defendants was entered into, and with full knowledge of the facts, the

railway company continued to receive the rents due to it from the plaintiffs under the lease for several months and until [722] it exercised its right to terminate the lease by giving the thirty days notice required by its terms, and made no objection to the subletting or assigning of the lease by the plaintiffs to the defendants. This, under the authorities, was a waiver by the railway company of the covenant against assigning or subletting. *McKildoe v. Darracott*, 13 *Grat. (Va.)* 278.

It is said in 24 *Cyc.* 968, and seems to be fully sustained by the cases, that "Restrictions against assignment or subleases, whether imposed by statute or by the terms of the lease, are intended for the benefit of the lessor and his assigns, and if neither of these object to a breach of the restriction, no one else may do so. One to whom the term has been assigned in breach of the restriction cannot set up the breach in defense of an action brought against him by the lessor on the lease, or in defense of an action brought against him by the lessee on an obligation incident to the assignment. . . ." See *Montecon v. Faures*, 3 *La. Ann.* 43; *Cordeviole v. Redon*, 4 *La. Ann.* 40; *Shumway v. Collins*, 6 *Gray (Mass.)* 227; *Chicago Attachment Co. v. Davis Sewing-Mach. Co. (Ill.)* 25 *N. E.* 669.

This being so, even if the breach of the restriction against assignment or subletting had not been waived, it furnished no defense to the defendants against the payment of the rent.

If the facts agreed did not show, as we think they do, that the defendants took actual possession of the leased premises, they do show that they were entitled to the possession immediately upon the execution of the lease; that the plaintiffs were in the possession of the whole of the leased premises, being the owners in fee of a portion and holding over as the lessees of the residue, for possession will always be considered as following the ownership unless there is an adverse possession. *Taylor on Landlord and Tenant*, sec. 86.

[723] The general rule is that a lease becomes complete and takes effect upon its execution, unless otherwise specifically provided, and entry by the lessee is not necessary to give it effect. The plaintiffs were not bound to put the defendants into actual possession of the leased premises. They were only bound to put them into legal or constructive possession—that is, to have the premises open to entry without any obstacle in the form of a superior right to prevent the defendants from obtaining actual possession. 24 *Cyc.* 1049-50; *Taylor on Landlord and Tenant*, secs. 86 and 15; *Gardner v. Keteltas*, 3 *Hill (N. Y.)* 330, 38 *Am. Dec.* 637, 638.

While the agreed statement of facts shows that the defendants had not seen the contract or lease between the railroad company and the plaintiffs until after the controversy in this case began, it does not show that the defendants asked to see the contract or inquired about its contents, or that the plaintiffs misrepresented its provisions in any respect before the agreement or lease between the plaintiffs and defendants was entered into. There is, therefore, no ground for the defendants' contention that they were induced to enter into the agreement or lease by the fraudulent representations of the plaintiffs.

The agreed facts do not show that after that agreement was made the plaintiffs, as is insisted, violated its terms or did any act which relieved the defendants from the payment of the rent. The fact that the plaintiffs misconstrued the meaning of their agreement with the railway company and erroneously considered that it had the right to require those operating under the lease to pay the cost of keeping a watchman, and so informed the defendants, would not, unless fraudulently done, and of that there is no suggestion, affect the question of rent. That agreement was in writing and by it the rights of [724] the parties were to be determined. The defendants were not bound by the construction which either the railway company or the plaintiffs may have placed upon it after its assignment, but by its terms. If the construction placed upon that agreement by the plaintiff was different from what the defendants supposed it was when they entered into their agreement with the plaintiffs, all that they had to do was to look to its provisions to ascertain what their rights and obligations under it were. If it required the lessee operating under it to pay the costs of keeping such watchman, they were bound to pay them in order to get the benefit of its possession; if it did not require such payment, they had the right to operate upon the right of way without paying them, but they did not have the right to accept the construction placed by the plaintiffs upon their lease with the railway company as correct and refuse to perform the condition imposed by it as thus construed and thereby escape the payment of the rent which they had contracted to pay.

Upon the whole case the court is of opinion that there is no error in the judgment complained of, and that it must be affirmed.

*Affirmed.*

#### NOTE.

It is held in the reported case that a lessor of property may waive a restriction in the lease against assignment or subletting and that an acceptance of rent constitutes such a

waiver. It is further held that even though the breach of such a restriction is not waived it cannot be made a defense in an action brought by the lessor against the assignee for the payment of rent. The cases discussing the effect of an assignment or sublease by a tenant on the liability for rent are collected in the note to *Kanawha-Gauly Coal and Coke Co. v. Sharp*, reported ante, this volume, at page 786.

## CITY OF ST. PAUL

v.

ROBINSON.

Minnesota Supreme Court—May 21, 1915.

129 Minn. 383; 152 N. W. 777.

**Jury — Right to Jury Trial — Petty Offenses.**

Neither the constitution nor the statutes of this state give the right of trial by jury to persons charged with petty offenses under the ordinances of a city.

[See 18 Ann. Cas. 380.]

**Holidays — Publication of Ordinance.**

The publication of an ordinance of the city of St. Paul under the 1900 Home Rule Charter may lawfully be made on Memorial Day.

[See note at end of this case.]

**Street Railways — Regulation of Use of Transfers.**

The common council of the city of St. Paul under that charter had the right to pass an ordinance restricting the use of street car transfers to the persons to whom they were issued. The city council possessed only such legislative power as was granted to it by the constitution or statutes in express terms and such as is necessary to the full enjoyment of powers expressly granted. The power was given to grant franchises for the operation of street railways and to regulate and control the exercise of such franchises. This conferred, by implication, the power to require issuance of transfers by the railway company and to regulate the manner of their issuance by the company, and the manner of their use by the public.

[See 11 Ann. Cas. 557.]

**Same.**

The evidence is sufficient to establish all the elements necessary to constitute an offense under the ordinance.

(Syllabus by court.)

Appeal from Municipal Court of St. Paul:  
FINEHOUT, Judge.

Prosecution for violation of municipal ordinance. H. E. Robinson convicted and appeals. The facts are stated in the opinion. **AF-FIRMED.**

*Russell L. Moore* for appellant.

*O. H. O'Neil* and *Thomas W. McMeekin* for respondent.

[384] HALLAM, J.—Defendant was convicted in the municipal court of the city of St. Paul upon a charge of violation of an ordinance of the city which provides that no person, for the purpose of defrauding the street railway company, shall use for passage or transportation upon any street car within the city of St. Paul, any transfer ticket, issued by the street railway company, which has not been issued directly to such person. Ordinance No. 3,218.

1. Defendant assigns as error the refusal of the court to grant him a jury trial. It is not claimed that he had any constitutional right to a jury trial, nor could he so claim under repeated decisions of this court that the constitutional guaranty of trial by jury does not extend to trials for petty offenses under the ordinances of a city. *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *State v. Grimes*, 83 Minn. 460, 86 N. W. 449; *Madison v. Martin*, 109 Minn. 292, 123 N. W. 809. It is not claimed that the statutes of the state give the right of trial by jury in this class of offenses in all courts of the state. The contention of defendant is that the statutes of the state give to all alleged offenders tried in this particular municipal court the right to [385] a jury trial, even though the offense charged is the violation of a city ordinance. This contention cannot be sustained. Section 7 of the Municipal Court Act (chapter 351, p. 996, Sp. Laws 1889), provides in terms that the judges of that court shall hear and dispose of such offenses "in a summary manner." This clearly means without a jury. *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *Jones v. Robbins*, 8 Gray (Mass.) 329; *State v. Williams*, 40 S. C. 373, 19 S. E. 5.

Defendant's contention is based on the provision of section 40 [p. 1002] of the Municipal Court Act, which reads as follows:

"Trial by jury in said court shall in all respects be conducted as in the district court of this state, and all laws of a general nature applicable to jury trials in said district court shall apply to said municipal court" and the further provision in section 41, p. 1002, which reads: "Each party to a civil or criminal action shall be entitled to three peremptory challenges and no more."

These provisions undoubtedly recognize that the right of trial by jury exists in some civil actions and criminal proceedings in that

court. In construing these provisions it must be borne in mind that there exists under the Constitution (article 1, § 4), unquestioned right of trial by jury in certain cases which are cognizable by the municipal court. The right of trial by jury exists in civil actions at law regardless of the amount involved. *Whallon v. Bancroft*, 4 Minn. 109; *State v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 41 N. W. 1020, 3 L.R.A. 510. It exists also in criminal prosecutions for offenses which are essentially criminal under the general laws of the state and such as have by the regular course of law and the established modes of procedure as theretofore practiced been the subjects of jury trial. *State v. Everett*, 14 Minn. 439; *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *State v. West*, 42 Minn. 147, 43 N. W. 845. Some of these civil actions and criminal proceedings are within the jurisdiction of the municipal court of St. Paul (section 1 [p. 994] Municipal Court Act), and in such actions and proceedings the right of trial by jury exists in that court. Construing the above sections of the Municipal Court Act in the light of these facts we are of the opinion that they were intended merely [336] to regulate the manner of exercise of the right of trial by jury in the cases where it already existed, and not to extend the right to any new cases. In no other manner can these sections be construed in harmony with section 7 [p. 996] of the act providing for "summary" trial of offenses arising under the ordinances of the city.

2. The next contention is that the ordinance under which defendant is being prosecuted is void because published on Memorial day. Under section 47 [c. 4, § 8] of the St. Paul Home Rule Charter of 1900, which was then in force, every ordinance was required to be published in the official paper before the same should be in force. Memorial day is made by statute one of the prescribed legal holidays, and it is provided that "no public business shall be transacted on those days, except in cases of necessity, nor shall any civil process be served thereon." G. S. 1913, § 9412, subd. 6. Two things are forbidden, service of process and transaction of public business. The publication of this ordinance clearly did not constitute service of process. Did it constitute transaction of public business? Two early decisions of this court bear on this question, *Sewall v. St. Paul*, 20 Minn. 511, and *Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L.R.A. 753. In the former it was held that a notice of confirmation of a city assessment for local improvement made on Sunday was void. The statute at that time forbade the doing on Sunday of "any manner of labor, business or work, except only works of necessity and charity." G. S. 1866, c. 100, § 19. The court said that "Sunday is not

a business day," and that therefore such a publication on that day was invalid. Even as to that proposition there is respectable authority to the contrary. *Savings, etc. Soc. v. Thompson*, 33 Cal. 347; *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Hastings v. Columbus*, 42 Ohio St. 585; *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 666, 64 S. W. 1075, 61 L.R.A. 888. In the *Malmgren* case it was held that a publication of a summons on Memorial day was valid. A distinction was drawn between Sunday and holiday publications. It was held that the publication on Memorial day was not a violation of the provision which prohibits the service of legal process on a legal holiday; that [337] the full purpose of notice for which the publication was designed was accomplished by such a publication; that the publication of a notice does not come within the spirit of the statute; that the object of the prohibition of the statute is to prevent any interference with the quiet enjoyment or observance of the day and that this reason does not apply to service by publication. The line of reasoning here followed is equally applicable to a case of this kind, and we think that since the decision in *Malmgren v. Phinney* it has been the understanding of the bench and bar that publication of legal notices in newspapers does not come within either of the inhibitions of the statute as acts done on legal holidays. Following the rule and the reasoning of the *Malmgren* case, it must be held that the publication of an ordinance in the official newspaper of the city on a legal holiday does not constitute the "transaction of public business" as that term is used in the statute relating to legal holidays.

3. It is contended the common council had no power to pass this ordinance. Undoubtedly the prevention of traffic in transfer tickets is a proper subject of legislation. In *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498, this court sustained a law prohibiting scalping in railway tickets. The principle is the same. It does not follow, however, that the council of the city of St. Paul has power to legislate on this subject. A city council has no inherent legislative power. General legislative power resides only in the state legislature. Power to legislate upon subjects of municipal concern may be granted to the city council. This body possesses only such legislative power as is granted to it by constitutional or statutory enactment in express terms, and such as is necessary to the full enjoyment and exercise of powers expressly conferred. *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *State v. Municipal Ct.* 32 Minn. 329, 20 N. W. 243; *Red Wing v. Chicago, etc. R. Co.* 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482. In this case the charter of the city is its grant

of power and we must look to it for evidence of authority to enact this ordinance. One provision in the charter seems to us decisive of this case. By chapter 4, § 22 [p. 124] [388] of the Home Rule Charter of 1900 the common council was empowered by ordinance to grant franchises for the construction and operation of street railways, and by chapter 4, § 23 [p. 125] it was empowered by ordinance to "provide for regulating and controlling the exercise . . . of any public . . . franchise . . . in any of the streets" of the city. Under these provisions the city has the unquestioned right to require the city railway company to issue transfers, and it has done so. *Pine v. St. Paul City R. Co.* 50 Minn. 144, 52 N. W. 392, 16 L.R.A. 347. By parity of reasoning it must be said to possess the power to regulate the manner of the issuance of such transfer and their manner of use by the public. The use of a transfer ticket by a person other than the one to whom it was issued and who has paid the fare which it represents, is a use not contemplated by the city council when it required the issuance of transfer. Such use is a species of fraud, which the city council, in the exercise of its regulatory power, is authorized to prohibit by ordinance. *Ex p. Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L.R.A. 55, 79 Am. St. Rep. 47; *Chicago v. Openheim*, 229 Ill. 313, 82 N. E. 294, 11 Ann. Cas. 554.

4. Defendant contends that the evidence is not sufficient to establish the elements legally necessary to sustain a conviction under the ordinance. We have examined the evidence with care and we are clear in the opinion that it is sufficient to sustain a conviction. There is sufficient evidence that the transfer was not issued to defendant. The evidence is that defendant "paid his fare by it." That constitutes "use" of it. The fact that he was at once arrested and then paid a cash fare, does not change the character of the earlier act. The proof of intent is ample. In fact all the elements of the offense were sufficiently proven.

Order affirmed.

#### NOTE.

#### Validity of Official or Judicial Act Performed on Holiday.

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Act of Municipal Officer Generally, 848.

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#### Introductory.

This note treats of the validity of an official or judicial act of any kind performed on a public holiday. It does not consider the exclusion of holidays in the computation of the time limited for the performance of an official or judicial act.

One phase of the subject-matter of the present discussion, the holding of court on a holiday, having been reviewed in earlier notes in this series, the present treatment of that question is supplemental to those notes.

The parallel question of the validity of an official or judicial act performed on Sunday is discussed in the note to *Moss v. State*, Ann. Cas. 1916B 1.

#### General Rule.

The designation by statute of a day as a holiday does not make it *dies non juridicus* or invalidate official or judicial acts performed on that day. And if, in connection with the declaration of a holiday certain acts are prohibited thereon, any official or judicial act which is outside the terms of the prohibition may be performed on that day. See the reported case and the cases cited throughout this note. "The rule generally appears to be that any and all business may be transacted upon a holiday except that which is positively forbidden." *McLaughlin v. Houston-Hudson Lumber Co.* 31 Okla. 182, 120 Pac. 659, 38 L.R.A.(N.S.) 248. In the leading case of *Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684, the court after reviewing the history of the Sunday laws said: "When we compare the course of the common law and legislation respecting Sunday with the statute now before us, a different treatment is observable. Although some of the days named are accounted holy by many, while others are national anniversaries, or days when public duties are enjoined on citizens, yet there has been enacted no prohibition against the pursuit of any business or pleasure. There is no express prohibition against the service of the process of the courts. The direct prohibitions of the statute are aimed at only two things, viz: (1) Compulsion to labor, and (2) the holding of courts on the days specified. The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sun-

day. *Phillips v. Innés*, 4 Cl. & F. (Eng.) 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays it does not permit a reference to the legal status of Sunday to discover its meaning. For it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor and from compulsory attendance upon courts, as officers, suitors or witnesses. Its true interpretation will limit the prohibition with respect to the courts to such actual sessions thereof as would require such attendance." In *Foster v. Toronto R. Co.* 31 Ont. 1, it was said: "It is held in *Lampe v. Manning* (1875), 38 Wis. 673, cited for the plaintiff, that the term 'holiday' used in a statute means *dies non juridicus*, and that such being the case the court had no power to hear a cause and render judgment on such a day. This I conceive to be an entirely erroneous view of the word, first of all translating it into a dead language and then imputing to it an ecclesiastical meaning which is foreign to the atmosphere of a new country where no established church exists. 'Holiday' according to the Oxford dictionary means, first, a consecrated day, a religious festival, and second, a day on which the ordinary occupations are suspended, a day of exemption or cessation from work, a day of festivity, recreation or amusement; see *Phillips v. Innes* (1837), 4 Cl. & F. (Eng.) 234. . . . No doubt in England there are many days canonically declared to be *dies non juridici* the same as Sunday; but in this country the only day on which no judicial act can be validly done is the Lord's Day or Sunday. This does not result from Sunday being a statutory holiday, but because it is *dies non juridicus* as declared by early canons of the church adopted or confirmed by the English kings and so incorporated into the common law and as such introduced into this Province by its first colonization and constitution. Christmas, Good Friday and the like are holidays by statute, but they are not on the same footing as to separateness from ordinary or secular work as the Lord's Day, nor are they regarded as religious occasions by a great part of the population. Though the rules of court sanction and provide for the closing of the offices on holidays, this is merely for the benefit of the officers and not making void necessarily any business done on those days."

In *Lampe v. Manning*, 38 Wis. 673, it was said that the term holiday imports *dies non juridicus*. That view, not elsewhere adopted, was in *Weil v. Geier*, 61 Wis. 414, 21 N. W.

246, confined to acts which are strictly of a judicial nature, and in *Spalding v. Bernhard*, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L.R.A. 423, it was practically overruled. In *Paine v. Fesco*, 1 Pa. Co. Ct. 562, the conclusions of the court were stated as follows: "We look upon that portion of the statute which simply ordains the 22nd of February to be a legal holiday as directory, and not imperative, permissive, but not obligatory, and this for the reasons: first, because the statute contains no negative words, and, secondly, because it imposes no penalty, in both of which respects it differs from the law and the adjudications in reference to the Christian Sunday. The provision in the statute that the legal holiday shall be as Sunday applies only to commercial paper, its maturity and protest, and not to judicial acts or to wordly employment in general."

A federal court is not bound by the holiday statutes of the state in which it sits. *American Automotoneer Co. v. Porter*, 205 Fed. 105.

The service outside of a state of process in an action pending therein is governed by the state law and cannot be made on a holiday if the statute creating the holiday prohibits service of process thereon. *Norvell v. Pye* (Tex.) 95 S. W. 666.

#### Application of Rule.

##### ACT OF MUNICIPAL OFFICER GENERALLY.

A municipal election may, in the absence of an express prohibition, be held on a holiday. *People v. Loylton*, 147 Cal. 774, 82 Pac. 620, wherein the court said: "The record shows that the election in the 'proposed corporation for the purpose of determining whether the same shall become incorporated' was ordered by the board of supervisors to be held on the ninth day of September, 1901, and was held on said day. That day being a holiday under the provisions of our statute (Pol. Code, sec. 10), it is claimed that no valid election could be held thereon. Appellant has pointed out no statute prohibiting the holding of such an election on a holiday, and we know of none. There is a statutory prohibition as to the transaction of certain 'judicial business' on certain holidays, including September 9th (Code Civ. Proc. sec. 134), but the holding of an election does not come within that term. In the absence of any such statutory prohibition we know of no reason why the election could not be held on a day set apart by statute as a holiday. The rule appears to be that on all such days all transactions not within the statutory prohibitions may be carried on as on any other day."

Surveyors may make on a holiday their report laying out a public road. *Lord v. Gifford*, 67 N. J. L. 193, 50 Atl. 903, and official



notice may on such a day be given by a city engineer of the time fixed for his inspection of a street improvement. *Boone v. Gleason*, 5 Ky. L. Rep. 169.

#### ADOPTION OR PUBLICATION OF STATUTE OR ORDINANCE.

A municipal ordinance may be adopted on a holiday. *Griffith v. Vicksburg*, 102 Miss. 1, 58 So. 781; *Mueller v. Egg Harbor City*, 55 N. J. L. 245, 26 Atl. 89; *In re Schumacher*, 21 Ont. L. Rep. 522. And see the reported case. Said the court in *Griffith v. Vicksburg*, supra: "One of appellant's contentions is that, since by section 4011 of the Code of 1906 the 1st day of January is declared to be a legal holiday, the ordinance providing for the issuance of the bonds is void. The mere fact that the legislature has declared a day other than Sunday to be a legal holiday does not make such day *dies non*. All acts done on such a day are lawful and valid, except such as are prohibited by the statute setting apart the day as a holiday." So in the case of *In re Schumacher*, supra, it was said: "I am unable to find any thing in the statute forbidding the holding of a meeting on Good Friday. Nor is there anything at the common law to prevent such a meeting. At the common law even Sunday was not a day upon which business could not be done—it required statutory provisions for that. 4 Bl. Com. 63, 64. One of these statutes, that of 27 Hen. VIII. ch. 5, prohibited the holding of fairs on Good Friday, also, upon pain of forfeiture of the goods exposed to sale. But the law has not gone further. For example, Courts of Assize are frequently held upon that day, although it is the practice to excuse from attendance all who may have conscientious scruples against every kind of secular business upon that day. This matter is discussed in *Foster v. Toronto R. Co.* 31 Ont. 1, at p. 4, by the Chancellor. While many have a disinclination to work on Good Friday, and it may be that, if any councillor objected on conscientious grounds to the meeting being held, there might have been some ground of complaint, I do not think that the act of the council, unanimous and without objection, can be said to be other than valid, though done on Good Friday."

A statute (*State v. Bertrand*, 122 La. 856, 48 So. 302) or an ordinance may be published on a holiday. *McVerry v. Boyd*, 57 Cal. 406.

#### JUDICIAL BUSINESS GENERALLY.

The designation of a day as a holiday has of itself no effect on the right to transact judicial business thereon. *Pickering v. Justice of Peace*, 16 N. M. 37, 113 Pac. 619. And a prohibition of judicial business on a holiday applies to such business only as is strict—*Ann. Cas. 1916E.—54*.

ly judicial and does not prevent the performance of ministerial acts by judges or officers of court. See the cases cited in this and the following subdivisions of this note. As was said in *Whipple v. Hill*, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L.R.A. 313: "It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond the plain import of the words used. Had the legislature intended to debar courts, or court officers, from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday." So in *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 48 L.R.A. 459, the court said: "Where the transaction of judicial business on Sunday or holidays is expressly forbidden by statute, acts of a ministerial character on those days are held lawful; such as the issue of a warrant for the apprehension of a criminal and his admission to bail, the receiving of a verdict and committing the defendant for sentence, the issue and service of civil process, and many other acts of a similar nature. All of which is a recognition of the rule already stated, that whatever acts may be lawfully done on other days are also lawful when performed on Sunday or a holiday, except when and in so far as their performance on those days is prohibited by statute."

Thus a defendant may plead to a rule on a holiday. *Mesure v. Britten*, 2 H. Bl. (Eng.) 616. Compare *Harrison v. Smith*, 9 B. & C. 243, 17 E. C. L. 367. Costs may be taxed on a holiday, *Gillmore v. Gilbert*, 7 N. Bruns. 50; and a motion for a new trial may be filed on a holiday, *Tully v. Grand Island Tel. Co.* 87 Neb. 822, 128 N. W. 508. Of the filing of papers in court on a holiday it was said in *Mitchell v. Bates*, 57 S. C. 44, 35 S. E. 420: "The statute declaring the 4th of July a legal holiday does not forbid the taking of any step in a legal proceeding on that day;

and in the absence of any such statutory provision, we are not prepared to hold that any step taken in a legal proceeding on a legal holiday, such as the filing of a paper in a pending case, would be either illegal or void. . . . It may be that a public officer would be justified in declining to perform any act pertaining to the duties of his office, or even to open his office, on a legal holiday; but if he consents to do so, we are unable to see anything either in the common or statute law which forbids him to do so, or renders his act void."

An indictment may be returned on a holiday. *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 48 L.R.A. 459; *Macklin v. State*, 53 Tex. Crim. 197, 109 S. W. 145; *Webb v. State (Tex.)* 40 S. W. 989. In holding that an information may be filed on such a day the court said in *People v. Helm*, 152 Cal. 532, 93 Pac. 99: "The information in this case was filed upon the twenty-sixth day of May, 1906. This date was one of the holidays declared by the chief executive, following the earthquake and fire in the city and county of San Francisco. It is contended by defendant that the information was illegally filed and is therefore void. Section 73 of the Code of Civil Procedure declares that the superior court shall be always open, legal holidays and non judicial days excepted. Section 134 of the same code declares that no court shall be open nor shall any judicial business be transacted on a holiday, saving for the purposes enumerated. The presentation of an information by the district attorney for filing, and the reception of this information and the placing of its file-mark thereon by the clerk of the court, are all purely ministerial acts.

. . . The only provision of the law other than those cited, bearing upon this question, is that contained in section 13 of the Code of Civil Procedure, which declares that whenever an act of a secular nature is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day. But this amounts to no more than a legal permission for the postponement of the act, and in no sense prohibits the doing of the act upon the designated day. It follows that it was not error, therefore, to file the information upon a legal holiday." In *Hamilton v. People*, 29 Mich. 173, it was held that a preliminary examination may be held on a holiday the court saying that a committing magistrate "does not act judicially, in the technical sense, but in his capacity of a conservator of the peace."

In *Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143, it was held that an injunction may be dissolved on a holiday.

In *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 218, 54 N. W. 258, 19 L.R.A. 316, it was held

that the allowance of an attachment is within a prohibition of judicial business on a holiday. In another case at the same term, *Whipple v. Hill*, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L.R.A. 313, the decision last cited was explained and limited the court saying: "The conclusion reached does not conflict with the case of the *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 218. It was there held that an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge Post in his opinion in that case, 'when the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment.' The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act. When the proper affidavit and bond are filed, it is the imperative duty of the county judge to issue the attachment. He has no discretion in the matter."

It has been held that a party cannot be compelled to attend and choose arbitrators on a holiday. *Doles v. Powell*, 9 Pa. Co. Ct. 207.

#### ISSUANCE OR SERVICE OF PROCESS OR NOTICE

The issuance of process is a ministerial act which may be performed on a holiday. *Smith v. Ihling*, 47 Mich. 614, 11 N. W. 406; *Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684; *Weil v. Geier*, 61 Wis. 414, 21 N. W. 246.

In the absence of an express prohibition process may be served on a holiday. *Gladwin v. Lewis*, 6 Conn. 49, 16 Am. Dec. 33 (prohibition of "servile labor"); *Gehring v. Pfommer*, 1 Marv. (Del.) 336; *Irish v. Wright*, 8 Rob. (Ia.) 428; *Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684; *Horn v. Perry*, 11 W. Va. 694; *Prichard v. McGraw Oil, etc. Co.* 66 W. Va. 300, 66 S. E. 366. So in respect to the service of a rule for a default it was said in *Russ v. Gilbert*, 19 Fla. 54: "It was suggested and urged with commendable patriotic fervor that the fault having been entered on the 'glorious fourth' of July, it was void, that day being *dies non*, or a national holiday. Our statute on that subject merely provides that the fourth of July shall, in regard to bills and notes, be treated as a public holiday, and presentation for acceptance or payment may be made on the preceding day. Courts and business are not inhibited on those days."

But in some jurisdictions the service of process on a holiday is expressly forbidden and a service in violation of the prohibition is invalid. *Swinney v. Johnson*, 18 Ark. 534;

Paul v. Bruce, 9 Bush (Ky.) 317; Farmers' Implement Co. v. Sandberg (Minn.) 157 N. W. 642; Decker v. St. Louis, etc. R. Co. 92 Mo. App. 50; Crisp v. Gochmour, 34 S. D. 364, 148 N. W. 624; Norvell v. Pye (Tex.) 95 S. W. 666; Michael v. Michael (Tex.) 100 S. W. 1018. Compare *Crabtree v. Whiteselle*, 65 Tex. 111. But such a prohibition does not invalidate a service by publication though one of the days of publication is a holiday. *M. Imgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L.R.A. 753, wherein the court said: "We think there is a clear distinction between a publication on Sunday, and one on what we may term a 'secular holiday.' The Sunday issue is commonly considered as really a distinct paper from the issue on week days, and to a considerable extent circulates among a different class of subscribers. A large and respectable portion of the community who take the week-day issues do not take the Sunday issue. Hence a publication on Sunday would not be so likely to come to the attention of the parties for whom it is intended. It would not be so likely to serve the purpose for which it was designed, to wit, notice. Not so with papers issued on such holidays as Memorial Day, the Fourth of July, and the like, which are part of the regular issue, and are distributed among the same subscribers. Again, the publication of a notice does not come within the spirit of the statute. The object of the prohibition against serving process on these holidays is to prevent any interference with their quiet enjoyment or observance, either by the intrusion of officers to serve process, or by the parties being compelled to obey them on those days. This reason applies to personal service, but not to service by publication."

The invalidity of a service of process on a holiday in violation of a statute is waived by an indorsement of acceptance of due service, *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062; or by appearance and answer, *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

The service of a notice on a holiday is good, *Upton v. Phelan*, 18 N. Bruns. 192; and does not violate a prohibition of "judicial business," *Sugar Pine Lumber Co. v. Garrett*, 28 Ore. 168, 42 Pac. 129 (notice to produce papers at trial). Neither is a notice within a prohibition of the service of process on a holiday. *Whitney v. Blackburn*, 17 Ore. 564, 21 Pac. 874, 11 Am. St. Rep. 857 (notice of election contest). So in *Stephens v. Hume*, 1 Litt. (Ky.) 6, it was said: "And as to serving a notice on an election day, we know of no law which forbids it. There is a statute of this country forbidding the service of process on the day of an election; but a notice is not, in technical language, a process, and does not, we apprehend, come within the operation of the law to which we allude. The

statute not only employs the expression, process, but is expressly directory to the sheriff, and should be construed to apply to such process only as must be directed to, and served by, an officer. But a notice is directed to no officer; and although it may be served by an officer, it may be served by any private individual."

In *Simmons v. Affolter*, 254 Mo. 163, 162 S. W. 168, it was held that notwithstanding a prohibition of the service of process on a holiday, a fictitious levy of execution under a tax judgment preliminary to an advertisement and sale could be made on such a day. The court said: "The levy is a mere fiction of the law, a mental process. It requires no labor to be performed by the sheriff, nor does he serve the same upon the owner of the property, and if perchance he should choose a public holiday to make this fictitious levy, he would not thereby disturb the peace and quietude of anyone. He is dealing abstractly, as it were, with lands alone; and even that may be putting it too strongly, for the reason that the judgment was a special one commanding the sheriff not to levy on the lands described in the execution, but of those lands to make the debt and costs."

#### TAKING OF DEPOSITION.

A deposition may ordinarily be taken on a holiday. *American Automotoneer Co. v. Porter*, 205 Fed. 105; *Matter of Green*, 86 Mo. App. 216; *Latta v. Catawba Electric Co.* 146 N. C. 285, 59 S. E. 1028. And see *Rogers v. Brooks*, 30 Ark. 612. Thus in *Green v. Walker*, 73 Wis. 548, 41 N. W. 534, it was said: "The learned circuit court did not exclude the depositions on the ground that the taking them was a judicial act, but it thought that the policy of the law, or the purpose of it, was to exempt a citizen of the state from being called into court for any purpose on a legal holiday. The statute does not say that no person shall be required to attend to any business whatever on a legal holiday. If it did, it might be claimed with much reason that it would be a violation of the spirit of the law to require a citizen to go to another state to take a deposition on such a day. There is no law which prohibits a citizen from laboring or pursuing his worldly business on any day of the week except Sunday. On a secular day which is made a holiday the ordinary business of courts is suspended, and while the law does not require, its policy may favor, the appropriation of the day to rest and festivity. Still every man is left free to follow the dictates of his judgment and conscience in that regard. He may abstain from work or not. Says Mr. Justice Grier, when speaking of a kindred question, in *Richardson v. Goddard*, 23 How. 44 [16 U. S. (L. ed.)

418]: 'Public officers, school-boys, apprentices, clerks, and others who live on salaries or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual.' We do not understand that the prohibition of the statute goes so far as to excuse a lawyer from disregarding a legal notice served on him on a holiday, or from attending to many things connected with his profession. However that may be, we see no ground for saying that the policy of the statute condemns the taking of a deposition in another state on a day which is made a legal holiday here, and that such deposition cannot be used as evidence in our courts." But in *State v. Bayley*, 42 N. J. L. 132, the taking of a deposition was held to be within a prohibition of judicial business on a holiday; and in *Dixon v. Dixon*, 73 W. Va. 7, 79 S. E. 1016, it was held that a deposition cannot be taken on a holiday, the terms of the statute not appearing.

#### HOLDING OF COURT.

In accord with the rule established by the earlier cases, which are collated in the notes to *Michel v. Boxholm Co-operative Creamery*, 5 Ann. Cas. 918, and *State v. Duncan*, 11 Ann. Cas. 557, it has been held in several recent cases that in the absence of a statute expressly making a holiday a nonjudicial day a court may sit on a holiday for the trial of cases. *Wood v. State*, 12 Ga. App. 651, 78 S. E. 140; *State v. Varnado*, 126 La. 732, 52 So. 1006; *Rex v. Kay*, 38 N. Bruns. 231; *Foster v. Toronto R. Co.* 31 Ont. 1. Compare *Reg. v. Murray*, 28 Ont. 549; *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

In *Milwaukee Harvester Co. v. Teasdale*, 91 Wis. 59, 64 N. W. 422, under a statute providing that no court shall be open or transact any business on a holiday, it was held that an order adjourning a case for hearing to another day cannot be made on a holiday. The court said: "The adjournment of a cause is the transaction of business. It is business which can be done only by a court. It is judicial business, being addressed to the judgment and discretion of a court. It is a very common proceeding in a cause. It is to put off or defer to another day. To 'hold open' to another day is but another name for the same thing. And there is no provision that matters pending in a justice's court shall be deemed continued over the holiday to the next day, as is provided for courts of record. Ibid. This statute makes some exceptions from its general prohibition. It mentions some things which may be done by a court upon a holiday. The legislature might have added to these exceptions, 'or to adjourn a

cause.' But it has made no such exception, and the court cannot make it. The exceptions named ascertain the rule. Nothing can be done by a court upon a holiday except the things which are expressly excepted from the prohibition. An action in justice's court which has been adjourned to a legal holiday must necessarily fall. But it would seem that this condition of the law need lead to no practical difficulty. The time of the Thanksgiving holiday is, practically, as definitely fixed as Christmas or the Fourth of July, in advance of the proclamation. It has been the custom, not departed from in many years, to set apart for Thanksgiving the last Thursday in November in each year. So that it can be foreseen with practical certainty that that day will be a nonjudicial day."

#### RENDERING OR ENTERING JUDGMENT.

The rendering of a judgment is ordinarily deemed to be within a prohibition of judicial business on a holiday. In *re Smith*, 152 Cal. 566, 93 Pac. 191; *Orban v. Northwestern F. etc. Ins. Co.* 169 Mich. 404, Ann. Cas. 1913E 73, 135 N. W. 252. And see *Ex p. Johnson* (Cal.) 157 Pac. 560. Compare *State v. Gould*, reported in full, post, this volume, at page 855. In *Orban v. Northwestern F. etc. Ins. Co.* supra, it was said: "The docket shows a void judgment, which was no bar to a new suit. Rendering judgment by a justice of the peace is a judicial act, to perform which it is necessary to hold court, and he is forbidden to hold court on a statutory holiday. *Hemmens v. Bentley*, 32 Mich. 89." In *Joseph Spiedel Grocery Co. v. Armstrong*, 4 Ohio Cir. Dec. 498, 8 Ohio Cir. Ct. 489, a judgment rendered on a holiday was held to be invalid though judicial business on such a day was not expressly inhibited. But in *State v. Thomas*, 61 Ohio St. 444, 56 N. E. 276, 48 L.R.A. 459, it was said obiter that the correctness of that decision "may well be doubted."

The entry or docketing of a judgment is a ministerial act which may be performed on a holiday. In *re Worthington*, 7 Biss. 455, 16 Nat. Bankr. Reg. 52; 4 Law. & Eq. Rep. 78; 16 Alb. L. J. 63, 23 Int. Rev. Rec. 233, 2 Cinc. L. Bul. 189, 30 Fed. Cas. No. 18,051; *Bear v. Youngman*, 19 Mo. App. 41; *Paine v. Fesco*, 1 Pa. Co. Ct. 562; *Elrod v. Gray Lumber Co.* 92 Tenn. 476, 22 S. W. 2; *Perkins v. Jones*, 28 Wis. 243. See also *State v. Gould*, reported in full, post, this volume, at page 855.

#### JUDICIAL SALE.

A judicial sale may ordinarily be held on a holiday. *Young v. Patterson*, 9 Cal. App. 469, 99 Pac. 552 (tax sale); *Lumpkin v. Cureton*, 119 Ga. 64, 45 S. E. 729; *Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122 (tax

sale); *Stewart v. Brown*, 112 Mo. 182, 20 S. W. 451; *McLaughlin v. Houston-Hudson Lumber Co.* 31 Okla. 182, 120 Pac. 659, 38 L.R.A. (N.S.) 248.

In *White v. Zust*, 28 N. J. Eq. 107, it was said: "The act in 'relation to legal holidays' (P. L. 1876, p. 73) declares that the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, Thanksgiving Day, the 25th day of December, and all days upon which any general election shall be held for members of assembly in each year, shall be legal holidays, and that no court shall be held upon those days, except in the cases where it would sit upon the first day of the week, and that no person shall be compelled to labor upon any of those days by any person or corporation. As before stated, when the sheriff set up the notice of sale in this case, the day of public thanksgiving for the year had not been designated. It happened that the day which he had fixed for the sale was subsequently selected as Thanksgiving Day. The act of the legislature made that day, when appointed, a nonjudicial day, except as to such judicial functions as might lawfully be discharged on Sunday. The act of the sheriff in adjourning the sale was not a judicial act, nor was it in any way forbidden by the law. It was eminently proper that he should, seeing that the day fixed for the sale had proved to be a legal holiday, adjourn the sale. The adjournment was for four weeks, and was advertised in the newspapers according to law. The fact that the sale was advertised to take place on a day which, by appointment made after the notices were set up, became a legal holiday, does not invalidate the advertisement." In *King v. Platt*, 37 N. Y. 155, it was held that while there was no legal objection to a judicial sale on a holiday it might be set aside if the selection of such a day for the sale resulted in any injustice. The court said: "A judicial sale, although conducted by one of the officers of the court, and under its direction, is not the business of a court, within the meaning of this statute. The object of the law referred to was, undoubtedly, to remove all obstacles which might necessarily interfere with the free exercise of the elective franchise. If the ordinary business of the courts were permitted, on election days, the attendance of witnesses and jurors could be compelled by compulsory process, and, in that way, they could be forcibly kept from the polls; it was to avoid such an evil, that the statute was passed. A judicial sale of valuable property, on an election day, presenting a tempting opportunity for gain, might induce sordid men to forego the privileges of electors, in order to promote their private interests; but their action would be voluntary, and freedom of action was all the law intended to secure.

The propriety of a forced judicial sale of a large and valuable property, on an election day, when public attention would necessarily to a great extent be turned to other objects, after a written notice from the person who was to be most affected by it, that he would consider it 'unjust and oppressive,' was, at least, very questionable, and although not of itself, perhaps, sufficient to warrant the court in setting aside the sale, yet, in connection with the other facts disclosed in this case, cannot fail to create in the mind an influence unfavorable to the plaintiffs." In *Rice v. Gable*, 1 Pa. Co. Ct. 567, the same considerations led the court to consider a sale on a holiday invalid as a matter of law. In that case it was said: "It seems to me, therefore, that a judgment entered or judicial process awarded on a legal holiday would not be void. It has, however, been decided otherwise in Wisconsin. However that be, no one will doubt that a legal holiday is not a day for a sheriff's sale, because the execution creditors, the defendant, and the bidders must not be compelled to attend to legal business on such a day." But in *Kauffeld v. Tinstman*, 54 Pa. Super. Ct. 158, it was held that a court was not bound to set aside a sheriff's sale held on Good Friday.

#### PROCEEDINGS ON APPEAL OR WRIT OF ERROR.

A prohibition of judicial business on a holiday does not prevent the giving of a notice of an appeal, *Ferrari v. Beaver Hill Coal Co.* 54 Ore. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016; the entry of an appeal, *Worthington v. Hobensack*, 8 Pa. Co. Ct. 65; the service of a proposed statement of facts, *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; on approval of an appeal bond, *Deere v. Hodges*, 59 Neb. 288, 80 N. W. 897; *Spalding v. Bernhard*, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L.R.A. 423. So it has been held that a writ of error may be issued on a holiday. *Starke v. Marshall*, 3 Ala. 44; and a bill of exceptions may be settled on a holiday, the statute not forbidding the transaction of judicial business. *Richter v. Chicago, etc. R. Co.* 273 Ill. 625, 113 N. E. 153.

#### Rule in New York.

The statutes of New York have undergone a number of amendments so that many of the early cases are no longer applicable, and one provision of the statute in that state, referring to public offices, under which most of the recent cases have arisen, is unique. It is therefore deemed advisable to give to that jurisdiction a separate treatment.

A statute (General Construction Law § 24) provides that "the term holiday includes the following days in each year." enumerating

them, and that "the term half holiday includes the period from noon to midnight of each Saturday which is not a holiday." The only prohibition of the transaction of official or judicial business on a holiday is found in another statute (Public Officers Law § 62) which provides that "holidays and half holidays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of the state and of each county."

As used in the statute last quoted the term "public offices" does not include the courts, and a holiday is not rendered *dies non juridicus*. Berthold v. Wallach, 14 Misc. 55, 35 N. Y. S. 208. The scope of the statute was authoritatively defined in Flynn v. Union Surety, etc. Co. 170 N. Y. 145, 63 N. E. 61, where in the court said: "The Public Holiday Law, as incorporated in chapter 614 of the Laws of 1897, amending the Statutory Construction Law in relation thereof, has recently received the attention of this court in Walton v. Stafford (162 N. Y. 558) and Page v. Shainwald (169 N. Y. 246), in which it has been held that the transaction of business was not prohibited upon legal holidays which were not Sundays, except as to the presentment, acceptance or payment of commercial paper. We did not, however, in these cases enter upon a construction of the concluding clause of the sentence, to the effect that 'the days and half days aforesaid shall be considered as the first day of the week commonly called Sunday and as public holidays or half holidays for all purposes whatsoever as regards the transaction of business in the public offices of this state or counties of this state.' The obvious purpose of this statute was to authorize the closing of the public offices of the state and the counties upon public holidays for the purpose of relieving the officers and employees in such offices from the duty of performing official services on such days. For this purpose the days are to be considered as the first day of the week, commonly called Sunday. This is the extent of the statute. It does not prohibit an officer from voluntarily performing an official act on such days or render such acts void or voidable unless the act is such as to create an unlawful preference under the Recording Act or is prohibited by some other statute, none of which have any application to the act here complained of."

In accord with the decision just quoted, it has been held that process may be served on a holiday. People v. Oswego County, 50 Hun 105, 3 N. Y. S. 751; Didsbury v. Van Tassell, 56 Hun 423, 10 N. Y. S. 32; Matter of Borne-

mann, 6 App. Div. 524, 39 N. Y. S. 686; Slater v. Jackson, 25 Misc. 783, 55 N. Y. S. 581. And see Doheny v. Worden, 75 App. Div. 47, 77 N. Y. S. 959 (publication of summons). And court may be held on Saturday afternoon. People v. Kearney, 47 Hun 129, 13 N. Y. St. Rep. 246, reversed on other grounds 110 N. Y. 188, 17 N. E. 736.

In Cohn v. Townsend, 48 Misc. 47, 94 N. Y. S. 817, it was held, quoting Flynn v. Union Surety, etc. Co. supra, that the effect of the statute on public administrative officers was to make the observance of a half holiday optional, and that a board of school examiners could conduct an examination of teachers on Saturday afternoon.

Prior to the enactment of the Consolidated Laws service of process on a holiday was expressly prohibited. Meeks v. Noxon, 1 Abb. Pr. 280; Bierce v. Smith, 2 Abb. Pr. 411; Weeks v. Noxon, 11 How. Pr. 189. Under that provision it was held that valid service could be made on a holiday of a notice of motion, Nichols v. Kelsey, 20 Abb. N. Cas. 14; of a subpoena, Wheeler v. Bartlett, 1 Edw. 323; or of a pleading, Corlies v. Holmes, 20 Wend. 681. In Rice v. Mead, 22 How. Pr. 445, it was held that a judgment could be rendered on a holiday the court saying: "The only motive the legislature could have had, in enacting the statute under consideration, was to close the courts on general election days so that no elector should be hindered or kept from voting, by them, unless guilty of an offense, or of threatening to commit one. The object they must have had in view is accomplished when all courts are stopped from transacting any business on such days, of a civil nature, that requires the attendance of any party, attorney, witness, officer, or other person. There was no necessity or reason for prohibiting courts from doing acts on those days, that judges or justices of the peace could quietly perform without interfering in the least with their own right or that of any other elector to go to the polls and deposit his ballot. The justice undoubtedly rendered the judgment in this case without thinking it was unlawful to do so on the day a general election was held; and had he been told it was illegal to do the act on that day, it is probable he would not have supposed it was wrong, on account of the sacredness of the day, but only because the legislature had interdicted it." In People v. Donovan, 63 Hun 512, 18 N. Y. S. 501, under a statute no longer in force providing that no court shall be open or transact business on election day, it was held that a judge could issue a writ of mandamus on that day.

**STATE**

v.

**GOULD.**

Missouri Supreme Court—November 17, 1914.

261 Mo. 694; 170 S. W. 868.

**Homicide — Information — Grammatical Error.**

An information, charging that accused with a deadly weapon, to wit, a pistol, did feloniously shoot off, at, against, and upon another, is sufficient to charge an assault with intent to kill, even though the use of the word "with" before "a deadly weapon" is bad grammar.

**Assault with Intent to Kill — Evidence for Jury.**

In a prosecution for assault with intent to kill, held that, under the evidence, it was a question for the jury whether accused was acting in self-defense or, of his malice, assaulted the prosecuting witness with intent to kill.

**Criminal Law — When Jeopardy Attaches.**

Though the jury was sworn before arraignment, accused's jeopardy did not begin, and he may thereafter be arraigned and the jury a second time sworn.

**Refusal of Accused to Plead — Failure to Enter Plea.**

Though the statute provides that, where accused refuses to plead, a plea of not guilty shall be entered, the failure to enter a plea of not guilty is harmless, if erroneous, where the trial proceeds as if accused had so pleaded.

**Instructions — Harmless Error — Undisputed Fact.**

In a prosecution for assault with intent to kill, where the jury heard the information read, and it charged and the evidence showed that the offense occurred on December 19, 1912, which was within less than three years before filing, the failure of an instruction to state the date of the offense, where it required the jury to find that the acts charged occurred within three years before the date of filing of the information, is not error.

**Instructions as to Form of Verdict Harmless.**

In a prosecution for assault with intent to kill with malice, an instruction that, if accused wilfully and of his malice aforethought did shoot at another with intent to kill, he should be found guilty of assault with intent to kill, if erroneous, because failing to require the jury to specify in the verdict whether the act was done with malice is harmless to accused.

**Verdict Sufficient — Guilty as Charged in Information.**

Where an information only charged the offense of assault with intent to kill with

malice, a verdict finding accused guilty as charged is sufficient.

**Holidays — Entry of Judgment on Holiday.**

Rev. St. 1909, § 1785, provides that no person on Sunday or any other day established a public holiday shall serve any writ, process, or other judgment, except in criminal cases, etc. Section 3880 declares that no court shall sit on Sunday, unless to receive a verdict or discharge a jury. Held that, while a judgment rendered on Sunday is void, yet, as the statute prohibiting the holding of court on Sunday does not by its terms include other holidays, a judgment of conviction entered on a legal holiday other than Sunday is valid.

[See note at end of this case.]

Appeal from Circuit Court, St. Francois county: HUCK, Judge.

Criminal action. Thomas Gould convicted of assault with intent to kill and appeals. The facts are stated in the opinion. **AFFIRMED.**

*B. H. Boyer* for appellant.

*John T. Barker* and *Thomas J. Higgs* for appellee.

[699] ROY, C.—Defendant was convicted of an assault with intent to kill with malice, and sentenced to three years in the penitentiary. The information so far [700] as it is necessary to set it out charges that defendant "on the nineteenth day of December, A. D. 1912, at and in the county of St. Francois and State of Missouri, in and upon one Charles Whaley, feloniously, wilfully, on purpose and of his malice aforethought did make an assault; and the said Thomas Gould with a certain deadly weapon, to wit, a revolving pistol loaded with gunpowder and leaden balls, then and there feloniously, wilfully, on purpose and of his malice aforethought did shoot off, at, against and upon the said Charles Whaley then and there giving to the said Charles Whaley in and upon the body of him, the said Charles Whaley, with the pistol aforesaid, two wounds, with the felonious intent then and there him, the said Charles Whaley, feloniously, wilfully, on purpose and of his malice aforethought to kill and murder."

Defendant and Chris Iahn had been running a saloon at the town of Frankclay several years at the time of the alleged offense on December 19, 1912. Maston Whaley lived diagonally across the street from the saloon and conducted a "beer house" on the opposite side of the street almost opposite the saloon. Charles and Bert Whaley are his sons. On the night of the difficulty, Charles Whaley was in the saloon having a friendly time. The defendant spoke of a fight which

had occurred between Luther Lawson and Bert Whaley, and said to Charles Whaley, "If I was as good a man as Lawson I wouldn't be afraid of all the Whaleys put together." Charles resented that statement and the defendant struck at him, knocking his hat off. Charles Whaley went out of the saloon and to his home, Iahn throwing his hat into the street after him. Charles Whaley told his brother Bert about what occurred, and they testified that Bert went for the hat, Charles following. The latter testified that the hat was six or seven feet from the saloon porch; that Iahn came out and said, "To hell with all of you. You all look alike to me, the whole Whaley family;" that Gould came [701] out and said, "Get, you s— of b—, I'll kill you all," then stepped off the porch and fired a shot at witness and missed him; that witness then threw a rock at Gould and ran; that Gould shot him twice in the left hip. He testified that he did not have any pistol. Bert Whaley testified that defendant shot at Charles Whaley before the latter threw the rock, and that after defendant was hit by the rock he shot twice more at Charles.

Defendant and Iahn both testified that they had pistols when they went out of the saloon. Iahn did not know whether Charles Whaley shot at defendant. The latter testified that Charles Whaley struck him in the mouth with a rock and shot at him, grazing the side of his head, before he shot at Charles. The doctor testified that defendant had an injury to his mouth and a horizontal abrasion on the side of his head a half inch wide and an inch or an inch and a quarter long. Maston Whaley testified that defendant fired the first shot before he was struck by the rock.

Iahn, Tinker and defendant testified that the mother of Charles Whaley was standing in the street in front of the saloon with a shot gun in her hand.

After the jury was sworn to try the case, it was discovered that defendant had not been arraigned. The court proceeded to arraign him when the following occurred:

"Mr. Boyer: If the court please, I object to any arraignment of the defendant at this time by the reading of the information to him, or in any other manner, for the reason that the jury has been sworn to try this cause and the defendant has been placed in jeopardy, and the defendant should have his liberty by the court directing this jury to return a verdict of not guilty.

"The Court: Let the objection be overruled. Read the information to the defendant.

[702] "Mr. Boyer: Note our exception to the ruling of the court."

Defendant was then arraigned and the following occurred:

"The court (addressing defendant and defendant's counsel): Are you guilty or not guilty?

"Mr. Boyer: Your Honor, we decline to plead. We are standing on our constitutional right, to a discharge on the ground of having already been placed in jeopardy on the same charge.

"The Court: The defendant will please stand up. Let the jury be resworn. (The defendant here rises.)

"Mr. Boyer: The court please, we desire to object to the swearing of this jury again, because the defendant has once been placed in jeopardy by the swearing of the jury to try this cause. It is a violation against the right of the defendant, that the defendant cannot be placed twice in jeopardy on the same charge.

"The Court: The court will have to overrule the objection. Swear the jury, Mr. Clerk."

The jury was then sworn the second time and the trial proceeded. At the close of the State's evidence and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence. It was refused.

Instruction 1 given by the court was as follows:

"The court instructs the jury that if you believe and find from the evidence that defendant Thomas Gould, in the county of St. Francois and State of Missouri, at any time within three years next before the filing of the information, feloniously, wilfully and on purpose and of his malice aforethought, did shoot at Charles Whaley with intent to kill said Charles Whaley, the jury will find defendant guilty of assault with intent to kill and assess the punishment at imprisonment [703] in the penitentiary for not less than two years and not exceeding ten years."

The verdict was as follows: "We the jury find the defendant guilty as he stands charged in the information and assess his punishment at three years in the State penitentiary."

I. Appellant contends that the use of the word "with" before the words "a certain deadly weapon" in the information vitiates the indictment. That objection was made to the same use of the word *with* in *State v. Turlington*, 102 Mo. 1. c. 651, 15 S. W. 141. It was held that the grammar and rhetoric were bad, but that the use of such word did not prejudice the substantial rights of the defendant.

II. It is contended that the evidence shows that defendant shot in self-defense; and that the demurrer to the evidence should have been given. We think not. It is conceded that both Iahn and the defendant went out of the saloon with pistols. The defendant held his



in his hand. The evidence for the State is that defendant shot at Charles Whaley before defendant was struck with the rock or shot at by any one.

III. Appellant contends that the jury having been sworn before the arraignment, his jeopardy had begun and that he was entitled to his discharge, and that the subsequent arraignment and swearing of the jury put the defendant a second time in jeopardy. The contrary was held in *State v. Weber*, 22 Mo. 321.

IV. When arraigned the defendant refused to plead but stated that he stood on "his constitutional right to a discharge on the ground of having already been placed in jeopardy on the same charge." No entry was made in the [704] record of a plea of not guilty. After what has been said in *State v. O'Kelley*, 258 Mo. 345, 167 S. W. 980, 52 L.R.A.(N.S.) 1063, we hold that a failure to enter a plea of not guilty is not prejudicial error. The statute says that upon a refusal to plead, a plea of not guilty should be entered. In other words, the statute provides that the record shall show what is not true. Conceding that a failure to obey the statute in that respect is error it certainly is not one which prejudiced the substantial rights of the defendant on the merits.

V. Fault is found with instruction 1 because it tells the jury that if they find that the defendant did certain things within three years before the filing of the information, they should find him guilty, without telling them of the date laid in the information, or the date of the filing of the information. The jury heard the information read. It charged that the offense occurred on December 19, 1912. The evidence on both sides shows that the difficulty in controversy was on that date. It was within three years of the filing of the information. The failure of the instruction to state the dates as contended for, in no way affects defendant's rights and does not constitute error.

VI. It is said that instruction 1 tells the jury that if they found the facts as therein mentioned they should find defendant guilty of assault with intent to kill, without telling them to specify in the verdict that it was done with malice. If that omission was error, it was in favor of defendant, and he cannot complain. The jury did find him "guilty as he stands charged in the information" and that is sufficient. [*State v. Bishop*, 231 Mo. 411, 133 S. W. 33.]

[705] VII. The fact that the judgment and sentence against defendant were entered on May 30, a legal holiday, does not invalidate the sentence and judgment. By section 1785, Revised Statutes 1909, Sundays and other holidays are put on a par so far as the service of writs, process, warrants, orders and

judgments is concerned. Such service is void. Section 3880, which prohibits the holding of courts on Sunday, does not, by its terms, include other holidays. In *Bear v. Youngman*, 19 Mo. App. 41, it was held that a judgment rendered by a justice of the peace on Thanksgiving day is not void under a statute which provides that a justice of the peace may hold court on any day except Sunday. It may be said that that case is not authority here. In *Diesing v. Reilly*, 77 Mo. App. 1. c. 455, it was said: "We are not, however, aware of any rule forbidding the performance of judicial duties on Christmas (twenty-fifth of December), or the other holidays mentioned in section 8952, Revised Statutes 1889. That section merely prohibits the service of civil process, except in certain attachment cases, but a judgment rendered on one of the days mentioned in the statute is not void. [*Bear v. Youngman*, 19 Mo. App. 41.]"

We agree with the latter case that there is no rule against the performance of judicial duties on legal holidays other than Sunday.

The judgment is affirmed. Williams, C., concurs.

PER CURIAM.—The foregoing opinion of Roy, C., on a new hearing in Banc, is adopted as the opinion of the court; Lamm, C. J., and Woodson, Walker, and Brown, J.J., concur; Graves, J., concurs in part and in result in a separate opinion in which Bond, J., concurs; Faris, J., dissents.

[706] GRAVES, J.—I concur in the opinion of the learned Commissioner in this case. I place that concurrence on the ground that the omission to formally enter of record a plea of "not guilty" upon his refusal to plead, is a "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits" (R. S. 1909, sec. 5115). This statute in my judgment covers this case. The Commissioner cites the recent case of *State v. O'Kelley*, 258 Mo. 345, 167 S. W. 980, 52 L.R.A.(N.S.) 1063. As I gather it the decision in that case discussed two views as tending to uphold the doctrine that the absence of a plea of "not guilty" would not vitiate the proceeding. First, that the failure to enter such plea of record was a defect of record covered, by section 5115, supra, and secondly, that the conduct of the defendant amounted to a waiver of the formal plea, and the entry thereof. We note this, because in the case at bar, it cannot be said that the defendant by his conduct waived anything. It will not do in this case to bottom the decision upon the doctrine of waiver, which was a potential feature in the *O'Kelley* case. I therefore concur for the reason stated at the outset. Bond, J., concurs in these views.

**NOTE.**

The reported case holds that under a statute prohibiting only the service of process on a holiday, such a day does not become *dies non juridicus* and judgment in a criminal case may be entered thereon. The cases discussing the validity of an official or judicial act performed on a holiday are reviewed in the note to *St. Paul v. Robinson*, reported ante, this volume, at page 845.

**STOUT**

v.

**STATE EX REL. CALDWELL.**

Oklahoma Supreme Court—February 11, 1913.

36 Okla. 744; 130 Pac. 553.

**Intoxicating Liquors — Action for Penalty — Nature of Proceeding.**

Section 4191, Comp. Laws 1909, provides as the punishment of one who uses or permits his premises to be used for violating the prohibition law both fine and imprisonment and a penalty. Held:

(a) That the proceeding to recover the penalty is the punishment of an offense.

(b) That while this proceeding punishes an offense, it at the same time is in the nature of a civil action and is governed by the rules of procedure applicable to civil instead of criminal cases.

[See note at end of this case.]

**Criminal Law — Defenses — Former Jeopardy.**

A defendant, sued for the penalty provided by section 4191, Comp. Laws 1909, for unlawfully permitting his premises to be used in violation of the prohibition law, may plead that the statute is invalid because in conflict with the former jeopardy section of the Constitution, although he has not been previously prosecuted for the crime pronounced by the statute.

**Same.**

The terms "jeopardy of life and liberty for the same offense," "jeopardy of life or limb," "jeopardy for the same offense," "twice in jeopardy of punishment," and other similar provisions used in the various Constitutions, are to be construed as meaning substantially the same thing.

**Action for Penalty as Jeopardy.**

Article 2, § 21, of the Constitution (Williams' Ann. Const. Okla. sec. 29), which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense," is not intended to apply to a civil proceeding which affects merely property

rights, even though such proceeding is in part a punishment of an offense.

**Constitutional Law — Presumption of Validity.**

An act of the legislature will not be declared unconstitutional unless its conflict with the Constitution is clear and certain.

[See 6 R. C. L. tit. *Constitutional Law*, p. 70.]

**Criminal Law — Former Jeopardy — Penal Action.**

Section 4191, Comp. Laws 1909, imposing as the penalty for the offense there described, a penalty to be recovered at the suit of the state, and a fine and imprisonment to be administered in a criminal prosecution, is not in conflict with article 2, § 21, of the Constitution, which provides, "Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

**Intoxicating Liquors — Offenses — Punishment.**

The fact that the Constitution prescribes the punishment for the sale of intoxicating liquors does not prevent the legislature from imposing other and different or greater punishment for using or permitting one's premises to be used for the sale of intoxicating liquors, as the two offenses are separate and distinct and require different proof to support them.

(Syllabus by court.)

Error to District Court, Oklahoma county: LOOFBOURBOW, Judge.

Action to recover penalty. Fred S. Caldwell, relator, and D. C. Stout, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Kistler, McAdams & Haskell for plaintiff in error.

Chas. West and Jos. L. Hull for defendant in error.

[746] AMES, C.—On the petition for rehearing our attention was first called to the contention that section 4191, Comp. Laws 1909, is in conflict with article 2, sec. 21 (Williams' Ann. Const. Okla. sec. 29) of the Constitution, prohibiting twice placing any person in jeopardy for the same offense, and we granted the petition in order that this position might be fully examined. We have been assisted in this examination by careful briefs and oral argument, and have given the subject a painstaking investigation, having carefully examined the authorities cited by counsel and many others disclosed by our own researches. Section 4191 is as follows:

"It shall be unlawful for the owner or owners of any real estate, building, structure, or room to use, rent, lease, or permit the same to be used for the purpose of violating any

provision of this act. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of not less than one hundred dollars, nor more than one thousand dollars for each offense, to be recovered at the suit of the state. The penalty so recovered shall become a lien on the property and premises so used, leased or rented in violation of this act from and after the date of the filing of the suit to recover such penalty, and the filing of a notice of the pendency of such suit with the register of deeds of the county wherein said property is located, and upon final judgment said property may be sold as upon execution to satisfy the same, together with costs of suit; provided, however, that such lien shall not attach to property under the control of any receiver, trustee, guardian or administrator; but in such case the receiver, trustee, guardian or administrator shall be liable, on his official bond, for the penalty so incurred, and in addition thereto shall be guilty of a misdemeanor. Each day such property is so used, leased or rented for any such unlawful purpose shall constitute a separate offense, and the penalty herein prescribed [747] shall be recovered for each and every such day. All leases between landlords and tenants under which any tenant shall use the leased premises for the purpose of violating any provision of this act, shall be wholly null and void, and the landlord may recover possession thereof as in forcible entry and detainer."

The offense charged against the defendant under this statute is using his premises for the purpose of selling and otherwise illegally furnishing spirituous, vinous, fermented, and malt liquors, and permitting his premises to be used for such purposes. It will be noticed that any person who willfully violates the provisions of this section is guilty of a misdemeanor, and in addition thereto is liable to a penalty of not less than \$100 nor more than \$1,000 for each day during which the property is so used. The punishment for the misdemeanor is a fine of not less than \$50, nor more than \$500, and imprisonment not less than 30 days, nor more than six months. Section 4206, Comp. Laws 1909. The punishment therefore, for a violation of the section involved, is fine and imprisonment and penalty. It will be observed that the statute uses the expression, "and in addition thereto," so that the punishments are concurrent, and not severable, and if one can be imposed all must be imposed. The punishment for the misdemeanor is administered in a criminal prosecution, while the penalty is collected in a suit brought by the state. Both sides agree that it requires two proceedings to complete this punishment, one criminal, and one in the

nature of a civil action, and we concur in this agreement; so that the question presented is whether or not, for the punishment of a crime, a man may be twice tried. It will also be observed that this statute imposes both punishments for the same offense. It is not a case of the same acts constituting different offenses, or offenses against different governments. The constitutional provision referred to is as follows (article 2, sec. 21, of the Constitution; Williams' Ann. Const. Okla. sec. 29):

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of [748] which he has been acquitted. Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

First. This proceeding to recover the penalty is the punishment of an offense, or at least a part of it.

On this point the opinion of this court in *Chicago, etc. R. Co. v. Territory*, 25 Okla. 238, 105 Pac. 677, is conclusive. That was a proceeding in the nature of a civil action, instituted against the railroad to recover the statutory penalty for accepting and receiving quail for the purpose of transportation. The quail were received in Blaine county and transported through Garfield county, where the suit was brought. The organic act of Oklahoma Territory provided that "all offenses committed in said territory, if committed within any organized county, shall be prosecuted and tried within said county," and it was argued by the railway company that the suit should have been brought in Blaine county, as it was the prosecution of an offense, although it was in the form of a civil action. This position was upheld by the court upon the authority of *U. S. v. Chouteau*, 102 U. S. 603, 26 U. S. (L. ed.) 246; *Huntington v. Attrill*, 146 U. S. 657, 13 S. C. 224, 36 U. S. (L. ed.) 1123; *Atchison, etc. R. Co. v. State*, 22 Kan. 1.

Second. While this is a proceeding to punish an offense, at the same time it possesses many of the attributes of a civil action.

Its ultimate object is the recovery of a money judgment, and it cannot at any time result in depriving the defendant of life or liberty, but merely of property. It is governed by the rules of procedure in civil instead of criminal cases, and would not require evidence beyond a reasonable doubt to support it, or a unanimous verdict, or the other peculiar classes of protection which are thrown around those whose life or liberty is at stake. In *re Scagraves*, 4 Okla. 422, 48 Pac. 272, held that an action to recover a penalty for intruding within the Indian

country cannot be enforced by a criminal proceeding. This subject has recently received a careful consideration in *Hepner v. U. S.* 213 U. S. 103, 29 S. C. 474, 53 U. S. (L. ed.) 720, 27 L.R.A. (N.S.) 739, 16 Ann. Cas. 960, which was an action to recover the penalty [749] prescribed by statute for inducing an alien to migrate to the United States for the purpose of performing labor there. The United States Circuit Court of Appeals for the Second Circuit certified the question to the Supreme Court to determine whether or not in an action to recover this penalty, where the evidence was sufficient, the court should instruct the jury to return a verdict for the United States, and the court held that the action to recover the penalty was not so far criminal in its nature as to prevent the direction of a verdict for the government, citing in support of its conclusion *Stockwell v. U. S.* 13 Wall. 531, 20 U. S. (L. ed.) 491; *Jacobs v. U. S.* 1 Brock. 520, 13 Fed. Cas. No. 7,157; *Stearns v. U. S.* 2 Paine 300, 22 Fed. Cas. No. 13,341; *U. S. v. Mundell*, 1 Hughes 415, 6 Call 245, 27 Fed. Cas. No. 15,834; *U. S. v. Younger* 92 Fed. 672; *U. S. v. Baltimore*, etc. R. Co. 86 C. C. A. 223, 159 Fed. 33; *Hawlowetz v. Kass*, 23 Blatchf. 395, 25 Fed. 765; *U. S. v. Zucker*, 161 U. S. 475, 16 S. C. 641, 40 U. S. (L. ed.) 777. The cases of *Boyd v. U. S.* 116 U. S. 616, 6 S. C. 524, 29 U. S. (L. ed.) 746, and *Lecs v. U. S.* 150 U. S. 476, 14 S. C. 163, 37 U. S. (L. ed.) 1150, are cited and limited in their application to the exact point there decided, namely, that such an action was so far criminal in its nature as to prevent the defendant from being compelled to testify against himself.

The *Zucker* case, 161 U. S. 475, 16 S. C. 641, 40 U. S. (L. ed.) 777, was a suit to recover the value of merchandise alleged to have been forfeited to the United States under the Act of June 10, 1890, c. 407, sec. 9, 26 St. at L. 131 (U. S. Comp. St. 1901, p. 1895), which provided for the forfeiture of the merchandise and punishment by fine or imprisonment. This act, therefore, is quite closely related to the one under review, because both involve the penalty plus criminal punishment. It was held that depositions could be used over the objections of the defendants, notwithstanding the sixth amendment, which would have entitled the defendants to have been confronted in court with witnesses against them, if the case had been criminal.

In an extensive note in connection with the report of the *Hepner* case, 27 L.R.A. (N.S.) 739, the annotator, at page 743, says:

[750] "In examining the cases collected in this note, it will be observed that those holding the action to be civil in nature rather than criminal—whether the offense is public or private—largely preponderate, and this

would seem to be the better rule. The exceptions to the ordinary rules of procedure in favor of the accused on trial for a crime are believed to have arisen because of the fact that the defendant's life or liberty was at stake. So sacred was his individual right to life and liberty held that it gave rise to the maximum of the English law that it is better that ten guilty persons escape than one innocent suffer. Possibly some of the rules of criminal procedure also arose because, at common law, the accused, singularly enough, was not allowed counsel. But it can scarcely be doubted that the rules formulated to shield the one innocent person, although ten guilty ones might thereby go free, would not have been adopted had the only inconvenience suffered by a person convicted of crime been a pecuniary loss. The ancient pains and penalties for criminal acts were severe in the extreme, and might well justify a merciful procedure, whereas, had the penalty been a mere loss of property, it would hardly have called for a procedure different from that provided where the penalty would be a loss of property for any other wrong. Nor will the fact that a person's character is involved in a charge of violating a penal statute furnish a sufficient justification for a resort to criminal trial rules; for is not a defendant's character as much involved in a civil action for damages for assault and battery as in a criminal prosecution for the same offense? It would seem, therefore, that no sufficient reason has been shown for adopting rules of criminal procedure in actions to recover statutory penalties. The penalty, broadly speaking, is a pecuniary one, the same as it is in any private action between individuals, and is no more a punishment—except, perhaps, in degree—so far as it bears upon the individual punished, than is the pecuniary loss imposed for any other wrong. The sum of money recovered may go to an individual, as compensation for an injury, or it may go to the state, as a penalty for a public offense; but the result is the same to the defendant—the loss of property to the extent of the penalty. If a preponderance of evidence is enough to establish the wrong in one case, it ought to be sufficient to prove the offense in the other. There would appear to be no more reason why a defendant in an action to recover a statutory penalty should be entitled to the privileges of one accused of crime than would be the defendant in an action for damages for a negligent killing, because the negligence amounted to manslaughter. That the action for a statutory penalty [751] is civil in nature has the support of a large majority of the cases in which the question has been squarely presented."

Third. Having now determined that this proceeding, while designed to punish an of-

fense, has for its object a mere money recovery, and is governed by the rules of procedure affecting civil cases, we now reach the inquiry whether or not the effect of the statute is to twice put the defendant in jeopardy of life and liberty for the same offense.

At the threshold of this inquiry, we are met with the objection that the defendant is not in position to plead former jeopardy, because it does not appear that he has ever been prosecuted criminally, and that therefore there has been no previous jeopardy to plead. In support of this position our attention is called to the case of *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 30 S. C. 663, 54 U. S. (L. ed.) 930, where it is said:

"Replying to the contention that to sustain this action would subject plaintiffs in error to the jeopardy of a second punishment, the court said that plaintiffs in error were 'probably a little premature in raising the point.' And further said, 'It might come with some force if presented in a criminal prosecution after recovery in a civil action.' In this we concur. In other words, plaintiffs in error cannot base a defense upon an anticipation of what may never occur. To permit this would discharge them from all liability, for the defense, if good at all, would be good against whatever action might be brought. Necessarily there must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened to be taken away. An occasion for the defense of double jeopardy may occur if the state of Minnesota should proceed criminally against plaintiffs in error. We do not mean to say, however, that it will be justified. We do not mean to say that the state law subjects an offender against its provisions to a double jeopardy."

This argument, however, does not impress us as conclusive, and, as it was not the deciding point in that case, we do not believe it is the expression of the matured opinion of that court. It will be remembered that this is a suit to recover a statutory penalty. The penalty is prescribed by the statute and can be recovered only by virtue of the statute. If the statute is invalid, then no penalty can be recovered. If the statute is valid, [752] then the penalty can be recovered, and the fine and imprisonment not only can, but must, be imposed. So that the question is not whether there has been an actual former jeopardy, but whether there is a valid statute upon which this action can be maintained. If the statute is in conflict with the Constitution, it is invalid. It does not exist. It is as if it were not, and therefore no action can be maintained under it. While, if it is valid, both actions must be maintained. The fail-

ure of the public officers to discharge a duty which the statute imposes upon them cannot improve the statute—cannot give life to that which is dead. The statute must, of course, be tested by its own requirements, and not by what public officials have done in the past. *Board of Education v. Aldredge*, 13 Okla. 205, 73 Pac. 1104; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Henderson v. Atlantic City*, 64 N. J. Eq. 583, 54 Atl. 533; *State v. Stark County*, 14 N. D. 369, 103 N. W. 913; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306.

We therefore proceed to an examination of the statute, to ascertain whether it is in conflict with the former jeopardy provision of our Constitution. The particular language which is relied upon as destroying the statute reads as follows:

"Nor shall any person be twice put in jeopardy of life and liberty for the same offense."

When our Constitution was adopted, similar provisions had been in the Constitutions of the United States and of the other states for many generations, and various phrases are used to express the same idea. The Constitution of the United States provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (Fifth Amendment.)

Other Constitutions using the expression, "life or limb," are Alabama (the same language being found in its Constitutions of 1819, art. 1, sec. 13; 1865, art. 1, sec. 10; 1868, art. 1, sec. 11; 1875, art. 1, sec. 10; and 1901, art. 1, sec. 10); Delaware (article 1, sec. 8, Const. 1792, the same language being in its Constitutions of 1831 and 1897); Kentucky (Constitutions 1792, art. 12, sec. 12; 1799, art. 10, sec. 12; 1850, art. 13, sec. [753] 14; and 1890, sec. 12); Maine (Dec. of Rights, sec. 8, Const. 1819); Pennsylvania (article 1, sec. 10, Const. 1873, and same in Consts. 1838 and 1790, art. 9, sec. 10); Tennessee (article 1, sec. 10, Const. 1870, same in Consts. 1834 and 1796). The following states use the expression, "life or liberty": Georgia (article 1, sec. 8, Const. 1877, and same in Consts. 1868 and 1865, art. 1, sec. 9); South Carolina (article 1, sec. 17, Const. 1895). The following states use the expression, "twice put in jeopardy for the same offense": California (article 1, sec. 13, Const. 1879, and same in Const. 1849, art. 1, sec. 8); Colorado (article 2, sec. 18, Const. 1876); Idaho (article 1, sec. 13, Const. 1889); Indiana (article 1, sec. 14, Const. 1851, and same in Const. 1816, art. 1, sec. 13); Montana (article 3, sec. 18, Const. 1889); Nevada (article 1, sec. 8, Const. 1864); North Dakota (article 1, sec. 13, Const. 1889); Ohio (article 1, sec. 10, Const. 1851, same in Const. 1802, art. 8, sec. 11); Oregon (article 1, sec. 12, Const. 1857);

South Dakota (article 6, sec. 9, Const. 1889); Utah (article 1, sec. 12, Const. 1895); Virginia (article 1, sec. 8, Const. 1902); Washington (article 1, sec. 9, Const. 1889); Wyoming (article 1, sec. 11, Const. 1889).

Michigan (article 1, sec. 12, Const. 1835); Minnesota (article 1, sec. 7, Const. 1857); and Wisconsin (article 1, sec. 8, Const. 1848) use the expression, "twice in jeopardy of punishment." New Hampshire, in its Constitutions of 1874 (article 1, sec. 16), 1892 (part 1, art. 16), and 1902, uses the expression, "tried after an acquittal for the same crime or offense," and New Jersey has substantially the same provision (article 1, sec. 10, Const. 1844). Arkansas first used the expression, "life or limb," and changed to, "life or liberty," in 1868 (article 1, sec. 9; Const. 1864, art. 2, sec. 12; Const. 1874, art. 2, sec. 8); Illinois in 1818, used the term, "life or limb" (article 8, sec. 11), and in 1870 changed to, "jeopardy for the same offense" (article 2, sec. 10, Const. 1870). Iowa's provision is substantially the same as that of New Hampshire (article 1, sec. 12, Const. 1857 and 1846). In 1855 Kansas used the expression, "jeopardy for the same offense" (article 1, sec. 10, Const. 1855). In 1857 it changed to, "jeopardy of life, limb or liberty" [754] (section 10, Bill of Rights, Const. 1857). While in 1859 it returned to the expression, "jeopardy for the same offense" (article 1, sec. 10, Const. 1859). In 1868 Louisiana had the expression, "for the same offense" (article 6, tit. 1, Const. 1868). While in 1879 it changed to "jeopardy of life or liberty for the same offense," and this was followed in 1879 (article 9, Bill of Rights). In 1817, in Mississippi, the expression, "life or limb," was used (article 1, sec. 13, Const. 1817), while in 1868 it was changed to, "jeopardy for the same offense" (article 1, sec. 5), and this was followed in 1890 (article 3, sec. 22). In 1820 Missouri used the term, "life or limb" (article 13, sec. 10), while it changed to, "life or liberty," in 1865 (article 1, sec. 19), and followed this in 1875 (article 2, sec. 23). Nebraska started, in 1866, with the expression, "jeopardy of punishment" (article 1, sec. 8), and changed it in 1875 to, "twice put in jeopardy for the same offense" (article 1, sec. 12). In 1821 New York used the term, "life or limb" (article 7, sec. 7), and changed in 1846 to, "jeopardy for the same offense" (article 1, sec. 3, which it followed in 1894 (article 1, sec. 6). In 1842 Rhode Island used the term, "after an acquittal, be tried for the same offense" (article 1, sec. 7), while in 1868 it changed it to, "jeopardy of his life or liberty" (article 1, sec. 18). In 1836 Texas used the term, "jeopardy of life or limbs" (section 9, Bill of Rights), which it subsequently changed to, "jeopardy of life or liberty" (article 1, sec. 14, Const. 1876).

West Virginia started with, "jeopardy for the same offense" (article 2, sec. 2, Const. 1861), which it subsequently changed to, "jeopardy of life or liberty for the same offense" (article 3, sec. 5, Const. 1872). Connecticut does not seem to have any constitutional expression on the subject, although it is treated in that state as a fundamental principle of the common law that no person shall be subject for the same offense to be twice put in jeopardy. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L.R.A. 498, 48 Am. St. Rep. 202.

These various constitutional provisions apparently are treated by the courts as meaning the same thing; the difference in phraseology not being discussed in the cases which we have examined. Indeed, it is assumed by the Supreme Court of the United States. [755] in the case of *Trono v. U. S.* 199 U. S. 521, 26 S. C. 121, 50 U. S. (L. ed.) 292, 4 Ann. Cas. 773, that the term, "life or limb," in the Constitution of the United States, has the same meaning as, "no person for the same offense shall be twice put in jeopardy of punishment," in the Act of July 1, 1902, c. 1369, 32 St. at L. 691, providing for the rights of persons accused of crime in the Philippine Islands, and, "jeopardy for the same offense," in the New York Constitution. Dissenting opinions were filed in this case by Mr. Justice Harlan and Mr. Justice McKenna, and in neither of them is a distinction drawn between the phrases. The case of *Kepner v. U. S.* 195 U. S. 100, 24 S. C. 797, 49 U. S. (L. ed.) 114, 1 Ann. Cas. 655, in which dissenting opinions were filed by Mr. Justice Holmes and by Mr. Justice Brown, further emphasizes the fact that that court treats as identical these various constitutional phrases. We therefore conclude that no particular significance is to be given to the term, "life or liberty," in our Constitution, but that it has substantially the same meaning as the various other forms of expression which are contained in other Constitutions and Bills of Rights.

In the early English law, it was a very usual form of punishment to take the limb of a defendant and it is doubtless this fact that caused the early expression, "life or limb." Sir James Fitzjames Stephen, in speaking of early English punishments, says (*History of the Criminal Law of England*, vol. 1, pp. 58; 59):

"The punishment upon a second conviction for nearly every offense was death or mutilation. In *Ethelred's* laws it is said of the accused when ultimately convicted, 'Let him be smitten so that his neck break.' The laws of Cnut lay down the principles on which punishment should be administered, and also regulate the practice of the court. The principle is thus stated: 'Though any one sin,

and deeply fordo himself, let the correction be regulated so that it be becoming before God and tolerable before the world. And let him who has power of judgment very earnestly bear in mind what he himself desires when he thus says, "*et dimitte nobis debita nostra sicut et nos dimittimus.*" And we command that Christian men be not on any account for altogether too little condemned to death; but rather let the gentle punishments be decreed for the benefit of the people; and let [756] not be destroyed for little God's handiwork, and his own purchase which he dearly bought.' The practice of the courts is regulated by the following enactment: 'That his hands be cut off, or his feet, or both, according as the deed may be. And if he have wrought yet greater wrong, then let his eyes be put out, and his nose, and his ears, and his upper lip be cut off, or let him be scalped; whichever of these those shall counsel whose duty it is to counsel thereupon so that punishment be inflicted, and also the soul be preserved.'"

In volume 2 of Pollock & Maitland's History of English Law, pp. 452, 453, it is said:

"When punishment came it was severe. We read of death inflicted by hanging, beheading, burning, drowning, stoning, precipitation from rocks; we read of loss of ears, nose, upper lip, hands and feet; we read of castration and flogging and sale into slavery; but the most gruesome and disgraceful of these torments were reserved for slaves. Germanic law is found of 'characteristic' punishments; it likes to take the tongue of the false accuser and the perjurer's right hand. It is humorous; it knows the use of tar and feathers. But the worst cruelties belong to the politer time."

As the methods of punishment grew less cruel with the development of civilization, the deprivation of limb was abandoned; but the phrase continued to live, with its meaning modified according to the refinements of civilization, so that, in broad terms, the doctrine may be said to mean that no man who has once been convicted or acquitted of an offense shall again be tried or punished for the same offense, and the question for our consideration is whether our statute which provides a penalty to be recovered in an action by the state, and fine and imprisonment to be recovered in a criminal prosecution, can be administered without violating this fundamental doctrine.

It is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed. It seems to us to occupy a similar position in the criminal law

to that covered by the doctrine of *res judicata* in the civil law, the one resting on the maxim, "*Nemo [757] debet bis vexari pro una et eadem causa*" (Broom's Legal Maxims [8th Ed.] p. 327), and the other resting upon the maxim "*Nemo debet bis puniri pro uno delicto*" (Broom's Legal Maxims [8th Ed.] p. 348).

Bearing in mind that the maxim has always been recognized, we may throw some light upon its meaning by an examination of the punishment for crime which coexisted with the maxim from the earliest days in England until 1870, and the effect of a conviction upon the defendant's property rights. Broadly stated, the effect of a conviction for felony from the earliest time in England was a forfeiture of all of the defendant's property. The rule is stated by Stephen (volume 1, Hist. of the Criminal Law of Eng. pp. 487, 488) as follows:

"One other consequence of treason and felony remains to be noticed. This is corruption of blood and forfeiture of property. The effect of corruption of blood was that descent could not be traced through a person whose blood was corrupted. Also his real property escheated to the lord of the fee or the king. The personal property of a traitor or felon was forfeited, not by his attainder, but by his conviction. These incidents of treason and felony have their source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions. They have no history at all, but prevailed from the earliest time till the year 1870, when they were abolished by 33 & 34 Vic. c. 23, sec. 1, except in the case 'of forfeiture consequent upon outlawry.'"

The theory of the law was that all land is held of some lord; that if the tenant died without heirs the lord should have back again that which he gave to the tenant; that when the tenant committed certain classes of crime, which gradually became known as felonies, his blood was corrupted, the bond between him and his lord was broken, he forfeited the property, and, his blood being corrupt, his heirs could not take through it, and the doctrine of corruption of blood continued in England until the Inheritance Act of 1834, which modified it, and it was abolished in 1870. 3 Holdsworth, History of English Law, pp. 61-64; 2 Pollock & Maitland's History of English Law, p. 466, together with the general discussion of the subject commencing at page 448. We [758] do not know just when this practice originated, but it is apparent from chapter 32 of Magna Charta that it was well established in the law prior to that time that the only effect of Magna Charta upon the forfeiture was to regulate the division of

the real estate as between the king and the feudal lord; that chapter providing:

"We will not retain beyond one year and one day the lands of those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs."

An excellent historical treatment is contained in McKechnie's *Magna Charta* discussing this chapter, at pages 394-401. There is no reference in *Magna Charta* to the subject of former jeopardy.

We have therefore two principles of law standing side by side in the history of English jurisprudence, by one of which a person accused of crime is entitled to the plea of former jeopardy, or, as it was more usually expressed in England, "*autrefois acquit*," or "*autrefois convict*," and the other that the convicted defendant forfeited his entire estate, both real and personal, because of the conviction. As our doctrine is the doctrine of the common law, it is significant, in considering the question before us, that the punishment for the crime in the English law was always accompanied by the destruction of the defendant's real estate and all his property, and its forfeiture to the crown, or the feudal lord, and this is a very persuasive argument that the doctrine of former jeopardy has never had any relation whatever to the protection of a man's property. This position is rendered even stronger by the fact that corruption of blood and forfeiture of estate were abolished by constitutional provisions (article 2, sec. 15, of Oklahoma Constitution, and similar provisions in the Constitutions of other states), and it has never been thought that the former jeopardy provision had the effect of abolishing these incidents of conviction for felony.

Historically, therefore, and on principle, it would seem that this doctrine has no relation to a deprivation of property, but only to such a criminal punishment as might result in the deprivation of life or liberty. In other words, one is not placed [759] in "jeopardy" by a proceeding affecting only property rights. Indeed, it seems that at common law, to enforce the forfeiture and recover the property, a second action might be necessary. Sir Matthew Hale, in his *Pleas of the Crown* (volume 1, p. 242), says:

"The king at common law and by virtue of this statute was entitled to a right of entry, where the party was *in* merely by disseisin or abatement, but not to a right of entry, where the possessor was *in* by title; but at this day by virtue of the statute of 33 H. 8, above mentioned the king is entitled to a right of entry in both cases, and that without office, *but then there must be an inquisition or seizure to bring the king into the actual possession*; and if he grant it over before such seizure, the grant must be special,

not of the land simply, but of the right to the land, otherwise neither land nor the right of entry passeth; it is so adjudged in *Downtie's Case*, 3 Coke (Eng.) 10b." (Italics ours.)

And again at page 363:

"The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or *upon a conviction of felony* by the petit jury, or the finding of a flight for the same, to *charge the inquest or jury to inquire* what goods and chattels he hath, and where they are, and thereupon to charge the *villata* where such goods are with the goods to be answerable to the king. *Vide* 3 E. 3. Corone 296, & *Alibi*, *vide* statute 31 E. 3, cap. 3. But tho the goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seized upon the offense committed, hath been controverted." (Italics ours.)

See, also, his history of the *Freeman Sands* case, at page 250, from which it appears that the king's attorney preferred an information against Sir George Sands, to have a conveyance of the land unto the king; Sir George in that case holding the land by a title which he claimed superior to that of the king under the forfeiture. It would seem, however, from the Act of 7 and 8 of George IV, c. 28, sec. 5, which provides "that where any person shall be indicted for treason or felony, the jury impaneled to try such person shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony," that the custom prior to that time was for the same jury which tried the indictment to inquire concerning [760] his real and personal property, in order that forfeiture might be accomplished. 4 Blackstone's *Commentaries* (Lewis' Ed.) star p. 387, and note 37. The inference from Blackstone's text at this page is that, if the jury under the old practice did not inquire of the lands and chattels, the forfeiture did not take place, as he says:

"But the jury very seldom find the flight, forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offense to which a man is prompted by the natural love of liberty."

It seems, however, from the cases referred to by Sir Matthew Hale, *supra*, and also in *re Bateman*, 15 L. R. Eq. Cas. (Eng.) 355, and in *re Tyson*, 1 Jur. (Eng.) 281, that it was customary for suit to be brought by officers of the crown for the purpose of reaching property forfeited as a result of a conviction, and subjecting it to the forfeiture.

This review of the history of forfeiture, when considered in connection with the history of the doctrine of former jeopardy and that they both grew up and existed side by



side for centuries, presents two persuasive reasons supporting the act under consideration. The first is that, notwithstanding the doctrine of former jeopardy, for centuries a convict of felony forfeited all his property, real and personal. The second is that, wherever it was necessary to perfect the forfeiture, a civil action was brought to recover the property. If another and separate proceeding could always be brought to collect the penalty which then followed as an incident of the conviction—and if this additional action bore no relation to the doctrine of former jeopardy—the defendant complains that he is again in jeopardy because he is here given another chance to defend his property rights.

We turn now to an examination of the American cases. There are hundreds dealing with applications of this doctrine which do not concern us, and we therefore lay on one side all of those cases touching upon the question as to when jeopardy attaches, when the discharge of the jury is jeopardy, when a new trial may be granted, and confine our attention in the main to those cases dealing with jeopardy as affecting the right to recover [761] a penalty, or to enforce a forfeiture, and we must confess that it is difficult to reconcile them all, or to ascertain a consistent principle. In *People v. Stevens*, 13 Wend. (N. Y.) 341, it is said:

"It is undoubtedly competent for the Legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors."

This is the doctrine of the New York courts. *Blatchley v. Moser*, 15 Wend. 215; *People v. Snyder*, 90 App. Div. 422, 86 N. Y. S. 415. This doctrine was followed by Judge Blatchford, when Circuit Judge of the Southern District of New York, in *Leszynsky's case*, 16 Blatchf. 9, 25 Int. Rev. Rec. 71, 7 Rep. 358, 15 Fed. Cas. No. 8,279, where he quotes the passage from *People v. Stevens*, supra, with approval. In that case, section 3218 of the Rev. St. (U. S. Comp. St. 1901, p. 2085) relating to the internal revenue, was under consideration. That section provides that any person who commits the offense against the internal revenue there specified shall pay a penalty, and also be fined and imprisoned; the penalty to be recovered in a suit by the government, and the fine and imprisonment to be inflicted in a criminal prosecution. It is to be observed that the section, for the

purpose under consideration, is substantially identical with the Oklahoma statute. In upholding this statute, Judge Blatchford, referring to the subject of second jeopardy, at page 17, says:

"But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection (Ex p. *Lange*, 18 Wall. 163, 170 [21 U. S. (L. ed.) 872]), yet the relator will not produce a second punishment for the same offense, but will only complete, on conviction, the punishment intended by Congress."

We have grave doubt about the soundness of the reasoning in the New York cases, and in the *Leszynsky case*. They sustain [762] similar statutes, on the ground that the two proceedings do not inflict two punishments, but merely complete the one punishment for the offense. If this reasoning was sound, then the Legislature might provide for punishment by fine and punishment by imprisonment for the same offense, and for a separate prosecution for the fine, and another prosecution for the imprisonment. It is unquestionably true that two punishments may be inflicted for one crime. Both fine and imprisonment may be, and frequently are, imposed. The historical review which we have given shows that punishment of the severest sort has always been administered in connection with forfeiture of all of one's property. The question is not, therefore, whether two punishments may be inflicted, but whether the suit to recover the penalty and the prosecution of the criminal offense conflict with the former jeopardy provision.

The conclusion is supported by better reasoning in *U. S. v. Three Copper Stills*, 47 Fed. 495, construing sections 3281 and 3296 of the Rev. Stat. (U. S. Comp. St. 1901, pp 2127, 2136) which provide for a criminal punishment and forfeiture of the property for violations of the internal revenue law there specified, and holding that a conviction under one section was not a bar to proceedings under other sections for the forfeiture of the property. At page 499 of 47 Fed. Judge Barr says:

"The constitution of the United States (amendment 5) declares that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' but this provision is not a limitation upon the kinds of punishment which may be inflicted for an offense. Hence there may be a fine, an imprisonment, and forfeiture of the same offense, if the law so provides. This provision of the Constitution does not in terms include such a proceeding as this one. It was intended by a constitutional provision to embody the common-law rule, but that rule did not embrace proceedings *in rem*, such as this

one, when the thing was forfeited because of its status, use, or location. The *Palmyra*, 12 Wheat. 12, 6 U. S. (L. ed.) 531, 534; *State v. Barrels of Liquor*, 47 N. H. 374, 369; *Sanders v. State*, 2 Ia. 230; Wap. Proc. in Rem, secs. 24, 25; *State v. Inness*, 53 Me. 536. There is no case known to [763] in which decides that this constitutional provision includes a proceeding *in rem*, which is a civil action, within its inhibition."

In *U. S. v. Olsen*, 57 Fed. 579, the owner of a vessel was indicted for aiding and abetting the act of his master in bringing Chinese laborers into the United States in violation of statute. He pleaded in bar a judgment of forfeiture against his vessel on account of the act of the master, and this plea was held bad. The third paragraph of the syllabus is as follows:

"A judgment of forfeiture entered against a vessel under Act of July 5, 1884, c. 220, sec. 10, 23 St. at L. 117 [U. S. Comp. St. 1901, p. 1309] for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 2 of the Act, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in section 11 of the Act. *U. S. v. McKee*, 4 Dill. 128 5 Rep. 7, 10 Chi. Leg. News 18, 6 Am. L. Rec. 196, 23 Int. Rev. Rec. 338, 25 Pittsb. Leg. J. 39 [26 Fed. Cas. No. 15,688]; *Coffey v. U. S.* 6 S. C. 437, 116 U. S. 436, 29 U. S. (L. ed.) 684, and *U. S. v. One Distillery*, 43 Fed. 846, distinguished."

In *Sanders v. State*, 2 Ia. 230 (Cole's Edition) the statute making it a criminal offense to keep liquors in the state, and forfeiting such liquors, was sustained, and it was held that the defendant's conviction for keeping liquors was not a bar to a proceeding to forfeit; also, that if the criminal punishment and the forfeiture could be administered in one proceeding, there was no reason why two proceedings should not be pursued. *Com. v. Prall*, 146 Ky. 109, Ann. Cas. 1913C 768, 142 S. W. 202; *Jones v. State*, 15 Ark. 261; *State v. Czarnikow*, 20 Ark. 160; *State v. Spear*, 6 Mo. 644.

As a penalty for cutting timber on the public lands of a state, in addition to criminal punishment, punitive damages, such as double or treble the value of the timber cut, may be imposed, without infringing the former jeopardy provision. *State v. Shevlin-Carpenter Co.* 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634, 102 Minn. 470, 113 N. W. 634, 114 N. W. 738, 218 U. S. 57, 30 S. C. 663, 54 U. S. (L. ed.) 930. A municipal corporation having authority to fix fire limits may provide for the summary abatement of buildings erected contrary to its ordinance, [764] and may also make such

erection a criminal offense. *Micks v. Mason*, 145 Mich. 212, 108 N. W. 707, 11 L.R.A. (N.S.) 653 and note, 9 Ann. Cas. 291. An acquittal upon a criminal charge for violating the liquor law is not a bar to a civil action brought against the defendant by the state to enjoin the maintenance of a place where intoxicating liquors are unlawfully sold. *State v. Roach*, 83 Kan. 606, 112 Pac. 150, 31 L.R.A. (N.S.) 670 and note, 21 Ann. Cas. 1182. Some of the courts hold that punitive damages will not be allowed at the suit of an individual for an act which is likewise a criminal offense. *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270. But the weight of authority, it is conceded, is to the contrary. 2 *Sutherland on Damages* (3d ed.) sec. 402; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Hauser v. Griffith*, 102 Ia. 215, 71 N. W. 223.

The cases of *U. S. v. McKee*, 4 Dill. 128, 5 Rep. 7, 10 Chi. Leg. News 18, 16 Am. L. Rec. 196, 23 Int. Rev. Rec. 338, 25 Pittsb. Leg. J. 39, 27 Fed. Cas. No. 15,688; *U. S. v. One Distillery*, 43 Fed. 846; *Coffey v. U. S.* 116 U. S. 436, 6 S. C. 437, 29 U. S. (L. ed.) 684; *U. S. v. Chouteau*, 102 U. S. 603, 26 U. S. (L. ed.) 246, and *U. S. v. Ulrici*, 102 U. S. 612, 26 U. S. (L. ed.) 249, note—would seem to reach a different conclusion. In the *McKee* case, 4 Dill. 128, 5 Rep. 7, 10 Chi. Leg. News 18, 16 Am. L. Rec. 196, 23 Int. Rev. Rec. 338, 25 Pittsb. Leg. J. 39, 27 Fed. Cas. No. 15,688, Justice Miller and Judge Dillon held that in a suit to recover the penalty, under section 3296 of the Rev. Stat. (U. S. Comp. St. 1901, p. 2136) a plea of former conviction and pardon by the President was a bar, on the ground that "our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor," and in *U. S. v. One Distillery*, 43 Fed. 846, it was held that a corporation, when sued for a forfeiture of property, might interpose as a defense the conviction of one of its officers on a criminal charge for the same offense growing out of a violation of the internal revenue laws. This case was taken to the Supreme Court of the United States and is reported under the same name, in 174 U. S. 149, 19 S. C. 624, 43 U. S. (L. ed.) 929, where the court affirmed the decision upon a technical ground [765] of pleading, intimating that the ground of the decision in the lower court might be erroneous, saying:

"But, if, independently of the particular question raised by the amended and supplemental answer, the judgment of the District Court dismissing the information was right upon any ground disclosed upon the record, the judgment of the Circuit Court affirming

the judgment of the District Court should not be held to have been erroneous."

In the Coffey case, 116 U. S. 436, 6 S. C. 437, 29 U. S. (L. ed.) 684, it was held that the government could not recover the penalty prescribed by the internal revenue statutes, where it had previously prosecuted the defendant for the criminal offense, and he had been acquitted. In that case the statutes imposed penalty, fine, and imprisonment, just as our statute here does, and a proceeding was instituted by the government to forfeit the brandy, machinery, and stills involved, and was therefore a proceeding affecting only property rights. Coffey's defense was that he had been prosecuted criminally and acquitted, and this defense was held good. In the opinion it is said:

"The proceedings to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat. 1, 14, 6 U. S. (L. ed.) 531. Yet where an issue raised, as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent [766] trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The Chouteau case, 102 U. S. 603, 26 U. S. (L. ed.) 246, was an action against the principal and sureties on the bond of a distiller, to recover penalties imposed by statute. The defense was that the distiller had been indicted and that the indictment had been compromised and settled by the payment of a fine. The court held that this was a good defense, on the ground that the sureties

on the bond shall not be subjected to the penalties connected with the offense, after the principal has effected a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty. The Ulrici case, 102 U. S. 612, 26 U. S. (L. ed.) 249, note, was the same as the Chouteau case, except that the defense was not a compromise, but that the defendant had pleaded guilty and had been fined and imprisoned. It was held that this verdict prevented recovery of the penalties on the bond.

It will be observed that in the Coffey case the verdict was "not guilty." In the Chouteau case the verdict was a compromise, while in the Ulrici case the verdict was "guilty," and that the court held in each case that the verdict barred the prosecution of the action for the penalty. We confess that these cases seem to us strongly to support the position of the defendant, and yet the fact remains that the sections of the internal revenue laws which are construed in those cases are still the law, and are still in force, and that the court has never held those statutes to be unconstitutional, but has merely held that the criminal prosecution bars the civil remedy. As we have previously held, it seems to us that the statute must stand or fall as a whole, as the penalty is plainly cumulative upon the criminal punishment, and as any proceeding must be based upon the statute.

It is worthy of note and entitled to weight that there has been a series of legislation by Congress very similar to the act here under consideration. The provisions of the internal revenue laws imposing a penalty or a forfeiture and fine and imprisonment [767] for the same offense illustrate the trend of congressional legislation. These various sections of the internal revenue laws have been previously cited and are referred to in the Leszynsky case, 16 Blatchf. 9, 25 Int. Rev. Rec. 71, 7 Rep. 358, 15 Fed. Cas. No. 8,279, in the Coffey case, 116 U. S. 436, 6 S. C. 437, 29 U. S. (L. ed.) 684, and in other cases herein cited. The act with reference to Chinese laborers (23 St. at L. 117) passed in 1884, punishes a violation by fine or imprisonment and forfeiture of the vessel. *U. S. v. Olsen*, 57 Fed. 579. By the Act of June 10, 1890, known as the Customs Administrative Act, forfeiture of the merchandise or the value thereof is provided, and also fine and imprisonment. Act June 10, 1890, c. 407, 26 St. at L. 131 (*U. S. Comp. St.* 1901. p. 1886); *U. S. v. Zucker*, 161 U. S. 475, 16 S. C. 641, 40 U. S. (L. ed.) 777. The fact that these various statutes have been in force for many years is persuasive of their validity.

It is also a fundamental principle of constitutional law that the courts will not declare an act of the Legislature unconstitutional, unless it is clear that such is the case. Upon the whole, we are inclined to the view that this act of Legislature is not in conflict with the former jeopardy provision of the Constitution, although some doubt is thrown upon this conclusion by the cases of McKee, Coffey, Chouteau, and Ulrici, cited supra. In view of our reluctance to strike down an act of a co-ordinate department of the government, we resolve the doubt in favor of the law, and hold that the act is not subject to the attack here made upon it.

Fourth. It is finally urged that this act is invalid, because it is repugnant to the prohibitory provision of the Constitution, in that it increases the punishment for the sale of liquor. This objection is not well taken. The section under review is imposing a penalty for using or permitting one's building to be used in violation of the prohibitory law, and it is a well-settled rule that the same act may be made separate offenses where the evidence supporting the two offenses must be different. In this case, if the defendant had been indicted for selling liquor, the question of the ownership of the building would be immaterial, while in this proceeding the question of the ownership of the [768] building is fundamental. *Gavieres v. U. S.* 220 U. S. 338, 31 S. C. 421, 55 U. S. (L. ed.) 489; *State v. Inness*, 53 Me. 536; *State v. White*, 123 Ia. 425, 98 N. W. 1027; *Wharton's Criminal Law*, p. 344.

The judgment of the trial court should be affirmed.

By THE COURT.—It is so ordered.

Rehearing denied February 14, 1913.

#### NOTE.

#### Action for Penalty for Violation of Intoxicating Liquor Statute.

##### Liability:

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#### Liability.

##### FOUNDATION OF LIABILITY.

The liability of the defendant in an action to recover a penalty for the violation of an intoxicating liquor law must be founded on a valid statute or ordinance. *Newlan v. Aurora*, 17 Ill. 379; *Bachman v. Brown*, 57 Mo. App. 68; *New York v. Walker*, 4 E. D. Smith (N. Y.) 258; *Mason v. State*, 2 Okla. Crim. 583, 103 Pac. 369. See also *Foster v. Haines*, 13 Me. 307; *Norton v. State*, 65 Miss. 297, 3 So. 665; *Brown v. Hoyt*, Smith (N. H.) 53; *Widderfield v. Metcalfe*, 21 U. C. Q. B. 247. And see the reported case.

Where the legislature has authorized a city to prohibit the sale of intoxicating liquor, the city has the power to determine what penalties shall be inflicted for the violation of its ordinances. *Deitz v. Central*, 1 Colo. 323; *Gunnarssohn v. Sterling*, 92 Ill. 569; *Arcola v. Wilkinson*, 233 Ill. 250, 84 N. E. 264. And a municipal corporation may be authorized to pass ordinances imposing additional penalties for acts already penal by the laws of the state. *Brooklyn v. Toynbee*, 31 Barb. (N. Y.) 232.

The validity of an ordinance is not to be tested by considering its operation in hypothetical cases. *Hensoldt v. Petersburg*, 63 Ill. 111; *Arcola v. Wilkinson*, 233 Ill. 250, 84 N. E. 264. And an ordinance fixing a penalty for the sale of intoxicating liquor need not recite that no such sale shall be made. *Arcola v. Wilkinson*, supra.

Under an ordinance providing that the penalties imposed "may be recovered in an action of debt, or as damages in a suit on his or their bond," it has been held that the city is not limited to an action on the bond. *Whalin v. Maccomb*, 76 Ill. 49.

Although the repeal of a statute prescribing a penalty, without a saving clause in the repealing act, takes away the right of recovery, yet that result does not follow the putting in force of a local option statute, which suspends but does not repeal the previous law. *Kerr v. Mohr*, 47 Tex. Civ. App. 1, 103 S. W. 210. Compare, *Long v. Green* (Tex.) 95 S. W. 79.

##### PERSONS LIABLE.

Where two or more persons jointly violate a liquor ordinance, they become jointly and severally liable to the penalty; and judgment may be recovered against one, the other not being sued. *Jacksonville v. Holland*, 19 Ill. 271; *Smith v. Adrian*, 1 Mich. 495. But where a single offense is committed by more than one person the offenders are jointly liable to a single penalty. *Tracy v. Perry*, 5 N. H. 504; *Hall v. McKechnie*, 22 Barb. (N.

Y.) 244; *Ingersoll v. Skinner*, 1 Denio (N. Y.) 540.

Under a statute providing that no person shall be allowed "by himself, his clerk, servant or agent, directly or indirectly to sell any wine," it has been held that one who sells wine as servant for another is liable for the penalty imposed by the statute. *Roberts v. O'Conner*, 33 Me. 496. See also *Prussia v. Guenther*, 16 Abb. N. Cas. (N. Y.) 230. And a master is absolutely liable for the act of his servant, on the principle of respondeat superior. *Draper v. Fitzgerald*, 30 Mo. App. 518. But it has been held that a master is not liable to a penalty for the act of his servant done in opposition to the bona fide command of the master. *Hugill v. Merrifield*, 12 U. C. C. P. 269.

The liability may be made to extend to the sureties on a liquor dealer's bond. *Day v. Frank*, 127 Mass. 497. But the recovery of a penalty cannot be had against the sureties where there is no statute making them liable thereto. *Headington v. Smith*, 113 Ia. 107, 84 N. W. 982.

A corporation may be held liable. *Stewart v. Waterloo Turn Verein*, 71 Ia. 226, 32 N. W. 275, 60 Am. Rep. 786. And the penalty may be recovered from a joint stock company. *American Exp. Co. v. Com.* (Ky.) 186 S. W. 887.

#### DEFENSES.

When prosecuted under an ordinance, the defendant may defend on the ground of lack of authority in the municipality to pass the ordinance. *Sweet v. Wabash*, 41 Ind. 7; *Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474.

It has been held to be a valid defense that the commission of the alleged unlawful act is procured by a public officer for the purpose of recovering the penalty to replenish the public treasury. *People v. Braisted*, 13 Colo. App. 532, 58 Pac. 796; *Walton v. Canon City*, 14 Colo. App. 352, 59 Pac. 840. But it is no defense that the unlawful act is instigated by a detective. *People v. Chipman*, 31 Colo. 90, 71 Pac. 1108; *Onondago County v. Backus*, 29 How. Pr. (N. Y.) 33. In *People v. Chipman*, supra, the court said: "A detective was employed by the town attorney of Sterling to ascertain if the said ordinance was being violated. The detective gave to the witness Peyton the sum of one dollar. With the money so given him by the detective the witness bought the whisky. Three cases of the court of appeals, namely, *Ford v. Denver*, 10 Colo. App. 500; *People v. Braisted*, 13 Colo. App. 532, and *Walton v. Canon City*, 14 Colo. App. 352, are cited by the defendant as sustaining the position. We do not regard the case of *Ford v. City* as applicable to the

one at bar. The other two cases are more nearly in point. In these cases, witnesses were furnished money by the officers of the town with instructions to buy liquor from the defendants, and the court held that the town treasury could not be replenished by fines from defendants who were induced to violate ordinances by persons who bought liquor with money furnished by the officers of the town. In the case here, the detective was employed by the town attorney for the purpose of ascertaining if the ordinances were being violated. The detective, and not the town attorney, procured the witness to buy the liquor, and it was the detective's money that was used for the purpose of buying liquor. Nor does the testimony show that any part of the money advanced the detective was to be used in the purchase of liquor, nor were instructions or directions given by the town attorney to the detective as to the purchase of liquor. The court found that in employing the detective the town attorney did not act in his official capacity, and in this case at least there appears to have been a legitimate effort to ascertain whether the ordinances were being violated, and not an attempt on the part of a town official to induce a violation of the ordinance for the purpose of replenishing the town treasury. We do not understand that the court of appeals has gone to the extent of saying that a municipal officer cannot employ persons to ascertain whether the ordinances are being violated, and that prosecutions cannot be supported by testimony procured in the way shown in this case; although, if carried to its logical conclusion, the doctrine announced in the two cases referred to might include this case. However, we are not prepared to announce as a doctrine that town attorneys are to be so handicapped in the performance of their duties that prosecutions may not be sustained by the testimony obtained in the manner the testimony in this case was obtained."

A former indictment for the same offense is no bar to an action for the penalty, where the statutes authorize the two proceedings independently. *Blatchley v. Moser*, 15 Wend. (N. Y.) 215.

Nor is the fact that the defendant has paid a United States internal revenue tax or has procured a county license a defense in an action under a valid city ordinance. *Sweet v. Wabash*, 41 Ind. 7; *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138. "The appellant was not charged with a violation of the laws of the state, or of the United States, but was charged with the violation of an ordinance of said city. If the ordinance in question was valid, then he was guilty of the offense with which he stood charged; and the fact that he had not violated the laws of the state,

or of the United States, constituted no defense." *Sweet v. Wabash*, *supra*.

In an action to recover a penalty for selling liquor to a minor, it has been held to be no defense that the minor was a partner of the defendant. *Drake v. State* (Tex.) 23 S. W. 398.

A sale unlawful when made is not legalized by the subsequent procuring of a license. *Kingston Almahouse v. Osterhoudt*, 23 Hun (N. Y.) 66. And payment of the increased license required of a person who has previously sold liquor without a license does not exempt that person from the penalty already incurred. *Boggs v. Com.* 15 Ky. L. Rep. (abstract) 653.

The defense that the penalties are excessive cannot be set up by a person who has executed a bond to the state that he will not commit the prohibited acts under the penalties provided by law. *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160.

The defendant cannot defend on the ground that before the time of the alleged unlawful sales he made proper application for a license which was refused. *Deitz v. Central*, 1 Colo. 323; *Clement v. Smith*, 60 Misc. 595, 112 N. Y. S. 955; *Charleston v. Hollenback*, 3 Strob. L. (S. C.) 355. In *Deitz v. Central*, *supra*, the court said: "If the clerk refused to issue the license where the defendant was entitled to it, the remedy was by mandamus to compel the clerk to perform his duty, or by action on the case for the wrongful refusal. It cannot be said that this was the act or default of the corporation, for the clerk, if the agent of the corporation in any sense, was so only within the limit of his duty. If he refused to issue the license, where he was bound by law to issue, it was of his own wrong, and the defendant must seek his remedy against him alone."

Good faith in intending to obey the law is usually not a defense. *Jamison v. Burton*, 43 Ia. 282; *Church v. Higham*, 44 Ia. 482; *State v. Chamberlin*, 74 Ia. 266, 37 N. W. 326; *Fielding v. LaGrange*, 104 Ia. 530, 73 N. W. 1038; *Roberge v. Burnham*, 124 Mass. 277; *Draper v. Fitzgerald*, 30 Mo. App. 518; *Markus v. Thompson*, 51 Tex. Civ. App. 239, 111 S. W. 1074. But in some cases good faith has been made a defense. *Perry v. Edwards*, 44 N. Y. 223; *Creel v. Cordon*, 44 Tex. Civ. App. 367, 98 S. W. 387. See also *Gilbert v. Hendricks*, 2 Brev. (S. C.) 161.

Where the statute imposes a penalty for the sale of liquor to a minor and gives the right of action to the father of the minor, it is no defense to such an action brought by the father that suit was brought after the minor became of age. *Hamer v. Eldridge*, 171 Mass. 250, 50 N. E. 611.

Where the action is brought by the plaintiff in a representative capacity, it has been

held that the defendant cannot set up a counterclaim existing against the plaintiff individually. *Headington v. Smith*, 113 Ia. 107, 84 N. W. 982.

### Procedure.

#### NATURE OF ACTION.

An action for the recovery of a penalty for the violation of an ordinance or statute concerning intoxicating liquors is ordinarily regarded as a civil action.

*Colorado*.—*Deitz v. Central*, 1 Colo. 323; *Weiss-Chapman Drug Co. v. People*, 39 Colo. 374, 89 Pac. 778; *McIntosh v. Pueblo*, 9 Colo. App. 460, 48 Pac. 969.

*Illinois*.—*Jacksonville v. Block*, 36 Ill. 507; *Chicago v. Everleigh*, 162 Ill. App. 623. *Compare* *Princeville v. Hitchcock*, 101 Ill. App. 588; *Waverly v. Goss*, 138 Ill. App. 68 (action held to be quasi-criminal, and clear preponderance of evidence held to be necessary to recovery).

*Indiana*.—*Indianapolis v. Fairchild*, 1 Ind. 315; *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138.

*Iowa*.—*Stewart v. Waterloo Turn Verein*. 71 Ia. 226, 32 N. W. 275, 60 Am. Rep. 786. *Compare* *Rogers v. Alexander*, 2 G. Greene, 443.

*Maine*.—See *In re Hanson*, 36 Me. 425.

*Massachusetts*.—*Roberge v. Burnham*, 124 Mass. 277.

*Michigan*.—*People v. Bartow*, 27 Mich. 68. *In re Sorenson*, 29 Mich. 475.

*Mississippi*.—*State v. Marshall*, 100 Miss. 626, Ann. Cas. 1914A 434, 56 So. 792.

*Missouri*.—*State v. Huffschtmidt*, 47 Mo. 73; *Edwards v. Brown*, 67 Mo. 377; *Draper v. Fitzgerald*, 30 Mo. App. 518.

*Nebraska*.—*Mitchell v. State*, 12 Neb. 538, 11 N. W. 848.

*New York*.—*People v. Bennett*, 5 Abb. Pr. 384.

*Oklahoma*.—*Hammett v. State*, 42 Okla. 384, 141 Pac. 419. And see the reported case.

*Pennsylvania*.—*Durr v. Com.* 9 Sad. 188. 12 Atl. 507. *Compare* *Specht v. Com.* 24 Pa. St. 103.

*Texas*.—*Cox v. Texas*, 37 Tex. Civ. App. 607, 85 S. W. 34, *affirmed* 202 U. S. 446, 25 S. Ct. 671, 50 U. S. (L. ed.) 1099.

Therefore, such action is governed by the rules of procedure applicable to civil instead of criminal cases. *Chicago v. Everleigh*, 162 Ill. App. 623. The plaintiff need prove only so many of the facts alleged in his complaint as constitute a cause of action. *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138. A preponderance of evidence is sufficient proof. *Roberge v. Burnham*, 124 Mass. 277; *Hammett v. State*, 42 Okla. 384, 141 Pac. 419. Evidence of the character of the defendant is

38 Okla. 744.

inadmissible. *Hammett v. State*, 42 Okla. 384, 141 Pac. 419. And the maxim respondeat superior applies to the defendant's liability. *Draper v. Fitzgerald*, 30 Mo. App. 518. In *State v. Marshall*, 100 Miss. 626, 56 So. 792, the court said: "The statute authorizes no fine or imprisonment. It merely provides that when a person shall violate its provisions, in addition to having his place of business suppressed as a nuisance, he shall be liable to pay to the state, county, etc., a penalty, recoverable in a suit for same, and giving the state, county, etc., the right of attachment. The fact that the suit may be commenced by attachment and seizure does not make of the proceeding a criminal one. Many civil suits are commenced in that way. The state is without limit as to its right to provide the procedure by which its own, or any other, debt may be collected, no matter how that debt may be incurred. The only limit on its authority is that such procedure shall be adopted as will not take property without due process of law."

The rule has been announced, however, that an action for a penalty for the violation of an intoxicating liquor law is of a quasi-criminal nature. *American Exp. Co. v. Com.* (Ky.) 186 S. W. 887. See also *Com. v. American Exp. Co.* reported in full, post, this volume, at page 875; *Harp v. Com.* 61 S. W. 467, 22 Ky. L. Rep. 1792; *James v. Helm*, 111 S. W. 335, 33 Ky. L. Rep. 871; *Brown v. Hoit, Smith* (N. H.) 53. And therefore it has been held that the defendant is entitled to have his guilt established by a unanimous verdict. *American Exp. Co. v. Com.* (Ky.) 186 S. W. 887.

It has been held in at least one instance that the penalty may be recovered by indictment. *People v. Hart*, 1 Mich. 467. And where the state proceeds by indictment instead of by a civil action, the defendant may waive his objections to the form of the proceedings, provided the court in which the proceeding is brought has jurisdiction both of the person of the defendant and the subject of the indictment. *State v. Warnke*, 48 Mo. 451.

#### WHO MAY SUE.

The person entitled to sue for a penalty for the unlawful sale of intoxicants is usually fixed by statute.

*Illinois*.—*King v. Jacksonville*, 3 Scam. 305 (president and trustees of town).

*Iowa*.—*Church v. Higham*, 44 Ia. 482; *Headington v. Smith*, 113 Ia. 107, 84 N. W. 982 (any citizen of county).

*Maine*.—*Portland v. Rolfe*, 37 Me. 400 (mayor and aldermen).

*Michigan*.—*Benalleck v. People*, 31 Mich. 200 (private persons).

*Mississippi*.—*Adams v. Johnson*, 72 Miss. 896, 17 So. 682; *Clark v. Adams*, 80 Miss. 219, 31 So. 746 (revenue agent).

*New Jersey*.—*Murphy v. Montclair Tp.* 39 N. J. L. 673 (township inhabitants).

*New York*.—*Board of Excise v. Purdy*, 22 How. Pr. 506, 13 Abb. Pr. 434 (board of commissioners of excise, and in case of their neglect, any other person in their name); *Thayer v. Lewis*, 4 Denio 269 (overseers of poor or other person); *Board of Excise v. Doherty*, 16 How. Pr. 46 (board of commissioners of excise); *Pomroy v. Sperry*, 16 How. Pr. 211 (same); *Hait v. Benson*, 18 How. Pr. 302 (same); *Hess v. Appellee*, 62 How. Pr. 313 (overseers of poor, and if they neglect duty, any other person in their name); *Record v. Messenger*, 8 Hun 283 (same); *Sutter v. Fauble*, 25 Hun 195 (same); *Horton v. Parsons*, 37 Hun 42 (same); *Bellinger v. Birge*, 54 Hun 511, 7 N. Y. S. 695, 8 N. Y. S. 174 (same); *Root v. Alexander*, 63 Hun 557, 28 Abb. N. Cas. 390, 18 N. Y. S. 632, affirmed 142 N. Y. 663, 37 N. E. 570 (overseers of poor or other persons); *Board of Excise v. Willey*, 2 Lans. 427 (board of commissioners of excise); *Manchester v. Herrington*, 10 N. Y. 164 (overseers of poor, and if they neglect duty then other persons); *Board of Excise v. Sackrider*, 35 N. Y. 154 (board of commissioners of excise, and in case of their neglect, any other person in their name); *Gloversville v. Howell*, 70 N. Y. 287 (same).

*South Carolina*.—*Charleston v. King*, 4 McCord L. 487 (city council).

*Texas*.—*State v. Eggerman*, 81 Tex. 569, 16 S. W. 1067; *Peavy v. Gloss*, 90 Tex. 89, 37 S. W. 317 (any person aggrieved); *Drake v. State*, 23 S. W. 398 (district or county attorney in name of state for use of county).

A statute prohibiting certain sales and giving a right of action to the "persons aggrieved" has been held to designate the classes of persons who are entitled to sue, and not to require the plaintiff to prove that he has in fact been aggrieved. *Tipton v. Thomson*, 21 Tex. Civ. App. 143, 50 S. W. 641; *Kruger v. Speckcheck*, 22 Tex. Civ. App. 307, 54 S. W. 295.

A college may sue as the "person aggrieved" in case of an unlawful sale of liquor to a student. *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, 50 S. W. 205.

#### LIMITATION.

The running of the statute of limitations against a cause of action to recover a penalty is not affected by the fact that during a part of the time limited an indictment for the same offense is pending. *Com. v. Elkins*, 116 Ky. 303, 76 S. W. 25, 25 Ky. L. Rep. 485.

## JURISDICTION.

The presumption of jurisdiction is in favor of a court of record having general original jurisdiction. *Weiss-Chapman Drug Co. v. People*, 39 Colo. 374, 89 Pac. 778. The jurisdiction in case of actions for penalties is sometimes fixed by a constitutional provision. See *State v. Stoutsenberger*, 4 Willson, Civ. Cas. Ct. App. (Tex.) § 247, 16 S. W. 304.

Where a certain court has exclusive jurisdiction of an action for a penalty, that jurisdiction is not ousted by the fact that the judge is a taxpayer and thereby interested in the penalty. *Com. v. Burding*, 12 Cush. (Mass.) 506. The provisions in the charter of a municipality conferring jurisdiction upon the public judge in causes arising under municipal ordinances have been held to be equivalent to an express declaration that the interest of the judge as a citizen of the municipality in the penalties recoverable shall not disqualify such judge from entertaining the proceedings. *Deitz v. Central*, 1 Colo. 323; *Com. v. Emery*, 11 Cush. (Mass.) 406; *Com. v. Tuttle*, 12 Cush. (Mass.) 502.

But it has been held that a city court cannot be authorized by a by-law of the city to hear a cause in which the city seeks to recover a penalty for its own benefit. *Downing v. Charlottetown*, 2 P. E. Island 1.

## PLEADING.

It has been held, where the liquor statutes have made liberal provisions for pleading in actions to recover penalties, that such liberality should not be extended beyond that indicated by the statutes. *Benalleck v. People*, 31 Mich. 200.

In a complaint alleging several unlawful sales of liquor the name of the person to whom the sales were respectively made should be given; or if the name cannot be given, that fact should be averred with sufficient of the circumstances of sale to inform the defendant of the ground of action. *Kee v. McSweeney*, 66 How. Pr. (N. Y.) 447, 15 Abb. N. Cas. 229. Where the increased penalty for a second offense is sought to be recovered, the complaint must allege the fact that the offense is a second one. *Garvey v. Com.* 8 Gray (Mass.) 382. See also *Norton v. State*, 65 Miss. 297, 3 So. 665. An allegation of the price or consideration is indispensable in charging a sale of liquor. *Camelton v. Collins*, 172 Ind. 193, 19 Ann. Cas. 692, 88 N. E. 66. But it is not necessary that the complaint should state to whom the penalty is to go. *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. Tuttle*, 12 Cush. Mass. 502. Where a complaint, stating the title of the action and specifying the court and county in which it was brought, alleged

that the defendant violated section one of the ordinances of the town of Monte Vista, in the county of Rio Grande, state of Colorado, entitled "An ordinance concerning intoxicating liquors," which said ordinance was passed and adopted on the 4th day of March, 1899, and had still remained and still is in force and effect, and to the damage of the plaintiff in the sum of three hundred dollars, such complaint was held to be subject to a motion to make it more definite and certain but not subject to a demurrer. *Weiss-Chapman Drug Co. v. People*, 39 Colo. 374, 89 Pac. 778. It has been held that the plaintiff is not confined to the exact day on which the offense was alleged to have been committed. *Deitz v. Central*, 1 Colo. 323; *Kruger v. Spachek*, 22 Tex. Civ. App. 307, 54 S. W. 295; *Munoz v. Brassel* (Tex.) 108 S. W. 417 (petition alleged that acts occurred "on or about" certain days).

In construing a charter clause providing that "it shall be lawful to declare generally in debt for such penalty, fine or forfeiture, stating the clause of this act, or the by-laws or ordinance, etc., and to give the special matter in evidence," the court in *Deitz v. Central*, 1 Colo. 323 said: "It is argued that under this provision the city attorney should be required to file a declaration, as in the common-law action of debt; but we think the statement, account or complaint which was filed in this cause, indefinite and informal as it is, must be regarded as a compliance with the intention of the legislature. We cannot believe that the legislature intended to introduce into a court not of record, and in this class of proceedings, which, in many instances, must be summary in their nature or else altogether ineffectual, the subtleties of the common-law action of debt, with the delays incident to it. Having reference to the subject-matter to which this legislation is applied, we think the language may well receive a construction less restricted than in another case we might be compelled to adopt."

Where a certain allegation in the complaint is not essential to the cause of action and is not descriptive of the identity of the action, the allegation may be rejected as surplusage and need not be proved. *McNeil v. Collinson*, 128 Mass. 313 (allegation that defendant was licensed and sold to minor in violation of license).

A motion on the part of the defendant to have the declaration made more specific does not preclude him from pleading that he has not violated the law. *Washington v. Greenwood* (Miss.) 23 So. 258.

Where the defendant pleads in his answer that the action was not brought in good faith but for the purpose of blackmail, a demurrer to that part of the answer will be sustained.



Headington v. Smith, 113 Ia. 107, 84 N. W. 982.

## APPEAL.

## TRIAL AND JUDGMENT.

Persons who furnish money to assist the prosecution for penalties are disqualified to act as jurors on the trial of the cause. *Jackson v. Sandman*, 64 Hun 634 mem. 18 N. Y. S. 894.

Where the defendant admits the fact that establishes guilt, it is not error for the trial judge to assess the minimum penalty without impaneling a jury. *Eastham v. Com.* 49 S. W. 795, 20 Ky. L. Rep. 1639.

Where the amount of the recovery goes to the school fund and not to the plaintiff it is not error for the trial judge so to inform the jury. *Cobleigh v. McBride*, 45 Ia. 116.

If it is the duty of the jury to fix the amount of the penalty, they may consider, in doing so, the place where and circumstances under which the unlawful act was committed. *Chicago v. Everleigh*, 162 Ill. App. 623.

Where a city charter warrants a commitment of an accused only when he has no property which can be taken to satisfy the judgment, it is error to enter a judgment ordering that the defendant shall stand committed until the payment of the fine and costs without reference to whether he has property liable to execution. *Deitz v. Central*, 1 Colo. 323.

A judgment in an action for a penalty, recovered by a city, estops the city to bring another action for the same offense on the dealer's bond. *Jenkins v. Danville*, 79 Ill. App. 339.

## COSTS.

A city is not liable for costs in an action of debt to recover a penalty. *Princeville v. Hitchcock*, 101 Ill. App. 588.

It is generally unnecessary for the plaintiff to file a bond for costs. *Jacksonville v. Block*, 36 Ill. 507; *Edwards v. Brown*, 67 Mo. 377; *In re Martin*, 2 How. Pr. N. S. (N. Y.) 26, 7 Civ. Pro. 399; *Board of Excise v. McGrath*, 27 Hun (N. Y.) 425. *Compare Thayer v. Lewis*, 4 Denio (N. Y.) 269 (private persons suing in name of public officer). In the case of *In re Martin*, supra, the court said: "The statute giving the right thus to prosecute has imposed no such restriction, and because it has not 'it would seem to follow,' as Daniels, J., said in *Board of Excise v. McGrath* (27 Hun 425), 'that he could not be required to give security for costs.'"

In the absence of a statutory provision therefor, attorneys' fees cannot be assessed as costs and imposed on the defendant in addition to the penalty. *Gripps Brewing Co. v. Virginia*, 32 Ill. App. 518.

In *Com. v. American Express Co.* reported in full, post, this volume, at page 875, it was held that in Kentucky the taking of an appeal in an action for a penalty for the violation of the liquor law is regulated by the civil code.

The procedure on appeal is something regulated by the statute imposing the penalty. See *Levant v. Varney*, 32 Me. 180.

It is generally held that the defendant cannot on appeal take advantage of defects in the form of the proceedings which were not pointed out at the trial. *Deitz v. Central*, 1 Colo. 323; *Jacksonville v. Holland*, 19 Ill. 271; *Arcole v. Wilkinson*, 233 Ill. 250, 84 N. E. 264; *Flora v. Lee*, 5 Ill. App. 629; *Chicago v. Everleigh*, 162 Ill. App. 623; *Church v. Higham*, 44 Ia. 483; *New Gloucester v. Bridgman*, 28 Me. 60; *Hamer v. Eldridge*, 171 Mass. 250, 50 N. E. 611; *Andrews v. Harrington*, 19 Barb. (N. Y.) 343.

## RECOVERY IN EQUITY.

It has been held that a penalty for the unlawful sale of intoxicants may be recovered in a court of equity, where jurisdiction has been acquired on some recognized ground of equitable interference. *State v. Marshall*, 100 Miss. 626, 56 So. 792, wherein the court said: "Courts of equity do not, and cannot, refuse to enforce penalties created by statute. The oft-quoted maxim that a court of equity will refuse to enforce a penalty has no application to any but penalties imposed by private contract."

Where a court of chancery has acquired jurisdiction, the trial must be conducted by the rules of procedure in chancery; and a jury trial is not a matter of right. *State v. Marshall*, 100 Miss. 626, 56 So. 792.

In *Druggist Cases*, 85 Tenn. 449, 3 S. W. 490, it was held that penalties prescribed by statute could be enforced only by strict pursuance of the statutory remedy given for their collection, and hence that the penalties could not be recovered in a suit in chancery.

## SEVERAL PENALTIES IN ONE ACTION.

Several penalties may be recovered in one suit. *Deyo v. Rood*, 3 Hill (N. Y.) 527; *Prussia v. Gventher*, 16 Abb. N. Cas. (N. Y.) 230. Under a complaint alleging the violation of a certain ordinance, the court is not restricted to a hearing and determination of only one offense against the ordinance. *Hensoldt v. Petersburg*, 63 Ill. 111. Penalties given by different sections of an act may be sued for in one action, provided the rules of pleading permit them to be united. *Ripley v. McCann*, 34 Hun (N. Y.) 112.

Under a statute making the recovery of one penalty a bar to the prosecution for other offenses committed before such recovery, it has been held that only one penalty could be recovered in one action. *Washburn v. McInroy*, 7 Johns. (N. Y.) 134. *Tiffany v. Driggs*, 13 Johns. (N. Y.) 253. In *Flora v. American Exp. Co.* 92 Miss. 66, 45 So. 149 the court construed a statute providing as follows: "Any person who may sell or give away liquors unlawfully, or allow the same to be sold or given away at his place of business, for any purpose whatsoever, shall be subject to pay the state, county and the city, town or village where the offense is committed, each, the sum of five hundred dollars." The court said: "It is not the intent of this statute to permit the recovery of more than one penalty up to the time of the commencement of the suit. It does not say that a penalty of \$500 shall be recovered for each offense. There is no such language in the statute. The thing which it denounces is the selling of intoxicants unlawfully. That is the substantive thing. There may be many acts of violation, many sales; but it is not said that \$500 penalty shall be recovered for each sale. The penalty is visited for the violation of the substantive thing named, the unlawful sale of intoxicants. The word 'each' in the statute refers to state, city, county, etc., not to the sale."

#### DISPOSITION OF AMOUNT RECOVERED.

The disposition of the amount recovered has frequently been directed by the statute imposing the penalty. *Headington v. Smith*, 113 Ia. 107, 84 N. W. 982; *State v. Smith*, 64 Me. 423; *Gloversville v. Howell*, 70 N. Y. 287; *Horton v. Carrington*, 1 How. Pr. N. S. (N. Y.) 124; *State v. Lesterjette*, 3 Hill L. (S. C.) 287; *State v. Eggerman*, 81 Tex. 569, 16 S. W. 1067. Under a statute directing the disposition of the amount recovered, it has been held that an amount paid to settle an action is as much a recovery as if paid after final adjudication. *Hull v. Welsh*, 82 Ia. 117, 47 N. W. 982. In *Indianapolis v. Fairchild*, 1 Ind. 315, it was held that the disposition of the penalty was not controlled by a statute directing the disposition of fines recovered under the penal laws; and that the penalty could be recovered by and given to a town.

Where the persons authorized by law to receive the amount recovered, consent to allow others, not entitled, to receive a part thereof, the persons authorized to receive the penalty do not thereby relieve themselves from their liability either to the public corporation which they represent or to the attorney whom they employ to bring the action. *Wright v. Smith*, 13 Barb. (N. Y.) 414.

That part of the penalty which belongs to the state may be remitted by the governor; but as to the part which belongs to the informer there is a vested interest, adverse to the state, as soon as the conviction takes place. *State v. Williams*, 1 Nott & McC. (S. C.) 26. Where the statute directs that a certain part of the amount recovered shall be paid to the informer, the rights of the informer do not accrue until the recovery, and therefore the informer need not make a specific claim before the recovery. *Hull v. Welsh*, 82 Ia. 117, 47 N. W. 982.

Error as to the appropriation of the penalty does no injury to the defendant. In re *Ricker*, 32 Me. 37.

#### Evidence.

In an action for a penalty for the violation of an ordinance, the ordinance is the foundation of the action. It is therefore brought into the case for all purposes by the complaint, although the complaint makes only the statutory recital of the number of the section charged to have been violated and the date of the adoption of the ordinance. *Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474.

The offense of selling liquor contrary to law may be established by circumstantial evidence. *Vallance v. Everts*, 3 Barb. (N. Y.) 553. But the fact that a person obtains spirituous liquor at a place where it is not lawful or customary to sell it, without the aid of evidence of attending circumstances, is not sufficient to justify the conclusion that the transaction is a sale. *Horton v. Parsons*, 40 Hun (N. Y.) 224. And it is not sufficient to prove the existence of an ordinance prohibiting the sale of liquor and then to prove the sale by the defendant. It must be shown furthermore that the sale was made after the ordinance took effect. *Newlan v. Aurora*, 17 Ill. 379. Where a penalty is sought to be recovered for the violation of a city ordinance, proof of the ordinance must be made, for the appellate court will not take judicial notice of the existence of the ordinance. *McIntosh v. Pueblo*, 9 Colo. App. 460, 48 Pac. 969.

It has been held that in an action to recover the penalty imposed by a city ordinance it is not necessary to produce any evidence of the promulgation of the ordinance, at least unless the fact of promulgation is denied by affidavit. *Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474; *Charleston v. Chur*, 2 Bailey L. (S. C.) 164. In an action brought by the officers of an incorporated town, the plaintiffs are not bound to adduce proof of its corporate existence until that existence is denied; and on denial thereof the plaintiffs are required to show only that the body has

been exercising the powers of a corporation. *Hamilton v. Carthage*, 24 Ill. 22.

A section of an act to regulate the sale of intoxicating liquor providing that "in all prosecutions under this law, proof that the defendant is the keeper of a grocery or tavern, and to all appearances engaged in retailing liquors by a less quantity than one quart at a time, shall be sufficient to produce a conviction," has been held not to create a distinct offense, but only to prescribe a new rule of evidence applicable to trials under the act. *State v. O'Conner*, 4 Ind. 299.

The burden is on the defendant to bring himself within the exceptions of a penal ordinance. *Flora v. Lee*, 5 Ill. App. 629; *Griffin v. Com.* 7 Ky. L. Rep. (abstract) 300; *Smith v. Adrian*, 1 Mich. 495; *Potter v. Deyo*, 19 Wend. (N. Y.) 361; *Cullinan v. Criterion Club*, 39 Misc. 270, 79 N. Y. S. 482. Compare *Buffalo v. Smith*, 8 Misc. 348, 28 N. Y. S. 690. Where it was proved that by a city ordinance the city clerk was required to keep a register of all licenses issued by him, and such register was produced at the trial and the clerk testified that no license had been issued to the defendant for the period in which the alleged unlawful sales were made, it was held, assuming that the burden of proof as to that point was on the prosecution, that sufficient was shown to shift to the defendant the burden of establishing the fact of his license if he had one. *Deitz v. Central*, 1 Colo. 323.

Evidence of the character of the defendant is not admissible. *Hammett v. State*, 42 Okla. 384, 141 Pac. 419. Neither is evidence of the effect of an ordinance on the business of the defendant admissible as affecting the validity of the ordinance. *Delphi v. Hamling*, 172 Ind. 645, 89 N. E. 308.

Where the defendant is charged with retailing liquor to a person unknown, he has a right to introduce in evidence a record of conviction in a previous case in the same court on information against him for retailing liquor to certain unknown persons, and to follow such record with the necessary proof that the offense charged is the same for which he has been convicted. *State v. O'Conner*, 4 Ind. 299.

## COMMONWEALTH

v.

## AMERICAN EXPRESS COMPANY.

Kentucky Court of Appeals—January 12, 1916.

167 Ky. 685; 181 S. W. 353.

## Appeal — Right Purely Statutory.

The right of appeal in all cases is a right created by statute, and, in the absence of a statute conferring the right, an appeal will not lie.

## Intoxicating Liquors — Action for Penalty — Nature of Proceeding.

An action in the name of the commonwealth against an express company to recover the penalties imposed for the violation of Ky. St. § 2569b, subsec. 2, forbidding the transportation of intoxicating liquors into prohibition territory, instituted under Cr. Code Prac. § 11, authorizing a prosecution of a public offense punishable only by fine, by penal action in the name of the commonwealth, and under Ky. St. § 1139, providing that the fine imposed by law shall inure to the commonwealth, except where given to a particular person, etc., may be recovered by civil procedure, or by indictment, is not a civil, but a penal action, and no judgment for imprisonment can be had thereunder.

[See note at end of this case.]

## Right to Appeal in Action for Penalty.

Ky. St. § 2569b, subsec. 2, makes the transportation of intoxicating liquors into prohibition territory a misdemeanor, punishable by fine and imprisonment. Cr. Code Prac. § 347, gives the court of appeals jurisdiction of appeals in penal actions, and in prosecutions for misdemeanors, if the judgment be or might have been for a fine exceeding \$50. Section 252 declares that a judgment on a verdict of acquittal of an offense punishable by imprisonment shall not be reversed, but that an appeal may be taken by the commonwealth as provided in section 337, when important to the correct and uniform administration of the criminal law. Section 337 prescribes the commonwealth's appeal in felony cases before a final judgment that the law may be determined by the court of appeals before a final trial. Section 355 declares that, if the prosecution be by penal action, the appeal shall be similar in all respects to appeals in civil actions. Section 11 provides that proceedings in penal actions shall be regulated by the code of practice in civil actions. Held that, as an appeal does not lie in a civil action except from a final judgment or order therein which either terminates the action itself or operates to divest a right so that the court after term has no power to put the parties in their original condition, the commonwealth's penal action against an express company for violation of the liquor statute to recover fines of \$200, in which there was a verdict of guilty in

the amount of \$100, and in which the judgment was set aside and a new trial granted, was never terminated, so that both the commonwealth's appeal and the company's cross-appeal would be dismissed.

[See note at end of this case.]

Appeal from Circuit Court, Grayson county.

Action to recover penalty. Commonwealth of Kentucky, plaintiff, and American Express Company, defendant. From judgment rendered, both parties appeal. **APPEALS DISMISSED.**

*James Garnett, Charles H. Morris, H. D. Moorman and Charles Carroll* for plaintiff.

*M. A. Arnold, S. L. Barber, J. Blakey Helm and Trabue, Doolan & Co* for defendant.

[686] HURT, J.—This is a penal action brought in the name of the Commonwealth of Kentucky against the American Express Company, in the Grayson circuit court. The petition charged the express company with a violation of Sub-section 2 of section 2569-b, Ky. Statutes, in that county, and sought to recover of the express company the sum of two hundred dollars. The petition was subscribed by the Commonwealth's attorney for the judicial district, which embraces Grayson county. The express company entered a plea of not guilty, and a trial being had, a verdict of guilty was returned against the company and the amount of the recovery fixed at the sum of one hundred dollars and judgment was rendered accordingly. Grounds for a new trial were filed and a motion made to that effect, and for reasons not necessary to be stated, the motion was sustained, the verdict and judgment set aside, and a new trial granted to the express company. The attorney for the Commonwealth objected to the order of the court setting aside the verdict and judgment and granting a new trial, and his objection being overruled, he excepted thereto, and prayed an appeal to this court, which was granted. Thereafter, the express company seeking to have the decisions of the court below, which were adverse to it, reviewed by this court, took a cross-appeal.

The question as to the right of the Commonwealth to maintain the appeal and the right of the express company to prosecute a cross-appeal is suggested, and those questions will be first considered.

The right of appeal, in all cases, is a right created by statute, and in the absence of a statute conferring the [687] right, an appeal will not lie. *Gough v. Illinois Cent. R. Co.* 166 Ky. 568, 179 S. W. 449. This is not a civil action, as contended by counsel, but is a penal action, instituted and conducted under the

provisions of section 11 of the Criminal Code, which gives authority for the prosecution of a public offense, the only punishment for which is a fine, by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation, if the whole fine recoverable be given to such individual or corporation; and by the authority of the provisions of section 1139, Kentucky Statutes, which provide that all fines and forfeitures, which are imposed by law, shall inure to the Commonwealth, except where the whole or a part thereof shall be given to a person or to a particular object, and may be recovered by civil procedure, or by indictment of a grand jury. While the offense, which is prosecuted, in the case at bar, is one which may be punished by imprisonment, as well as by fine, only the fine denounced is sought in the action, and no judgment for imprisonment can be recovered in the action. The case of *Com. v. Brand*, 166 Ky. 754, 179 S. W. 844, cited by counsel, is not in point. That was a prosecution, by indictment for a felony, and appeals in such cases are authorized and regulated by the provisions of Article 1, chapter 1, title 9, of the Criminal Code.

The offense denounced by sub-section 2, section 2569-b, Ky. Statutes, is a misdemeanor. Appeals to this court from judgments in prosecutions for misdemeanors are provided for and regulated by the provisions of article 2, chapter 1, title 9 of the Criminal Code. Section 347 of that article provides that this court shall have jurisdiction upon appeals in penal actions and prosecutions for misdemeanors, if the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days, or in case of acquittal, in cases in which a fine exceeding fifty dollars or imprisonment exceeding thirty days might have been inflicted. In as much as a penal action cannot be maintained, except for a fine, the section, *supra*, limits the jurisdiction of this court to appeals, in penal actions, to cases in which a fine exceeding fifty dollars has been assessed, or to a case in which such a fine might have been inflicted. The cases in which imprisonment has been or might be inflicted, necessarily, has reference to prosecutions for misdemeanors, by indictment, information or warrant. The appeals contemplated [688] by this section seem to be only such as may be taken from final judgments of conviction or acquittal.

Section 352, Criminal Code, provides that a judgment on a verdict of acquittal of an offense, the punishment of which is imprisonment, shall not be reversed, but in such cases an appeal may be taken by the Commonwealth as provided in section 337, Criminal Code, when it is important to the correct and uniform administration of the criminal law. Section 337, *supra*, is where in the manner

of taking an appeal by the Commonwealth is provided for in felony cases, and in which, by the provisions of section 348, Criminal Code, an appeal may be taken by the Commonwealth from the decisions of the court before a final judgment in the case, for the purpose of having the law of the case determined by this court before the final trial. In the case of *Com. v. Huber*, 128 Ky. 456, 104 S. W. 282, 345, this court, in construing section 352, *supra*, held that before final trial, where one was indicted for a misdemeanor, the punishment for which is imprisonment, the Commonwealth might appeal in the manner provided by section 337, *supra*, before a final judgment in the case, from the decisions of the court made in the case, for the purpose of a uniform and correct administration of the law, as in felony cases. As in felony cases, however, an appeal by the Commonwealth, in a prosecution for a misdemeanor for the purpose of having a certification of the law, in a case wherein the punishment is imprisonment, does not operate to suspend proceedings in the case. Section 352, *supra*, however, could not authorize an appeal in a penal action by the Commonwealth, before final judgment in the case, as only a fine in such actions can be inflicted.

The Code makers, however, expressly provided for appeals to this court in cases wherein misdemeanors are prosecuted by penal actions, by the enactment of section 355, Criminal Code, which is as follows:

"If the prosecution be by a penal action, the appeal shall be similar in all respects to appeals in civil actions."

In the case of *International Harvester Co. v. Com.* 161 Ky. 49, 170 S. W. 660, this court construing section 355, *supra*, held that in penal actions, that, although, section 348, Criminal Code, provided that upon an appeal in a case of misdemeanor that the record must be lodged in the clerk's office of this court within sixty days after [689] the rendition of the judgment, that an appeal from a judgment in a penal action could be taken within the same time as an appeal from a judgment in a civil action. Section 2, Criminal Code, *supra*, provides that "the proceedings in penal actions are regulated by the Code of Practice in civil actions." Hence, it conclusively follows that the stage of proceedings in a penal action at which an appeal may be taken, is regulated by the Civil Code, and is the same as in a civil action. An appeal does not lie in a civil action except from a final order or judgment in the action. A final order or judgment in a civil action, from which an appeal will lie, is one which

either terminates the action itself or operates to divest a right in such manner that the court making the order does not have power after the expiration of the term to put the parties in their original condition. *Helm v. Short*, 7 Bush (Ky.) 623; *Turner v. Browder*, 18 B. Mon. (Ky.) 825; *Christman v. Chess*, 102 Ky. 230, 43 S. W. 426; *Harrison v. Lebanon Waterworks*, 91 Ky. 255, 15 S. W. 522, 34 Am. St. Rep. 180, and many others. The action in the case at bar has never terminated, and the parties have all the same rights, and are in the same condition as at the beginning of the suit.

It is, therefore, adjudged that the original and cross appeal be both dismissed.

#### NOTE.

The statute under which the action in the reported case was brought [Ky. Stats. (Carroll, 1915) vol. 1, pp. 1321-2] provides as follows: "It shall be unlawful for any person to consign, ship or transport in any manner whatsoever, or deliver any of the liquors mentioned in section 1 of this act [vinous, malt, brewed, fermented, spirituous or intoxicating liquor] to any person in any county, district, precinct, town or city where by law sale of such liquors is prohibited, or for any person residing in such prohibited territory to receive any such liquors, unless there appears upon the outside of the package containing any such liquors, except such as may be received by distillers, brewers, or wholesale liquor dealers, the following information: Name and address of the consignor, name and address of the consignee, and the statement either that such liquors are for personal and family use of the consignee, or for medicinal, mechanical, chemical, scientific or sacramental purposes. Any consignee accepting or receiving any package containing such liquors upon which appears a false statement, or any person consigning, shipping, transporting or delivering any such package, knowing that said statement appearing upon the outside thereof is false, shall be deemed guilty of violating the provisions of this act."

The reported case holds that an action to recover the penalty prescribed for a violation of this statute is not a civil but a penal action, an appeal in such an action, however, being regulated by the civil code. The cases discussing actions for penalties for the violation of intoxicating liquor statutes are reviewed in the note to *Stout v. State*, reported ante, this volume, at page 858.

**GARTNER**

v.

**PITTSBURGH STOCK EXCHANGE.**

Pennsylvania Supreme Court—January 2,  
1915.

247 Pa. St. 482; 93 Atl. 759.

**Exchanges — Rules and By-laws —  
Seat of Insolvent Member.**

A provision of the by-laws of a stock exchange, authorizing the sale of a member's seat on his insolvency and distribution of the proceeds to members in payment of their claims against him, before payment of anything therefor to him or those claiming through him, is valid.

[See note at end of this case.]

**Same.**

That an assignee of an insolvent member was not given an opportunity to be heard by the arbitration committee appointed pursuant to such provision and the by-laws of the exchange did not entitle him to complain of a sale of the member's seat in accordance with the committee's action, or of the distribution of the proceeds of the sale pursuant to the by-laws, especially where he did not appeal from the action of the committee to the board of appeals, as provided by the by-laws.

[See note at end of this case.]

Appeal from Court of Common Pleas, Allegheny county: SHAFER, Judge.

Assumpsit to recover value of seat on stock exchange. T. L. Gartner, plaintiff, and Pittsburgh Stock Exchange, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

**OPINION OF COURT BELOW.**

[482] SHAFER, J.—In this case the defendant offered no evidence, but [483] asked for binding instructions in its favor, and a verdict was thereupon directed for the defendant. The question therefore is whether the plaintiff made out a case to go to the jury. The evidence showed that the defendant is a corporation, not for profit, organized for the purpose of carrying on a stock exchange; that one E. D. Gartner, brother of the plaintiff, was a member of it on and before January, 1906; that E. D. Gartner having gotten into financial difficulties, borrowed ten thousand dollars from the plaintiff, giving him his note therefor, and as collateral security therefor assigning to him the membership in the Stock Exchange standing in his name, of which assignment the Stock Exchange afterwards received notice; shortly after the making of this note and assignment E. D. Gartner became insolvent, and he and the firm of which

he was a member made a deed of voluntary assignment, and subsequently went into bankruptcy. The by-laws provide that in every case where a member becomes insolvent or bankrupt the board of directors may cause his membership to be sold, and after paying out of the proceeds all dues and claims owing by the member, or any firm of which he is a member, to other members of the exchange whatever may be due them as certified by the arbitration committee, they are to pay the balance, if any, to the member whose membership has been sold, or to such other person as may legally be entitled to the same, the transferee under such sale to be subject to the approval of the board of directors before being admitted as a member. That by-law providing for the appointment of an arbitration committee, to consist of five members, provides further that each party to a controversy shall have a right to challenge one out of the five and that three shall constitute a quorum, and that all claims and differences arising in dealings between members of the exchange, all disputes arising out of the closing of contracts, all complaints of breach of contract, and violations of the rules, shall be determined by this committee; that the exchange itself and its members [484] wishing to secure their claims out of the proceeds of any transfer or sale of a membership must file their claims within three days after notice of such transfer or sale is posted. The by-laws further provide for a board of appeals from the decisions of the arbitration committee, which shall consist of the board of directors, not less than seven to be present at each hearing, and that each party may challenge one member of the board of directors, and that within five days after the making of an award or decision by the arbitration committee either party may appeal to the board of appeals thus constituted, which shall then have power to affirm, modify or reverse the award or decision or rehear the same as they see fit, and their award and decision shall be final and conclusive in all respects. It further appears that in July, 1906, the exchange sold the seat of E. D. Gartner for five thousand dollars; that the arbitration committee had presented to it claims to a large amount, and that it allowed claims of four or five persons amounting in all to thirteen thousand odd dollars. It further appears that the plaintiff demanded to be heard by the arbitration committee in opposition to the claims which were afterwards so allowed, or some of them, on the ground that they were founded upon fictitious sales such as were forbidden to be made by the by-laws of the exchange; and to show that no money was owing to members of the exchange by E. D. Gartner, and that the committee refused to allow him to appear before it for that purpose.

The plaintiff offered to prove on the trial that the claims which were allowed to members of the Stock Exchange by the arbitration committee were fictitious and that no money was owing in fact to those members by E. D. Gartner or the firm of which he was a member, the evidence of which offer was rejected. The plaintiff's claim as set out in his amended declaration is that he could have sold the membership for eight thousand dollars cash and could have secured a purchaser acceptable to the defendant but they would not permit him to do so, [485] and that the sale for five thousand dollars was against his rights, that the allowance of claims made by the arbitration committee was wrongful, and that therefore the defendant "by its conduct as herein set forth in preventing him from realizing the value of said membership became and is liable to pay the said plaintiff the value of said membership, to wit: eight thousand dollars," for the recovery of which the plaintiff brought this suit. The plaintiff offered no evidence as to the value of the seat, but acquiesced in the result of the sale.

A seat in such exchange is not property in the eye of the law; it is a mere creation of the board, to be held and enjoyed with all the limitations and restrictions which the constitution and by-laws put upon it; *Thompson v. Adams*, 93 Pa. St. 55. The provision for the sale of the seat upon insolvency, or otherwise, and for the distribution of the proceeds of such sale to members of the board in payment of their claims against the person whose seat is sold, before the payment of anything therefor to him or those claiming under him, is one which the exchange had an undoubted right to make, and by which the member and those claiming under him in any way are bound. An assignment by a member of his seat, with notice thereof to the board, can mean nothing more than that the board should not pay out to the member any balance found in his favor without regards to the rights of the assignee. Upon the making of such an assignment the assignor does not cease to be a member, nor does the assignee become a member in any sense, and especially is this the case if the assignment is not absolute but conditional as security for a debt. Any number of such assignments might be given out by the member and the board is not bound to treat such an assignee or assignees as having any rights except to receive the surplus, if any, awarded to the member. If this view of the rights of an assignee is correct the plaintiff could not complain of not being heard by the arbitration committee. There is no evidence that his assignor was not permitted to be [486] heard. But whether this view be correct or not, we are of opinion that the plaintiff, if he had standing to appear before the arbitration committee,

was bound to appeal from its decision as provided by the by-laws and that his failure to do so is conclusive against his claim.

It further appears by the evidence that the board is a mere custodian of the price of the seat, under the terms of the by-laws, for the creditors of the member and for the member himself. To allow the member or his assignee to recover the whole fund in an action in which only the exchange itself is a defendant would be an injustice to the exchange and to the members who also claim the fund. The plaintiff has no other or greater right to the fund than have these members themselves, and if the plaintiff can recover in this action each one of them can recover in like manner. We are of opinion, therefore, that the plaintiff did not make out a case entitling him to receive from the exchange the whole purchase-money received by it for the seat of E. D. Gartner, and the motion is therefore refused.

Upon the trial the court refused to permit the plaintiff to offer testimony tending to prove that the claims of other members of the stock exchange against the insolvent member were false and fictitious, fraudulent and unlawful.

*W. A. Stone and T. L. Gartner* for appellant.

*A. M. Imbrie* for appellee.

[487] *PER CURIAM*.—The judgment is affirmed on the opinion of Judge Shafer, dismissing the motion for a new trial.

#### NOTE.

#### Validity of Rule of Stock Exchange with Respect to Seat of Insolvent or Defaulting Member.

It has been generally held that rules of a stock exchange affecting the seat of an insolvent or defaulting member are valid. *Hyde v. Woods*, 94 U. S. 523, 24 U. S. (L. ed.) 264 (suspension of defaulting member, and sale of seat for benefit of creditor members); *In re Gregory*, 174 Fed. 629, 98 C. C. A. 383, 27 L.R.A.(N.S.) 613 (preference in favor of members); *Zell v. Baltimore Stock Exch* 102 Md. 489, 62 Atl. 808, 4 L.R.A.(N.S.) 435 (preference in favor of members); *Mohler v. Chamber of Commerce*, 130 Minn. 288, 153 N. W. 617 (lien on membership in favor of other members); *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495 (suspension of insolvent and in certain cases forfeiture of membership); *Londheim v. White*, 67 How. Pr. (N. Y.) 467 (prohibition of transfer of membership by defaulting member); *Thompson v. Adams*, 93 Pa. St. 55 (preference in favor of members); *Moxey's*

Appeal, 9 W. N. C. (Pa.) 441 (preference in favor of members); *Keyer v. Memphis Cotton Exch. (Tenn.)* 186 S. W. 593 (prohibition of transfer of membership by defaulting member); *Clarkson v. Toronto Stock Exch.* 13 Ont. 213, 19 Am. & Eng. Corp. Cas. 386 (preference in favor of exchange and members). And see the reported case. The validity of such a rule has also been recognized, though not passed on, in the following cases. In re *Gaylord*, 111 Fed. 717; In re *Currie*, 185 Fed. 263, 107 C. C. A. 369; *Shannon v. Cheney*, 156 Cal. 567, 105 Pac. 588; *Weston v. Ives*, 97 N. Y. 222; In re *Hayes*, 37 Misc. 264, 75 N. Y. S. 312; *Cohen v. Budd*, 52 Misc. 217, 103 N. Y. S. 45, *affirmed* 117 App. Div. 922, 102 N. Y. S. 1133; *Leech v. Leech*, 3 W. N. C. (Pa.) 542.

The reason underlying these decisions was clearly stated in the leading case of *Hyde v. Woods*, 94 U. S. 523, 24 U. S. (L. ed.) 264, as follows: "A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come. As the creators of this right—this property—took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition. . . . It is said that it is against the policy of the bankrupt law, against public policy, to permit a man to make in this or any other manner a standing or perpetual appropriation of his property to the prejudice of his general creditors; and it is to this point that the numerous authorities of counsel are cited. They all, however, relate to cases where a man has done this with property which was his own—property on which he himself imposed the direction, or the incumbrance, which impeded creditors. It is quite different where a man takes property by purchase or otherwise, which is subject to that direction or disposition when he receives it. It is no act of his which imposes the burden. It was imposed by those who had a right to do it, and to make it an accompaniment of any title which they gave to it."

In the case of *In re Gregory*, 174 Fed. 629, 98 C. C. A. 383, 27 L.R.A.(N.S.) 613, the court pointed out that if the effect of such a rule was that a part of the estate of the insolvent member would be taken out of the bankruptcy act, the rule would be invalid, but that such was not the effect, for the rule merely passed with the estate of the bankrupt for administration under the act. For a discussion of membership or a seat in a

stock exchange as an asset in bankruptcy see the note to *O'Dell v. Boyden*, 10 Ann. Cas. 239.

## BRACK ET AL.

v.

## MAYOR AND CITY COUNCIL OF BALTIMORE.

Maryland Court of Appeals—February 17, 1915.

125 Md. 378; 93 Atl. 994.

### Eminent Domain — Measure of Compensation.

In proceedings to condemn land, the measure of compensation is the value of the land condemned, together with a due allowance of consequential damages as to the remainder; the amount allowed for the property taken being based on its actual market value, which is estimated with reference to all uses for which the land is adapted, such as suitability for a reservoir, etc.

[See 10 R. C. L. tit. *Eminent Domain* p. 129 et seq.]

### Adaptability to Particular Use — Storage of Water.

In proceedings to condemn land for storage of a city water supply, it was alleged that plaintiff's land, through which a strip was condemned, was specially adapted for reservoir purposes. The court excluded evidence of special adaptability to such use, on the ground that, since the owner had no right to impound the waters of the stream flowing through the land without consent of the city, as lower riparian proprietor, there was no actual increase in the value of the land by its abstract adaptability for reservoir purposes. Held that, in the absence of affirmative showing in the record that the use of the land for reservoir purposes would necessarily involve an invasion of the riparian rights of the city, and the offer of proof being distinctly to show that the land had an independent availability for reservoir purposes, evidence as to its value for such use was improperly excluded.

[See note at end of this case.]

### Offer of Privilege to Reduce Damages.

In proceedings to condemn land to store water for a city, where a strip running through the farm was condemned, which would be flooded, thus dividing the land in halves, an amendment to the petition obligating the city to construct a road and bridge across the flooded area, and to give the owner the right perpetually to maintain the same, the object being to reduce damages, is improper over objection by the owner; since, in awarding compensation, the jury



cannot in place of money require a property owner to accept privileges.

**Same.**

Where a strip through the middle of a farm was taken to secure land for the storage of a city water supply, an offer by the city to grant the owner and his successors the perpetual right to water their stock in the stream flowing through the land taken is not available to reduce damages; the continuance of the privilege being precarious under Acts 1914, c. 810, vesting power in the state board of health to prevent the pollution of waters to protect the public health.

**Same.**

In condemnation proceedings to take land for storage of a city's water supply, where the petition, over the owner's objection, was amended to extend to him certain privileges and reservations to reduce damages, a motion *ne recipiatur*, denying the right of the city to so modify the petition, assigning that the amendment was too vague and uncertain, was inconsistent with the petition, was offered too late, and was not germane to the issue, was sufficiently comprehensive to raise the question for review on appeal.

**Amount of Allowance — Review on Appeal — Prejudice from Exclusion of Evidence.**

In condemnation proceedings, where the evidence as to damages is conflicting, but some of the estimates exceed the sum ascertained by the verdict, the reviewing court cannot rule, as matter of law, that the allowance is so obviously excessive as to render nonprejudicial erroneous rulings below excluding evidence as to the special adaptability of the land for reservoir purposes as bearing on the measure of damages.

Appeal from Circuit Court, Baltimore county: DUNCAN, Judge.

Condemnation proceeding. Mayor and City Council of Baltimore, plaintiff, and Henry L. Brack et al., defendants. From judgment rendered, defendants appeal. The facts are stated in the opinion. **REVERSED.**

*Wm. L. Ogden and Frank Gosnell* for appellants.

*S. S. Field* for appellee.

[379] URNER, J.—This is a condemnation proceeding for the acquisition by the City of Baltimore of certain land of the appellant, in Baltimore County, included in the area required for the storage and protection of a new water supply for the City to be impounded by an extensive dam in the valley of the Gunpowder River. The tract condemned contains about forty-four acres. It embraces the middle portion of the appellant's farm of one hundred and ninety acres, and lies along a stream called Peterson's Run, which, for the greater part of its course through the farm, will be absorbed in the waters of the reservoir.

Ann. Cas. 1916E.—56.

By the appropriation of ground in this proceeding the remainder of the appellant's land will [380] be divided into two disconnected tracts of approximately equal acreage. The buildings are located at the eastern end of the farm, and an outlet is provided by a roadway extending through the property to a public thoroughfare beyond its western limits. This private way crosses Peterson's Run by a bridge not far below the point where the stream enters the farm, but the land taken by the City will be necessarily flooded to such an extent as to prevent the use of the roadway and bridge at their present level. The condemnation of the intersecting tract, which is proposed by the petition to be acquired in fee simple, would also in itself have debarred the landowner from the use of the customary outlet, but it was provided by an amendment to the petition that the property required should be condemned subject to the obligation upon the part of the Mayor and City Council of Baltimore to construct a suitable bridge over Peterson's Run, and a suitable road from each side of the bridge to the outlines of the property sought to be condemned, along the line of the present way, the new road and bridge to be equally as good as those now existing, and to be at a sufficient elevation to furnish a safe and solid roadway connecting the separated portions of the farm, and to be for the perpetual use and benefit of the owners of the remaining land, by whom, however, it was to be maintained. By the same amendment it was further stipulated that the condemnation should be subject to the reservation in behalf of the landowner, his heirs or assigns, of the right of access to the Run above the roadway for all domestic purposes, including the cutting of ice and the right to have live stock, except hogs, resort to that portion of the stream.

The petition was thus amended, by leave of the Court, after the jury had been impaneled and had viewed the premises. Objection to the amendment was taken by a motion *ne recipiatur*, which was overruled; and a formal exception to this action was reserved and constitutes the first bill of exceptions in the record. The appellant complains of the modification referred to mainly on the ground that it is [381] inconsistent with a condemnation in fee simple, to which the proceedings are in terms directed, and seeks to accomplish by the provisions stated the partial satisfaction of damages which are claimed to be legally demandable as a whole in money. Other exceptions were reserved to the refusal of the Court below to allow the defendant to show that the land being condemned has special features which give it an independent value as a reservoir site. The appeal by which the questions we have indicated are brought before us for determination has been

taken by the defendant from a judgment entered upon the inquisition as returned by the jury awarding him damages to the amount of \$15,967.00.

In the argument of the case in this Court the subject first considered was the propriety of the exclusion of evidence as to the adaptability of the land for reservoir purposes, and we will adopt the same order of discussion.

The just compensation to which the landowner is entitled, where part of his land is taken for public use, includes the value of the ground condemned and a due allowance for consequential damages, if any, to the remainder. *Patterson v. Baltimore City*, 124 Md. 153, 91 Atl. 966; *Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331; *Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057; *Ridgely v. Baltimore*, 119 Md. 567, 87 Atl. 909. With respect to the property taken the award must be based upon its actual market value at the time of the condemnation. *Norris v. Baltimore*, 44 Md. 607; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479. The rule is that the market value of the land is to be estimated with reference to the uses and purposes to which it is adapted, and that any special features which may enhance its marketability may properly be considered. But the fact that the land is needed for the particular object sought by the condemnation is not to be regarded as an element of the value to be ascertained. The question is not what the property is worth to the condemning party, but what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available.

[382] In 15 Cyc. 757, it is said: "The true rule is that any use for which the property is capable may be considered, and if the land has an adaptability for the purposes for which it is taken, the owner may have this considered in the estimate as well as any other use for which it is capable. Thus, in proceedings to condemn land for railroad purposes, for a bridge site, or for a reservoir or water supply, it may be shown that the land has an especial availability which would render it valuable to any one who might wish to purchase it for railroad purposes, for a bridge site, or for the purpose of a reservoir or water supply, and the owner may insist upon this availability of his land for the particular purpose as an element in estimating its value."

In *Mississippi, etc. River Boom Co. v. Patterson*, 98 U. S. 403, 25 U. S. (L. ed.) 206, where three islands in the Mississippi River were being condemned for use in the construction of a boom, and the owner desired to have their special availability for such use considered in the estimate of his damages, it was

said: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."

It was held in *Sargent v. Merrimac*, 196 Mass. 171, 81 N. E. 970, 124 Am. St. Rep. 528, 11 L.R.A. (N.S.) 996, where a landowner was seeking compensation for property taken as a source of municipal water supply, that: "The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, plus such sum as a purchaser would have added to that value because of the chance that the land in question might be some day used as a water supply." The decision in *Moulton v. Newburyport Water Co.* 137 Mass. 163, was to the same general effect.

[383] In *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681, it was held to be proper to show that land which was being condemned for a reservoir site was so situated as to be peculiarly adapted to such use. The same theory was adopted in the case of *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L.R.A. 123, where land was condemned for a reservoir, and it was said that the market value to which the owner was entitled "includes every element of usefulness and advantage in the property. If it be useful for agriculture or for residence purposes; if it has adaptability for a reservoir site, or for the operation of machinery; if it contains a quarry of stone, or a mine of precious metals; if it possesses advantage of location, or availability for any useful purpose whatever, all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate."

An opinion delivered by Lord Chief Justice Alverstone, in *re Gough*, etc. Joint Water Board [1904] 1 K. B. (Eng.) 422, approves as correct the following statement of Wright, J., whose action was under review: "If there is a site which has peculiar advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation,—if the

site has peculiar advantages for supplying in that sense—apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, I think it may be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration.”

The case of *Brown v. Forest Water Co.* 213 Pa. St. 440, 62 Atl. 1078, also recognized the rule that the special availability of land for reservoir or water supply purposes is a proper element [384] of value to be proven. It was said in the opinion: “The defendant cannot properly complain of the admission of evidence that the property taken by it was adapted to reservoir purposes, from the natural formation of the land, the amount of water flowing over it, and its proximity to certain towns. All these matters were elements entering into the market value of the property.”

The general principle of the above citations is applied in numerous cases collected in *Lewis on Eminent Domain*, 3 ed. sec. 707, and in notes to decisions reported in *Missouri*, etc. *R. Co. v. Roe*, 15 L.R.A.(N.S.) 679; *Sargent v. Merrimac*, 11 L.R.A.(N.S.) 996; *Brown v. W. T. Weaver Power Co.* 3 L.R.A.(N.S.) 912, and *Smith v. Com.* 24 Ann. Cas. 1236.

In the case of *Callaway v. Hubner*, 99 Md. 529, 58 Atl. 362, this Court, in passing upon exceptions to the ratification of a sale of land reported by trustees, and in determining whether the sale was improvident, had occasion to consider the availability of the property for reservoir purposes as entering into the market value, and as affecting the question as to the propriety of the sale, which had left that element out of view. The opinion by Judge Pearce cited and quoted from the decisions in *In re Furman St.* 17 Wend. (N. Y.) 669; *Young v. Harrison*, 17 Ga. 30, and *Mississippi*, etc. *River Boom Co. v. Patterson*, 98 U. S. 403, 25 U. S. (L. ed.) 206, in support of the proposition that the availability of property for particular uses should be taken into consideration when its value is being estimated. It was accordingly decided that the value of the land as a reservoir site should have been considered by the trustees, and that as they sold the property in disregard of the special advantage which it thus possessed, and at a much lower price than might otherwise probably have been obtained, the sale could not be approved. It was remarked that the trustees had made no effort to sell the land to the City of Baltimore, although they knew it was in the market for a reservoir site in that locality, and disposed of the property as if it were [385] ordinary unimproved ground. In this connection it was said, in the language of the lower Court, which was quoted with approval: “Had the city proceeded by condemnation (as it might

have done), the peculiar value of this land as a reservoir site would have been a fact to be considered by the jury in assessing its value.”

The case of *Matter of Simmons*, 130 App. Div. 350, 114 N. Y. S. 571, 195 N. Y. 573, 88 N. E. 1132, 229 U. S. 363, 33 S. Ct. 876, 57 U. S. (L. ed.) 1228, 46 L.R.A.(N.S.) 391, is cited as tending to support the opposite theory. But an examination of the decision rendered in that case, by the courts of New York and by the Supreme Court of the United States, has satisfied us that they are not opposed to the general trend of authority on the subject under inquiry. In the opinion delivered by the Appellate Division of the Supreme Court of New York it was said that the landowner, whose property was being taken as part of the site of the Ashokan Reservoir for New York City, was entitled to receive its market value for any purpose to which it was adapted. The principle was distinctly recognized that when land is shown to have a market value for some particular use, its adaptability to that use can be taken into account in the estimate of the compensation to be awarded. In that case the landowner did not attempt to prove that the value of the property had been increased by its availability for reservoir purposes before the commencement of the condemnation proceedings. It was pointed out that there was no evidence “of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined.” In the absence of such evidence it was held that the owner had received the benefit of everything which enhanced the value of his property except the increase caused by its appropriation for the use of the city. The action of the Appellate Division in sustaining the award was affirmed by the Court of Appeals of New York without the delivery of an opinion. The case was then appealed to the Supreme Court of the United States upon the question as to whether the ruling [386] on the measure of compensation amounted to a taking of property without due process of law. This question was answered by the Supreme Court in the negative, and Mr. Justice Holmes, who delivered the opinion, observed: “The enhanced value of the land as part of the Ashokan Reservoir depends upon the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation.”

It is apparent, therefore, that the case last cited is consistent with the theory of the other decisions referred to that any particular capa-

bility which actually enhances the value of the property independently of the demand created by the condemnation, should be considered in the estimate to be made of the market value which constitutes the measure of compensation. In the case now before us the defendant offered to prove the existence of such a condition with reference to the land involved in this proceeding. It was testified by the Sanitary Engineer of the State Board of Health that he had examined the defendant's property in respect to its contour and drainage, and it was then proposed to prove by the witness that by reason of the topographical features of the ground a storage reservoir could readily be constructed there with a capacity of 1,200,000,000 gallons, that there was a market at that time for such a reservoir, that the site will be destroyed by the taking of the property sought to be condemned, and that the land has an independent value as a reservoir site. The reason for the exclusion of the evidence thus proffered is not indicated in the record, but the argument against its admission was that the land in question could not have any value as a reservoir site, apart from the object of the present condemnation, because its owner would have no right to impound and distribute the waters of the [387] stream flowing through it without the consent of the City of Baltimore as the lower riparian proprietor, and that as the City needs the stream as a source of supply for its people, the storage of the water for the use of other consumers would be legally impracticable. In order to sustain this contention we should have to hold in effect that the evidence offered to be introduced, though theoretically admissible under the rule we have discussed, must nevertheless be excluded in this instance on the ground that the special element of value to which it refers could not possibly have any existence in fact, and is, therefore, incapable of being proven. The record, however, does not justify such a conclusion. It affords us no sufficient reason for making a formal and final declaration that the defendant's land cannot conceivably have any peculiar availability for the purposes of a reservoir in view of the acquisition by the City of the rights of a lower riparian owner. It would not seem reasonable to hold that land situated on a watercourse can under no conditions have any inherent value as a reservoir site unless it is held under a common ownership with all the other properties through which the further course of the stream extends. If it affirmatively appeared that the use of the tract in question for such a purpose would necessarily have involved an invasion of the riparian rights of the City, which it has held for many years, there could be no difficulty in eliminating the element of reservoir value from further consideration.

But the proffer is distinctly made to prove that the land has an *independent* availability for such use, and the record does not conclusively show that competent evidence to that effect could not be adduced. If we were to preclude the inquiry which the defendant proposes on that subject, we could not be certain, as the case is now presented, that his rights were receiving the full measure of recognition to which they may be justly entitled. In our opinion, the defendant should have the opportunity he desires to prove, if he can, that the property being condemned has an independent value and marketability as a reservoir site. If testimony had been allowed [388] to be introduced for that purpose, and had appeared to be merely speculative or otherwise legally insufficient to support the theory upon which it was admitted, it could have been stricken out or withdrawn from the consideration of the jury by suitable instructions. As Chief Justice Rugg said in *Smith v. Com.* 210 Mass. 259, Ann. Cas. 1912C 1236, 96 N. E. 666, where a somewhat similar question was under discussion: "Witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions of sale by fantastic visions as to future exigencies of growing communities." But we cannot determine in advance that the evidence here proffered would be too inconclusive to be considered, and we are, therefore, unable to concur in the ruling by which the offer was unconditionally refused.

The other question to be considered relates to the amendment of the condemnation proceedings by the provision we have noted reserving to the land owner, and his successors in title, a right of access to the waters of Peterson's Run at the place and for the purposes stated, and imposing upon the condemning agency the duty of elevating and reconstructing the road and bridge upon which the eastern portion of the land is dependent for an outlet to the public highway, and reserving to the present and future owners of the property a perpetual right to the use of the way thus preserved. It was, of course, the object of these stipulations to mitigate the damages occasioned to the defendant's remaining land by the appropriation of the part required for the purposes of the condemnation. The property taken was condemned in fee simple, and it will be flooded to such an extent as to require, as already stated, the raising of the road and bridge if they are to be further utilized. The effect of the amendment in this regard is not to reserve from the condemnation an existing and available roadway over the land, but to provide a new way upon a higher level in lieu of the one which the waters of the reservoir will render impassable. Such a substi-

tution, according to the terms of the amendment, [389] involves the construction of the new roadway and bridge by the City and their future maintenance by the owner of the land to which the way is intended to be appurtenant.

As the condemnation of a part of the defendant's land entitles him, in addition to the value of the property taken, to compensation for any injury to the value of the remainder resulting from the use of the condemned portion for the purposes of its acquisition, the question we are now to decide is whether the consequential damages thus accruing to the defendant can be partially satisfied by the reservation of the rights and the creation of the obligations specified in the amendment.

In *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, where the question before the Court grew out of the fact that part of a lot of ground owned and occupied by a coal dealer had been condemned for a railroad right of way, and the inquisition as returned required the condemning company to erect for the lot owner a trestle to be used for moving coal, in place of one which would be removed in the building of the railroad, and imposed other conditions, it was said by Chief Justice Bartol to be a correct statement of the law, as quoted from *Mills on Eminent Domain*, section 112, that: "Compensation is ordinarily to be made in money, yet reservations of rights to owners are favored, and the condemning party may ratify an award, a part of which requires certain improvements to be made for the benefit of the owner. The reservation of rights to the owner is only carrying out the spirit of the law, that the public improvement shall be made with the least damage to private individuals. These conditions and reservations cannot be fixed against the will of the parties." This quotation was partially repeated in the case of *Russell v. Zimmerman*, 121 Md. 339, 88 Atl. 337.

In 15 Cyc. 898, it is said to be "the duty of the jury or commissioners to award compensation to the property owner in money, and they cannot in lieu thereof impose conditions upon the party condemning the property, or require the property owner to accept certain privileges." The rule is [390] stated to the same effect in *Lewis on Eminent Domain*, (3d ed.) sec. 756, and has been applied in *Chicago, etc. R. Co. v. Melville*, 66 Ill. 329; *Central Ohio R. Co. v. Holler*, 7 Ohio St. 220; *Chesapeake, etc. R. Co. v. Halstead*, 7 W. Va. 301; *Hill v. Mohawk Hudson River R. Co.* 7 N. Y. 152; *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931.

In a case like the present, where part of the farm on which the buildings are located is apparently dependent for an outlet upon the roadway over the portion of the land which is being condemned, it seems entirely

reasonable that the way should be preserved, if possible, in order to promote the convenience of the landowner and to reduce the extent of the consequential injury to the property. But as the defendant is objecting to the provisions which seek to accomplish that result, and as he is entitled to assume such a position by virtue of the rule stated in the decisions of this and other courts, we are unable to sustain the inquisition in its present form. Upon the remanding of the case it may be practicable to restrict the interest or area to be acquired, or modify the terms of the condemnation, so as to avoid the difficulty now presented. The brief of the appellee suggests that the objection could be obviated, and there is ample authority to permit an amendment for that purpose. Code, Art. 33A, sec. 4.

The reservation of an unrestricted right to the present and succeeding owners of the land not condemned to have their cattle resort to the waters of Peterson's Run need not be separately discussed, but it may be observed that the propriety of this provision may be open to question when applied to a municipal water supply, and the right would at all events be precarious in view of the power vested in the State Board of Health, by Chapter 810 of the Acts of 1914, to prevent the pollution of the waters of the State in so far as may be necessary for the protection of the public health or comfort.

It is urged on behalf of the City that the objection we have considered, as to the reservation and conditions created [391] by the amendment to the petition, was not raised in the Court below, and is, therefore, not a proper subject for review on appeal. The motion *ne recipiatur* denied the right of the City to modify the petition by inserting the stipulations in question, and the reasons assigned were that the proposed amendment was too vague and uncertain, that it was inconsistent with the petition as filed, that it was offered too late, and that it was not germane to the issue upon which the jury had been sworn. The objections thus interposed were sufficiently comprehensive to entitle the defendant to have this Court pass upon the question here presented.

The further contention is made that the damages assessed by the jury afford the defendant more than adequate compensation upon any of the theories advanced, and that he has consequently not been injured by the rulings to which he objects. There is the usual wide diversity of opinion in the testimony contained in the record as to the proper amount of damages to be awarded the defendant, but some of the estimates exceed the sum ascertained by the verdict, and we are not at liberty to rule as a matter of law, upon the evidence before us, that the allowance made by the jury was so obviously excessive from

any point of view, as to render nonprejudicial the rulings we have under consideration.

There is an exception in the record which relates to the instructions granted at the instance of the City, but the questions thus raised are answered in effect by the views we have already expressed.

Judgment reversed, with costs and cause remanded.

#### NOTE.

The reported case applies the general rule that in determining the value of property taken for public use the adaptability of the property to a particular use may be shown to enhance its value. It is accordingly held that in proceedings to condemn land for a reservoir site it may be shown that the land is peculiarly adapted to that use. The cases applying the same rule to the condemnation of land on which is a stream available and of value as a source of water supply are reviewed in the note to *Smith v. Com.* Ann. Cas. 1912C 1236.

#### ESTATE OF BECKWITH ET AL.

v.

#### SPOONER.

Michigan Supreme Court—December 18, 1914.

183 Mich. 323; 149 N. W. 971.

#### Workmen's Compensation Acts — Termination of Allowance — Review of Findings.

On petition to review an order of the industrial accident board denying an application to stop compensation, the essentials leading up to the award or its equivalent are to be taken as *res judicata*, except the physical condition of the injured employee, which remains open to inquiry.

[See note at end of this case.]

#### Same.

Where a molder was injured by a splash of molten iron into his right eye, and after ample opportunity for investigation an agreement as to compensation was entered into between him and a casualty company insuring the employer's liability under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), in which it was recited that the nature and cause of injury and ground of claim was molten iron splashed into right eye, causing a bad burn in the corner of the eye, such agreement, when approved by the industrial accident board, and an order for compensation entered in accordance therewith,

were conclusive as to the cause of the injury, so that in a subsequent proceeding to terminate compensation, it could not be successfully claimed that the defect in the eye at the time of the order was the result of senile cataract.

[See note at end of this case.]

#### Same.

Findings of the industrial accident board that an injured employee's condition was the result of injury and not of senile cataract could not be set aside on petition for review, unless the court could say from the whole record as a conclusion of law that the board must have found from the evidence as a conclusion of fact that the cataract in the eye was senile and not traumatic.

[See note at end of this case.]

#### Same.

Where compensation was granted to an injured employee under an agreement providing that he had sustained an injury to the eye as the result of traumatism, evidence on a petition to terminate the compensation held not to require the industrial accident board as a matter of law to find that the condition was not traumatic, but senile.

[See note at end of this case.]

Certiorari to Industrial Accident Board.

Petition for order terminating right to compensation of Alden Spooner. Estate of P. D. Beckwith et al., petitioners. Petition denied. Petitioners bring certiorari. The facts are stated in the opinion. **AFFIRMED.**

*Charles H. Ruttle* for petitioners.

*Person, Shields & Silsbee* for respondent.

[325] STEERE, J.—Plaintiffs and appellants herein seek, by certiorari, review and reversal of certain "Proceedings and Decisions and Awards," had and made before and by the Industrial Accident Board of this State, which culminated in the following final order: "Alden Spooner, Claimant, v.

"Estate of P. D. Beckwith & Fidelity & Casualty Company of New York, Respondents.

"This matter having come on to be heard upon the petition of the respondent filed herein, praying for relief and to stop compensation for reasons set forth in said petition, and, after full examination of the proofs, upon said petition, and hearing argument thereon, and due consideration thereon having been had, and it appearing to the board that the facts alleged in said petition as reason for stopping compensation are not sustained by the proofs, it is ordered and adjudged that the said petition be, and the same is hereby, dismissed."

It appears undisputed that said Alden Spooner was regularly employed as a molder by the above corporation, known as the "Estate of P. D. Beckwith," of Dowagiac,

Mich., which, as an employer of labor, had, with approval of the Industrial Accident Board, elected to come under the provisions of Act No. 10, Public Acts of 1912, Extra Session (2 How. Stat. [2d ed.] § 3939 et seq.). While regularly engaged in its employment as a molder Spooner suffered an accident resulting in an injury to his right eye, described by his employer, in its report made under the requirements of section 16, part 3, of said act, as follows: [326] "Molten iron splashed into right eye, right eye burned."

Section 5 of part 3 of said act provides:

"If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employee reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

Pursuant to the provisions of this section the following was filed with the Industrial Accident Board, on November 14, 1913:

"AGREEMENT IN REGARD TO COMPENSATION.

"We, Al Spooner, residing at city or town of Dowagiac, Mich., and Fidelity & Casualty Co. of N. Y., have reached an agreement in regard to compensation for the injury sustained by said employee while in the employ of Estate of P. D. Beckwith, Inc., Dowagiac.

"The time, including hour and date of accident, the place where it occurred, the nature and cause of injury and other cause or ground of claim, are as follows:

"Mr. Spooner was injured October 22, 1913, about 4:30 P.M. Molten iron splashed into right eye, causing bad burn in corner of eye.

"The terms of the agreement follow: \$17.60 wages earned; \$8.80 compensation agreed upon.

"Al Spooner.

"Fidelity & Casualty Co., of N. Y.,

"By Leo A. Donahoe.

"Witness: Wm. Hurst.

"E. A. Miecham.

"Dated at Dowagiac, Mich., this 12th day of November, 1913."

This agreement was approved by the Industrial Accident Board on November 14, 1913, and thereafter compensation was paid accordingly from October 22, 1913, to January 14, 1914. On January 21, 1914, appellants [327] filed with the Industrial Accident Board a petition asking to be relieved from further payments, based upon the following letter or report, addressed to Dr. Jones, the local physician who attended Spooner professionally at the time of his injury, and who had referred him to Dr. Bonine, an eye specialist:

January 15, 1914.

Dr. J. H. Jones,  
Dowagiac, Mich.

Dear Sir:

I have had Mr. Spooner under my careful scrutiny and find the following condition: Some years ago I operated for cataract on one eye and obtained good results—above the average. The other eye shows signs of the same trouble at this time. That, however, is not strange as it is the rule with senile cataracts if they come on one eye they are quite certain to grow on the other, as you know.

Therefore there is nothing unexpected about the remaining lens filling in, so can't see where any one could be held responsible for present conditions, as no other pathological condition of the orbit is in evidence.

[Signed] F. N. Bonnie, M. D.

Upon the hearing of said petition depositions of Drs. Jones and Bonine were introduced in evidence. The board thereafter made the following:

"FINDINGS OF FACT.

"(1) The respondent, Alden Spooner, was employed in the plant of the Estate of P. D. Beckwith, Inc., as a molder, and had worked there for several years in that capacity. He was 65 years old, and at the time of the injury was receiving wages of \$17.60 per week.

"(2) That on October 22, 1913, respondent while attending to his duties as a molder, received an injury to his right eye by having hot sand and other substances splashed into the same, producing an inflammation necessitating immediate medical attention and causing disability to do work.

"(3) That in 1905 respondent had a cataract removed from his left eye by Dr. F. N. Bonine, and that [328] such operation was successful and the result thereof above the average.

"(4) That respondent's right eye, being the one injured in October, 1913, has now developed a cataract, which is so far advanced that he can discern light, but has practically no vision. His left eye, operated on in 1905, is of little use, and he is in a condition of total disability on account of the condition of his said eyes.

"(5) That the claim of petitioners that the present condition of respondent's right eye is due not to the injury thereof on October 22, 1913, but that such condition is due to senile cataract, is not sustained by the evidence.

"(6) That the present condition of respondent's right eye and his resulting disability is due to the injury received by him October 22, 1913.

"(7) That all of the proposed findings of fact of petitioners, not included in these findings, are refused."

Against the action of the Industrial Accident Board in this matter, appellants urge two major grounds of reversal: *First*, that the controlling findings of fact are unwarranted and unsupported by evidence; and, *second*, "insufficiency of proceedings." In explanation of the latter it is stated that not the legality, but the sufficiency, of the proceedings is questioned, in the particular that, although appellants' in support of their petition produced proof which established—

"Spooner was suffering with a senile cataract, and that his disability was not a result of his injury of October 22, 1913, yet the Industrial Accident Board refused to accept the unchallenged testimony of the physicians, and without any further evidence whatsoever, as to Spooner's precise condition, with respect to his eyes, entered an order denying appellants' petition, which order is so vague, uncertain and indefinite that it may work irreparable damage to appellants, . . . " and "that appellee has never produced any proof that he sustained an injury while in the employ of the Estate of P. D. Beckwith, Inc.; that there is no evidence that his disability or impairment of eyesight [329] were a result of his accident of October 22, 1913, as well as that it did not exist for some time prior to the date mentioned; that at no time has any admissible evidence been offered relative to his present condition, whether the sight of the left eye operated on in 1905 is good, or in any degree impaired, and if impaired to what extent, nor is there any testimony as to the exact condition of the right eye, in which grains of sand lodged on October 22, 1913, and whether the sight in that eye is impaired, permanently or partially, or to what degree."

In the latter particular appellants disregard the significance of the report and agreement as to compensation filed by them, which eliminate the various statutory steps of arbitration now urged as imperative. The agreement, filed with and approved by the board, is a substitute for, and, under the statute, the legal equivalent of, an arbitral award. They have equal force and like standing when, to enforce recovery it becomes necessary to put them in judgment in the circuit court for the county where the accident occurred (section 13, part 3, of said act). The power of the board to act upon a petition such as appellants presented in this case is found in the following section (14), which authorizes it to review any weekly payment at the request of the employer, insurance company carrying the risk, commissioner of insurance, or employee, "and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action."

On the hearing of such petition for review it can be stated as a general rule that the essentials leading up to the award, or its equivalent, are to be taken as *res adjudicata*, except the physical condition of the injured employee, which naturally and legally remains open to inquiry. *Mead v. Lockhart*, 2 B. W. C. C. (Eng.) 398.

We discover no claim in this record that appellants were induced to enter into the agreement regarding [330] compensation by fraudulent misrepresentations of the other party. It is established beyond question by their own representations that Spooner was injured on October 22, 1913, while working as a molder for the Estate of Beckwith, by "molten iron splashed into right eye; right eye burned;" that he was treated by Dr. Jones, one of their witnesses, on October 23d, 27th, 30th, and 31st. Dr. Jones, a physician in general practice, testified that he found small, black particles of foreign substance in the right eye and inflammation in the conjunctiva, but neither it nor the cornea were abraded or penetrated; that the inflammation was slow in disappearing, and continued over several weeks—four or five weeks before it disappeared—that he thought it a case which needed the service of a specialist, and referred the patient to Dr. Bonine. The only reference in Dr. Jones' testimony to a cataract is found in this answer to a question, on cross-examination, whether he thought the injury he treated would cause, or help cause, a cataract.

"A. Well, upon technical points, the substance of special matters bearing upon the interior conditions of the eye, I don't make a special work of it. I would state, however, severe injuries to the eye do cause cataracts. I do not make a practice of treating conditions that involve the interior of the eye, but I refer them to a specialist."

We see no force in the contention that at the time of settlement Spooner was not suffering from an injury which arose out of and in the course of his employment. The manner of the accident and condition of the eye were then open to appellants' investigation, and unquestioned. After ample time and opportunity to learn fully of the accident and history of the case from the physician in charge, the injured employee, and all other sources, the agreement was made on November 12th following. We find no testimony tending in any manner to show that prior to the accident there [331] was any cataract or impairment of vision in, or trouble with, this right eye. Thereafter its vision was impaired, and a state of inflammation, slow in healing, led the local physician to refer the patient to a specialist, who, on December 20, 1913, discovered an immature, developing cataract, the existence of which was undisputed at the time of hearing.



Dr. Bonine testified that when he examined the injured eye, on December 20, 1913, "there was irritation of the eye that could be attributed to an inflammatory state of traumatism producing it, or hardness of the eyeball would cause a largeness of the vessels of the eye, would give it that appearance;" that he found a pretty well-advanced cataract on that eye, but could not tell how long it had been forming, because he had not seen Spooner, except casually, since he operated on his left eye for a cataract eight years previous, in 1905. In explaining the nature of cataracts, witness stated that there were three distinct ways in which they are formed, the simplest being a traumatic cataract, caused from an injury, the second a senile cataract, caused by an interference with the nourishment of the lens through diseases of the inner tissues, and the third hereditary, or resulting from hereditary tendency; that a traumatic cataract would usually come in from one to three or four weeks after an injury, or sometimes instantly if the lens was pierced so that the aqueous humor came in contact with it; asked if this was a traumatic or senile cataract, he answered:

"A senile. . . . It is the rule when a cataract comes on one eye the tendency is to form on the other; not necessarily, but it is the rule, and not concurrent. . . .

"Q. Could you determine, in saying, whether this was a senile or traumatic cataract?

"A. The stage of inflammation had gone on until it would be a difficult matter to do that. The only indication [332] had was irritation or flushed eyeball that I spoke of at first; that was traumatism.

"Q. Has the cataract grown since you first saw Mr. Spooner in December?

"A. From the first to the last the vision has decreased decidedly. . . .

"Q. If this was a traumatic cataract, would it have been probably fully developed by December 20th, in 8 weeks?

"A. Depending upon the severity of the injury. If the injury was slight, it would develop slowly."

Being asked on cross-examination, "In your opinion, doctor, is there any connection between the cataract on the left eye and on the right?" he answered:

"The only connection established would be the rule of the formation of cataracts, as over 80 per cent of cataracts that form first in one eye would later form on the other, 20 per cent of one eye will be cataracts, and the other eye not at all, so that is the only relation one eye could have to the other."

The doctor nowhere testifies that the cataract removed by him from the left eye over eight years before was senile, but such possibly may be inferred from his testimony, especially when considered in connection with his letter to Dr. Jones.

Section 12, part 3, of said Act No. 10, under which these proceedings are had, empowers this court to review only questions of law; all questions of fact determined by the board from competent evidence being conclusive, in the absence of fraud. It must be conceded, as urged by appellants, that the record discloses no testimony, competent or otherwise, to sustain the finding:

"His left eye, operated on in 1905, is of little use, and he is in a condition of total disability on account of the condition of his said eyes."

This finding, however, tends only to confuse, and must be eliminated from consideration, not only because it has no evidential support in the case, but no [333] claim was ever made for injury to the left eye, and its condition is not in issue. With it eliminated, there is sustaining evidence for the remaining findings of fact essential to support the order sought to be reversed.

The controlling issue raised before the board by appellant's petition for review was whether they had by their evidence conclusively established that the cataract which appeared in claimant's right eye after the injury was senile, and therefore not connected with, or attributable to, such injury. To sustain appellant's contention here this court must therefore be able to say, from the whole record, as a conclusion of law, that the Industrial Accident Board must find, not could find, as a conclusion of fact, that the cataract in the injured right eye is senile and not traumatic, and that Spooner was not, at the time of hearing said petition, under any incapacity attributable to the accident, and resulting injury to that eye, on October 22, 1913.

We conclude that upon such issue different inferences of fact could legitimately be drawn from what the record discloses and, in such case, where the board does not find "that the facts warrant such action" as may be requested under section 14, part 3, of the act creating said board, the court cannot disturb its findings and orders thereon, made while acting within the authority there conferred.

The order complained of is therefore affirmed.

McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

#### NOTE.

**Increase, Decrease, Termination or Suspension of Allowance under Workmen's Compensation Act.**

Introductory, 890.

Increase, 890.

Decrease, 891.

Termination, 894.

Suspension, 897.

*Introductory.*

The English workmen's compensation act and those of some of the American states provide for a review or revision of an allowance of compensation in case of a change of conditions. The statute of Michigan, on which the court proceeds in the reported case, is patterned after the English act and is fairly typical. It provides as follows: "Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer, or the insurance company carrying such risks, or the commissioner of insurance as the case may be, or the employee; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action." Some American acts limit the time within which a revision may be applied for. Thus the Illinois act provides for a review "at any time within eighteen months after such agreement or award." Other statutes contain no provision for a review. The provisions of the English act have been the subject of much litigation, but as yet there have been few decisions under the American statutes. The extent of the power to increase, decrease or terminate an award in the absence of an authorizing statute seems never to have been passed on.

*Increase.*

Under some of the workmen's compensation acts an increase of allowance may be awarded a workman in case of an unexpected continuance of incapacity to perform the work at which he was engaged at the time of his injury or a change in the condition of the injured man since the original allowance. *Walton v. South Kirby, etc. Colliery*, 107 L. T. N. S. (Eng.) 337, 5 B. W. C. C. 640; *Foley v. Detroit United Ry.* (Mich.) 157 N. W. 45. See also *Moreland v. Eley* [1915] W. N. (Eng.) 359, 60 Sol. J. 59. Thus in *Walton v. South Kirby, etc. Colliery, supra*, it appeared that a workman while mining coal for his employers received injuries to his head, body and foot through the fall of a roof. After paying his compensation for some time the employers ceased doing so on the ground that he was fit to return to work. Proceedings were taken thereupon and an award was made for the payment of arrears and a stipulated sum up to a certain date and thereafter 1d. per week. According to the evidence of the workman's doctors he was unable to work. The employers' doctor stated that he was able to do some light work, and the employers said they were prepared to find him such work. On the workman applying from time to time he was informed they could not give him any work but at the coal face, and he

was not fit to go there. Ultimately he was told to commence when he liked at the coal face which he did but was unable to continue owing to his injuries and was ordered out and told to see the manager. He did this and was told there was nothing else for him to do. He then applied for a review of the weekly payment asking for an increase. The county court judge could see no change of circumstances at all and found that he had made no definite attempt to work at the coal face, thereupon dismissing the application. Discharging the order of the county court judge and allowing the appeal, *Kennedy, L. J.*, said: "With great respect to the learned county court judge, I am entirely at a loss to understand how upon the uncontradicted evidence at the last hearing, the learned county court judge found that there was either no change of circumstances or no bona fide attempt to work. It seems to me that there has been some misunderstanding in the evidence which I am unable to explain. Then still less, if it were possible, do I understand the statement that the evidence was the same as before. We have nothing to do with deciding quantum, but, with great respect to the learned county court judge, it is quite clear that the workman is entitled to compensation, the amount of which the learned county court judge will have now to assess." In *Foley v. Detroit United Ry.* (Mich.) 157 N. W. 45, wherein it appeared that an injured motorman made application for further compensation, it was held that to sustain its award the Industrial Accident Board must have been able to find from competent testimony a continuing partial incapacity to properly perform such work of motorman. The court said: "There is testimony tending to sustain such a finding. Aside from claimant's own testimony as to continuing pain, weakness, and swelling in his leg which rendered it difficult for him to be upon his feet long and get around readily, the physicians called by both sides agree that he had a shortening of the leg of from a half to three-quarters of an inch which would be permanent, and that otherwise it would be months, if not years, before it would be strong and normal, if ever; that in its condition at the time they testified the lost percentage of normal use and strength was from 25 to 75."

On the other hand, where there has been no change in the condition of the workman from the time of the award no increase of compensation will be granted. See *Giardelli v. London Welsh Steamship Co.* [1914] W. C. & Ins. Rep. (Eng.) 339, 7 B. W. C. C. 550; *Scott v. Long Meg Plaster Co.* 111 L. T. N. S. (Eng.) 773, 7 B. W. C. C. 502 [1914] W. C. & Ins. Rep. 258. Thus in *Giardelli v. London Welsh Steamship Co. supra*, it appeared that a workman applied for an increase of allowance.

The county court judge, refusing the application, found that there was no change in his condition and that he could do light work, both at the time of the award and of the review. It was held that the finding was justified.

In *Hart v. Cory* [1915] W. N. (Eng.) 369, 60 Sol. J. 89, 85 L. J. K. B. 116, wherein it appeared that a workman's left eye was injured, no increase was allowed for trouble to his right eye later on which was not caused by the accident. And in *Williams v. Bwlfa*, etc. *Steam Collieries* [1914] 2 K. B. (Eng.) 30, 83 L. J. K. B. 442, 110 L. T. N. S. 561, 7 B. W. C. C. 124 [1914] W. N. 44, wherein it appeared that an application for a review of the weekly payment was made by a workman who was under twenty-one years of age at the time he was disabled, it was held that the court could not award an increase as from a time prior to the date of the application. The court said: "It is important to make it quite clear that this appeal falls to be determined upon the proper construction to be attached to the proviso. Paraphrasing that proviso, it comes to this: if the injured workman was an infant at the date of the accident and if the review takes place more than twelve months after the accident the court may inquire what the applicant probably would have been earning at the date of that inquiry and may award any percentage of the sum so found up to fifty per cent thereof; that is to say, the compensation is fixed not with regard to the actual earnings, but with regard to what the workman would probably have been earning at a particular moment of time had he remained uninjured. It is not open, in my view, to the learned judge, having found, if he had found, as a fact that the workman would be earning a particular wage at a particular moment of time, to really assume that he would have been earning, without evidence, that same amount of wages at an antecedent date, and to throw back the operation of the order to such antecedent date. In my opinion the order operates and can only operate from the moment of time at which the inquiry is to be answered—that is to say, the moment of time at which the inquiry is initiated."

#### Decrease.

The allowance awarded a workman for injury under a workmen's compensation act may be reduced if it is shown that he has recovered to an extent enabling him to do light work. *Cardiff Corp. v. Hall* [1911] 1 K. B. (Eng.) 1009, 104 L. T. N. S. 467, 4 B. W. C. C. 159; *Silcock v. Golightly* [1915] 1 K. B. (Eng.) 748, 84 L. J. K. B. 499 [1914] W. C. & Ins. Rep. 164, 8 B. W. C. C. 48, 112 L. T. N. S. 800 [1915] W. N. 33; *Roberts v. Hall*, 106 L. T. N. S. (Eng.) 769 [1912]

W. C. Rep. 269. See also *Ashmore v. Lillie* [1915] W. C. & Ins. Rep. (Eng.) 7, 8 B. W. C. C. 89. Compare *Proctor v. Robinson* [1911] 1 K. B. (Eng.) 1004, 3 B. W. C. C. 41. Thus in *Roberts v. Hall*, *supra*, wherein it appeared that a workman was able to do light work, it was held that the judge had discretion to reduce his allowance without evidence of the amount the man could actually earn. *Fletcher Moulton, L. J.*, said: "In my judgment it would be a real calamity if we were to hold that compensation could not be reduced unless there was definite evidence as to the amount the man is able to earn at particular work and the probability of obtaining that particular work. Cases would go on to such a length and would require so much evidence, that instead of this being a beneficial jurisdiction it would be onerous to both parties. The act contemplates and enjoins that the arbitrator should use his good sense in the same way as members of a jury. I think he has a wider discretion than a jury because the act has not laid down any definite directions as to what the compensation should be. There is a maximum in the case of partial incapacity. It is not to exceed the difference between the wages the workman was earning before the accident and the wages he is still earning, or 'is able to earn in some suitable employment after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.' Here the employer has established his right to have the amount of the weekly payment reviewed. Nineteen shillings represented the total incapacity. The employers proved that the workman was now able to do braiding or other light work. Thereupon the arbitrator was bound to consider what was the relation between the past and present wages. He came to the conclusion that the amount ought to be reduced to 14s. a week. In my opinion there was abundant material on which he could come to that conclusion, especially when taking into account his own knowledge of the work in that locality and the fact of the man being able to do some light work. This court does not reverse such a decision merely on a question of quantum for which there was abundant material." In *Cardiff Corp. v. Hall* [1911] 1 K. B. (Eng.) 1009, 104 L. T. N. S. 467, 4 B. W. C. C. 159, it appeared that the county court judge reduced the weekly payments of a workman on the report of a medical referee that the man though not able to do his former work could do light work. Dismissing an appeal from the finding the court said: "The facts here are that after certain evidence had been tendered before the judge the matter was sent to a medical referee who reported that 'Osborne Hall is now quite able to do any form of light work—more particularly such

as would require principally the use of the right hand.' This is a complete finding of capacity for work such as described. Hall had made attempts in a number of directions to get work and had failed, but such failure was not by any evidence connected with the fact of the personal disqualification under which he stood by reason of the stiffness of the right arm and the weakness of the grip of the left hand. There was evidence of ability to earn qualified only by some evidence of difficulty in getting employment. Under these circumstances the judge could in my judgment rightly find as he did that the circumstances had so altered as that the weekly sum ought to be reduced, and he has reduced it." So in *Silcock v. Golightly* [1915] 1 K. B. (Eng.) 748, 84 L. J. K. B. 499 [1914] W. C. & Ins. Rep. 164, 8 B. W. C. C. 48, 112 L. T. N. S. 800 [1915] W. N. 33, it appeared that an appeal from a decision of the county court judge of Liverpool who had diminished the weekly compensation payable to a workman for the loss of his right arm was dismissed. Lord Cozens-Hardy, M. R., said: "On the whole, I have come to the conclusion that we cannot interfere with the decision of the learned county court judge. I think that he was entitled to take advantage of his own local knowledge, and to say that, although the workman is one-armed and left-handed, he is not so disabled from earning anything that he should be allowed to be a pensioner for life receiving 11s. a week from his employers, having the good fortune to have a wife who is earning 15s. a week, and so live in comparative ease on an income of 26s. a week doing nothing. I think that we ought not to encourage such conduct, and I think that the learned county court judge was justified in saying that, from his local knowledge, he was satisfied that this is a man who is able to obtain light work in Liverpool if he wished to try to do so. Of course, at some future occasion, if the workman should have made attempts—honestly and in good faith made them, and extensively made them—and found himself unable to obtain any light work suitable for his infirmities, then it may be open to him to apply for, and it may be competent for the learned county court judge to grant an increase from the 7s. 6d. a week to the 11s.

In *Sharman v. Holliday* [1904] 1 K. B. (Eng.) 235, 90 L. T. N. S. 46, 6 W. C. C. 147, the court reduced a weekly payment to a nominal sum on the ground that the workman injured was no longer incapacitated. And in *Wright v. Sneyd Collieries*, 113 L. T. N. S. (Eng.) 633 [1915] W. C. & Ins. Rep. 354, 8 B. W. C. C. 537, it appeared that an award was reduced to 1d. per week owing to the conduct of the injured employee in refusing to submit to proper treatment. So in *Radcliffe v. Pacific Steam Nav. Co.* [1910] 1 K. B.

(Eng.) 685, 102 L. T. N. S. 206, 3 B. W. C. C. 185, it appeared that compensation was reduced on the ground that the workman's chances were somewhat, though not very materially, decreased by his loss of a finger.

In *New Monckton Collieries v. Toone*, 109 L. T. N. S. (Eng.) 374 [1913] W. C. & Ins. Rep. 425, 6 B. W. C. C. 160, 57 Sol. J. 753, it was held that the burden was on the employers to show that a workman was able to perform work of the kind that he was doing at the time of the accident. It appeared that a miner was injured and an award of 18s. 3d. was paid him for about a year. Light work in the pit was then offered him and he took it. Shortly thereafter a doctor acting for the employers reported that the workman was fit to return to his old work. No suitable working place was ready for him and he did not return to his old work at the coal face. Later on owing to a loss of memory he conducted himself in a peculiar manner and was prohibited from going down in the pit again and work was found for him at the surface. His mental condition was in no way connected with the injury to his back. Application was made to terminate or diminish the weekly payment. Without hearing evidence on behalf of the respondent the arbitrator decided first that the applicants had not affirmatively discharged the onus of proving that the respondent had entirely recovered from the injury to his back; and, secondly, that it was proved to his satisfaction that the respondent's mental state was not connected with his injuries; but that it was not proved to his satisfaction that such mental state rendered him incapable of returning to his old work as a miner. He therefore refused to terminate the weekly payment but reduced the same, having regard for the wages that the workman was capable of earning. The court said: "The arbitrator found that the applicants, the employers, had not affirmatively discharged the burden upon them of proving that the respondent, the workman, had recovered—I leave out the word 'entirely'—from the effects of the injury to his back. Having regard to the evidence, these two matters strike one forcibly: The first is, that although the issue which the employers came to prove was that the workman had recovered from the effects of his injury and that the incapacity had ceased, they adduced no direct evidence to that effect. There was a statement of the workman that he had had no trouble with his back. But the doctor was not even desired to examine, and did not in fact examine, the workman from that point of view in order to establish that the incapacity arising from the injury had ceased and that the workman had recovered from the accident. He did not examine him from that point of view and gave no evidence upon that point. Then the other test was:

Had the workman in fact gone back to his ordinary work, and proved by actual experiment that he could do the old work? The answer to that is 'No.' He had been down the pit. He had done some light work, and on the occasion when he came up he seemed to be strange in his mind and was not allowed to go down the pit again. In this state of things the arbitrator came to the conclusion that the evidence did not satisfy him that the workman has recovered from his accident. In my opinion the arbitrator might quite fairly and properly have taken the view he did, and that, without disbelieving the evidence at all, it was quite open to him to say that the burden which the employers had to discharge had not in fact been discharged by the evidence that has been adduced." In *Hosegood v. Wilson* [1911] 1 K. B. (Eng.) 30, 103 L. T. N. S. 616, 80 L. J. K. B. 519, 27 Times L. Rep. 88, it appeared that the employers applied for a review of the weekly payments made to a workman for injuries. The judge reduced the payments to a sum specified from a date some time previous to the order. The employers stopped the weekly payment of the reduced sum in order to reduce the overpayment. Holding that this could not be done, *Fletcher Moulton, L. J.*, said: "It is clear by par. 19 of the 1st schedule to the act, that it is intended that the weekly payments that are awarded to workmen by way of compensation should be paid to them, and should not be allowed to be the subject of set-off or any cross-claim. In the present case the decision of the learned judge establishes that the employers have, during certain past weeks, paid, under compulsion of law, a sum larger than they ought to have paid. The balance they can clearly recover from the workman. But it is suggested that they are entitled to take the sums so paid as being paid on account of future weekly payments. My first answer is, that, as a fact, they were not paid on account of future weekly payments; the second answer is, that under the paragraph to which I have referred, by law they cannot be paid on account of them. For these reasons, I think that this appeal must be dismissed." Compare *Blackford v. Green*, 87 N. J. L. 359, 94 Atl. 401.

On the other hand in *Penman v. Smith's Dry Docks Co.* 8 B. W. C. C. (Eng.) 487, it was held that there was no ground for reducing the award. It appeared that after a workman had lost his eye he was offered his old work as a toolsmith. He tried it for awhile, but finding it not suitable, gave it up. The employers made application to reduce the compensation but the county court judge relied on the workman's evidence of not being able to do the work and refused to make any reduction. In *Proctor v. Robinson* [1911] 1 K. B. (Eng.) 1004, 3 B. W. C. C. 41, it ap-

peared that Robinson, a lime washer, while working for Proctor & Sons sustained injuries to his left leg and ankle. Compensation was settled by agreement. After the agreed sum had been paid for twelve months the question arose whether the man had recovered so far as to justify an application by the employers to reduce the weekly payments. It was not suggested that the man had fully recovered. Dismissing an appeal from an award of the county court judge refusing to diminish the weekly payment it was held that in order to obtain such reductions the employers must show what light work the workman could do and what chance he had of obtaining the same. The court said: "The appellants here were the employers, who were applying for a reduction of the amount of compensation which the workman was receiving from them. They had therefore not only to establish a right to reduce the compensation but to put the court in a position to determine the amount by which it should be reduced. They succeeded in obtaining a finding from the county court judge that the workman was able to do some light work—a vague phrase to which I think the learned judge attached no very definite meaning. They adduced no evidence that he was able to do any obtainable work nor any evidence as to his wage-earning capacity in the condition in which he then was. I think that the decision of the county court judge was right and that this appeal should be dismissed."

In *Cripps' Case*, 216 Mass. 586, Ann. Cas. 1915B 828, 104 N. E. 565, wherein it appeared that an employee worked for two and one-half months after receiving injuries from which he died, the court held that the Industrial Accident Board did not err in not deducting from the award to his widow the time during which he had resumed work as the statute stipulated that compensation should accrue from the date of the injury. See to the same effect *In re Nichols*, 217 Mass. 3, 104 N. E. 566. In *De Zeng Standard Co. v. Pressey*, 86 N. J. L. 469, 92 Atl. 278, it appeared that after his injury an employee worked for his employers for fifty-five weeks at full wages. It was contended that the fifty-five weeks should be deducted from the sixty weeks for which the award was made. Holding that no such deduction could be made the court said: "The answer is that the prosecutor was under no obligation to employ the petitioner at twenty dollars a week or any other sum, and that inasmuch as he chose to do so without any understanding, express or implied, that petitioner was not worth those wages, or that part of them should be treated as moneys paid under the compensation act, he must be presumed to have paid the money as wages and because he

thought the petitioner was worth that amount. Indeed, it was optional to petitioner to continue working for the prosecutor just as it was optional with the prosecutor to employ him, and if the petitioner had chosen to do no work, he would have been entitled to his compensation under the act just the same. We see no force whatever in this argument."

### *Termination.*

The allowance awarded a workman for injury under a workmen's compensation act may be terminated if it is shown that the incapacity resulting to him from the injury has ceased. *Gibson v. Wishart* [1915] A. C. (Eng.) 18, 13 L. J. P. C. 321 [1914] W. C. & Ins. Rep. 202, 7 B. W. C. C. 348, 111 L. T. N. S. 466 [1914] W. N. 232, 30 Times L. Rep. 540, 58 Sol. J. 592; *Bagley v. Furness* [1914] 3 K. B. (Eng.) 974 83 L. J. K. B. 1546, 7 B. W. C. C. 560 [1914] W. N. 300; *Nicholson v. Piper*, 96 L. T. N. S. (Eng.) 75, 9 W. C. C. 123, *affirmed* [1907] A. C. 215, 97 L. T. N. S. 119, 9 W. C. C. 128; *Wheeler v. Dawson*, 107 L. T. N. S. (Eng.) 339. See also *Taylor v. London, etc. R. Co.* [1912] A. C. (Eng.) 242, 81 L. J. K. B. 541 [1912] W. C. Rep. 95, 106 L. T. N. S. 354, 56 Sol. J. 323, 28 Times L. Rep. 290; *Jones v. Anderson*, 112 L. T. N. S. (Eng.) 225, 84 L. J. P. C. 47 [1915] W. C. & Ins. Rep. 151, 8 B. W. C. C. 2 [1914] W. N. 432, 31 Times L. Rep. 76; *Housley v. Hadfields*, 8 B. W. C. C. (Eng.) 497; *Dolan v. Ward* [1915] W. C. & Ins. Rep. (Eng.) 274, 8 B. W. C. C. 514; *Law v. Baird* [1914] W. C. & Ins. Rep. (Eng.) 140; *Maunder v. Hancock* [1914] W. C. & Ins. Rep. (Eng.) 327; *Hanley v. Union Stockyards Co. (Neb.)* 158 N. W. 930. Thus in *Gibson v. Wishart*, *supra*, the following facts appeared: The respondent had on September 24, 1912, completely recovered his capacity for work as a dock laborer. On September 24, 1912, he left Scotland, and on September 25 he entered into employment at Chesterfield at first as a detective and afterwards as a member of the police force and was earning the full rate of wages for a police constable. In these circumstances the sheriff-substitute ended the compensation payable under the award as at November 4, 1912, the date of the presentation of the application for review. He would have ended the compensation as at September 24, 1912, had it been competent for him in that application to do so; but he held that it was not competent for him to do so in respect since he would be disturbing a decree of Court as at a date when there was no proper application to enable that to be done. Allowing the appeal it was held that the weekly payments could be terminated as from the date of the workman's recovery from his incapacity. The

court said: "The only question is whether the words in the schedule to which I have referred enabled the sheriff-substitute to pronounce that the incapacity had ended before the application to review, in this case on September 24. I think that they did. The alternative construction would allow the workman to claim payment notwithstanding that incapacity had ceased. I think the intention of the Act is to give compensation only during incapacity. If it has ceased and the employer has not availed himself of his right to apply for review, it may be, as I have already said, that he cannot recover what he has paid while the first decree remained uninterrupted in its operation. But that would not involve the further conclusion that the judicial authority was precluded from subsequently determining the real date when the incapacity during which alone the first decree could properly continue undisturbed to operate had come to an end." In *Housley v. Hadfields*, 8 B. W. C. C. (Eng.) 497, it appeared that a steel fitter through injury lost the sight of one eye. His employers paid him compensation for a period thereafter and then stopped on the ground that he was able to resume his former occupation. This the workman admitted but said that on account of the fact that men so employed were in continual danger of such an accident, having lost one eye, he should not risk losing the sight of the other. The county court judge found that such work offered him was suitable and his finding was sustained. See to the same effect *Law v. Baird* [1914] W. C. & Ins. Rep. (Eng.) 140. So in *Maunder v. Hancock* [1914] W. C. & Ins. Rep. (Eng.) 327, the court said that if the incapacity of a workman had ceased and there was no reasonable ground for anticipating its recurrence, an award terminating compensation could be made. Likewise in *Dolan v. Ward* [1915] W. C. & Ins. Rep. (Eng.) 274, 8 B. W. C. C. 514, the court said that if the incapacity of a workman had ceased, or if still existing was due to the man's own unreasonableness in not undergoing an operation, compensation should be terminated.

But in *Cory v. Hughes* [1911] 2 K. B. (Eng.) 738 [1911] W. N. 152, an application for a review and termination of the weekly payments to a workman, it was held that the burden of proof was on the employers to satisfy the court that the man was not under any incapacity by reason of the accident which befell him. The court said: "The contention of the employers may be stated thus: 'This man was injured in 1906. For a couple of years afterwards we employed him at the same wages as before. This is evidence that his wage-earning capacity was not reduced. He could be holding that employment still but for a fact which had no

relation to the accident, namely, heart disease. He could not go uphill to his work owing to the condition of his heart. He lost his work by reason of that disease. Therefore it follows that, so far as the accident is concerned, the man's earning capacity is the same as before he was injured.' I fail to follow the sequence of ideas. It may be that it is the same as before or that it is not. The fact is not proved. What is proved is that the hand is healed, as far as it ever will be, but that he could not use it for ordinary work as a collier. The facts only come to this, that under circumstances which we have to weigh, and which are that his employers found certain light work, he did for a time get the same wages as before. It does not follow that his wage-earning capacity is the same as before." In *Birmingham Cabinet Mfg. Co. v. Dudley*, 102 L. T. N. S. (Eng.) 619, 3 B. W. C. C. 169, an appeal was allowed to a workman from a decision of the county court judge terminating an agreement with his employers to make a weekly payment as compensation for injuries received by him. The following facts appeared: "The workman was injured by an accident within the meaning of the Workmen's Compensation Act 1906 which resulted in the injury to two of the fingers of his left hand; the ends of the fingers were cut off. Compensation was paid to him for a time at the rate of one-half of his wages. Then his employers took him back to work and an agreement of a very peculiar kind was registered, by which the employers offered to give the workman work again at their works at his old rate of wages, which offer the workman accepted, and consented, whilst so employed, to the weekly payment of 15s. 9d. per week being reduced to the sum of 1d. per week. . . . In 1909 the employers applied to terminate the payment of 1d. a week." The court said: "The question which the learned county court judge put to himself appears to have been whether the workman was able to earn the same wages as he did before the accident. I do not think that was the proper question. The question should have been: Is he hampered in the labor market by reason of the accident? Is he not less likely to obtain employment? If he is, it would not be right to disentitle him from ever saying that his capacity was diminished by reason of the accident. Merely because he is with his old employers getting his old wages is not enough to prevent his saying that he is entitled to come back for compensation. The effect of an order for 1d. a week is simply to keep alive the right to obtain compensation in an event which, at the least, may be called possible and may be called probable. As I read the evidence in this case, the employers' own witnesses said that this accident had prejudiced

the workman. One said that the power of grasp was necessarily depreciated to some extent; and that if the workman were dismissed from his present employment he would not get another job so easily." In *Devlin v. Chapel Coal Co.* [1915] S. C. Ct. Sess. 71 [1914] W. C. & Ins. Rep. 621, 8 B. W. C. C. 357, wherein it appeared that the partial incapacity of a workman still existed but was due in whole or in part to his failure to return to work, the court held that as the arbitrator's findings did not exclude the conclusion that the incapacity was due partly to his injuries, compensation could not be terminated.

The allowance awarded a workman for an injury, under a workmen's compensation act, may be terminated if it is shown that his incapacity results from disease or other cause not attributable to the accident itself. *Hargreave v. Haughhead Coal Co.* [1912] A. C. (Eng.) 319 [1912] S. C. Ct. Sess. II. L. 70, 81 L. J. P. C. 167 [1912] W. C. Rep. 275, 5 B. W. C. C. 445, 106 L. T. N. S. 468 [1912] W. N. 79, 56 Sol. J. 379; *Higgs v. Unicum* [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. 369 [1913] W. C. & Ins. Rep. 263, 6 B. W. C. C. 205, 108 L. T. N. S. 169 [1913] W. N. 36; *Taylor v. Clark*, 111 L. T. N. S. (Eng.) 882, 84 L. J. P. C. 14 [1914] W. C. & Ins. Rep. 448 [1914] W. N. 327. See also *Booth v. Carter* [1915] W. C. & Ins. Rep. (Eng.) 59, 8 B. W. C. C. 106. See also *Jones v. Guest*, 60 Sol. J. (Eng.) 75. Thus in *Taylor v. Clark*, supra, it was held that the finding of an arbitrator terminating the weekly compensation of a workman for injuries was justified. The following were the facts: "Clark met with an accident on the 7th October, 1910 arising out of and in the course of his employment with the appellants. Liability was admitted, and compensation was paid down to the 12th July 1913, when it ceased on the ground that he had completely recovered from the effects of the accident, and the appellants asked the arbitrator to end the compensation. A remit was made to a doctor to examine Clark and to report. The reply of the doctor was that Clark had recovered from the direct effects of his injury, but not from the indirect effects. The arbitrator desired further information, and a second remit was made to the doctor, whose report was that Clark had a natural tendency to obesity which was checked by active work; that the result of his injury was to incapacitate him from active work, with the result that when the immediate effect of the accident had come to an end he was unfit to resume his former employment as a miner working at the face, and was only fit for sedentary employment. On these reports the arbitrator found that the incapacity to work resulting from the accident had ceased by

8th October 1913, and ended the compensation payable as at that date." Reversing a decision of the First Division of the Court of Session and restoring the award of the arbitrator, Earl Loveburn in his opinion said: "In this case the only point raised before the arbitrator was whether the present incapacity of this man resulted from his injury. The arbitrator found that it did not result from his injury. We may not go into the evidence for the purpose of seeing whether we should agree with him, we must take the findings of the sheriff as findings upon which his conclusion rests, and we may look at that conclusion and ask whether a reasonable man could arrive at it or not. The arbitrator says that the partial incapacity on the 8th October 1913, which is the crucial date, did not result from the injury sustained by the applicant on the 7th October 1910. I ask whether that is such a finding that I can say that a reasonable man could not have arrived at it. The learned arbitrator might think that the increase of obesity and age were as matter of substance, and looking at it broadly, the real causes which led to this incapacity—that the incapacity resulted from that and not from the injury. You cannot analyze the chain of causation too closely or you will get into all the labyrinth of argument and disputation which has constantly surrounded the discussion of this subject. The arbitrator may, after puzzling over these considerations, have said to himself in the end, 'I think on the whole that it was the disease and the age which was the cause of his incapacity,' and in fact he has said so. Mr. Moncrieff said that the arbitrator had made an error in law, because he had assumed that in order to bring the case within the statute the incapacity must be the direct consequence of the injury, and that the injury must be the exclusive cause of the incapacity. If that were so, then I should think that it was an error in law. It is not necessary that the incapacity should be the direct result of the injury. It is not necessary that there should be no contributory source of weakness. But in this case I think that the arbitrator may have arrived, and very likely did arrive, at his conclusions from the considerations to which I have referred." In *Higgs v. Unicume* [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. 369 [1913] W. C. & Ins. Rep. 263, 6 B. W. C. C. 205; 108 L. T. N. S. 169 [1913] W. N. 36, wherein it appeared that the workman's incapacity was due to poor medical advice and the domination of his wife, it was held that the workman was acting unreasonably and that his allowance should be terminated. Reviewing the facts Buckley, L. J., said: "Before the judge there was a conflict of medical evidence. It was for him to determine how the facts were. He has found that the employers' med-

ical evidence gives the correct view of the man's condition. The substance of that evidence is that the man's complaint of his symptoms is not well founded, that nothing would be better for him than work or occupation, that he was fit for work when he left hospital, that he could do work as a gatekeeper or timekeeper, that he has no physical disability preventing him from acting as timekeeper or beginning work as a bricklayer, and that he is merely suffering from weakness of will and a fixed but erroneous idea that he is a chronic invalid—that he wants a stimulus to work. That is a finding of fact that the man has recovered and is fit for work. There is one sentence in the learned judge's judgment the other way, and that is where he says, 'I do not think that he is a malingerer.' A malingerer is a person who is not ill and pretends that he is. If he bona fide thinks he is ill he is not guilty of that pretense. That is, I think, what the judge meant to affirm. The man, he thinks, is not shaming, but erroneously believes that his condition is that which it is not. The judge says that he is not a malingerer because he is not shaming, but he finds in fact to the effect which I have stated. Upon these findings I think that the judge was right in terminating the award and that this appeal must be dismissed with costs." So in *Booth v. Carter* [1915] W. C. & Ins. Rep. (Eng.) 59, 8 B. W. C. C. 106, it was held that compensation should be terminated on the ground that the workman was suffering from a disease not due to the accident. See to the same effect *Hargreave v. Haughhead Coal Co.* [1912] A. C. (Eng.) 319 [1912] Sc. Ct. Sess. H. L. 70, 81 L. J. P. C. 167 [1912] W. C. Rep. 275, 5 B. W. C. C. 445, 106 L. T. N. S. 468 [1912] W. N. 79, 56 Sol. J. 379; *Jones v. Guest*, 60 Sol. J. (Eng.) 75.

But in *Hillis v. Oval Wood Dish Co.* (Mich.) 158 N. W. 214, it was held that so long as the incapacity of an employee results from the injury, even when prolonged by pre-existing disease, it comes within the statute and compensation will not be terminated. The following facts appeared: "While claimant was employed in the sawmill of the Oval Wood Dish Company, at Traverse City, he met with an accident by which his right arm was injured above the elbow. As found by the Industrial Accident Board, 'the flesh was bruised and torn, and the front part of the arm denuded of its skin, exposing the blood vessels and muscles underneath.' An agreement for compensation was reached and approved, and payments were made in compliance therewith for a period of 19 weeks. At the end of that period the payments were discontinued, and presently the respondents filed with the Industrial Accident Board a petition asking that they be relieved from making further payments



upon the ground that claimant's continued disability was due to a venereal disease, viz., syphilis which retarded the healing of the injury. The claimant filed an answer to this petition in which he denied that he had ever contracted such disease, or been afflicted with it; and we do not understand it to be claimed that he was suffering from syphilis in any active stage." The court said: "Assuming that such disability is being prolonged by the disease, there is yet no point at which the consequences of the injury cease to operate. It is the theory of respondents, not that the consequences of the injury cease, but that they are prolonged and extended. There is no part of the period of disability that would have happened, or would have continued, except for the injury. The consequences of the injury extend through the entire period, and so long as the incapacity of the employee for work results from the injury, it comes within the statute, even when prolonged by pre-existing disease."

#### **Suspension.**

In *Harrison v. Dowling* [1915] 3 K. B. (Eng.) 218 [1915] W. C. & Ins. Rep. 351, 113 L. T. N. S. 622, 8 B. W. C. C. 544 [1915] W. N. 262, 31 Times L. Rep. 480, wherein an application was made by the employers to suspend the compensation being paid to an injured workman, it was held that the county court judge was right in dismissing the application. It appeared that the workman obtained an award of 15s. a week. After the outbreak of the war with Germany the workman enlisted and the employers, on hearing of this stopped payment of the compensation. The workman applied to issue execution for the same and thereupon the employers commenced proceedings to obtain a review. Before the case came on the employers' solicitors wrote asking for a medical examination of the workman but were told that his regiment was in India. They then abandoned their application for a diminution or termination of the weekly payment but obtained leave to amend so as to ask that it should be suspended on the grounds that the workman had obstructed the holding of a medical examination and that he had ceased to reside in the United Kingdom. The court said: "I cannot find that there is any refusal by the workman in the present case to submit himself for examination. I am quite aware of certain letters which passed between the solicitors. But they certainly did not amount to a refusal to submit to examination. Nor do I see that there is a particle of evidence that the workman is obstructing the same. His being in India with his regiment under military control does not seem to me in any way to be obstructing within the meaning of that section. I am not at all satisfied that

Ann. Cas. 1916E.—57.

he might not be required by the employers to submit to examination by a duly qualified medical practitioner; it may be the regimental surgeon at Cawnpore. According to the section it seems to me that might be the case. Then it is said that the workman is no longer in the United Kingdom. Of course he is physically not within the United Kingdom; he is at Cawnpore. But the act does not say, and I am satisfied that it does not intend to say, that the mere fact that an injured workman is for the moment not in truth physically in the United Kingdom deprives him of his right to compensation or authorizes suspension. It contemplates the case of a workman having gone from this country, say as an emigrant to Canada, the United States, or what not."

#### **ACKERET**

v.

#### **CITY OF MINNEAPOLIS.**

(Two Cases.)

Minnesota Supreme Court—March 26,  
1915.

129 Minn. 190; 151 N. W. 976.

#### **Municipal Corporations — Liability for Personal Injury — Parks.**

In establishing, caring for and maintaining streets, highways and public parks, municipalities act in their governmental and not in their proprietary capacity.

[See note at end of this case.]

#### **Same.**

Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute.

[See note at end of this case.]

#### **Same.**

A city that constructs and maintains walks and footpaths in its parks which are used as thoroughfares in passing from one part of the city to another is liable for injuries resulting from dangerous conditions in such walks caused by the negligence of its employees.

[See note at end of this case.]

#### **Notice of Claim by Parent for Injury to Child — Sufficiency.**

A notice given by a parent of a claim for injuries sustained by his minor child which contains the essential information required by the statute is sufficient, although it fails

to state specifically that the parent claims damages on his own account and also as the statutory representative of his child, and fails to make an apportionment between the two of the amount claimed.

[See Ann. Cas. 1916E 560.]

**Parent and Child — Loss of Services of Child — Action — Parties Plaintiff.**

A father who is supporting the family may maintain an action for loss of the services of a minor child without joining the mother as a party plaintiff.

(Syllabus by court.)

Appeal from District Court, Hennepin county: HALE, Judge.

Two actions for damages. Casper A. Ackeret and Aloysius J. Ackeret, plaintiffs respectively, and City of Minneapolis, defendant in each case. Judgments for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*C. J. Rockwood* for appellant.

*Healy & La Du* for respondent.

[192] *TAYLOR, C.*—Under and pursuant to chapter 281 [p. 404] of the special Laws of 1883, and the acts amendatory thereof and supplemental thereto, the board of park commissioners of the city of Minneapolis has established, improved and maintains a system of parks and parkways for the use of the inhabitants of that city. Among the parks so established and maintained is a tract of about 36 acres, now known as Loring Park, located in the midst of a thickly settled portion of the city. Running through this park in various directions are numerous gravel and cement walks and footpaths, but no carriage ways. These walks and paths are in constant use as thoroughfares by people passing from one part of the city to another. On April 30, 1913, employees of the park board raked together a large quantity of leaves and other rubbish and burned it at the intersection of two or more of these walks. When they quit work at night they left the ashes and unburned rubbish lying upon the walk. In the evening of the same day, Aloysius J. Ackeret, a child less than two years of age, while proceeding along the walk with his mother, stumbled and fell into this pile of ashes, and burned his hands upon the coals and heated refuse underneath the ashes to such an extent that his right hand is permanently crippled. Casper A. Ackeret, the father of the child, brought two actions for damages, [193] one on behalf of the child and the other on his own behalf, and recovered a verdict in both. In the action brought by the father in his own behalf, defendant moved for judgment notwithstanding the verdict. This motion was denied. Judge

ment was entered, and defendant appealed therefrom. In the action brought on behalf of the child, defendant moved for judgment notwithstanding the verdict or for a new trial. This motion was also denied and defendant appealed from the order denying it. The two cases were argued together and submitted upon one brief.

The important question presented is whether the city is liable in damages for injuries resulting from dangerous conditions in the walks or pathways in its public parks.

1. In establishing, maintaining and caring for streets, highways and public parks, a municipality acts in its governmental and not in its proprietary capacity. *St. Paul v. Chicago, etc. R. Co.* 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L.R.A. 184; *Schigley v. Waseca*, 106 Minn. 94, 118 N. W. 259, 19 L.R.A.(N.S.) 689, 16 Ann. Cas. 169; *International Falls v. Minnesota, etc. R. Co.* 117 Minn. 14, 134 N. W. 302; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Hartford v. Maslen*, 76 Conn. 599, 57 Atl. 740; *Higginson v. Treasurer, etc. of Boston*, 212 Mass. 583, 99 N. E. 523, 42 L.R.A.(N.S.) 215; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895; *Park Com'r v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196, 33 L.R.A.(N.S.) 523. From the earliest times, it has been the recognized rule that a municipality is not liable in damages for negligence in performing its governmental functions, unless such liability had been imposed by statute. This rule has been recognized and applied many times by this court. *Dosdall v. Olmsted County*, 30 Minn. 96, 14 N. W. 458, 44 Am. Rep. 185; *Altnow v. Sibley*, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191; *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Bank v. Brainerd School Dist.* 49 Minn. 100, 51 N. W. 814; *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 13 L.R.A. 151; [194] *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788; *Claussen v. Luverne*, 103 Minn. 491, 115 N. W. 643, 15 L.R.A.(N.S.) 698, 14 Ann. Cas. 673; *Brantman v. Canby*, 119 Minn. 296, 138 N. W. 671, 43 L.R.A.(N.S.) 862.

But by what is termed in *Lane v. Minnesota State Agricultural Soc.* 62 Minn. 175, 64 N. W. 382, 29 L.R.A. 708, an "illogical exception to this rule," it has become firmly established in this state, and in most of the middle and western states, that a city is liable for injuries resulting from defects or dangerous conditions in its streets. 2 *Dunnell*, Minn. Dig. § 6814; 15 *Am. & Eng. Enc. of Law* (2d ed.) 420. The reasons assigned for making a distinction between such cases and those governed by the general rule are

various and not very satisfactory. The reason most generally assigned is that such municipalities, having been given the exclusive control over their streets with ample power to provide funds to care for and maintain them, are chargeable with the duty to keep them safe for travel; and that it follows by implication therefrom that they are liable for failure to perform such duty. 15 Am. & Eng. Enc. of Law (2d ed.) 420; Shartle v. Minneapolis, 17 Minn. 308; Noonan v. Stillwater, 33 Minn. 198, 22 N. W. 444, 53 Am. Rep. 23; Blyhl v. Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596; Peterson v. Cokato, 84 Minn. 205, 87 N. W. 615; Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259, 19 L.R.A.(N.S.) 689, 16 Ann. Cas. 169. But it is difficult to see why the same reasoning would not also impose liability upon cities for negligence in performing many of their other governmental functions. It would certainly apply with equal force to the case now under consideration, for the city is given as plenary power in respect to its parks as in respect to its streets. In Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L.R.A. 151, it is suggested that the distinction can best be sustained upon considerations of public policy and the doctrine of *stare decisis*. The exception, whether logical or otherwise, is now too firmly established to be questioned, and our present concern is to determine whether the case at bar is controlled by the exception or by the general rule.

[195] On examining the grounds upon which liability is imposed for defects in streets, we find that the same grounds exist for imposing liability for defects in the walks and pathways in question. These walks and pathways were used not merely for purposes of pleasure and recreation, but as thoroughfares for passing from one part of the city to another. They differed from other walks provided by the city for the use of pedestrians only in the fact that they were within the limits of a park. We find no substantial distinction between such walks and those located along the public streets. When we turn to the decided cases, we find a diversity of opinion. The New England states, as well as some others, do not recognize the exception to the general rule which we have been considering, and hold that a city is not liable for defects in its streets unless such liability is expressly imposed by statute, and, of course, also hold that it is not liable for defects in the paths and ways traversing its parks. Most of the cases cited by defendant are from states where such is the rule, and lack cogency in states which have adopted a different rule. Some courts, however, hold that a city is liable for negligence in respect to its streets, but is not liable for negligence in respect to its parks. *Park Com'r v. Prinz*,

127 Ky. 460, 105 S. W. 948; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895. Other courts hold that it is also liable for negligence in respect to its parks. *Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590, 2 L.R.A.(N.S.) 147, 114 Am. St. Rep. 158, 7 Ann. Cas. 1042; *Barthold v. Philadelphia*, 154 Pa. St. 109, 26 Atl. 304; *Weber v. Harrisburg*, 216 Pa. St. 117, 64 Atl. 905; *Silverman v. New York*, 114 N. Y. S. 59. We find no sufficient ground for making a distinction between the walks and pathways in question and the ordinary sidewalks provided by the city for the use of pedestrians, and hold that the city is liable for dangerous conditions therein caused by its own employees. See *Klepfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908.

2. The statute requires every person who claims damages from a city for injuries sustained by reason of defective streets, or through the negligence of city employees, to cause a written notice to be presented to its governing body stating the time, place and circumstances [196] of the injury, and the amount of compensation demanded. A notice was duly served stating the time, place and circumstances of the accident in question; that the child was the infant son of Casper A. Akeret; and that damages were claimed in the sum of \$10,000. The notice was signed by the attorney for Casper A. Akeret. Defendant contends that this notice is fatally defective in this: That the accident gave rise to two claims for damages—one in favor of the father and one in favor of the child—and that the notice states only one claim and does not specify whether that is the claim of the child or of the father; and further contends that in any event the notice cannot serve as a basis for both actions. The purpose of the notice is to give the municipal officers information which will enable them to ascertain and investigate the facts while the evidence is available, and to determine whether a liability exists, and, if so, the nature and extent of such liability. While the essential requirements of the statute must be complied with, it has been determined that a claimant is not barred from maintaining his action because his notice was informal, or not technically accurate, if the information required by the statute could, in substance, be ascertained therefrom. *Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653; *Nicol v. St. Paul*, 80 Minn. 415, 83 N. W. 375; *Terryll v. Faribault*, 81 Minn. 519, 84 N. W. 458; *Terryll v. Faribault*, 84 Minn. 341, 87 N. W. 917; *Kandelin v. Ely*, 110 Minn. 55, 124 N. W. 449; *Larkin v. Minneapolis*, 112 Minn. 311, 127 N. W. 1129; *Wornecka v. St. Paul*, 118 Minn. 207, 136 N. W. 561.

The notice in question gave the officials full and accurate information as to the time, place and circumstances of the injury. It

also informed them that the one injured was the infant son of the one giving the notice, and that damages were claimed in the sum of \$10,000. If the facts stated in the notice were true, the law gave the father the right to bring two actions—one in his own behalf and one in behalf of his child. It is true that the notice did not state whether he made the claim in his own behalf, or in behalf of the child, or in behalf of both; and if in behalf of both, that it did not apportion the damages between them. The natural [197] inference would be that he was insisting upon all the rights given by the law. We think that all the essential facts were set forth, and that no prejudice resulted to defendant from the failure of the father to state specifically that he claimed damages both individually and as the statutory representative of his child, or from his failure to apportion the damages between the two claims. The purpose of the notice was fully accomplished, and we hold that it was not so defective as to bar either right of action.

3. In the action brought in his own behalf, the father sought to recover for the expenses which he had incurred in providing medical and surgical treatment for the child, and also for the partial loss of services which will result from the child's crippled condition. Defendant demurred to the complaint on the ground that two causes of action were improperly united, and that there was a defect of parties plaintiff. The demurrer was overruled, and defendant answered. The same questions were again raised by objections interposed to the answer and were again ruled against defendant. Defendant's contention is that the claim for loss of services vested in the father and mother jointly and that they must bring a joint action in order to recover therefor. This contention is based upon comparatively recent statutes.

Section 7146, G. S. 1913, among other things, provides:

"Where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family."

Section 7442, G. S. 1913, states:

"The father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable, they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other."

Defendant insists that both parents are equally liable for the support of their children, and are equally entitled to the custody of them, and that it follows as a consequence

that they are jointly entitled to the benefit of the services of the children, and must bring a joint action to recover for the loss of such services. This contention [198] is correct to some extent, but we think it was neither the purpose nor the effect of these statutes to make any material change in the duty imposed upon the husband and father to support and maintain the family. Other late statutes making his failure to do so a criminal offense point strongly to the contrary. Where he in fact performs this duty, we think he may maintain an action to recover for loss of the services of his minor child. If in fact he did not perform such duty, a different question would be presented which is neither involved nor determined herein.

It follows that the order in one case and the judgment in the other are affirmed.

#### NOTE.

In the reported case the court adheres to the rule obtaining in the majority of jurisdictions that a municipality in maintaining its highways and parks acts in a governmental capacity. It recognizes, however, that an exception thereto with respect to defects and dangerous conditions in streets has become firmly fixed by the earlier decisions in the state, and holds that the exceptional rule is equally applicable to walks in a park, and that a municipality is accordingly liable for personal injuries caused by a dangerous obstruction in such a walk. The cases discussing the liability of a municipality for negligence in the maintenance of a public park are reviewed in the note to *Capp v. St. Louis*, Ann. Cas. 1915C 245.

#### AGE-HERALD PUBLISHING COMPANY

v.

#### WATERMAN.

Alabama Supreme Court—May 22, 1913.

188 Ala. 272; 66 So. 16.

#### Appeal — Harmless Error — Rulings as to Pleadings.

The elimination by plaintiff of counts of a complaint rendered harmless any errors committed in rulings as to such counts.

**Limitation of Actions — Amendment Stating New Cause of Action.**

In an action against a newspaper for libel, an amendment to the complaint setting up a republication of the libelous article by other newspapers, and charging that they were induced or caused by defendant, states a different cause of action, and hence, being filed more than a year after the publication, is expressly barred by Code 1907, § 4840.

**Pleading — Amendment — Complaint for Libel.**

In an action for libel, the court may properly permit plaintiff to amend his complaint so as to allege by way of inducement his trade, business, etc.

**Libel and Slander — Pleading — Inducement and Colloquium.**

Where the words set out in the complaint in an action for libel are not actionable per se, the complaint must allege facts as inducements and colloquia to show the sense in which the language was used, etc.

**Same.**

In an action for libel, matters of inducement and colloquium averred by way of introduction must be facts and circumstances, and not mere statements, arguments, or conclusions, which show that the words in question are actionable.

**Innuendo.**

In a complaint for libel, the office of the innuendo is to explain the subject-matter, and hence, if the language averred to have been used does not itself constitute a libel, no words contained in the innuendo can make it actionable.

**Same.**

An innuendo in a complaint for libel means the same as "id est," "scilicet," or "afore-said," being merely explanatory of the subject-matter sufficiently expressed before.

**Proof of Colloquium and Innuendo.**

In actions for libel and slander, facts alleged as inducement or colloquia are traversable, and must be proved, while the innuendo is not traversable, and hence need not be proved.

**Libelous Words — Imputation of Fraudulent Dealing.**

A complaint, in an action for libel against a newspaper, alleged that defendant, in purporting to report the proceedings had before the referee in bankruptcy in the matter of the bankruptcy of Knight, Yancey & Co., which company was reported to have issued and disposed of spurious bills of lading for cotton, stated that a witness testified that Mr. Knight intimated that others knew of the fake bills of lading, that the witness "was closely questioned as to a loan of \$5,000 made to a Mr. Waterman [plaintiff], agent for a Mobile steamship line. It developed that the general belief is that Waterman is abroad and does not intend to return," and that "the information disclosed that several large shipments of cotton had been made by the way of the line represented by Waterman. It is also brought to light that several spurious bills of lading are held upon which

cotton was supposed to have been routed via the lines represented by Waterman"—and alleged that the article implying that plaintiff was a fugitive, etc., was false, etc., that it was given wide circulation, and plaintiff was greatly damaged in his business as shipping agent, and deprived of the opportunity of completing profitable and honorable business connections with the organization of a steamship company, etc. Held, that the complaint stated a cause of action for libel.

[See 116 Am. St. Rep. 816.]

**Republication by Others.**

In an action against a newspaper for libel, evidence that the alleged libelous article was republished by other newspapers is not admissible, and is not rendered so because the same reporter who reported to defendant also reported it to the other papers.

[See note at end of this case.]

**Repetition by Initial Libeler.**

In an action for libel, a repetition by defendant of the libelous words is evidence of malice, and may thereby aggravate the damages.

**Same.**

Every repetition of a slander, or the publication thereof by a newspaper, is a republication, rendering each person so repeating or republishing liable, as well as the initial one.

**Repetition by Others.**

The initial slanderer or libeler is not responsible, in an action of slander or libel, for such repetitions and republications of the libel or slander.

[See note at end of this case.]

**Same.**

In an action against a newspaper for libel, it is error to charge, "I charge you that under the law of Alabama this defendant, the Age-Herald Publishing Company, is responsible for the publication of any libel which may result in actionable injury," since it authorized a recovery for publications made by other newspapers than defendant.

[See note at end of this case.]

**Instructions — Ignoring Defense of Privilege.**

Where, in an action for libel, there were special pleas by defendant alleging that the matter was privileged and evidence to support them, charges to find for plaintiff if the jury were reasonably satisfied that plaintiff had been injured in the manner averred in the complaint are erroneous.

Appeal from Circuit Court, Jefferson county: CROWE, Judge.

Action for libel. John B. Waterman, plaintiff, and Age-Herald Publishing Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[273] Count 2 is as follows:

Plaintiff claims of defendant the sum of \$30,000 damages for falsely and maliciously publishing of and concerning plaintiff in a

newspaper published in Birmingham, Jefferson county, Ala., called the Birmingham Age-Herald, on, to wit, the 28th day of May, 1910; with intent to defame plaintiff, a statement in substance as hereinafter set out, the same having reference to the bankruptcy and failure of a partnership known as Knight, Yancey & Co., which was alleged to have issued and disposed of a vast amount of spurious and fraudulent bills of lading, said publication being in part as follows: "In answer to a question as to whether Mr. Knight implicated others in the criminal knowledge relative to false bills of lading, the witness said: 'Knight intimated to me that others knew of the fake bills of lading. His intimations were not sufficiently distinct for me to even hazard a guess as to whom he referred. I then told him to shut up as I did not care to hear any more about it. I simply wished to know how bad we [274] were stuck and then get remedies, to which the creditors were justly entitled.' Mr. Nesbitt was closely questioned by Mr. Benners in regard to a loan of \$5,000 which was made to a Mr. Waterman, agent for a Mobile steamship line. It developed that the general belief is that Waterman is abroad and does not intend to return. Mr. Nesbitt said he knew Waterman, and did not know a loan was made by him to Knight, Yancey & Co. Mr. Nesbitt, however, qualified his statement by adding that he presumed that it was simply a personal act between Mr. Knight and Mr. Waterman. 'Did Mr. Knight mention this loan to you?' was the question asked by Mr. Benners. 'He did,' said Mr. Nesbitt. 'He also told me that the mention of the loan publicly would reflect upon Mr. Waterman.' 'What did he mean by the reflection?' 'I do not know,' answered the witness. The information was disclosed that several large shipments of cotton had been made by the way of the line represented by Waterman. It is also brought to light that several spurious bills of lading are held upon which cotton was supposed to have been routed via the lines represented by Waterman."

Addenda to Count 2.—And plaintiff avers that at the time of said publication and for many years prior thereto, plaintiff's business was, and has been that of freight and shipping agent, contractor or representative in Mobile, Alabama; and that plaintiff then resided in Mobile, intending to continue his business at that point; and that at the time of said publication plaintiff had well nigh concluded the organization of a shipping company with excellent connection for the handling of cotton, and with headquarters in Mobile, Alabama; that the failure of Knight, Yancey & Co., one of the largest Southern cotton concerns, under circumstances which were alleged to have disclosed fraud in the

matter of false or fraudulent bills of lading, occasioned intense interest and feeling [275] in the cotton trade in America and abroad, and aroused general resentment and indignation towards those who might be considered responsible or connected with the alleged irregularity; and plaintiff avers that the publication of and concerning plaintiff herein complained of in direct connection with said fraudulent transaction and having reference to plaintiff's business, his finances and intentions to abandon his residence, and place of business in Mobile, Alabama, and published during the investigation of said failure (the Knight and Nesbitt referred to in said publication being members of the said firm of Knight, Yancey & Co.) conveyed the false meaning and question that plaintiff was dishonorably connected with said fraudulent practices, or was a fugitive or had abandoned his domicile, or had absented himself by reason of the matters published, and thereby directly and proximately cast suspicion upon plaintiff on the part of the cotton trade, brought him into public contempt, and injured plaintiff in his said business and calling, and in his reputation, credit and good name, and caused him to suffer great mental pain, anguish and mortification, etc.

Plaintiff avers that the statements, insinuations, and implications contained in said article meaning and implying, among other things, that plaintiff was fugitive, or had concealed or absented himself by reason of the matters referred to in said statement, or was evading a responsibility, debt, or obligation, or had dishonorable connection with said Knight, Yancey & Co., were false, malicious, and libelous; and plaintiff avers that said items published as aforesaid were given large circulation by defendant throughout the state of Alabama and elsewhere, and as a proximate consequence thereof plaintiff was injured in his good name and in his business of shipping agent and reputation, and was caused to suffer mental [276] pain and anguish, and was caused to be deprived of the opportunity of completing profitable and honorable business connections with the organization of a Mobile Steamship company at a handsome salary, and with a reasonable prospect of realizing large returns.

*Nathan L. Miller and Needham A. Graham, Jr., for appellant.*  
*Campbell & Johnston for appellee.*

[277] MAYFIELD, J.—The action is libel. The libel alleged was the publication of what purported to be a report of the proceedings had in a bankruptcy court, before a referee in bankruptcy, in the matter of Knight, Yancey & Co., engaged in the business of buying and selling cotton. The bankrupt was supposed

to have issued and disposed of a vast amount of spurious and fraudulent bills of lading.

The plaintiff was not a member of the partnership of Knight, Yancey & Co., but only had dealings with it in the cotton business, and seems to have been on friendly relations with some of the members of the firm.

The reporter will set out count 2 of the complaint, which contains the alleged libelous publication in *haec verba*; such publication being made to appear to be a part of the newspaper report of the proceedings in the bankrupt court.

There were quite a number of counts added to the complaint by amendment, one of which was count 2, ordered to be set out, on which alone the case was submitted to the jury. The other counts were all eliminated by request [278] of plaintiff, which elimination, of course, could work no injury to the defendant, and rendered perfectly harmless any possible errors committed in rulings as to the eliminated counts, but not necessarily such as inhered in rulings as to the admission of evidence as will be hereafter shown.

All counts related to publication of the same matter or parts of the reports of the proceedings in the bankrupt court, but some of these counts set up a different publication of this matter—that is, a subsequent publication of the same matter in other newspapers than that of the defendant, to wit, the *Memphis Commercial-Appeal*, a newspaper published in Memphis, Tenn.—with appropriate allegations that these publications were induced or caused by the defendant. Some of these counts were added more than a year after the publication, and as to such counts the defendant interposed the plea of the statute of limitations of one year.

Actions of libel and slander are in terms, by our statute (Code, § 4840), limited to one year. So the question is: Did these amended counts, filed after a year, state a new and different cause of action, or the same cause of action, but in language varying from that stated in the original complaint, which was filed within a year? If they stated a different cause of action, such action was barred when the amendment was filed; if the same cause of action, in varying language, then it was not barred.

The rule is thus stated in *Cyc.* (volume 25, p. 436): "Every distinct publication of libelous or slanderous matter gives rise to a separate cause of action, although several causes of action for different libels or slanders may be united in the same action. But it has been held that slanderous words spoken at one time constitute one cause of action, and the same or other slanderous words spoken at other times constitute other causes of action, [279] and if relied upon they should be separately pleaded in separate counts or paragraphs."

Mr. Newell (Def. Lib. & Slan. p. 350) states the rule as follows: "It is well settled that every utterance of slanderous words is a distinct cause of action, and, if recovery is sought for repeating a slander, the repetition must be declared upon as a separate cause of action. The mere general allegation of the repetition of the slander is but pleading evidence which is admissible without pleading, for under a single count the plaintiff may show repetitions, not for the purpose of sustaining the action, but for the purpose of showing malice in the speaking of the words declared upon, thereby aggravating the damages. And where the alleged cause of action is barred by the statute of limitations, it cannot be claimed by the plaintiff that, because the alleged defamatory words were repeated at various times up to the commencement of the suit, the statute of limitations has no application."

It would therefore seem that these counts, setting up republications in other papers, stated different causes of action from that contained in the original complaint; and, if filed more than a year after the publication, they were barred, and the plea of the statute of limitations of one year, as to such counts, was good. We say this for the benefit of the trial court, and of the parties, in the event there is a new trial, as these counts were eliminated before the case was submitted to the jury.

There are a number of questions raised and discussed in briefs as to the sufficiency of the matters of colloquium, inducements, and innuendoes. The rules touching these have been often stated by this court and others, and by text-writers, and there is very little difference in the statements as to the necessity and sufficiency of such averments in actions of libel and slander.

[280] In actions for libel, it is often proper and sometimes necessary to allege, by way of inducement, the trade, profession, or business in which plaintiff was engaged at the time of the publication, and that he was so engaged at that time. Such allegations are called matters of inducement, and are proper and sometimes necessary to show that the matter alleged was libelous, and to support damages for injuries on account of such trade, profession, or business. This was a proper case for such allegations, and the trial court did not err in allowing amendments to the complaint, which added such matters of inducement.

Complaints or declarations must contain allegations to show that the words published or spoken were so published or spoken in reference to and concerning the plaintiff, and of and concerning distinct and independent facts, which show that the words were used, on the occasion alleged, in a particular sense, such as would render them actionable, although

they might not be actionable if, otherwise used. The law proceeds upon the theory that what is the ordinary meaning and nature and force of language is a question of law. And when the language or words used are set forth, the first question is whether or not the language, standing alone, imputes such a crime or offense as to be actionable per se. If the language is not per se actionable, then facts, as inducements and colloquia, must be alleged to show the sense in which the language was used, that it applied to the plaintiff, and that, as so applied, it is actionable by him. If the meaning and sense of the language is clearly actionable, the mere charge that it was used of and concerning the plaintiff is sufficient to state a cause of action; and the same is true if the language itself shows that it was so used, and that it would naturally injure the plaintiff. If the language is ambiguous in meaning [281] or sense, and of and concerning whom and what it is so used, then the office of the colloquium is to make it certain as to these matters, and to show that, as used, it was actionable at the suit of the plaintiff.

Whatever circumstances are necessary to constitute the crime or offense imputed, or to show that the language used was actionable, must be alleged. If the words used are actionable per se, the matter of colloquium may tend to aggravate; but it is not necessary to state a good cause of action. Hence such matter may be proper when it is not necessary; but it is often necessary to the statement of a good cause of action.

As to matter of inducement and colloquium, the averments must be of facts and circumstances which, by way of introduction, show the words in question to be actionable, and not of mere statements, arguments, conclusions, and inferences.

Matters of explanation are not treated strictly as averments of facts, but as mere explanations of what was meant by the averments. This explanation, in complaints for libel and slander, is called the innuendo, which means the same as "id est," "scilicet," or "aforesaid." Its only office is to explain the subject-matter, which must have been sufficiently averred before, as such one, meaning the plaintiff, or such a subject, meaning the subject in question. If the matters going before the innuendo do not constitute libel or slander, no words contained in the innuendo can make the language used actionable, for it is not the nature or purpose of an innuendo to state the cause of action.

The matters constituting the inducement and the colloquium are traversable and must be proven: the innuendo is not traversable, and hence need not be proven. Verdicts are set aside, and judgments arrested, in libel and slander suits, for the reason that the

pleader attempted [282] to make an innuendo serve as traversable matter in stating the cause of action, when it is at best merely explanatory of the traversable matter, the mere opinion of the pleader as to what it means. *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Carter v. Andrews*, 16 Pick. (Mass.) 1.

In the first of the above cases, it is said, in the opening sentence of the opinion: "It is with great regret, and not without much labor and research to avoid this result, that we are obliged to arrest the judgment in this case for want of a sufficient count to support the verdict."

Later on in the opinion the court says: "With respect to the manner of putting upon the record those facts and circumstances which tend to render the words actionable, . . . it must be by averments in opposition to argument and inference, by way of introduction if it is new matter, and by way of innuendo if it is only matter of explanation, for an innuendo means nothing more than the words 'id est,' 'scilicet,' or 'meaning,' or 'aforesaid,' as explanatory of a subject-matter sufficiently expressed before, as such a one, meaning the defendant, or such a subject, meaning the subject in question."

The opinion then quotes from *Barham's Case*, in *Coke*, which is cited in all the books in illustration of this doctrine: "*He has burnt my barn*, meaning a barn full of corn," adding, "This is bad, because what comes in under the innuendo is an addition to, and not an explanation of, the words spoken."

In 16 Pick. (Mass.) 4, Chief Justice Shaw said: "If the words did in fact mean what it is thus intimated by way of innuendo that they did mean, they would be abundantly sufficient to support the action. But after the numerous discussions and decisions upon that subject, it is in vain now to contend that it is a good mode [283] of declaring to say that such words are used with such a meaning and leave it as an open question to the jury to determine upon the facts and circumstances whether the language was used with such a meaning or not. The case of *Bloss v. Tobey*, 2 Pick. (Mass.) 320, states the principle and the grounds on which it rests so fully that it cannot be necessary to repeat it. The rule is founded upon that important general principle that a plaintiff, to entitle himself to a judgment, must lay his case in such a mode as to enable the court to see, after verdict, that he has a good cause of action."

In illustrating the nature and necessity of a proper colloquium, when the words are not actionable per se, this same learned justice says: "The law will not shut its eyes to what all the rest of the world can see and let the slanderer disguise his language and wrap up his meaning in ambiguous givings



out, as he will; it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understands it. This is a correct rule and must be regarded as a most sound and salutary one, to be acted upon by the court, and to be fully explained and enforced upon the trial of the facts before a jury. So language may be used ambiguously, or ironically, or technically, or conventionally. What are called cant terms and flash language are of the latter sort, where, among a particular class of persons, or by usage or convention, words are used in a particular sense. But, wherever this is the fact, it is in consequence of the existence of some usage or agreement, of some report in circulation, of the time, place, or manner in which the conversation was held, in short, of some fact capable of being averred in a traversable form, so that it may be put in issue and proved or disproved. If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of [284] some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact then must be averred in a traversable form, with a proper colloquium."

This court, speaking through Stone, C. J. (*Gaither v. Advertiser Co.* 102 Ala. 462, 14 So. 789), said:

"An innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. It cannot alter or extend the sense of the words, or make that certain which is in fact uncertain. . . . An innuendo cannot be proved. And it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it." 13 Am. & Eng. Enc. of Law (2d ed.) 465-467. In other words, the court determines whether the words used are susceptible of the meaning sought to be given to them by the innuendo. If this inquiry is decided by the court against the contention of the pleader, this puts an end to it, for it is not permissible to make proof that the words employed were uttered in the sense or with the meaning imputed to them in the innuendo. That is not the subject of proof. If it be decided by the court that the words are susceptible of the meaning of the innuendo seeks to ascribe to them, then it becomes a question for the jury to determine, under all the circumstances, whether they were intended to mean what the innuendo avers they did."

Count 2 of the complaint as amended, tested by these rules, is a good count; that is, it will support a verdict, was not shown

to be bad by demurrer; but the original count is subject to the criticism that matter is stated in the innuendo which should have been stated as an inducement and colloquium, so as to make it traversable, and not merely explanatory.

[285] As before stated, the trial court properly allowed the amendments alleging the plaintiff's trade, business, or profession, and matters of inquiry thereto. What was said in *Ware v. Clowney*, 24 Ala. 707, 710, is apt here, and we repeat it: "Words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business in any lawful employment by which he may gain his livelihood."

"The authorities generally concur in upholding this action in three classes of cases which injuriously reflect upon the trade, profession, or business of an individual, namely: First, when the words charge the person with a want of fidelity in his trade or profession generally; second, where they charge such person with dishonesty, corruption, or want of integrity in a particular case; and, third, where the words impute ignorance or want of skill and capacity in general terms. *Foot v. Brown*, 8 Johns. (N. Y.) 66."

The rule as to the nature and sufficiency of statements as to special damages, as distinguished from those that are general, is well stated by Mr. Newell, in his work on *Defamation, Slander & Libel*, p. 634. It is there said: "Special damages are such as in fact have actually occurred as the result or consequence of the injury complained of, and not implied by law. They are either superadded to general damages arising from the act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arises from an act indifferent, and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing.

"Special damages must always be the legal and natural consequence arising from the defamation itself, and not a mere wrongful act of a third person. Whenever [286] special damages are claimed, in order to prevent a surprise on the defendant, which might otherwise ensue at the trial, the law requires the plaintiff to state the particular damage which he has sustained, or he will not be permitted to give evidence of it at the trial."

The majority of the court hold that defendant's motion to suppress the depositions of the witnesses named therein, as shown on page 53 of the transcript, was properly overruled. The writer, however, dissents as to this proposition. The depositions were taken on interrogatories filed by the plaintiff on

April 13, 1911, and cross-interrogatories filed by the defendant within ten days thereafter, and were taken on April 27th, 28th, and 29th. The defendant demanded notice of the time and place of taking such depositions, as is authorized by statute (Code, § 4032, as amended by the act of April 18, 1911 [Acts, pp. 487-489]). The majority are of the opinion that the record fails to show that this statute was of force at the date in question so as to be applicable to this case, and that if the statute applied, it was complied with as to notice.

Taking testimony in courts of law by deposition was not common, if known to law courts at common law, and hence statutes upon the subject must be strictly construed; and he who would avail himself of the benefits conferred by the statute must pursue the statute, at least in a substantial manner. The common law, in such courts, allowed the party to cross-examine the witness face to face, and in the presence of the jury. The statute authorizes the taking of testimony in the cases mentioned in the statute in the absence of the jury, but preserves the right of the adverse party to be present at the taking of the testimony, and to cross-examine the witness. In order that this right may be preserved, the statute provides for notice to issue to the adverse party, or [287] to his attorney, of the place and the time for the taking of the testimony. This is to the end that, if such adverse party so desires, he or his counsel may be present and face the witnesses at the taking of such testimony.

As to whether the depositions should have been taken jointly or severally by the commissioners named in the commission was a question which the defendant probably waived by not objecting within the proper time. The commission was issued to Smith and Thomas, "or to such one or more of you as shall herein." No objection was taken to this commission on the filing of cross-interrogatories, nor until after the depositions were taken.

It was error to allow plaintiff to prove, by various witnesses, that after the alleged publication by defendant these witnesses had read other similar publications in other newspapers, and had heard parties discuss the connection of plaintiff with the failure of Knight, Yancey & Co. Such testimony was prima facie incompetent and irrelevant, and nothing appears in this record to show that it was competent or relevant. It was, of course, competent to prove the publication by the defendant, and the wide circulation which the defendant gave the alleged libel; but it was not competent to prove that other third parties repeated it or republished it in other newspapers, and thereby increased the circulation and aggravated the damages.

In actions of libel or slander, the plaintiff cannot prove that he sustained special damages, by means of repetitions, by third persons of the same or similar words uttered by the defendant. The defendant was not shown to be responsible or liable for the acts of such third parties in repeating, or of such other newspapers in republishing, the alleged libel. If the defendant is liable, such third parties are also liable; but they are not [288] sued in this complaint. The mere fact that the same reporter who reported to the defendant company also reported it to other papers did not make such evidence admissible on this trial.

A case somewhat similar to this is that of *Bathrick v. Detroit Post, etc. Co.* 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63. In that case it appears that the plaintiff offered to prove the publication of the matter in other papers; and the court, speaking through Cooley, J., said: "Mr. Brown, the local correspondent at Battle Creek, who had furnished the article complained of for defendant's paper, was called by the plaintiff to prove that he also furnished the articles for the Chicago papers. This was objected to, but the evidence received. The tendency was to suggest to the jury that the defendant was in some manner responsible for the Chicago publications. But this was an error. Brown was in no sense the general representative of any one of the papers, and neither of them was in any respect responsible for what he might do, except in so far as it might adopt his articles and make them its own by publishing them. Neither of them had any more concern with what Brown might do with or for the others than if it were done by any third person."

The question has been several times before the Supreme Court of Massachusetts, and such evidence has always been held not admissible. In the case of *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683, it was said, through Gray, C. J.: "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the [289] person slandered, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

These decisions date back to the English case of *Ward v. Weeks*, 4 M. & P. 796; s. c. 7 Bing. 211, 20 E. C. L. 104.

The Supreme Court of New York has so decided the question in the case of *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec.

420. That court, speaking by Strong, J., said: "The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate, and legal consequence of the words. *Stark. on Sland.* by Wend. (2d Ed.) 203; 2 id. 62, 64; *Beach v. Ranney*, 2 Hill (N. Y.) 309; *Crain v. Petrie*, 6 Hill (N. Y.) 522, 41 Am. Dec. 765; *Kendall v. Stone*, 5 N. Y. 14. Where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages. *Ward v. Weeks*, 7 Bing. [20 E. C. L. 104] 211; *Hastings v. Palmer*, 20 Wend. (N. Y.) 225; *Keenholts v. Becker*, 3 Denio (N. Y.) 346; *Stevens v. Hartwell*, 11 Metc. (Mass.) 542."

It is, of course, proper to show that the defendant repeated the same words to show malice. Such repetition is evidence of malice, and may thereby aggravate the damages. *Newell on Libel & Slander*, pp. 349, 350. Every repetition of a slander, or the publication thereof by [290] a newspaper, is a republication, rendering each person so repeating or republishing liable to an action, as well as the initial one. It is no defense that the defendant did not originate the slander or libel. Of course, if the defendant causes or induces the republication, such evidence would be admissible to show malice, and to aggravate the damages to the same degree as if the defendant itself had republished the libel. But it was not shown in this case that the defendant corporation caused or induced the republication, in the *Montgomery*, *Mobile*, *New Orleans*, *Atlanta*, *Pensacola*, and *Memphis* papers, as to which the witness testified. Nor was it shown that the defendant caused or induced various individuals to repeat what the papers had said on the subject of the *Knight, Yancey & Co.* failure. Of course other newspapers are liable to republish reports such as the one complained of, and people are liable to talk about and discuss such reports and thereby circulate and give notoriety thereto; but the law is that the initial slanderer or libeler is not responsible, in an action of slander or libel, for such repetitions and republications of the libel or slander.

We have not overlooked the fact that there was an attempt to show that the *Age-Herald*

induced or aided in the publication of similar reports in other papers, to wit, the *Commercial-Appeal*; but there was a complete failure so to do. In fact, it was conclusively shown that the *Age-Herald* had nothing whatever to do with the publication in other papers, and the proffered evidence on the subject was excluded.

The trial court also erred in giving charge No. 7, as requested by the plaintiff. This charge is as follows: "I charge you that under the law of Alabama this defendant, the *Age-Herald Publishing Company*, is responsible for the publication of any libel which may result in actionable injury."

[291] This charge would authorize a recovery against this defendant for publications made by other newspapers than itself, and for which it is not at all responsible. The charge does not even attempt to limit the publication to that made by the defendant, but includes all, by whomsoever made, "which may result in actionable injury." It does not even limit liability to cases which "do result," but includes all which "may" so result. The charge illustrates the erroneous theory upon which the court admitted proof of the publications of the same or similar reports in various newspapers of the South about the time the report in question appeared in the defendant's paper. The trial court seems to have proceeded upon the theory that this defendant is liable for each and all of these separate publications, in this action, which, as we have shown, was erroneous.

Charges 8 and 9, given at the request of plaintiff, were erroneous and improper, as applied to the issues and the evidence in this case; the charges requesting a finding for the plaintiff if the jury were reasonably satisfied from the evidence that the plaintiff had been injured in the manner and under the circumstances averred in the complaint. The defendant had interposed special pleas, in which it alleged that the matters published were as to it privileged matter, and for which publication the defendant was not liable, though the publication would otherwise be actionable. There was evidence tending to support the pleas, and the court could not thus take away from the jury the right to pass upon the same, and, if the jury should have found the pleas to have been proven, then, of course, the plaintiff could not recover.

Charges like the ones in question were held bad, and their giving reversible error in the cases of *Frierson v. Frazier*, 142 Ala. 232, 37 So. 825, and *Alabama Steel, etc. Co. v. Thompson*, 166 Ala. 460, 52 So. 75; the [292] latter case overruling the case of *Virginia Bridge, etc. Co. v. Jordan*, 143 Ala. 603, 42 So. 73, 5 Ann. Cas. 709. It is true that in those cases the charges were held bad be-

cause they ignored the special pleas of contributory negligence; but the rule would necessarily be the same as to special pleas setting up privileged matter in actions of libel and slander.

As the case must be reversed, we deem it unnecessary to pass upon other questions which may not arise on another trial.

Reversed and remanded.

All the Justices concur in the reversal as to the points upon which the case is reversed, but do not desire to commit themselves to all that is said in the opinion, deeming this not necessary, since all the counts were eliminated except count 2.

Rehearing denied June 30, 1914.

### NOTE.

#### Liability of Author of Libel or Slander for Repetition or Republication by Others.

##### General Rule.

It is the general rule that the author of a libel or slander incurs no liability, either as on a distinct cause of action or by way of enhancing the damages of the original defamation for a voluntary and unauthorized repetition or republication of the libelous or slanderous matter by others who act independently.

*England*.—Ward v. Weeks, 7 Bing. 211, 20 E. C. L. 104, 9 L. J. C. Pl. 6, 4 M. & P. 796; Tunnicliffe v. Moss, 3 C. & K. 83; Barnett v. Allen, 1 F. & F. 125; Dixon v. Smith, 5 H. & N. 450; Speight v. Gosnay, 60 L. J. Q. B. 231, 55 J. P. 501; Bree v. Marescaux, 7 Q. B. D. 434. See also Parkins v. Scott, 1 H. & C. 153, 10 W. R. 562, 6 L. T. N. S. 394, 31 L. J. Exch. 331.

*Alabama*.—Hereford v. Combs, 126 Ala. 369, 28 So. 582. And see the reported case.

*California*.—Adams v. Cameron, 27 Cal. App. 625, 150 Pac. 1005 (rehearing denied 151 Pac. 286).

*Delaware*.—Cameron v. Cockran, 2 Marv. 166, 42 Atl. 454.

*Illinois*.—Clifford v. Cochrane, 10 Ill. App. 570.

*Indiana*.—Cates v. Kellogg, 9 Ind. 506.

*Iowa*.—Prime v. Eastwood, 45 Ia. 640; Zurawski v. Reichmann, 116 Ia. 388, 90 N. W. 69; German Sav. Bank v. Fritz, 135 Ia. 44, 109 N. W. 1008; Mills v. Flynn, 157 Ia. 477, 137 N. W. 1082.

*Maryland*.—Dicken v. Shepherd, 22 Md. 399.

*Massachusetts*.—Stevens v. Hartwell, 11 Metc. 542; Hartings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Shurtleff v. Parker, 130 Mass. 293, 39 Am. Rep. 454; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208, 5

L.R.A. 724; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97.

*New York*.—Olmsted v. Brown, 12 Barb. 657; Pettibone v. Simpson, 66 Barb. 492; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Bassell v. Elmore, 48 N. Y. 561; Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502, reversing 25 App. Div. 438, 49 N. Y. S. 627. See also Keenholts v. Becker, 3 Denio 346; Gutkes v. New York Produce Exch. 46 Misc. 133, 93 N. Y. S. 254.

*Texas*.—King v. Sassaman, 54 S. W. 304. Compare Southwestern Telegraph, etc. Co. v. Long, 183 S. W. 421; Southwestern Telegraph, etc. Co. v. Wilkins, 183 S. W. 429.

*Wisconsin*.—Gough v. Goldsmith, 44 Wis. 262, 28 Am. Rep. 579.

In applying the rule in Ward v. Weeks, 7 Bing. 211, 20 E. C. L. 104, wherein the plaintiff sought to recover damages for the repetition of slanderous words spoken by the defendant, the court said: "The evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representation to Bryer, the repetition of which words, and not the original statement, occasioned the plaintiff's damage. Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words. For no effect whatever followed from the first speaking of the words to Bryce; if he had kept them to himself Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." And in Shurtleff v. Parker, 130 Mass. 293, 39 Am. Rep. 454, wherein it appeared that the plaintiff sought to recover damages resulting from a slanderous statement uttered by the defendant, a clergyman, it was held that the trial court properly excluded evidence tending to show that his auditors had repeated the remarks. The court said: "There is nothing in the evidence to show that the defendant, when he uttered them in a meeting of his own church, authorized or intended any repetition of them by any of the persons present, and, this being so, he is not answerable for any consequences which followed from such repetition or discussion. If the words were slanderous, the repetition under such circumstances gave an independent right of action against those who repeated them; but the fact that they were repeated was not admissible for the purpose, either of showing malice on the part of the defendant,

188 Ala. 272.

or of enhancing the damages to be recovered against him." The reason for the general rule was stated by the court in *Cates v. Kellogg*, 9 Ind. 506, as follows: "It is the doctrine of this court, that every person who repeats a slander, unless upon a justifiable occasion, is liable to an action therefor; and that such person cannot exempt himself from damages in the action by proving that when he repeated the slander he gave the name of the author of it. . . . This being so, the person who originates the slander can only be liable for the special damage occasioned by his own communication of it; otherwise, there might be several different recoveries for the same damage." In *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502, the court said: "It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. . . . The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. . . . The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander."

Where the libelous or slanderous matter is communicated only to the person defamed there is no publication (see notes to *Rumney v. Worthley*, 1 Ann. Cas. 189, and *Lyon v. Lash*, 11 Ann. Cas. 424) and if he gives it currency among others the originator is not liable for the resulting damages. *McCoombs v. Tuttle*, 5 Blackf. (Ind.) 431; *Lyon v. Lash*, 74 Kan. 745, 11 Ann. Cas. 424, 88 Pac. 262; *State v. Lund*, 80 Kan. 240, 101 Pac. 1000; *Galligan v. Kelly*, 31 N. Y. S. 561, 64 N. Y. St. Rep. 197; *Fonville v. McNease*, Dud. L. (S. C.) 303, 31 Am. Dec. 556; *Sylvia v. Miller*, 96 Tenn. 94, 33 S. W. 921; *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L.R.A. 760. See also

*Robitaille v. Porteous*, 11 Quebec Super. Ct. 181. *Compare Allen v. Wortham*, 89 Ky. 485, 13 S. W. 73.

It of course follows from the general rule that where defamatory matter has previously received publication the original author is not liable for damages growing out of its repetition or republication by the plaintiff. *Speight v. Gosnay*, 60 L. J. Q. B. (Eng.) 231, 55 J. P. 551; *Parkins v. Scott*, 1 H. & C. 153, 10 W. R. 562, 6 L. T. N. S. 394; *Fournier v. La Compagnie*, etc. 47 Quebec Super. Ct. 45; *Konkle v. Haven*, 140 Mich. 472, 103 N. W. 850; *Schmuck v. Hill*, 2 Neb. (unofficial) Rep. 79, 96 N. W. 158. Thus in *Fournier v. La Compagnie*, etc. supra, it was held that a journalist who was libeled by an article published in another paper could not recover damages resulting from the increased publicity given the article by the republication thereof with comments in his own paper.

The fact that the person making the repetition states the name of the original author in no way affects the nonliability of the originator for the subsequent dissemination of the defamatory words by others. *Ward v. Weeks*, 7 Bing. 211, 20 E. C. L. 104; *McGregor v. Thwaites*, 3 B. & C. 24, 10 E. C. L. 6; *Mills v. Flynn*, 157 Ia. 477, 137 N. W. 1082; *Stevens v. Hartwell*, 11 Metc. (Mass.) 542.

#### Limitations of Rule.

In qualification of the general rule it has been held that the repetition or republication by others of defamatory words may under some circumstances be the natural and probable consequence of the original act of uttering or publishing the libel or slander, in which case the author is liable for the damages resulting therefrom. *Derry v. Handley*, 16 L. T. N. S. (Eng.) 263; *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Miller v. Butler*, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; *Schmuck v. Hill*, 2 Neb. (unofficial) Rep. 79, 96 N. W. 158; *Fitzgerald v. Young*, 89 Neb. 603, 132 N. W. 127; *Bigley v. National Fidelity*, etc. Co. 94 Neb. 813, 144 N. W. 810, 50 L.R.A. (N.S.) 1040; *Com. v. Wolfinger*, 16 Pa. Co. Ct. 257, 7 Kulp 537; *Southwestern Telegraph*, etc. Co. v. Long (Tex.) 183 S. W. 421. See also *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L.R.A. 732; *Southwestern Telegraph*, etc. Co. v. Wilkins (Tex.) 183 S. W. 420; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579. Thus in *Davis v. Starrett*, supra, it appeared that the defendant uttered in the presence of two persons the following slanderous words: "Orren Davis, is the greatest rum-seller in Warren, Maine" and "Orren Davis

is a rumseller." The court said: "The defendant relies upon the familiar rule that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages for the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control. . . . But this rule has one important qualification. It is a general principle that every one is responsible for the natural and necessary consequences of his act. And it well may be that the repetition of a slander may be the natural consequence of the defendant's original publication. . . . We think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible." And in *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, wherein the evidence showed that the defendant had caused a libelous article to be published in a newspaper, it was held that he was liable for damages resulting from the act of a third person in cutting the article from the paper and sending it pasted on a post card to the plaintiff's fiancé. The court said: "Although one who publishes a libel is not to be held responsible for an independent wrong done by a third person, though connected with the libel, he is responsible for the natural consequences of his own wrongful act, although the wrongful act of a third person may concur in bringing about such consequences. If it were a natural consequence of defendant's publication through the newspaper that some evil-disposed person should send a copy of the paper, or the item cut from the paper, to some one whom defendant had not thought of its reaching, he would be liable for it as the consequence of his own wrong." So in *Com. v. Wolfinger*, 16 Pa. Co. Ct. 257, it was held that where a person sent a libelous article to the editor of a newspaper to be printed he was responsible for damages arising from its publication therein. In *Derry v. Handley*, 16 L. T. N. S. (Eng.) 263, the original author was held to be liable where the intermediate person was under a moral obligation to repeat the words.

If the slander is repeated under innocent circumstances so as not to give a cause of action against the one repeating the same then the first publisher thereof is generally responsible for the damages caused by the repetition. *Fowles v. Bowen*, 30 N. Y. 20. See also *Keenholts v. Beaker*, 3 Denio (N. Y.) 346; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Bassell v. Elmore*, 48 N. Y. 561.

It has been held that where there is no proof of the circumstances under which slanderous words are repeated by the parties who originally hear them the damages which result are deemed to be the consequence of the wrongful repetition and not a natural, immediate and legal effect of the original speaking by the defendant; in other words that the burden is on the plaintiff to show that the exception to the general rule exists. *Prime v. Eastwood*, 45 Ia. 640; *Zurawski v. Reichmann*, 116 Ia. 388, 90 N. W. 69; *Mills v. Flynn*, 157 Ia. 477, 137 N. W. 1082. See also *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L.R.A. 732; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420.

It is, however, for the jury to determine whether the additional circulation given to the libel by a third person is a natural consequence of the defendant's act. *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19; *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L.R.A. 732; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; *Fitzgerald v. Young*, 89 Neb. 693, 132 N. W. 127. But it has been held in the recent decision of *Southwestern Telegraph, etc. Co. v. Long (Tex.)* 183 S. W. 421, which may be considered as an extreme holding in view of the earlier decisions, that where the words are slanderous per se the damages arising from repetition by others are as matter of law the natural result of the original slander. In that case the court said: "Ought a party who utters words so derogatory as to constitute slander per se be held to have reasonably anticipated that they would be repeated? We think so. We think that the fact that the law conclusively presumes damages from the utterance of a slander per se, even though in the presence of but one person, who did not believe it, shows that the slanderer must be held to have reasonably anticipated its repetition, from which, as experience shows, may arise the only injury suffered. Any person with sufficient intelligence to be guilty of slander ought, in the light of common experience, to anticipate the repetition of such slander, and the injurious consequence thereof. He who utters a slander, especially against the reputation of a woman for chastity, must know that he is opening a veritable Pandora's box. He must realize that he is turning loose, as it were, the down of thistle, and ought not to be heard to say that he is not responsible for the wind's scattering it abroad. The 'breath' of scandal blows almost as universally as does the wind. Of a scandal, even when uttered to only a few persons, it may well be said: 'Behold how great a matter a little fire kindleth' (James 3:6); and, 'He that kindleth a fire shall surely make resti-

tution' (Exodus, 22:6)." See in this connection, *Parkins v. Scott*, 1 H. & C. (Eng.) 153, 10 W. R. 362, 6 L. T. N. S. 394.

**TROUT**

v.

**BURNETTE ET AL.**

South Carolina Supreme Court—September 24, 1914.

99 S. Car. 276; 83 S. E. 684.

**Illegitimacy — Inheritance through Illegitimate — Construction of Statute.**

Under Civ. Code 1912, § 3562, which was enacted in 1906, and which provides that any illegitimate child whose mother shall die intestate shall, so far as her property is concerned, be an heir at law as to such property, the children of an illegitimate child who died prior to 1906 are heirs of their grandmother, the mother of the illegitimate child, who died subsequent to 1906; as the act is remedial, and so construed is not retrospective, since it looks forward to the time when the distribution of the intestate's estate is to be made, especially in view of section 3555, providing that the lineal descendants of an "estate" (intestate) shall represent their respective parents and take among them the share or shares to which their parents would have been entitled had such parents survived the intestate, and, moreover, the legislature in using the technical term "heir at law" must have intended to invest the illegitimate children with inheritable blood such as other heirs at law possess.

[See note at end of this case.]

Appeal from Circuit Court, Spartanburg county: SHIPP, Judge.

Action for partition. J. W. Trout, plaintiff, and Stanley Burnette et al., defendants. From judgment rendered defendants Iris Wilson et al., appeal. REVERSED.

[276] The facts are stated in the master's report, which is as follows:

"Mrs. Nancy D. McClure died intestate in 1910, seized and possessed of a tract of 88 acres of land, about eight miles north of the city of Spartanburg, and owning a small personal estate. This suit is brought by plaintiff, her eldest son, for the partition and division of her property.

"Mrs. McClure was first married to a man named Trout, and the plaintiff was the only child by the first marriage. After the death of her first husband, her second child, Ella,

[277] was born out of wedlock. This child, Ella, familiarly known as 'Babe,' was married to R. R. McMillan. To them were born three children, viz.: Iris McMillan (now Wilson), Ralph McMillan and Nannie McMillan. Ella McMillan died some years ago—previous to 1906—leaving her husband and children surviving her. After the birth of Ella, Mrs. Trout was married to a man named Burnette, and to them was born one child, Otis L. Burnette, who died in 1908, leaving five children, viz.: Stanley, Flavius, Joyce, Ruby and Eleanor Burnette. After the death of Mr. Burnette, Mrs. Burnette married a man by the name of McClure, in 1893, who died about 1903. During her lifetime Mrs. Nancy D. McClure conveyed certain property to her son, Otis L. Burnette, which plaintiff alleges to have been in the nature of advancements. During the latter years of her life the management of her property was in the hands of her eldest son, the plaintiff, who is to account for his handling of such property. These two questions will be considered last in this report. I shall first address myself to the principal question arising herein, viz.: Are the children of Ella McMillan heirs at law of their grandmother, Mrs. Nancy D. McClure? Are they entitled to represent their mother, Ella McMillan, and to take among them the share to which she would have been entitled if she had survived the intestate, Mrs. Nancy D. McClure?

"Section 3562, vol. I, Code of 1912, is (in part) as follows:

"Any illegitimate child . . . whose mother shall die intestate, possessed of any real or personal property, shall be, so far as said property is concerned, an heir . . . at law as to said property, notwithstanding any law or usage to the contrary."

"This is the act of 1906 (XXV. Stats. 156), and was enacted after the death of Ella McMillan, the illegitimate child, but before the death of Nancy D. McClure, her [278] mother. Can the legitimate children of Ella McMillan share in the distribution of the estate of their grandmother?

"The act is an enabling and remedial statute, affecting the rights of those who have heretofore been under the ban of law, and giving a remedy where none existed before. In such cases it is to be presumed that the legislature intended the most beneficial construction of the act consistent with a proper regard for the ordinary canons of construction. Before the passage of this act illegitimate children could not inherit; a bastard was said to be *nullius filius*. It would seem that the illegitimate child was not allowed to inherit for two reasons: (1) In order that a penalty might be inflicted for wrongdoing (the penalty here falling upon the only innocent person concerned in the committing of

the wrong), and (2) because his parentage was uncertain (though, of course, no uncertainty could exist in the case of the mother).

"In the case at bar the only doubt as to the right of the children of Ella McMillan to inherit arises out of the fact that their mother (the person whom it would seem that the statute was meant to benefit) was dead before the passage of the act. This statute was intended by the legislature to invest the illegitimate child (so far as his mother's property is concerned) with inheritable blood, as if he had been born in wedlock. Can this statute breathe the breath of life into the dead illegitimate and invest her with such inheritable blood as that she can transmit to her children the right to inherit from the one from whom she could inherit if she had lived? Would such a construction of the law be retrospective? It is a well settled rule that an heir may transmit through his heritable blood to his heirs property which he would have inherited if he had been alive at the time of the distribution.

"The questions propounded above are answered by the Supreme Court of Massachusetts in the case of *Curtis v. Hewins*, 11 Metc. 294. The Court decides that in such [279] a case the provision of the statute does not apply to the grandchildren of the mother of the illegitimate child.

"The contrary view is taken by the Texas Court, in the case of *Blair v. Adams*, reported in 59 Fed. Rep. and by the Illinois Court in *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421. So also by the Indiana Court, in *Moran v. Holiday*, reported in 77 N. E. 861. The last named case is strongly relied upon by defendants, and will doubtless be fully presented to the Court by counsel. In this case the illegitimate daughter died June 7, 1892, the enabling statute was passed in 1901, and the intestate died in 1902. The widow and mother of another illegitimate son claim all the property, on the ground that the first illegitimate daughter died nine years before the statute was passed, but the Court decided that the children of the illegitimate daughter should share in the distribution of the estate.

"In *Bales v. Elder*, supra, suit was brought to partition the land of Hiram Walker, a legitimate son of Sarah Walker, a woman who had an illegitimate son, Hampton D. Bales. Hiram Walker died intestate, leaving (as defendants contended) one sister and the descendants of four sisters as his only heirs at law. Hampton D. Bales, the illegitimate, died in 1852, Sarah Walker in 1854, the statute was passed in 1872, and this case was tried in 1887. The question was whether or not the children of the illegitimate Hampton D. Bales were heirs at law of their uncle, Hiram Walker, along with his sisters' children and surviving sister. In this case the

illegitimate had been dead for twenty years when the act was passed. In deciding that the descendants of the illegitimate were heirs at law, and as such should participate in the distribution of the Walker estate, the Court says:

"It is claimed that appellants cannot claim under the act of 1872, for the reason that Sarah Walker and Hampton D. Bales both died before the act was passed. There is no provision of the act under which its application is limited [280] and confined to a case where the mother and illegitimate may be living at the time the act took effect. This act is one prescribing a rule of descent of property. . . . The appellants do not claim a part of this estate as heirs of Sarah Walker, or Hampton D. Bales, but they claim as the heirs of Hiram Walker; and as he died after the act of 1872 was adopted, his estate must descend and be distributed according to that act."

"The effect of this case is to hold that such application of the statute as the defendants in the case at bar ask for is not retrospective; and I hold as a matter of law that the act of the legislature of 1906 (sec. 3562) would not be retrospective when so applied, for the reason that the act looks forward to the time when the distribution of the intestate's estate is to be made, and not backward to the time when the illegitimate died, leaving children. After a very long and careful consideration of this case, I have been forced to this conclusion, although I must state that the case has been an exceedingly difficult case to decide. I do not find it necessary, however, to base my report upon the cases decided from Indiana, Illinois and Texas alone; the plain provision of our own statute is much clearer and simpler than the reasoning in these cases cited from other jurisdictions. Section 3555, vol. I. Code of 1912, subdivision 1, c. 2, reads as follows:

"The lineal descendants of the intestate shall represent their respective parents, and shall take among them the share or shares to which their parents would have been entitled had such parent survived the intestate."

"(The word *intestate*, in the first line of the quoted sentence appears as *estate* in the Code of 1912, but of course this is a typographical error—*intestate* is meant.) This section has been the law of South Carolina for more than a hundred years, and it is to be presumed that the legislature intended the act of 1906 to fit into the body of the law already in force in South Carolina. If we put these two [281] provisions of the law together (sec. 3562 and sec. 3555, subd. 1) we shall be forced to the conclusion that the children of Ella McMillan are heirs at law of Nancy D. McClure; our statute says that they shall represent their mother, and take



the share she would have been entitled to if she had survived her parent. Such a construction does not make the statute retroactive, because the statute is looking forward to the death of the ancestor, to the time of the distribution of the intestate's property. When the legislature uses a technical word, it is to be presumed that they intended a technical construction to be given it. Therefore, if an illegitimate is to be the "heir at law" of his mother, he is to be invested with inheritable blood, such as other "heirs at law" possess under the plain wording of the statutes already in force. I hold, therefore, that the act under consideration invested even a dead illegitimate child with heritable blood, which such child could transmit to his living children, so as to enable them to share in the distribution of any property of which the mother of such dead illegitimate child might die seized and possessed of, after the passage of the act. Therefore, Iris Wilson, Ralph McMillan and Nannie McMillan are heirs at law of their grandmother, Nancy D. McClure, and as such are entitled to their share of her estate—i.e., the share that their mother would have been entitled to if she had lived longer than Nancy D. McClure. *Ita lex scripta est.*"

To this report the plaintiff, J. W. Trout, and the defendants, Stanley Burnette, Flavius Burnette, Joyce Burnette, Ruby Burnette and Eleanor Burnette, excepted, upon the ground that the master erred:

First. In holding that the defendants, Iris Wilson, Ralph McMillan and Nannie McMillan, are the heirs at law of their grandmother, Nancy D. McClure.

Second. In holding that the said defendants are entitled to the share of their grandmother's estate that their mother, [282] Ella McMillan, the illegitimate daughter of Nancy D. McClure, would have taken had she survived her mother.

Third. In holding that the act of 1906, section 3562, Code Law, vol. I. 1912, was retroactive and invested a dead illegitimate child with heritable blood.

Fourth. In failing to hold that the act of 1906, section 3562, Code Law, was not retroactive, and that Ella McMillan never had any vested interest in her mother's estate which she could transmit to her children.

Fifth. In failing to hold that Iris Wilson, Ralph McMillan and Nannie McMillan were not the lineal descendants of Mrs. Nancy D. McClure, and not entitled to any part of her estate.

From the circuit decree, reversing the master's report, this appeal is taken.

Gwynn & Hannon for appellants.

Carson & Boyd, John Gary Evans and I. C. Blackwood for respondents.

Ann. Cas. 1916E.—58.

[283] WATTS, J.—This was a suit brought to partition the lands of Nancy D. McClure, who died intestate in 1910. She left surviving her as her heirs at law the respondents, who are her son and the children of a predeceased son. The appellants are the children of a predeceased daughter, who was an illegitimate daughter of Nancy D. McClure. The only question involved in the appeal is: "Do the children of Ella McMillan, born Ella Trout, who was an illegitimate daughter of Nancy D. McClure, take as heirs of the estate of their grandmother, Nancy D. McClure, who died intestate?" Their mother, Ella McMillan, having died several years before her mother, Nancy D. McClure, and prior to the enactment of the statute of 1906 (25 Stats. at L. 156; Civil Code, 1912, sec. 3562). The master found that they were entitled to inherit and so recommended, but upon exceptions to his report, his Honor, Judge Shipp, reversed his report, and decreed that they were not entitled to inherit, and from this decree an appeal is taken, and above question is raised for determination. We are inclined to give a broad and liberal interpretation to the act of the legislature, and not a narrow, restricted interpretation. It was clearly the intention of the legislature, when they enacted the act in question, that the illegitimate children, whose mother should die intestate possessed of any real or personal property, should inherit, as far as that property is concerned, as an heir; and it was the intention to make the illegitimate child an heir of the mother of the property she was possessed of at her death, and in the event of the illegitimate child's death leaving heirs born in wedlock that they should take the share their parent would have taken if alive. In other words, it was the intention of the legislature by the act to make the illegitimate child an heir to inherit the property that the mother was seized and possessed of at her death, and having so made the illegitimate child an heir at law, the illegitimate's child would inherit the share that the illegitimate child would have inherited if alive. We cannot add to the [284] reasoning of the admirable report of the master for Spartanburg county, S. T. Lanham, Esq., on this question. His report is sustained both by reason and authority cited by him. The exceptions to the decree of his Honor, Judge Shipp, are sustained and his decree reversed.

FRASER, J. (dissenting).—I dissent. It is clear to my mind that the right of illegitimates to inherit is a restricted right under the act of 1906 (25 Stats. 156; Civil Code, 1912, sec. 3562). The restriction is to property, real or personal, of which the mother was possessed, and only as to such property are the children heirs at law. If the legisla-

ture intended to give inheritable blood generally, why use the words "be, so far as said property is concerned, an heir" or heirs at law "as to such property."

#### NOTE.

The reported case, asserting that a statute making an illegitimate child an heir of its mother should receive a broad and liberal construction, holds that it gives to the child of an illegitimate the right to inherit by representation any estate which its mother would, if living, have taken under the statute. The court also holds that a retrospective operation is not given to the statute by making it effective to permit the child of an illegitimate to take by representation from her grandmother though the illegitimate mother died before the act was passed. The right of an illegitimate to inherit from or through its mother is discussed, with specific mention of the retrospective effect of statutes giving the right, in the note to *Barron v. Zimmerman*, Ann. Cas. 1914D 574.

#### CRAMER'S ELECTION CASE. CRAIG ET AL.

v.

#### CRAMER.

Pennsylvania Supreme Court—February 22, 1915.

248 Pa. St. 208; 93 Atl. 937.

#### Certiorari — What Constitutes Part of Record — Opinion of Lower Court.

On certiorari to review the decision in an election contest, the opinion of the lower court, though not strictly a part of the record, is open to examination to discover the grounds of the court's action.

#### Elections — Effect of Irregularity — Arrangement of Voting Room.

Where in an election contest it appeared that in violation of Act June 10, 1893 (P. L. 428) § 19, two separate rooms were employed for holding the election, one being occupied by the election board and containing the ballot box and the other containing the booths, and that, instead of a guard rail, a rope was employed which did not exclude from the space reserved for voters all but the election board and the persons actually engaged in voting, and that votes cast for an office other than that contested had been purchased, the court should have declared that all votes cast under such circumstances were invalid, though no actual fraud was

shown as to the vote for the office in contest.

[See note at end of this case.]

#### Same.

The provisions of Act June 10, 1893 (P. L. 428) § 19, relating to the arrangement of the rooms in which elections are held, being mandatory, a disregard of same without excuse invalidates the ballots cast and requires that the returns from wards wherein such violations occurred be excluded in the general count.

[See note at end of this case.]

#### Statutes — Mandatory or Permissive.

A legislative provision accompanied by a penalty for failure to observe it is mandatory.

Appeal from Certiorari to Court of Quarter Sessions, Fayette county: VAN SWEARINGEN, Judge.

Petition for leave to contest an election. Alexander W. Craig et al., petitioners, and Charles T. Cramer, defendant. From judgment rendered, petitioners appeal. The facts are stated in the opinion. REVERSED.

H. S. Dumbauld for appellants.

W. J. Sturgis for appellee.

[209] STEWART, J.—This proceeding was instituted in the Court of Quarter [210] Sessions of Fayette County upon the petition of the requisite number of qualified voters contesting the election of Charles T. Cramer to the office of tax collector of the Borough of Uniontown in said county. The election had been held 4th of November, 1913, and by the returns filed it appeared that of the whole number of votes cast for tax collector, Charles T. Cramer received 1110, and J. Searight Marshall, the opposing candidate, 1069. The contest involved the integrity of the election held in the fourth ward of the borough. The vote as returned shows a majority in the entire borough of 41 for Cramer over Marshall. The contention on the part of the petitioners was that because of certain irregularities, to which we shall more particularly refer hereafter, in the holding of the election in this ward, the election there held was invalid, and that the returns of said ward are not to be included in the general count. Had this contention prevailed, Marshall and not Cramer would be entitled to the certificate of election, since, eliminating from the count the votes cast in the fourth ward, Marshall would be the majority candidate by 21 votes. Answer was filed by Cramer denying the material averments in the petition. The case was heard on petition, answer and evidence taken in support of petitioners' averments, with the result that petitioners failed in their contention before the court, and it was adjudged and decreed "that Charles T. Cramer

had received the greatest number of votes for the office of tax collector of the Borough of Uniontown at the election held on November 4th, 1913, and is entitled to the certificate of election." The case is brought to this court by certiorari, and the field of our inquiry is therefore a restricted one. Under a certiorari, we have simply revisory power, and in the exercise of such power while we may examine and revise the record for the purpose of seeing whether the court below exceeded its jurisdiction or its proper legal discretion, to the record we are confined; and as a result of this restriction, the actual [211] merits of the case are not a subject of inquiry, and the evidence is therefore a matter wholly aside. Nevertheless, in election contests, because these occupy a middle ground between common law and proceedings in equity, the opinion of the court, though not strictly part of the record, is open to examination to discover the grounds of the court's action. In *re Independence Party Nomination*, 208 Pa. St. 108, 57 Atl. 344. In the present case the learned judge in his opinion filed states very fully the facts as he derives them from the evidence. Under the authority just cited, it becomes our duty to inquire whether, upon such facts as found, the court exercised proper legal discretion in holding that the election here contested was a valid election, and that Cramer was duly elected to the office of tax collector. The petition of contestants contained a number of charges affecting the integrity of this particular election besides that one to which we propose to make special reference, but the findings with respect to these were adverse to petitioners' contention, and they are therefore eliminated from the present inquiry, which must be confined to a consideration of such facts as the court has found to exist, and in view of which the election returns of the fourth ward have been sustained.

We come now at once to the charge that the place where the election was held was, with respect to its arrangements and appointment, in flagrant disregard of legal requirements, and that in consequence the election was illegal. That the extent of this departure may be understood, it is necessary to have clearly in mind what the law requires with respect to a place of election. The Act of 10th June, 1893, P. L. 419, in Sec. 19, provides as follows: "The county commissioners of each county shall provide for each election district therein, at each election, a room large enough to be fitted up with voting shelves and a guard rail as hereinafter provided. If in any district no such room can be rented or otherwise obtained, the said commissioners shall cause to be constructed for such district, a temporary room of adequate [212] size to be used as a voting room. They shall also

cause all the said rooms to be suitably provided with heat and light and with a sufficient number of voting shelves or compartments, at, or in which, voters may conveniently mark their ballots, with a curtain, screen or door, at the upper part of the front of each compartment, so that in the marking thereof they may be screened from the observation of others, and a guard rail shall be so constructed and placed that only such persons as are inside of said rail can approach within six feet of the ballot box and of such voting shelves or compartments. The arrangement shall be such that neither the ballot box nor the voting booths shall be hidden from view of those just outside of the said guard rails. The number of such voting shelves or compartments shall not be less than one for every seventy-five names on the assessor's list; but shall not in any case be less than three for the voters qualified to vote at such voting place. No persons other than the election officers and voters admitted as hereinafter provided, shall be permitted within the said rail, except by authority of the election officers for the purpose of keeping order and enforcing the law."

The facts with respect to the circumstances attending the election at this fourth ward poll as recited in the opinion filed, are these: "Such an arranged room as is required by the act cited was not provided or used at the election in question. The election was held in a one-story frame building, 18x24 feet in size, used originally by the owner as a place for making wire fence, and later as a storage room in connection with his place of business. At that time the entire inside of the building remained in one large room. About four years ago, while in that condition, the building was established as a polling place for that ward, and it remained in that condition until a short time prior to the primary preceding the election in question, when a separate room in one corner of the building was constructed by the erection of two partitions to be used as a cobbler's shop. The remaining [213] big room was used for election purposes at the primary election on September 16th, 1913. After that primary, and about a week prior to the general election, the owner of the building erected two partitions through the large room, constituting a division of the entire building into four rooms. At the time of the election in controversy, the two rooms in the other end were used for purposes of the election. The main entrance from the street was into the front one of these two rooms and the door leading from that room into the one back of it was in the corner of the front room, diagonally across from the front door which was not quite in the corner of the front room. The owner of the building, in arranging for the

election, the day before it was held, erected the voting booths in the back room, all of them except one being in the positions and places they had occupied at previous elections. The table and chairs for the election officers were placed in the front room away from the doors, and an inch rope was stretched from the side of the front door next to the tables to the same side of the front door leading into the back room, thus separating the space occupied by the election board from that in front of the rope, and allowing voters to get their ballots from the election board over the ropes and pass on into the other room, which extended further toward the other end of the building than did the front room, and mark their ballots in the booths, and returning deposit their ballots in the ballot box which was kept just inside the rope in that portion of the front room occupied by the election officers through the door between the two rooms and others of them were not. All of them were in view of persons outside the rope at a position near the door between the two rooms. The ballot box at all times was in view of all persons on either side of the rope in the front room."

The case as here presented by these findings of fact shows an open disregard of the requirements of the act manifestly sufficient, because of omissions of many material [214] requirements, to defeat the purpose of the act, given a disposition on the part of any present to take advantage of existing irregularities to obtain fraudulent results. It is only necessary to indicate some of the derelictions which rendered fraudulent practice, if not easy, certainly far less difficult of accomplishment than would have been the case had the requirements of the act been complied with. A manifest prerequisite to the accomplishment of legislative purpose is a room at the place appointed for the holding of the election sufficient in dimensions to admit of the employment of such safe guards as are provided for by the act. Except as such room is provided an election conducted in the manner prescribed would be utterly impracticable. In the present case whatever irregularity there was in this election resulted from the fact that two separate rooms were employed. One of these was occupied by the election board and in this was placed the ballot box; the other contained the booths which the voters used to mark their ballots. We have no distinct finding by the court that either of these two rooms was adequate in itself, but, considering the dimensions given of the entire building, and the manner of its sub-division, it is clear that neither by itself would have been adequate, and to this inadequacy is to be referred most of the irregularities to which our attention has been directed. The rope which was employed as a

substitute for a guard rail, placed as it was, served not a single purpose for which it was prescribed. The main purpose of the guard rail is to exclude all persons from the space containing the booths and occupied by the election board having in charge the ballot box, except such as are admitted for the purpose of receiving, marking and depositing the ballot; and to prevent all persons, except the voter admitted for the purpose of voting, from approaching within six feet of the ballot box. In this case the rope that was substituted for the guard rail ran directly alongside the ballot box, and was within the reach of [215] those who stood outside or who passed from one room into the other. The voter received his ballot, not within the guard rail, but while standing outside the rail; and instead of entering within the rail, to mark it and cast it, he retired to the adjoining room where the booths were protected by no guard rail or rope; then returning to the front room, and without entering the guard rail there, but standing outside with persons there assembled, he handed his vote to the election officer. Under such conditions there was absence of all restraint upon interference with the voter who entered the booth to mark his vote, and considering the fact found by the court, that at this election there were cast votes which had been bought at a price, though not for the office of tax collector, it is made clear beyond question, that if no such fraudulent votes were cast for the office of tax collector, it was not because opportunity was not afforded by the absence of the safeguards prescribed by law. The court finds that with respect to the election of tax collector, notwithstanding the irregularities he refers to, no actual fraud was shown, and it is upon this finding that he rests his decree in the case. The position taken assumes that the provisions of the act above recited are directory merely, and not mandatory, and that no disregard of these will vitiate the poll except as actual fraud is shown, and then only as the fraudulent votes cannot be separated from those legally cast. To this we cannot agree. The purpose of the act in requiring such safeguards as those prescribed is strictly protective. The act was not framed with a view to discover fraud when practiced, or to provide a method for the correction of the returns where fraudulent votes have been cast, but its sole purpose was to prevent fraud in the first instance, and the requirements were designed to this end. That the legislature understood and intended the provisions of the act to be mandatory is evident not only from the fact that the language used is imperative, but for the still stronger reason that by the 33d Sec. it is made a misdemeanor for [216] any public officer upon whom a duty is imposed by the

act to negligently or wilfully fail to perform such duty, or negligently or wilfully perform it in such a way as to hinder the objects of the statute, or negligently or wilfully violate any of the provisions thereof. It is an established rule of construction that where a legislative provision is accompanied with a penalty for failure to observe it, the provision is mandatory. It would offend against the plain and unmistakable meaning of such a statute to otherwise construe it. Aside from this, it is too clear for debate that except as provisions of the act referred to are held mandatory the whole purpose of the act is defeated, and, as has been said by another, the opportunities for fraud are increased rather than diminished. So it is not a question whether the fraudulent votes that were admittedly introduced into this ballot box—votes that had been openly purchased and that too by a county detective—were cast for this respondent, or whether these could be identified and eliminated from the count; these matters are wholly aside. As we have said it was not for the purpose of detecting or correcting fraud that the act was passed, but for the prevention of it. As here conducted the election at this particular poll prevented nothing in the way of fraudulent practice that would not have been equally guarded against by the law as it stood before this act was passed.

A necessary conclusion from what we have said must be that the election held for the fourth ward in the Borough of Uniontown was wholly illegal, since in the conduct of the same, requirements of the statute absolutely essential to its efficiency, and therefore imperative, if for no other reason, were flagrantly disregarded, and that too without excuse or justification.

The circumstances to which our attention has been directed by way of excuse and avoidance of the result indicated, are wholly without influence. It is not for us to apportion the responsibility for these gross derelictions between the county commissioners and the board of [217] election officers; it is enough to know that both fully understood the requirements of the law, and that at the instance of either, however late the insufficiency of the room was discovered, the matter was open to correction by application to the court, under Sec. 2, Act of April 17, 1866, P. L. 107. The partition wall which divided the one room into two had been erected by the owner without any right whatever, and, so far as appears, its removal could have been accomplished without trouble or serious delay. The findings do not disclose that this unwarranted interference with the room was made the subject of remonstrance, or that any demand for its removal was made. The officials charged with responsibility simply acquiesced in conditions which made a legal election at

that place impossible so long as these existed, and made no effort at their correction. Every voter at that poll on that day must be held to a knowledge of the fact that the requirements of the statute were not being complied with, but were being openly and flagrantly disregarded, and acquiescence on their part in the dereliction leaves but little ground for them to complain if the entire vote of the ward should be stricken out. The remedy was as available to them as to the officials.

If the election was illegal—and we so hold, for the reasons stated—then it follows that the return from the ward was improperly reckoned in the general count, and must be thrown out. Precedent and authority for this course may be found in *Melvin's Case*, 68 Pa. St. 333, and the cases there cited and reviewed.

The decree is reversed, and now February, 1915, it is ordered, adjudged and decreed that J. Searight Marshall is the duly elected tax collector of the Borough of Uniontown, and that the proper certificate of his election to said office be issued to him accordingly.

#### NOTE.

**Effect on Election of Failure to Comply with Statute as to Arrangement of Voting Rooms or Booths.**

#### *General Rule.*

Since the right of suffrage is not to be impaired by official acts which do not prevent a fair and free expression of the public will, a failure to comply with the statute as to the arrangement of voting rooms or booths is ordinarily deemed to be merely an irregularity which will not invalidate an election. *Patton v. Watkins*, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43; *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30; *Laird v. Boothe*, 22 Cal. App. 569, 135 Pac. 703; *Yunker v. Susong* (Ia.) 156 N. W. 24; *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773; *Pace v. Reed*, 138 Ky. 605, 128 S. W. 891; *Perry v. Hackney*, 11 N. D. 148, 90 N. W. 483; *Moyer v. Van De Vanter*, 12 Wash. 377, 41 Pac. 60, 50 Am. St. Rep. 900, 29 L.R.A. 670. Compare *Choisser v. York*, 211 Ill. 56, 71 N. E. 940; *Allen v. Griffith*, 160 Ky. 528, 160 S. W. 1003; and the reported case. Thus in *Yunker v. Susong*, supra, wherein it appeared that at an election no booths were provided by the officials the court said tersely: "An election will not be declared void because the arrangement of the polling place, manner of placing booths, etc., was not according to law." And in *Conaty v. Gardner*, 75 Conn. 48, 52 Atl. 416, it was held that mere irregularities in the arrangement of the voting rooms and booths, due to the failure of

the election officers to perform their duty properly, would not, in the absence of evidence showing injurious results, vitiate an election. The court said: "The law punishes by fine or imprisonment any person who wilfully fails to perform any duty imposed upon him by the election law, but it makes no provision that ballots shall be void or shall not be counted merely because the arrangement of the polling place at which they are cast does not in every respect conform strictly to the requirements of the statute. The provision that all ballots cast in violation of the provisions of the election law shall be void and not counted, refers to ballots which the casting voters have failed to prepare and deposit in the manner provided by the statute, rather than to those cast at a voting place not arranged in every particular as the statute provides." But in *Allen v. Griffith*, 160 Ky. 528, 169 S. W. 1003, it was held that an election was void, it appearing among other irregularities that a plank was torn from a booth whereby voters were enabled to show their votes. The court said: "In Jackson Precinct No. 2, which gave appellee a majority of 24 votes, there were no booths, but the officers of election stretched a piece of carpet across one corner of the voting place, which was a small boxed house. Some of the partisans of appellee tore a plank off the corner of the house, which enabled the voters to expose their votes. The election officers put a sheet across this opening so that the voters might vote secretly. The sheet was taken down and torn to shreds. When a voter would go in to vote he would go to the crack and hold up the ballot. The partisans of appellee would say 'That is all right. Put it under the log cabin. Double it up and come out here.' There is no denial of these facts. They are practically admitted by witnesses for appellee, who also say that certain Democrats were present and watching the ballots as they were shown through the crack. This method of voting continued until all the ballots were cast, with the exception perhaps of 20. Then the voting place was moved to another part of the room."

#### *Application of Rule.*

A failure to provide booths as required by the statute has been held to be a mere irregularity which will not vitiate the election. *Patton v. Watkins*, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43; *Yunker v. Susong* (Ia.) 156 N. W. 24. Thus in *Patton v. Watkins*, supra, it appeared that at a polling place no booths were provided for the occupation of voters while preparing their ballots but they were prepared in a room adjoining that occupied by the inspectors. It was held that

the irregularity did not render the vote illegal. The court said: "A vote cast by a legally qualified elector at an election held by the proper officers at a time and place designated by law is not made illegal by a failure to observe a mere direction given by statutes as to the mode of conducting the election. In general, statutory provisions relating to procedure in elections are directory merely, unless their disregard be made expressly vitative. . . . No such consequence of non observance is expressed in the statutes which require that the sheriff shall furnish booths."

In *Moyer v. Van De Vanter*, 12 Wash. 377, 41 Pac. 60, 50 Am. St. Rep. 900, 29 L.R.A. 670, the court said that the fact that the election officers failed to have booths erected which complied with the law was an irregularity which would not vitiate the election. In *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773, it appeared that at an election, in the precincts where a heavy vote was registered, the sheriff put in but three booths and not one booth for each 100 voters as shown by the registration. Reversing the judgment of the circuit court, adjudging that there had been no election for this and other irregularities the court said: "Section 1467, Ky. St. regulating the number of booths, is in these words: 'The number of such booths shall not be less than one to every one hundred voters, and one for every fraction of one hundred voters exceeding fifty who voted at the last preceding election in such precinct.' It will be observed that this section also fixes the number of booths, not according to the number of voters in the district, but according to the number 'who voted at the last preceding election in such precinct.' As the districts had just been established, the sheriff could only be guided by the presumption that the county judge had done his duty, as provided in section 1443, and, acting upon the presumption, he was only required to put in three booths in each precinct. It might have been wiser in the statute to require the sheriff to be governed by the registered vote in cities where registration is had, but the statute does not so provide. The sheriff literally followed the statute. When it was known what had been done no one applied to him to put in more booths. Contestees knew then, as well as they know now, the number of registered voters in each precinct, and if they desired more booths, they should have applied to the sheriff to put them in. They cannot now be heard to complain of the sheriff for not thinking of what they did not think of themselves."

The fact that the booths have no curtains or doors will not render the election void. *Pace v. Reed*, 138 Ky. 605, 128 S. W. 891; *Perry v. Hackney*, 11 N. D. 148, 90 N. W.

483. Thus in the case first cited the court said: "All the testimony shows that the election in this precinct was quiet and peaceable, and that the conduct of the election officers was admirable, with the exception stated, and the election was held as near in conformity with the law as the circumstances and facilities furnished would permit. The voters in that precinct should not be deprived of their suffrage and the election officers condemned for holding the election at that place when it was the only place furnished them for holding it. There is not the slightest proof showing that appellee or any of his friends had anything to do with furnishing of the house or the booths in which to hold the election, and he should not be made to suffer on account of this error."

It has been held that the placing of booths in a room other than that occupied by the officials will not render the election invalid. *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30; *Laird v. Boothe*, 22 Cal. App. 569, 135 Pac. 703. Thus in *Laird v. Boothe*, supra, a violation of the Political Code was alleged in erecting the voting booth so as to be "hidden from the view of those just outside of the guard rail." The cottage used for the polling place consisted of two rooms, one about 14 feet by 20 feet, used by the board for its accommodation and the other about 6 feet by 10 feet. A door opened into this small room from the larger one, and there was one window in it. A booth was erected inside of the small room, with three sides to it, but having no covering across its front. It was held that the irregularity was not sufficient to invalidate the election. The court said: "It was an irregularity, not to be commended, to place the voting booth in a separate room which when the door was closed shut off the view of the booth from both the by-standers and the officers. But it appeared that only one voter was allowed to enter this room at the same time and this voter was shielded from interference or view from the outside and generally the door was open allowing full view of the booth."

In *Choisser v. York*, 211 Ill. 56, 71 N. E. 940, it was held that ballots marked in a room adjoining the room in which the election was held and used as a booth were invalid. Quoting the statute requiring voting booths the court said: "This provision of the statute is an important one, and should not be disregarded. It has been held that a failure of election officers to erect booths in compliance with the law was an irregularity which would not vitiate the election. . . . We are of the opinion, however, this statute is so far mandatory that it must substantially be complied with. To permit a room adjoining the room in which the election is held to be used as a booth would open wide the door

for fraud by permitting unauthorized persons to have access to the voter, and it would substantially destroy the seclusion of the citizen while preparing his ballot—at least such might be the result." *Compare Patton v. Watkins*, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43.

In *Laird v. Boothe*, 22 Cal. App. 569, 135 Pac. 703, wherein it appeared that the officers of the election failed to provide a guard or railing to prevent the public from mingling with the election officers, it was held that it would be unjust to the voters of the precinct to disregard their votes wholly because of the irregularity. The court said: "The failure to erect a guard rail or a substitute for it in the forenoon and allowing voters to enter the room in which the officers sat is, we think, explained in a way to relieve the officers from culpability, and the evidence is undisputed that the proper conduct of the election was not in any wise interfered with. Some degree of liberality of construction should be given the statute in dealing with these small precincts in counties where it is not always practicable to conveniently arrange the voting places in strict conformity with the statute." *Compare Detroit v. Rush*, 82 Mich. 532, 46 N. W. 951, 10 L.R.A. 171.

In *Perry v. Hackney*, 11 N. D. 148, 90 N. W. 483, the sole contention of the contestant was that votes cast in a precinct were void, because of the failure of the election officers to comply with some of the provisions of the code, among which was a requirement that the guard rail must be more than ten feet from the ballot boxes and booths. It was held that the violation did not defeat the spirit of the law as to having a secret ballot. The court said: "The derelictions in question were free from fraudulent design, and were without effect upon the merits of the election. No illegal votes were cast, and there is no pretense that the voters did not vote their convictions with the same freedom that they would have had if the guard rail and booths had been arranged strictly in accord with the provisions of section 521, supra. Not only do the findings show that the omissions had no effect upon the state of the vote, but they also show that the electors in Cheyenne precinct had a secret ballot within the meaning and spirit of the law. It is true, the statutory mode of guarding its secrecy was not strictly obeyed; that is, the voter was not screened from observation when marking his ballot in the manner contemplated by the statute, and the guard rails were not ten feet from the ballot boxes and booths. But these are mere means of securing a secret ballot, which is the end aimed at, and when that is accomplished the spirit and purpose of the law has been accomplished."

**WIMBROUGH**

v.

**WIMBROUGH.**

Maryland Court of Appeals—April 8, 1915.

125 Md. 619; 94 Atl. 168.

**Marriage — Annulment — Power of Equity.**

Though Code Pub. Civ. Laws, art. 62, § 14, provides that circuit courts and the superior court of Baltimore city upon petition, and the circuit courts and the criminal court of Baltimore on indictment, may inquire into the validity of any marriage and declare any marriage contrary to that article, or any second marriage, the first subsisting, null and void, the authority of courts of equity to determine the validity of a marriage charged to have been procured by abduction, terror, fraud, or duress, rests upon their general jurisdiction to set aside contracts affected by fraud, etc.

**Same.**

The jurisdiction of equity to set aside a marriage for fraud, duress, etc., should be exercised with extreme caution, and only on clear, distinct, and satisfactory evidence.

**Grounds for Annulment — Duress — Marriage to Escape Prosecution.**

Where a man marries to escape arrest or imprisonment for seduction or bastardy he cannot avoid the marriage on the ground of duress, nor is a marriage induced by threats of lawful prosecution, arrest, or imprisonment, to redress or punish a wrong, open to impeachment on that ground.

[See 20 Ann. Cas. 1375, 14 Id. 869.]

**Evidence of Duress Insufficient.**

In a husband's action to annul a marriage, evidence held insufficient to show duress on the part of the wife's father, justifying the annulment of the marriage.

**Intent Not to Perform Marital Obligations.**

The statement of a man at the time of his marriage that he would not live with the woman does not render the marriage void.

[See note at end of this case.]

Appeal from Circuit Court, Worcester county: JONES, Judge.

Action to annul marriage. Walter T. Wimbrough, plaintiff, and Susie May Wimbrough, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. Affirmed.

Geo. M. Upshur and Franklin Upshur for appellant.

Wm. F. Johnson for appellee.

[620] THOMAS, J.—The bill in this case was filed in the Circuit Court for Worcester

County on the 11th of October, 1913, by Walter T. Wimbrough, of that county, the appellant, to annul a marriage between him and the appellee on the ground that it was the result of duress "practiced upon him" by the father of the appellee.

It alleges that on the 19th of March, 1913, "an alleged marriage took place in the town of Berlin, in Worcester County," between the plaintiff and defendant; that the plaintiff "was compelled to go through a marriage ceremony with the defendant only because of duress practiced upon him by John T. Adkins, the father of the defendant, and because of fear of instant death or grievous bodily harm at the hands of the said Adkins by reason of threats then and there made by" him "against" the plaintiff if he "should refuse to go through the marriage ceremony with the defendant;" that he left the defendant at her father's house immediately after the ceremony, which took place there, "and has not since lived," cohabited with, seen or communicated with her in any way, and that the marriage was procured as aforesaid without his consent, "and under his protest, uttered at the time of the performance of the ceremony in the presence and hearing of the defendant," her parents, "and the minister of the Gospel who performed the ceremony."

The answer of the defendant admits that the plaintiff left her at her father's house immediately after the marriage, [621] and that he has not lived or cohabited with her or seen her since; but it denies that he ever consented to the marriage, or that he was compelled to go through the marriage ceremony by duress practiced upon him by her father, or because of fear of death or bodily harm at the hands of her father, or that the marriage was procured by fraud, force or duress, and avers that the marriage license was procured by the plaintiff; that the minister who performed the ceremony was secured by him, and that "he expressed not only his willingness but a desire to marry the defendant, only at the last moment asking that the ceremony be deferred for a day, which the defendant then declined to do." The answer further alleges "that since said marriage a child has been born, the offspring of the plaintiff:" that since the birth of the child on the 5th of July, 1913, the plaintiff has contributed "nothing to its support," or "towards the maintenance of defendant" since the marriage beyond the sum of sixteen dollars paid her shortly thereafter.

Chancellor Bland says in *Fornhill v. Murray*, 1 Bland (Md.) 479, 18 Am. Dec. 344, that, "Marriage has been considered among all nations as the most important contract into which individuals can enter, as the parent not the child of civil society," and a reference to some of the authorities bearing



upon the important and delicate questions involved, will greatly aid us in the examination of the evidence in the case.

While section 14 of Article 16 of the Code of 1912 provides that the Circuit Courts of the counties and the Superior Court of Baltimore City, upon petition of either of the parties, and the Circuit Courts of the counties and the Criminal Court of Baltimore, on indictment, may inquire into, hear and determine the validity of any marriage, "and may declare any marriage contrary to the table of this article, or any second marriage, the first subsisting, null and void," the authority of courts of equity in this State to determine the validity of a marriage charged to have been procured by abduction, terror, fraud or duress, rests upon their general [622] jurisdiction to set aside contracts affected by fraud, etc. *Fornhill v. Murray*, supra; *Le Brun v. Le Brun*, 55 Md. 496; *Ridgely v. Ridgely*, 79 Md. 298, 29 Atl. 597, 25 L.R.A. 800.

The caution, however, with which courts exercise this jurisdiction is clearly and forcibly stated in *Le Brun v. Le Brun*, supra, where Judge Miller says: "But while the courts are thus clothed with jurisdiction, the peculiar nature of the subject to be dealt with, requires that the power should be exercised with extreme caution, and only where the allegations of the bill are sustained by clear, distinct and satisfactory evidence. This position is sustained by an unbroken current of authority. Marriage has been considered, among all civilized nations, as the most important contract into which individuals can enter, as the *parent*, not the *child*, of civil society. The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion, or by the mere declarations of either of the parties, and should only be brought into question upon the most undisputed proofs." After referring to the presumptions in favor of the validity of a marriage where there is issue, or where it is assailed upon the ground that a former marriage of the woman is still subsisting, he says further: "We cannot, therefore, pass a decree in this case which will bastardize the issue and impute crime to the woman, unless the fact that her former husband was alive, at the date of her second marriage, is clearly established by such proof as all of the authorities upon the soundest of reasons indicate and require." In the case of *Seyer v. Seyer*, 37 N. J. Eq. 210, the Vice-Chancellor said: "And as to this branch of the case, it may be said that when the Court is satisfied that ante-nuptial incontinence has taken place, the charge of threat or menace unlawful, or fraud or duress, must be most fully

and satisfactorily established before the Court will annul the marriage." In *Rooney v. Rooney*, 54 [623] N. J. Eq. 231, 34 Atl. 682, the Chancellor said: "It is hardly necessary to cite authority for the position that a complainant who comes into court under the circumstances above stated, and asks a decree of nullity, the result of which is to declare one whom he has sworn to love and cherish as a wife to be no more than a concubine, and her offspring, the fruit of the unlawful communion (born pending the suit), a bastard, must prove his case with the utmost strictness. The same rule applies in such a case as on an indictment for bigamy. The Court in such cases is bound to act as the guardian of the helpless infant, and watch his rights and interests with jealous care;" and it is said in 26 Cyc. 913: "The burden is on the plaintiff to sustain his material allegations, and in view of the peculiar nature of the contract of marriage and the grave consequences of dissolving it, the courts will not grant a decree except upon the production of clear, satisfactory and convincing evidence. . . . According to the generally accepted rule, such a decree will not be given on the mere admissions or confessions of the parties alone without satisfactory extraneous evidence, or upon the uncorroborated testimony of plaintiff."

In *Todd v. Todd*, 149 Pa. St. 60, 24 Atl. 128, 17 L.R.A. 320, where the statute of Pennsylvania authorized a divorce where the marriage was procured by fraud, force or coercion, the Court said: "It is not alleged that there was any force used to compel the marriage, and, in order to justify a divorce, under the statute, upon the ground of threats, they must be such threats, against the life or to do bodily harm as would overpower the judgment and coerce the will. There must be such a mental condition as a result of the threats that the libelant did not and could not in reality consent to the marriage," and it is said in 14 Cyc. 596, "A divorce will not be decreed on the ground of duress unless it appears that the marriage was contracted under force or threat of bodily harm." Where a man marries to escape arrest or imprisonment for seduction or bastardy he cannot avoid the marriage [624] on the ground of duress, nor is a marriage induced by threats of lawful prosecution, arrest or imprisonment, to redress or punish a wrong open to impeachment on that ground. 1 *Bishop on M. & D.* sec. 543; 26 Cyc. 906; *Sickles v. Carson*, 26 N. J. Eq. 440; *Todd v. Todd*, supra; *Collins v. Ryan*, 49 La. Ann. 1710, 2 So. 920, 43 L.R.A. 814, and note; *Ingle v. Ingle* (N. J.) 38 Atl. 953; *Frost v. Frost*, 42 N. J. Eq. 55, 6 Atl. 282; *Scott v. Shufeldt*, 5 Paige (N. Y.) 43.

The plaintiff testified that he had several talks with Mr. Adkins about marrying defendant; that on Monday previous to the

marriage, which took place on Wednesday evening, Mr. Adkins and his wife came to his father's shop and told the plaintiff in the presence of his father and his brother that he had to marry the defendant "else he would die by me;" that "it wasn't need for me to try to get away," for if he did "they would put an officer on my track;" that he went around to Mr. Adkin's house that night and they arranged for Mr. Adkins to get the license the next day and for the marriage to take place at seven o'clock Wednesday evening; that the threat Mr. Adkins made on Monday referred to was the only threat he made before the evening of the marriage; that he also went to see the defendant Tuesday evening before the marriage. That on Wednesday evening at the time appointed for the marriage he went to the defendant's house, and when he knocked on the door Mr. Adkins came to the door, and that he then told him that he could not decide until the following evening whether or not he would marry the defendant; that Mr. Adkins called his wife to the door and told her what the plaintiff had said, and that they invited him in the house; that Mr. Van Dyke, the minister, and the defendant were there; that as soon as they got inside of the house Mr. Adkins flew into a rage and told Mr. Van Dyke that he had refused to marry the defendant, and said I would "have to marry her" before I went out of the house; that he, plaintiff, then said that if he had to marry her he would do it, but that would not live with her or support her unless he had to do it; that Mr. Van Dyke did [625] not want to perform the ceremony under those conditions, but that Mr. Adkins insisted, and that they were married and that he left the house immediately afterwards; that he did not want to marry the defendant and did it to save his life; that as soon as he told Mr. Adkins that night that he would not then marry his daughter he rushed into another room in a fit of passion and got some kind of weapon; that his wife and daughter tried to stop him, and said "don't do that Tom," but he got the weapon and when he came back he said to the plaintiff "you will marry this girl before you leave the house;" that he had his right hand in his coat pocket so that he could shoot right through the pocket, and that he, plaintiff, thought he had a pistol and thought he would kill him, as he was defenseless and had no means of escape. Mr. Wimbrough, the father of the plaintiff, testified that on Sunday previous to the marriage he went to see Mr. Adkins; that they "talked on some matters" in regard to the plaintiff and defendant, and that Mr. Adkins said he could not give him any answer until he talked with his wife, and that he would be around to his shop to see him Monday afternoon; that he and his wife came to the shop and said in the

presence of the plaintiff that "he wouldn't make any compromise of any kind" and that the plaintiff "had his daughter to marry;" that if he did not want to live with her he did not have to do so or support her, and said to the plaintiff, "you needn't think you will run off for I will die by you," that he would "put an officer on him."

Mr. Van Dyke states that the first he knew of the matter was when the plaintiff spoke to him as he was passing the shop and told him of the trouble; that the plaintiff said he "guessed he would have to marry the girl," and asked him if he would go around to Mr. Adkins' house Wednesday night, and that he agreed to do so; that on Wednesday afternoon Mr. Adkins brought him the license and asked him if he was coming around and that he said yes; that he went to the house at the hour appointed, and that after a while the plaintiff came, and after some conversation between Mr. [626] Adkins and the plaintiff on the porch, they came into the house and Mr. Adkins announced that the plaintiff was unwilling to marry the defendant that night; and that when Mrs. Adkins asked why, he said the plaintiff wanted more time, that Mr. Adkins said that he would "do it to-night or not at all, the next move is mine;" that after some further discussion about it the plaintiff said he would not unless he had to, and would not live with her or support her; that Mr. Adkins replied that it did not make any difference whether he lived with her or supported her; that he had kept her ever since she was a baby and could still do so; that he, Mr. Van Dyke, said that he could not marry them under those conditions, and advised them to take more time to consider the matter or to go to a magistrate and have a civil marriage; that Mr. Adkins insisted that the ceremony be performed; that the plaintiff said "if he had to do the thing he could do it but only under those conditions; that he, witness, asked Mr. Adkins if he was willing to have his daughter marry under those conditions and he said he was; that he asked the defendant if she was willing to enter into such an agreement and she said she was; and that he then married them. He was asked if he had heard the testimony of the plaintiff in reference to Mr. Adkins rushing into another room for a weapon, etc., and what he saw and how it appeared to him, and he replied that Mr. Adkins did leave the room and go into another room, followed in a few minutes by his wife and daughter, but that he did not know what they went for; that he did not remember seeing anything in his hand; that Mr. Adkins made no threats of bodily harm in his presence, and that the worst thing, as he sees it, in the proceedings was his statement that "you will do it to-night or not at all, the next move is mine;" that

the plaintiff is a member of his church and that he left the house with him immediately after the ceremony.

The testimony of Mr. Adkins, Mrs. Adkins, and the defendant, which is very full and explicit, is to the effect that the plaintiff is the father of the defendant's child; that he [627] promised to marry her, and that when he came to the house on the evening of the marriage the only reason he assigned for wanting the marriage postponed for a day was that he had gotten some information from certain persons and wanted to see some others about it, but he would not tell them what it was. They deny most positively that Mr. Adkins on the evening of the marriage went into another room and got a "weapon," or that he made any threats whatever of bodily harm to the plaintiff. Mr. Adkins states that he insisted upon the marriage because the plaintiff was responsible for the condition of his daughter, and what he meant when he told the plaintiff that he would "have to" marry her was that he was the one who had seduced her; that after he saw the plaintiff and his father at the latter's shop on Monday the plaintiff came to his house that night; that the next morning the plaintiff asked him to get the license as the defendant was not of age and he could not get it; that the plaintiff was also at his house Tuesday night; that when he came Wednesday night he said that he had been talking to some parties and that he could not marry the defendant that night; that he asked the plaintiff who he had been talking to but he would not tell, and that he then said to him that he could marry her then as well as any other time. Horace Shockley testified that he was at Mr. Adkins' house on Tuesday evening before the marriage and that the plaintiff was there; that he had known the plaintiff for a long time and that they had always been great friends; that while at Mr. Adkins' house Tuesday night the contemplated marriage was discussed, and that afterwards he and the plaintiff went out on the porch and had a talk in which the plaintiff told him he guessed he had got the defendant in trouble and guess he had to marry her, that he did not see any other way."

The plaintiff was called in rebuttal to state what he referred to when he told Mr. Adkins Wednesday night that he had heard something and did not want to marry the defendant that night, and he stated what he had heard. The matters related by him were positively denied by the defendant, [628] are in conflict with the testimony of her father and mother and are not supported by the testimony of either the plaintiff's informant or any of the parties referred to in the information he received.

This evidence, when carefully considered in the light of the authorities we have cited, is

hardly sufficient to justify an annulment of the marriage on the ground of duress. The only threat shown by the evidence indicating any intention on the part of the defendant's father to inflict bodily injury, or to justify a fear of bodily harm to the plaintiff is the statement of the plaintiff himself that Mr. Adkins secured a "weapon" which he held in his pocket in such a position that he could shoot him through his pocket. This statement is not supported by the testimony of any of those present, and is not only positively denied by Mr. Adkins, Mrs. Adkins and the defendant, but Mr. Van Dyke, the plaintiff's witness, says that "Mr. Adkins made no threats of bodily harm in his presence," and that, as he regarded it, the worst thing in the whole proceeding was his statement; "you will do it to-night or not at all, the next move is mine." Nothing occurred to indicate that the "next move" referred to was a threat of bodily injury. If there had been, Mr. Van Dyke would certainly have observed it, and could not have testified that Mr. Adkins made no such threat. The statements of Mr. Adkins that if he attempted to run away he would "put an officer on his track," and that he "would die by" him, testified to by the plaintiff's father, or the statement that the "next move" would be his, without something more to show a purpose to inflict bodily harm or injury, would not justify that construction, and there is not a particle of evidence in the case, except the statement of the plaintiff, that he so construed them. They may have expressed a purpose to institute such proceedings against the plaintiff as the law and facts justified, and from all the evidence in the case the plaintiff must have so interpreted them, for notwithstanding his repeated interviews with Mr. Adkins in reference to marrying the defendant, he went to see her Monday night [629] and Tuesday night, and to his house on the evening of the marriage with apparently no thought of any danger to himself, and certainly without preparation to repel an attempt to inflict bodily injury. His conduct throughout, as disclosed by all the evidence, which we need not refer to at greater length, is entirely inconsistent with the claim he now makes, and if he married the defendant in obedience to an impelling sense of justice to her, or for the purpose of escaping the penalties of such redress as she or her father were lawfully entitled to a Court of Equity will not aid him to annul his obligation and cast a stigma upon his offspring.

The statement of the plaintiff that he would not live with defendant cannot render the marriage void. In *Brooke v. Brooke*, 60 Md. 524, the Court said in reference to a similar statement alleged to have been made by the husband: "As to the proposition of law con-

tended for by the appellants, that, assuming Henry Brooke to have been the real party to the ceremony of marriage, his having remarked to the complainant just previous to its performance, 'I will marry you, but understand I will never live with you,' rendered the marriage ceremony an idle form without binding force, while we would remark we can give no countenance to the idea that the solemn rights of marriage which it is the policy of the law and good morals to uphold, can be thus converted into a delusion and a fraud, there is in this case no foundation even to contend for the doctrine set up, as the evidence shows the facts do not exist to which it could be applicable. Even if Brooke made that declaration with the intention at the time of not treating the complainant as his wife, he nevertheless proceeded to take the vows that declared them man and wife."

Decree affirmed, with costs to the appellee.

#### NOTE.

The reported case holds that the fact that a man contracts a marriage with the declared intention not to assume or continue the marital relation is not ground for an annulment of the marriage at his instance. While in several instances a marriage has been set aside on similar facts, the cases so holding were actions brought by the wife and proceeded on the theory that the husband's lack of good faith in contracting the marriage operated as a fraud on her. The cases are reviewed in the note to *Johnson v. Johnson*, Ann. Cas. 1915A 829.

#### DIBBERT

v.

#### METROPOLITAN INVESTMENT COMPANY.

Wisconsin Supreme Court—May 1, 1914.

158 Wis. 69; 147 N. W. 3; 148 N. W. 1095.

#### Elevators — Owner as Carrier of Passengers.

The owner of an elevator in an office building is, to all intents and purposes, a common carrier, and his liability to those rightfully using it is that of common carrier to passengers.

[See Ann. Cas. 1914B 373.]

#### Carriers of Passengers — Degree of Care Required.

To provide for the safety of passengers, a carrier must exercise the highest degree of

care reasonably to be expected from human vigilance and foresight, in view of the character of the conveyance adopted, and consistent with the practical operation of the business.

[See 4 R. C. L. tit. *Carriers* p. 1144 et seq.]

#### Same.

A carrier must use every precaution for the safety of its passengers that human skill and foresight could suggest; and, if there are known and satisfactory tests by which latent defects may be discerned in those appliances on the soundness and strength of which safety of passengers depends, they must be used.

#### Presumption of Negligence from Accident.

Proof of injury, without contributory negligence, to a passenger in an elevator, from its fall due to a defective bolt, raises a presumption of negligence of the carrier, requiring it to show that all required precautions to safeguard passengers had been taken.

#### Latent Defect — Possibility of Discovery — Evidence.

Evidence, in a passenger's action for injury from fall of an elevator, held sufficient for a finding that application of a known test for tensile strength would have disclosed a latent defect in a bolt, breaking of which caused the accident.

#### Appliance Purchased from Manufacturer — Liability of Carrier.

A carrier, the owner of an elevator in an office building, is responsible to a passenger, injured by fall of the elevator because of a latent defect, for negligence of the manufacturer in not making a proper test therefor, which would have disclosed it.

[See note at end of this case.]

#### Same.

That an elevator in an office building had been in use 20 years before it broke, injuring a passenger, through a latent defect existing when it was installed, does not affect the question of negligence, and liability of the elevator owner therefor, of the manufacturer in not making a test which would have disclosed it.

[See note at end of this case.]

#### Judges — Affidavit of Prejudice — Effect of Giving Effect to Affidavit Filed Too Late.

Even if the affidavit of prejudice against the judge before whom a case is pending for trial is not seasonably filed, any error in his sending it for trial to a judge presiding over another branch of the circuit court for the county is not jurisdictional or prejudicial.

#### Buildings — Liability for Injury from Defect — Change of Ownership.

Change in ownership of an office building, at least where practically nominal, as from individuals to a corporation in which they are the principal stockholders, between the time a passenger elevator was installed therein and the time it broke, cannot affect the question of liability of the owner at the time of the accident to a passenger injured, for negligence of the manufacturer in not making a proper test of the part which broke.

Appeal from Circuit Court, Milwaukee county: WILLIAMS, Judge.

Action for damages. William Dibbert, plaintiff, and Metropolitan Investment Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[70] On February 28, 1912, plaintiff, while riding as a passenger in an elevator in the office building of the defendant in the city of Milwaukee, was injured by the dropping of the elevator from the fourth floor to the basement. This action was brought to recover damages for injuries sustained. It was a cable-hoisted hydraulic passenger elevator running on guides. The elevator cage was attached to the cables by means of a draw-bolt or king-bolt. The upper end of the draw-bolt contained five eyes or holes. Through these holes three hoisting cables were fastened on one side and two counter-weight cables on the other side. The lower end of the bolt passed through a saddle strap, and a nut was screwed onto the thread at the lower end of the bolt and under the saddle strap. The nut was held in place by a cotter-pin which ran through the bolt below the nut, the saddle strap resting on the nut. This strap went around the beam on the top of the elevator cage and in this manner the cage was suspended. The draw-bolt broke off flush with the upper side of the nut, through the threaded portion of the bolt, and this is what caused the elevator to drop.

The complaint charged the defendant with negligence for failure to maintain a reasonably safe and suitable elevator for the carriage of passengers: alleged that for a long time prior to the accident the elevator was in an unsafe and dangerous [71] condition and defective: that it was not equipped with a proper safety device as required by the city ordinance: that the draw-bolt in question was placed in the elevator at the time the elevator was installed, nearly twenty years previous to the accident, and that long usage and the vibration from the elevator when in operation had caused the bolt to become worn and defective and the steel to become crystallized: further, that the bolt was defective at the time it was put in place, having a flaw known as a blow-hole or sand-hole at the place where it broke. The answer of the defendant denied all the material allegations of the complaint. The case was regularly called for trial in branch number 3 of the circuit court for Milwaukee county, and by order of the court it was sent for trial to branch number 2 of said court, where, over defendant's objection, it was tried. The jury returned the following special verdict:

"(1) Was the defendant guilty of negligence in failing to keep the south elevator provided, up to the time plaintiff was in-

jured, with a draw-bolt which was reasonably safe and sufficient for the carriage of passengers? A. Yes.

"(2) If you answer the first question 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? A. Yes.

"(3) At the time plaintiff was injured, was the safety device on the south elevator in a reasonably safe condition for the purpose for which it was intended? A. No.

"(4) If you answer the third question 'No,' then answer this question: Was the defendant guilty of negligence in failing to keep such safety device in a reasonably safe condition for the purpose for which it was intended? A. No.

"(5) If you answer the fourth question 'Yes,' then was such negligence the proximate cause of plaintiff's injury? A. —.

"(6) At the time plaintiff was injured, was the guide post on the north side of the south elevator reasonably safe and sufficient for the purposes for which it was intended? A. No.

"(7) If you answer the sixth question 'No,' then answer this question: Was the defendant guilty of negligence in [72] failing to have the guide post at the time of the accident in a reasonably safe and sufficient condition for the purposes for which it was intended? A. No.

"(8) If you answer the seventh question 'Yes,' then was such negligence the proximate cause of plaintiff's injury? A. —.

"(9) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess the plaintiff's damages? A. Three thousand dollars."

From a judgment entered in accordance with such verdict defendant appeals.

*Doe & Ballhorn* for appellant.

*Waldemar C. Wehe* and *Christian Doerfler* for respondent.

BARNES, J.—The appellant seeks to reverse the judgment because there was no evidence to support a finding that it was negligent, and because there was a mistrial on account of other errors committed.

In deciding the motions made after verdict the trial judge said:

"Without contradiction, it appears that the defendant and its predecessor acted in the utmost good faith and exercised extraordinary prudence in selecting the elevator which was installed, in arranging for frequent inspections thereof, in relying upon the recommendations and advice of the inspectors, and in promptly complying with their recommendations."

We concur in this statement. We also think it was a matter of conjecture under the entire evidence whether the defect in the

bolt was such that it could have been discovered by the so-called oil, whiting, or hammer tests when the elevator was installed. We shall assume that none of these tests would have discovered the flaw in the metal.

This bolt was one of the vital parts of the elevator, just as vital as the cables or the beam which supported it. If any [73] one of these things gave way, the elevator would fall and injury would be likely to follow, unless, perchance, the safety device stopped the descent before the momentum became excessive.

The owner of an elevator in an office building is to all intents and purposes a common carrier, and his liability to those rightfully using the elevator is that of common carrier to passengers, and of such a common carrier as a railroad or steamship line. *Ferguson v. Truax*, 132 Wis. 478, 490, 13 Ann. Cas. 1092, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L.R.A.(N.S.) 350, 136 Wis. 637, 643, 118 N. W. 251; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423; *Oberndorfer v. Pabst*, 100 Wis. 505, 513, 76 N. W. 338; *Treadwell v. Whittier*, 80 Cal. 574, 591, 592, 600, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498; *Fox v. Philadelphia*, 208 Pa. St. 127, 134, 57 Atl. 356, 65 L.R.A. 214.

The duty imposed on common carriers to provide for the safety of passengers is to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance adopted and consistent with the practical operation of the business. This rule has been applied to both railroad companies and elevator owners. *Oberndorfer v. Pabst*, supra; *Wanzer v. Chippewa Valley Electric R. Co.* supra; *Ferguson v. Truax*, supra; *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945; *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Some courts state the rule to be that the slightest neglect against which human prudence and foresight may guard and by which hurt is occasioned makes the carrier liable. *Meier v. Pennsylvania R. Co.* 64 Pa. St. 225, 3 Am. Rep. 581; *Fox v. Philadelphia*, 208 Pa. St. 127, 134, 57 Atl. 356, 65 L.R.A. 214; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 456, 26 U. S. (L. ed.) 141; *Morgan v. Chesapeake*, etc. R. Co. 127 Ky. 433, 16 Ann. Cas. 608, 105 S. W. 961, 15 L.R.A.(N.S.) 790, 792; *Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 313, 2 Am. Rep. 229.

The carrier must use every precaution for the safety of its passengers that human skill and foresight could suggest, and [74] if there are certain known and satisfactory tests by which latent defects may be discerned in those appliances upon the soundness and

strength of which the safety of the passenger depends, it is the duty of the manufacturer to make such tests. *Hegeman v. Western R. Corp.* 16 Barb. (N. Y.) 353, 13 N. Y. 9, 26, 64 Am. Dec. 517; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282, 287; *Miller v. Ocean Steam-Ship Co.* 118 N. Y. 199, 207-209, 23 N. E. 462; *Palmer v. Delaware, etc. Canal Co.* 120 N. Y. 170, 174, 175, 24 N. E. 302, 17 Am. St. Rep. 629; *Carlson v. Phenix Bridge Co.* 132 N. Y. 273, 277, 30 N. E. 750; *Treadwell v. Whittier*, 80 Cal. 574, 594, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498; *Texas*, etc. R. Co. v. *Hamilton*, 66 Tex. 92, 95, 17 S. W. 406; *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234, 237; *Morgan v. Chesapeake*, etc. R. Co. supra; *Sharp v. Grey*, 9 Bing. 457, 23 E. C. L. 331; *Burns v. Cork*, etc. R. Co. 13 Irish C. L. 543. Mr. Hutchinson, after reviewing the authorities English and American on this point, states the rule as follows:

"The established law in both countries may, therefore, be now stated to be that, while a carrier of passengers is bound to use the utmost care and skill in everything that concerns the safety of the passenger, he will not be responsible for injuries arising from latent defects in his vehicles or machinery, which no human care or skill could have either detected or prevented; or in other words, that, while it is his duty to apply every known and practicable test for the discovery of defects and imperfections in the vehicles and machinery which he employs for the transportation of passengers, he does not warrant that they are free from such defects and imperfections, and if it appear that such defects actually existed, but were undiscoverable by such tests, he will not be held liable to the passenger for an injury which may result from them." 2 Hutchinson, *Carriers* (3d ed.) sec. 905, p. 1013.

The plaintiff proved that he was injured by a fall of the elevator due to a defective bolt. There is no claim that he was guilty of any want of ordinary care. This proof raised a presumption of negligence on the part of the defendant, [75] and cast upon it the burden of showing that it took all the precautions to safeguard those whom it carried which the law required it to take. *Meier v. Pennsylvania R. Co.* 64 Pa. St. 225, 230, 3 Am. Rep. 581; *Miller v. Ocean Steam-Ship Co.* 118 N. Y. 199, 206, 23 N. E. 462; *Breen v. New York Cent. etc. R. Co.* 109 N. Y. 297, 300, 16 N. E. 60, 4 Am. St. Rep. 450; *Treadwell v. Whittier*, 80 Cal. 574, 582, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498; *Toledo*, etc. R. Co. v. *Beggs*, 85 Ill. 80, 83, 84, 28 Am. Rep. 613; *Caldwell v. New Jersey Steamboat Co.* 56 Barb. (N. Y.) 425, 427; *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383, 387, 74 N. E. 410; *Griffen v.*

Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L.R.A. 922.

It appears from the evidence of a number of witnesses what the tensile strength of this bolt would have been had it been sound and free from the sand flaw found therein and from other defects; so it appears that the tensile strength of the bolt might have been tested. It is quite as important for the safety of this elevator that the tensile strength of this bolt be tested as it is for the safety of a railroad train that the strength of a car or locomotive axle be tested, or that the resisting power of a locomotive boiler be tested. A break in any of these appliances is liable to result in the killing or maiming of human beings. It appearing that there was a known method of testing this bolt for a latent defect, which had it been applied might and in all probability would have discovered such defect, it was negligence on the part of the manufacturer not to test the tensile strength of the bolt, considering the use to which it was to be put. The evidence shows, without dispute, that if this bolt had been sound and free from defects it would have had sufficient strength to sustain a weight of from 50,000 to 60,000 pounds after it was threaded and from 70,000 to 80,000 pounds before. The weight of the car and passengers at the time the bolt broke was about 3,600 pounds. The carrying capacity of the car at and before the injury was limited by the city to about 1,000 pounds in excess of the load carried when the bolt broke. The factor of safety was very large if the bolt was [76] sound. It should have been capable of sustaining from twelve to fifteen times the weight that was being actually carried when it broke. It seems almost certain that a proper test of the tensile strength of the bolt would have disclosed its weakness.

Barring for the present one consideration which will be next discussed, the burden was on the defendant under the authorities above cited to show that an actual test of the tensile strength of the bolt had been made, in order to relieve itself from the presumption of negligence which followed from the facts shown by plaintiff's evidence. This it did not do.

The courts which exempt the carrier from liability in the case of appliances purchased from a reliable manufacturer, on account of latent defects not discoverable by ordinary inspection, where the manufacturer was negligent in not making known tests to discover latent defects, do so on these grounds: They say truly enough that the carrier is not an insurer; that the law does not contemplate that carriers will make their own appliances; that the manufacturers are not the agents of the carriers; that the carriers have the

right to assume that a dealer of good repute has used such care as was incumbent on him to use in the construction of the appliance; that all that can be expected of a carrier is to purchase such an appliance as it has reason to believe is safe, giving it such an inspection as is usual and practicable, and that to adopt any other rule would make the carrier an insurer. The following cases follow the foregoing rule: *Grand Rapids, etc. R. Co. v. Huntley*, 38 Mich. 537, 547, 31 Am. Rep. 321; *Frelsen v. Southern Pac. Co.* 42 La. Ann. 673, 7 So. 800; *Richardson v. Great Eastern R. Co.* 1 C. P. D. (Eng.) 342. There are some expressions to the same effect in *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234, but the question under discussion was not really involved in the case. There are also a number of other cases cited as holding the same doctrine, in the note to *Morgan v. Chesapeake, etc. R. Co.* 127 Ky. 443, 16 Ann. Cas. 608, 105 S. W. 961, 15 L.R.A. (N.S.) 790. The [77] cases have been examined and are not considered in point. In practically all of them it is stated that adequate tests were made to discover latent defects. The only case we have found in this country in which the question is really discussed is that cited from the Michigan court, and that is based on the decision in *Richardson v. Great Eastern R. Co.* 1 C. P. D. (Eng.) 342. The argument of the Michigan court, that a different rule from that adopted would make the carrier an insurer, does not appear to be sound. Liability can always be defeated by showing that an adequate test was in fact made. If the carrier were an insurer this would not be so.

Turning to those cases which hold the carrier liable for the negligence of the manufacturer, we find that they proceed upon the following line of reasoning: The passenger has the right to insist that the carrier shall furnish appliances that will secure his safety, if they can be furnished by the exercise of the utmost care, skill, and precaution. The contract of carriage is between carrier and passenger, and the latter, having no control over or contract relations with the manufacturer, must look to the carrier to see that he is properly protected. The carrier itself may construct the appliance which it uses or it may employ some one else to do so. In either case it engages that all that well conducted skill can do will be done to make the appliance safe. A good reputation on the part of a manufacturer is not a substitute for a good vehicle. What is demanded and what is undertaken by the carrier is not merely that the manufacturer has the requisite capacity, but that it was skilfully exercised in the particular instance. In the ordinary course of things the passenger does not know whether the carrier has himself manu-

factured the means of carriage or contracted with some one else for its manufacture. If the latter, the passenger does not usually know who the manufacturer is, and in no case has he any share in his selection. The liability of the manufacturer must depend on the terms of the contract between him and [78] the carrier, of which the passenger has no knowledge and over which he can have no control, while the carrier may make such stipulations and take such sureties as he deems proper for his protection. For injury resulting to the carrier himself for want of care on the part of the manufacturer, the former has or may provide for a remedy, while the passenger has none against the manufacturer for its breach of contract with the carrier. It is not to be presumed that when the passenger makes his contract of carriage he waives damages caused by a defective appliance which the manufacturer in the exercise of due care could have ascertained was defective. The only way that a remedy can be given in such a case is to hold the carrier responsible to the passenger and permit it to seek indemnity from the party whom it has selected to build the appliance and whose breach of contract has caused the mischief. The carrier is in no better position where it employs another to do its manufacturing for it than it would be if it were its own manufacturer, and where it sees fit to employ another to do its manufacturing for it, the rule of *respondet superior* applies. The following cases hold the carrier liable for the negligence of the manufacturer: *Hegeman v. Western R. Corp.* 16 Barb. (N. Y.) 353, 356, 13 N. Y. 9, 26, 64 Am. Dec. 517; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282, 287 et seq. 56 Barb. (N. Y.) 425; *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 277, 30 N. E. 750; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 U. S. (L. ed.) 141; *Treadwell v. Whittier*, 80 Cal. 574, 596 et seq. 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498; *Morgan v. Chesapeake, etc. R. Co.* 127 Ky. 443, 16 Ann. Cas. 608, 105 S. W. 961, 15 L.R.A.(N.S.) 790; *Francis v. Cockrell*, L. R. 5 Q. B. (Eng.) 184; *Burns v. Cork, etc. R. Co.* 13 Irish C. L. 543; *Sharp v. Grey*, 9 Bing. 457, 23 E. C. L. 331; 2 *Hutchinson, Carriers* (3d ed.) sec. 909.

Considering the degree of care which a common carrier is required to use, we think the better reasoning, as well as the weight of authority, is to the effect that the carrier is liable for the negligence of the manufacturer, and we so hold. The [79] New York decisions have been generously referred to herein, and we are not unmindful that it has been held in that state that an elevator owner is not a common carrier and hence its liability is not measured by that of such a carrier. *Griffen v. Manice*, 166 N. Y. 188, 197,

59 N. E. 925, 82 Am. St. Rep. 630, 52 L.R.A. 922. That question is set at rest in this case, however, by the decisions of this court in the *Pabst Case*, 100 Wis. 505, 76 N. W. 338, and in the two appeals in the *Truax Case*, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L.R.A.(N.S.) 350, 136 Wis. 637, 118 N. W. 251, which have been heretofore referred to.

The elevator had been in service for more than twenty years when the bolt broke, but we do not see how this long use could affect the situation. The fact remains that there was a large flaw in the bolt which greatly weakened its strength; that in all probability a proper test of the strength of the bolt would have disclosed the flaw; that such test was not made; and that plaintiff was injured because it was not made. If long use would tend to acquit the manufacturer of negligence, then the exercise of due care would impose on the owner the duty of taking the machinery apart and examining and testing the bolt to ascertain whether or not it had become materially weakened from constant use, and this was not done.

The case was pending for trial before Judge Williams and an affidavit of prejudice was filed against him. He held that the affidavit had not been filed within the time the statute required, but declined to try the case and sent it for trial to Judge Fritz, who presided over another branch of the circuit court for Milwaukee county. It is said that Judge Williams erred in sending the case to another judge for trial and that Judge Fritz erred in proceeding with the trial over defendant's objection, and further that the error was jurisdictional. There is but one circuit court for Milwaukee county, consisting of six branches presided over by different judges. The jurisdiction of these judges is co-ordinate, and litigants have [80] no vested right to try their cases before one judge in preference to another, unless perchance the judge before whom a cause is pending is disqualified on some statutory ground. Surely Judge Fritz had the same jurisdiction to try the case that Judge Williams did. The latter, in common with most judges, felt some delicacy about trying a case after the filing of an affidavit of prejudice, even if it was not filed within the statutory time, and in effect called in another judge of the same court to try the case, because this is what the proceeding amounted to. We do not see where there was anything improper or prejudicial in the conduct of Judge Williams.

The building in which the elevator was located was originally built and owned by Mr. Cotzhausen. Later it was conveyed to the defendant corporation. Mr. Cotzhausen was called in as an adverse witness and under objection testified that he and his wife



were the principal stockholders in the corporation. It is argued that this was prejudicial error. If the change in ownership could in any case affect the question of liability, it did not do so here where the change was practically nominal. *Haynes v. Kenosha Electric R. Co.* 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; *Wolf Co. v. Kutch*, 147 Wis. 209, 132 N. W. 981.

The other detailed errors assigned become immaterial under the view of the case taken by the court.

By THE COURT.—Judgment affirmed.

ON MOTION TO MODIFY MANDATE.

(October 6, 1914.)

PER CURIAM.—The verdict in this case was rendered June 25, 1913. Before the expiration of one year the defendant made a motion for a new trial in the circuit court on the ground of newly discovered evidence. The mandate of this court affirms the judgment of the circuit court. The defendant conceives that such mandate would preclude the trial court from passing on the motion for a new trial and asks [81] this court to modify its mandate so as to order a new trial, or, in the alternative, to so modify it that the circuit court may do so if satisfied that the motion should be granted. The merits of the motion should be passed upon by the lower court, and the mandate is modified so as to affirm the judgment without prejudice to the right of the defendant to have its motion for a new trial determined by the circuit court. Otherwise motion denied without costs.

It is so ordered.

NOTE.

**Liability of Carrier of Passengers with Respect to Appliances Purchased from Manufacturer.**

I. Generally:

1. View that Carrier Is Liable, 929.
2. View that Carrier's Liability Depends on Proper Inspection, 932.

II. Defect Not Discoverable by Known Tests, 936.

I. Generally.

1. VIEW THAT CARRIER IS LIABLE.

The rule laid down in the reported case, that a carrier of passengers is liable for the negligence of a manufacturer with respect to appliances purchased from him, on the theory that the doctrine of respondent superior applies, finds support in a few jurisdictions. *Sharp v. Grey*, 9 Bing. 457, 23 E. C. L. 331, 2 Moo. & S. 621; *Grote v. Chester*, etc. R. Co. 2 Exch. (Eng.) 251; *Gaiser v. Niagara St. Catharines*, etc. R. Co. 19 Ont. L. Rep. 31, 14 Ont. W. Rep. 42; *Treadwell v. Whittier*, 80 Cal. 574, 596 et seq. 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498; *Siemens v. Oakland*, etc. Electric Ry. 134 Cal. 494, 66 Pac. 672; *Morgan v. Chesapeake*, etc. R. Co. 127 Ky. 433, 16 Ann. Cas. 608, 105 S. W. 961, 15 L.R.A.(N.S.) 790, 2nd appeal 129 Ky. 731, 112 S. W. 859; *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 517, 16 Barb. 353; *Curtis v. Rochester*, etc. R. Co. 18 N. Y. 534, 75 Am. Dec. 258; *Bissell v. New York Cent. R. Co.* 25 N. Y. 445, 82 Am. Dec. 369; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282, 287, 56 Barb. 425; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221; *Palmer v. Delaware*, etc. Canal Co. 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, 44 Am. & Eng. R. Cas. 298, *affirming* 46 Hun 486, 11 N. Y. St. Rep. 872. See also *Francis v. Cockrell*, L. R. 5 Q. B. (Eng.) 184; *Hyman v. Nye*, 6 Q. B. D. (Eng.) 685, 29 Moak 709; *Hanley v. Harlem R. Co.* 1 Edm. Sel. Cas. (N. Y.) 359; *Brown v. New York Cent. R. Co.* 34 N. Y. 404; *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 277, 30 N. E. 750. Compare *Dube v. Reg*, 3 Can. Exch. 147 (Government Railroad). Thus in *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 517, *affirming* 16 Barb. 353, which is apparently the first American decision wherein the foregoing rule was laid down, the action was brought to recover damages for injuries sustained to the person of the plaintiff, alleged to have been caused by the negligence of the defendant. The plaintiff proved that an axle of a car on the defendant's railroad in which he was riding broke, and the plaintiff was seriously and permanently injured. The plaintiff rested his case on proving the accident and the injury to him. . . . The substance of the charge was, that although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible. On appeal the court said: "Two questions were presented for the consideration of the jury. First, was there a test known to and used by others, and which should have been known to a skilful manufacturer, by which the concealed defect in the axle of the car could have been detected; and if so, then, secondly was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which the jury have found; and the question returns, can the defendant, who neither applied

the test, or caused it to be applied by the manufacturer, insist that this accident could 'not have been avoided by the utmost degree of care and skill, in the preparation of the means of conveyance,' or 'that they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff, as one of their passengers?' It seems to me that there can be but one answer to the question. It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public. It is perfectly understood that latent defects may exist undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove, and the jury have found, that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel), existed, by which it could be detected. This should have been known and applied by men 'professing skill in that particular business.' It was not known, or if known, was not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable." In *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L.R.A. 498, the plaintiff instituted action to recover damages for injuries to his person caused by the falling of a hydraulic elevator operated by the defendant on which the plaintiff was

riding at the time. The defendants requested the trial court to charge as follows: "If the accident in question was caused by a defect or flaw in one of the piston rods of the elevator apparatus, which defect or flaw was not discoverable on an ordinary, reasonable, and careful examination, then your verdict should be for the defendants." The court modified the instruction so as to read as follows: "If the accident in question was caused by a defect or flaw in one of the piston rods of the elevator apparatus, which defect or flaw was not discoverable on a reasonable and careful examination, according to the best known tests reasonably practicable, then your verdict should be for the defendants." On appeal the court said: "In the light of . . . well-settled rules of law, that carriers of passengers are responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect; that they are bound for defects in the vehicles which they furnish which might have been discovered by the most careful examination—we think the court below did not err in modifying the instruction under consideration, as pointed out above. It is a most reasonable precaution imposed on such a carrier, of whom we consider the owner of an elevator one, to require him to test the vehicles or machinery used by him by the best known tests reasonably practicable. If such tests are not used, the carrier is wanting in the care and foresight required. Nor are the defendants excused from the degree of care and diligence above pointed out by the fact that the elevator in use was constructed by a competent and skilled manufacturer, from whom they purchased it. The manufacturer was their agent or servant in the construction of the elevator, and they are responsible for any want of care of the maker or builder. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person. . . . The reasonableness of the rule that the responsibility cannot be shifted to the manufacturer appears from the consideration that the law gives no remedy to the injured passenger against the manufacturer or builder of the elevator. There is no privity between the builder and the passenger." In *Siemens v. Oakland, etc. Electric Ry.* 134 Cal. 494, 66 Pac. 672, the rule was applied in an action for damages brought against a street railway company, wherein it appeared that the injury was caused by breaking of a wheel due to a latent defect therein which might have been discovered by proper tests during the process of manufacture but which was not discoverable by the tests applied by the carrier. In *Curtis v. Rochester, etc. R. Co.* 18 N. Y. 534,

75 Am. Dec. 258, it appeared that the plaintiff was injured while a passenger on the defendant's railroad. Evidence was presented that the train containing the plaintiff ran off the track at a switch. The proof left it uncertain whether the switch was out of order, or whether the accident resulted from the spreading and breaking of the rails. There was no evidence that there was any visible defect in the apparatus prior to the accident. The court said: "If it appears that the mischief has resulted from a defect in some part of the apparatus of the company, the negligence, if any, must have been that of some one for whose acts and omissions the company is liable; it being well settled that the carrier is responsible for the negligence or want of skill of every one who has been concerned in the manufacture of any portion of its apparatus." And in *Bissell v. New York Cent. R. Co.* 25 N. Y. 445, 82 Am. Dec. 369, Selden, J., in enumerating various duties and responsibilities of railroad companies, said: "In regard to the transportation of passengers, they are not in any respect insurers, but are answerable for any injuries to their passengers, against which the utmost skill and foresight could guard. . . . This responsibility embraces not only any want of care and foresight on the part of the immediate agents of the corporation, but also any defects arising from want of care or skill in the manufacturers of the machinery or materials used in the structure or operation of the road, whether discoverable by any exercise of care and skill on the part of the immediate agents of the road or not." In *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221, the court said: "Carriers of passengers are not insurers of the safety of persons whom they carry; nor do they undertake that the vessels or vehicles which they use, or that the machinery they employ, are absolutely free from defects. They are held to the exercise of the utmost skill and care in the construction and management of both; and when they undertake to carry by the dangerous agency of steam, and injury is occasioned to passengers thereby, they cannot escape liability, unless it appears that the accident happened from causes beyond their control and to which neither the negligence of the carrier or of the manufacturer of the machinery, or those employed to manage it, contributed." In *Palmer v. Delaware, etc. Canal Co.* 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629, 44 Am. & Eng. R. Cas. 298, affirming 46 Hun 486, 11 N. Y. St. Rep. 872, it appeared that the accident by which the plaintiff was injured was caused by the breaking of a spindle of a draw bar which connected the cars of the train on which the plaintiff was riding. The court said: "The evidence warranted the

conclusion that the broken appliance, which in the present case was the cause of the injury complained of, was defective, and that if it did not become so by its use upon the car it was so when put on it. The witnesses did not agree about its apparent condition at the time it broke. But evidence on the part of the plaintiff tended to prove that at the point where it severed, there was a flaw in the spindle three-fourths of an inch in depth. Such a flaw would extend nearly half way through the spindle, which was a round bar of iron one inch and five-eighths of an inch in diameter. This necessarily weakened it, and permitted the inference that such imperfect condition was the cause of its breakage. Assuming that this flaw existed, it is not unreasonable to suppose that it may have been in the iron when it was put on the car, and that although the car had afterward been in use on the road for two years, the spindle may not have been subjected to the peculiar strain which severed it until the time in question. When it was made to be put upon the car, the duty was to apply the known tests to ascertain whether it was in all respects fit for the purpose it was intended to serve; and if in consequence of the failure to do so the defect was not discovered and the accident occurred, the defendant was responsible. . . . There was evidence warranting the inference that the flaw in this one had no surface covering. It did not necessarily appear by the evidence whether this was a flaw produced in the process of manufacture of the spindle, or a fracture resulting from its use on the car." In *Gaiser v. Niagara St. Catharines, etc. R. Co.* 19 Ont. L. Rep. 31, 14 Ont. W. Rep. 42, an action to recover for damages sustained by the plaintiff by being thrown down an embankment against a signal post by reason of a car of the defendants on which she was a passenger leaving the rails and tilting, the direct cause of the accident was attributed to the breaking of a flange in one of the hind wheels of the car, due to an inherent defect in the shape of an air hole at the time of the manufacture of the wheel. In affirming a judgment in favor of the plaintiff *Boyd, C.*, said: "Now, the law is plain that purchasing from a reputable maker does not absolve the persons who use the article from legal liability for its insufficiency in the carriage of passengers. If the defendants rely upon the tests applied by the manufacturers when they purchase, well and good; if anything goes wrong, they will then fall back on the manufacturers to give the evidence of what was done or what could be done to detect the flaw. This evidence has not been adduced in the present case, and one of the gaps in the defense has thus not been stopped. The other gap left open is that the defendants themselves made no

proper examination of the wheel before putting it in use, after being laid up for the winter and before using it on the first trip in May. I think the evidence leads to the conclusion that the defendants failed to discharge adequately the duty devolving upon them of examining thoroughly and skilfully the equipment furnished for the excursion, and were negligent in such active diligence as the law demands." However, in *Birmingham v. Rochester City, etc.* R. Co. 137 N. Y. 13, 32 N. E. 995, 18 L.R.A. 764, 49 N. Y. St. Rep. 888, the court said: "Where the street railroad is confronted by one of the canals of the state over which it has no right to build a bridge, but which it is necessary to cross in order to carry out the purpose of its organization, the company may cross such bridge with the permission of the state authorities, without thereby making it a part of its appliance, for a latent defect in which it must be held responsible if discoverable in the process of manufacture. The contract to carry safely does not and ought not to extend that length."

The reason for the rule was clearly stated in the first appeal in *Morgan v. Chesapeake, etc.* R. Co. 127 Ky. 433, 16 Ann. Cas. 608, 105 S. W. 961, 15 L.R.A.(N.S.) 790, wherein the court said: "The carrier, in consideration of certain well-known and highly valuable rights granted to it by the public, undertakes certain duties toward the public, among them being to provide itself with suitable and safe cars and vehicles in which to carry the traveling public. There is no such duty on the manufacturer of the cars. There is no reciprocal legal relation between him and the public in this respect. When the carrier elects to have another build its cars, it ought not to be absolved by that fact from its duty to the public to furnish safe cars. The carrier cannot lessen its responsibility by shifting its undertaking to another's shoulders. Its duty to furnish safe cars is side by side with its duty to furnish a safe track, and to operate them in a safe manner. None of its duties in these respects can be sublet so as to relieve it from the full measure primarily exacted of it by law. The carrier selects the manufacturer of its cars, if it does not itself construct them, precisely as it does those who grade its road, and lay its tracks, and operate its trains. That it does not exercise control over the former is because it elects to place that matter in the hands of the manufacturer, instead of retaining the supervising control itself. The manufacturer should be deemed the agent of the carrier as respects its duty to select the material out of which its cars and locomotives are built, as well as in inspecting each step of their construction. If there be tests known to the crafts of car builders, or iron

moulders, by which such defects might be discovered before the part was incorporated into the car, then the failure of the manufacturer to make the test will be deemed a failure by the carrier to make it. This is not a vicarious responsibility. It extends as the necessity of this business demands, the rule of respondeat superior to a situation which falls clearly within its scope and spirit. Where an injury is inflicted upon a passenger by the breaking or wrecking of a part of the train on which he is riding, it is presumably the result of negligence at some point by the carrier. . . . When the passenger has proved his injury as the result of a breakage in the car or the wrecking of the train on which he was being carried, whether the defect was in the particular car in which he was riding or not, the burden is then cast upon the carrier to show that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent. And the carrier in this connection must show, if the accident was due to a latent defect in the material or construction of the car, that not only could it not have discovered the defect by the exercise of such care, but that the builders could not by the exercise of the same care have discovered the defect or foreseen the result. This rule applies the same whether the defective car belonged to the carrier or not." (The foregoing decision was later approved in a second appeal of the same action reported in 129 Ky. 731, 112 S. W. 859).

## 2. VIEW THAT CARRIER'S LIABILITY DEPENDS ON PROPER INSPECTION.

In other jurisdictions however, it has been held that if a carrier purchases its appliances from a competent and reliable manufacturer and subjects them to a careful and proper test, it is not liable to a passenger for injuries resulting from a latent defect therein. *Carter v. Kansas City Cable R. Co.* 42 Fed. 37; *Toledo, etc. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Grand Rapids, etc. R. Co. v. Boyd*, 65 Ind. 526; *Buckland v. New York, etc. R. Co.* 181 Mass. 3, 62 N. E. 955; *Cleveland, etc. Traction Co. v. Ward*, 27 Ohio Cir. Ct. Rep. 761; *Meier v. Pennsylvania R. Co.* 64 Pa. St. 225, 3 Am. Rep. 581; *Murray v. Pawtuxet Valley St. R. Co.* 25 R. I. 209, 55 Atl. 491; *Roanoke R. etc. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 128 Am. St. Rep. 971, 19 L.R.A.(N.S.) 316. Thus in *Cleveland, etc. Traction Co. v. Ward*, supra, the plaintiff sued to recover damages for an injury sustained because of the breaking of a wheel on one of the cars owned by the defendant company, on which he was a passenger. On appeal the following in-

struction of the trial court was sustained: "While the defendant is bound to exercise the highest degree of care and diligence in providing a car, safe in all its machinery and wheels, yet if the defendant is not a manufacturer of the car wheels which it used under car No. 65, at the time of the injury to plaintiff, and used the proper care in the purchase and inspection of the said wheels, and purchased the same from a competent and reliable manufacturer and carefully inspected the wheel which broke, on the day in question, a reasonable time before the plaintiff became a passenger on said car, it is not liable for any injury resulting from any hidden or latent defect in said wheel which it could not have discovered and provided against in the exercise of due care and diligence." In *Murray v. Pawtuxet Valley St. R. Co.* 25 R. I. 209, 55 Atl. 491, an action to recover damages for an injury sustained by the plaintiff by being thrown from her seat in the defendant's car by its sudden stop caused by an accident, it appeared that the motor underneath the floor of the car was attached thereto by two bearings on an axle which held its principal weight, while a bolt or pin on its front end passed through a hole in the center of a wrought-iron suspension bar placed edgewise in front of the motor from side to side of the truck, and steadied it and supported the remainder of its weight. This bar, a part of the car truck, was about four feet long, five-eighths of an inch thick, and was five inches wide, excepting that in the middle about the hole the width had there been increased to preserve its strength. The accident was due to the breaking of this suspension bar. The break occurred in the center, from the hole downward, allowing the pin to drop out and the forward end of the motor to fall upon the ground, causing the car to stop suddenly. The defendant offered evidence to the effect that the car truck, of which the suspension bar formed a part, was manufactured by a reputable concern in that line of business, under a patent; that it was purchased directly from the foundry, and came all ready to place under the car; that the truck was a new one and had never been in use on any other car; that the cars of the defendant company were inspected to discover defects every day when in use; that this car in which the plaintiff sustained injury was placed over a pit and inspected by an expert of ten years' experience on the afternoon before the accident and was found to be in good order; that all the bars, nuts, and bolts were tested with hammer and wrench, and everything was found to be sound; that the car was not run after the inspection until the morning of the accident, when it was subjected to a slight inspection by the motorman who ran it; that after it

had been run about eighteen miles and about one hundred and fifty feet beyond a sharp curve which the car had rounded, the suspension bar broke; that the break was clean and fresh and did not even show a flaw, and that the cause of the breaking was in no way apparent; that the speed of the car at the time of the accident was six or eight miles an hour. The court said: "The defendant having satisfied the jury by evidence not only that it purchased the broken appliance from a reputable maker and dealer in such commodities, but had made daily inspections of the same by an expert employed for that purpose, without any attempt upon the part of the plaintiff to meet it with evidence tending to show that the bar was unlike or inferior to other bars in use for like purposes, or that it was too thin, too narrow, or too weak, and without offering evidence tending to throw discredit upon the kind of inspection that was made or upon the competency of the inspector, the jury was justified in arriving at a verdict for the defendant." In *Roanoke R. etc. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 128 Am. St. Rep. 971, 19 L.R.A. (N.S.) 316, it appeared that the accident whereby the plaintiff was injured was caused by the falling of a bridge due to the breaking of an iron cord which sustained it. It appeared from the evidence that the bridge was made to order for the defendant company by a thoroughly reputable, competent and reliable manufacturer and that it had been thoroughly inspected by the defendant company on several occasions; and that the defect in the cord was an imperfect weld which could not have been detected by the utmost scrutiny. The court said: "As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it; and if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, therefore, be a case of negligence. . . . Applying these well-settled principles to the established facts in the case before us, the conclusion cannot be escaped, that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against, and that no liability attaches to the plaintiff in error on account thereof." In *Carter v. Kansas City Cable R. Co.* 42 Fed. 37, the plaintiff sued to recover damages for an injury sustained while a passenger on one of the defendant's cars. The accident was

occasioned by the sudden breaking of one of the shafts of a grip by which the car was carried up hill. Phillips, J., orally charging the jury, said *inter alia*: "If . . . you are satisfied from the evidence that the defendant, in operating this road, obtained and used the best appliances known to and obtainable by it; that it bought or procured the best grip it knew of, after inquiry and investigation, and subjected it to reasonable tests to discover its strength and fitness—then it had done all the law demands in that respect." In *Grand Rapids, etc. R. Co. v. Boyd*, 85 Ind. 526, wherein it appeared that the accident whereby the plaintiff was injured was caused by the breaking of an axle due to a latent defect therein, the court held that the carrier cannot be held liable where the jury find that the axle was made by a good and reputable manufacturer, and that prior to the accident it had been tested by the best approved methods in use, which revealed no defect, and that the carrier had committed or omitted to perform any duty in particular that contributed to the injury complained of. In *Toledo, etc. R. Co. v. Beggs*, 85 Ill. 80, 2 Am. Rep. 613, it appeared that the accident in which the plaintiff was injured was caused by the breaking of a defective wheel on one of the defendant's trains. The court said: "That the car wheel broke when in operation, raising the presumption of negligence in the corporation is admitted, but that presumption is overcome by showing the wheel was the work of one of the most skilful manufacturers in the United States; that it was of the kind usually employed in the service, and had been subjected to and withstood the usual tests." In *Buckland v. New York, etc. R. Co.* 181 Mass. 3, 62 N. E. 955, the court said: "A carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects, which could not have been discovered by the most careful inspection." See to the same effect *Ladd v. New Bedford R. Co.* 119 Mass. 413, 20 Am. Rep. 331.

In some cases the doctrine that a carrier is liable for the negligence of a manufacturer in making its appliances, has been expressly repudiated, the courts holding that the duty of the carrier to the passenger is discharged by a thorough inspection of appliances purchased from a reputable manufacturer. In *Galls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; *Grand Rapids, etc. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Nashville, etc. R. Co. v. Jones*, 9 Heisk. (Tenn.) 29. See also *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234. Thus in *Grand Rapids, etc. R. Co. v. Huntley*, *supra*, suit was brought by the plaintiff for personal injuries suffered by reason of an accident caused by a passenger

car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. It was testified by witnesses who made an actual examination that the flaw was entirely within the axle and covered by a small thickness of sound metal. The court said: "The main question, . . . relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles. This doctrine is we think entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them.

. . . This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons. There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers

for anything which they could not avoid by their own diligence." In *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346, the court held that while carriers of passengers are bound to use the utmost care and diligence in providing safe, sufficient and suitable appliances they do not warrant the work of the manufacturers and if an accident arises from a hidden and internal defect which a careful and thorough examination would not disclose the carrier cannot be held liable therefor. And in *Nashville, etc. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, which was an action brought by an employee against the defendant railroad company, Nicholson, C. J., in commenting on the liability of a carrier of passengers with respect to appliances purchased from a manufacturer, said: "The legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein, which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skilful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests. We hold it unreasonable to assume that the company not only contracts to be responsible for its negligence, but also for that of the manufacturers." The court specifically disapproved the contrary doctrine laid down in an earlier decision in *Nashville, etc. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611, 78 Am. Dec. 506. In *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234, the court in discussing the liability of carriers for injury to passengers said: "They cannot be held to answer for latent defects in materials employed in the construction of their machinery, which the usual and well recognized tests of science and art afford for the purpose but fail to detect. Nor are they liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them; nor for the acts of persons not in their employment, and over whom they have no control, or when they have exercised judgment and skill in selecting the material, manufacturing their machinery, and in its use upon their roads, or in selecting machinery manufactured by others."

But the fact that the carrier has purchased its appliances from a reputable manufacturer does not relieve it of the further duty of

inspecting and testing the appliances, so where an accident results from a defect which might have been discovered by a proper test made by the carrier, it is liable therefor. *Louisville, etc. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 294, 10 Am. St. Rep. 60, 3 L.R.A. 434; *Lowenthal v. Vicksburg, etc. R. Co.* 117 La. 1007, 42 So. 483; *Stevens v. European, etc. R. Co.* 66 Me. 74; *Kingman v. Lynn, etc. R. Co.* 181 Mass. 387, 64 N. E. 79. See also *Gerlach v. Detroit United Ry.* 171 Mich. 474, 137 N. W. 256; *St. Louis Southwestern R. Co. v. Moore (Tex.)* 161 S. W. 378. Thus in *Louisville, etc. R. Co. v. Snyder*, supra, wherein it appeared that the plaintiff was a passenger on one of the defendant trains, which, by the falling of a bridge was precipitated into a river, the plaintiff being severely injured, the court said: "The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use, for the company is bound to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements." In *Kingman v. Lynn, etc. R. Co.* 181 Mass. 387, 64 N. E. 79, it was held that however reputable the builder from whom an appliance is purchased, the carrier is liable if it permits the appliance to get into and remain in a dangerous condition thereby causing an injury to a passenger. In *Stevens v. European, etc. R. Co.* 66 Me. 74, it appeared that the plaintiff was a passenger on a car of the defendant company and was injured by the car leaving the track within a moment after it had left the depot. The accident happened because of a wheel being loose on the axle under one of the cars. On the part of the defense, evidence was introduced tending to show that the car was comparatively new, and that the wheels and axle had been little used, were purchased of a company having a high reputation, were constructed of the best known materials and combined all the appliances which men skilled in the art of car construction employ; that the car and wheels and axle were duly and carefully inspected the night before and the morning when the train started; that the cause of the running of the car from the

track was the loosening of the wheel; that this could not have been detected by the most careful examination; that the loosening of a wheel may take place when the wheel and axle have been manufactured with the highest degree of skill and of the best materials, and cannot be detected by the most careful inspection; cannot be detected either by the ear or eye; that it may be a latent defect not discoverable by the most careful examination and not possibly to be prevented by the highest skill in manufacturing. The jury rendered a verdict in favor of the plaintiff and on appeal the court said: "The question . . . comes, whether the explanation set up in this case is made out. If the defect existed at the depot before the train was put in motion, of which we think there was quite satisfactory evidence, were the jury justified in believing that it could have been there remedied by such caution and watchfulness on the part of the agents of the defendants as under the circumstances were required by common care? We are not convinced that the jury committed an error in this respect, giving the defendants the benefit of the interpretation of the rule as to common care, invoked by them and supported by the authorities by them cited. The defendants' witnesses do not swear positively that it was not within the limits of practicability to have discovered the defect before leaving the depot, if it existed then. The judgments of the experts are based upon the statement that a proper and sufficient examination had been made by the employees, the correctness of which statement may well be doubted. If there are no means of discovering such a defect, it is certainly a deplorable risk for travelers. The truth is, that men who have routine work to perform often become careless. Undoubtedly, defects may exist in the running gear of railroads, not discoverable by any of the ordinary tests applied for their detection; but we are not satisfied that the jury erred in coming to the conclusion that such was not the case here." And in *Lowenthal v. Vicksburg*, etc. R. Co. 117 La. 1007, 42 So. 483, it appeared that the accident in which the plaintiff was injured was due to the breaking of a wheel on one of the defendant's trains. The court said: "It appears that one of the wheels of the train was cracked. The wheel broke in two pieces while the train was under headway, and part of the train left the track. Defendant does not admit the fault and negligence charged. It sought to sustain its defense by urging that the wheels of the train were manufactured by a reputable and experienced company; that these wheels were manufactured of material of average quality; that the construction was good; that an inspection had been made at Shreveport be-

fore the train left that place on the day of the accident; that the conductor in whose charge the train was, and the engineer, as defendant's agents, were capable and intelligent workmen. . . . There can be no question that the examination and inspection of the wheels of cars is a matter of the greatest importance. And it must be further said that, when a carrier of passengers sets up as a defense that a defect could not be discovered, it devolves upon it to prove that fact. It has the onus of proof. It should prove that the train was in good running order, and that, if there was anything out of order, it was not visible. But the defendant did not sustain that defense. It did not succeed in proving that the fissures in the wheels were mere invisible lines."

## *II. Defect Not Discoverable by Known Tests.*

It is well settled that a carrier of passengers is not liable for injuries caused by latent defects in its appliances, which could not have been discovered either in the process of manufacture or subsequently by the application of that skill and care which is required of a carrier. *Readhead v. Midland R. Co.* L. R. 4 Q. B. (Eng.) 379, L. R. 2 Q. B. 412, 9 B. & S. 519, 38 L. J. Q. B. 169, 20 L. T. N. S. 628, 17 W. R. 737; *Stokes v. Eastern Counties R. Co.* 2 F. & F. (Eng.) 691-693; *Canadian Pac. R. Co. v. Chalifoux*, 22 Can. Sup. Ct. 721; *Pershing v. Chicago*, etc. R. Co. 71 Ia. 561, 32 N. W. 488; *Baltimore City Passenger R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L.R.A. 161; *Western Maryland R. Co. v. State*, 95 Md. 650, 53 Atl. 969; *McPadden v. New York Cent. R. Co.* 44 N. Y. 478, 4 Am. Rep. 705; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 139, 17 Am. Rep. 221; *Houston*, etc. R. Co. v. *Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Houston*, etc. R. Co. v. *Summers* (Tex.) 49 S. W. 1106. See also *Hyman v. Nye*, 6 Q. B. D. (Eng.) 685, 29 Moak 769; *Christie v. Griggs*, 2 Campb. (Eng.) 79, 11 Rev. Rep. 666; *Gerlach v. Detroit United Ry.* 171 Mich. 474, 137 N. W. 256; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282, *affirming* 56 Barb. 425; *Leyh v. Newburgh Electric R. Co.* 108 N. Y. 667, 61 N. E. 1131. Compare *Alden v. New York Cent. R. Co.* 26 N. Y. 102, 82 Am. Dec. 401, the decision in that case was expressly disapproved of by the court in *McPadden v. New York Cent. R. Co.* *supra*, and is in effect disapproved by all of the later decisions passing on the question involved. Thus in *Readhead v. Midland R. Co.* L. R. 4 Q. B. (Eng.) 379, *Montague Smith, J.*, said: "In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the



carriage in which he traveled getting off the line and upsetting; the accident was caused by the breaking of the tire of one of the wheels of the carriage owing to 'a latent defect in the tire which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking.' Does an action lie against the company under these circumstances? This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious, that for the plaintiff on this state of facts to succeed in this action, he must establish either that there is a warranty, by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence. We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care or foresight, we think the plaintiff has failed to sustain his action.

. . . We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carrier of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. . . . 'Due care,' however, undoubtedly means having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the

machinery which they are obliged to use, which no human skill or care could either have prevented or detected. In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently the judgment of the Court of Queen's Bench in favor of the defendants will be affirmed." In *Pershing v. Chicago, etc. R. Co.* 71 Ia. 561, 32 N. W. 488, it appeared that the following instruction by the trial court was approved on appeal: "If you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skilfully made; if, at the time of the accident, they were placed and lying securely on sound ties, with good angle bars or splices at the ends, with sufficient ballast under the ties, with all their connections and supports well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances by the most careful and best managed railroads in the country, by some servants of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; and if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner herein before explained—then the defendant was not negligent with reference to said rails."

Likewise a carrier is not responsible for an accident due to a latent defect in an appliance where it is shown that the appliance was manufactured in a proper manner by respectable manufacturers and that no defect was revealed by the usual examination and test made by the carrier shortly before the accident. Thus in *Frelsen v. Southern Pac. Co.* 42 La. Ann. 673, 7 So. 800, it appeared that while the plaintiff was a passenger on a sleeper attached to a train of the defendant company, a wheel from under a coach in front of that on which she was riding broke; that her sleeper became uncoupled, derailed and capsized and that in the upsetting she was injured. The defendant contended that it had provided a safe conveyance with proper equipments, as far as it could do so, with the exercise of the utmost care and skill, and that the accident was solely due to a latent defect in a wheel, which no human care or skill could have

detected or prevented. The court said: "There can be no doubt that, as it is shown, the wheel was manufactured in a proper manner by respectable manufacturers, and that like it, the axle was without blemish; that as no defect was revealed after the usual examination and test on the night of the accident and shortly before its occurrence, no fault could be imputed to the defendant, from which liability for the injury sustained could be attached."

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**BOLTON**

v.

**BOLTON.**

New Jersey Court of Errors and Appeals—  
November 16, 1914.

*86 N. J. Law 622; 92 Atl. 389.*

**Alimony — Power to Modify Decree —  
Past Due Instalments.**

The decree made by a court of a sister state, adjudging alimony to a wife payable in future instalments, is a final judgment entitled to the protection of the full faith and credit clause of the Federal Constitution as to all past-due instalments, unless the right to the alimony is so within the discretion of the court rendering the decree that it does not vest in the beneficiary, even in the absence of the exercise of any discretionary power which the court may have to annul, vary, or modify the decree.

[See note at end of this case.]

**Same.**

A decree for future alimony payable in instalments, and which the court may subsequently annul, vary, or modify upon due notice to all parties interested, confers a vested right in the beneficiary to all instalments that have become due, which cannot be annulled, varied, or modified as to them.

[See note at end of this case.]

**Same.**

The statute of the state of New York authorizing the court to make directions concerning the allowance of alimony, with power at any time after final judgment to annul, vary, or modify such judgments, confers no retroactive power to alter the judgment as to past-due instalments, and the annulment, variation, or modification can only affect instalments which have not fallen due, and such decree as to past-due instalments is a final decree, entitled to the benefit of the full faith and credit clause of the Federal Constitution.

[See note at end of this case.]

(Syllabus by court.)

**Appeal from Supreme Court.**

Action to recover past-due instalments of alimony. Tillie J. Bolton, plaintiff, and James H. Bolton, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Clarence E. Case* for appellant.

*Collins & Corbin* for appellee.

[623] **BERGEN, J.**—By the decree of the Supreme Court of the State of New York, the plaintiff was granted an absolute divorce from her husband, the defendant, and by the same decree it was adjudged that the defendant pay the plaintiff the sum of \$125 monthly, for her support and maintenance, such payments to be made on the first day of each month, beginning with August 1st, 1911.

The defendant made such payments to, and including November 1st, 1911, and thereafter refused to make them, whereupon the plaintiff brought her suit in the Supreme Court of this state, to recover past-due instalments which had accrued on the decree between December 1st, 1911, and November 1st, 1913, the summons being tested November 10th, 1913.

The defendant, in his answer, admitted the making of the decree by the Supreme Court of the State of New York, as well as nonpayment of the instalments of alimony thereby adjudged, as set out in plaintiff's complaint, but set up two defences—(a) that the defendant had been, on February 28th, [624] 1913, adjudged a bankrupt, and that all of the alimony which had accrued prior to that date became the property of her trustee in bankruptcy, and was therefore not recoverable by her; (b) that the decree, the basis of plaintiff's action, was not final in the state where made, but was there subject to annulment, variation or modification, and therefore the complaint disclosed no cause of action. The plaintiff moved, before a justice of the Supreme Court of this state, to strike out the answer, who, after argument, determined, first, that all of the instalments which were past due, when the petition in bankruptcy was filed, belonged to the trustee in bankruptcy, and, as to that part of plaintiff's claim, she could not recover; second, that the decree was not such a final judgment as to be within the full faith and credit clause of the federal Constitution; third, that the decree was evidential of the amount due, no claim of payment, or change in the decree being claimed, and "a sound public policy should prompt this court to aid the courts of New York in the enforcement of a decree whose propriety is in no way questioned." The court thereupon ordered a judgment entered in favor of the plaintiff for the instalments of alimony which had accrued subsequent to

the petition in bankruptcy and prior to the bringing of the suit, and denied recovery as to the past due and unpaid installments accruing prior to the bankruptcy. The defendant appeals from the judgment thus entered against him. Whether alimony awarded the wife for support and maintenance is an asset subject to be taken by her trustee in bankruptcy we do not pass on, because the wife has not appealed from the adjudication against her on that branch of the case.

We do not agree with the determination of the court below, that although the decree of a court of a foreign jurisdiction is not such as to entitle it to full faith and credit in this state, it may, nevertheless, be used as conclusive evidence of the amount due, in aid of the enforcement of a decree of a sister state, for that would give it a part, at least, of the qualifications of a judgment entitled to full faith and credit, it either possesses such qualifications, or it is not conclusively evidential of the fact it is supposed to prove, and which the court [625] assumed it did conclusively prove, otherwise the judgment ordered had no support. In addition to this, the proceeding in this state is not to aid the State of New York in enforcing its decree here, either by execution, sequestration or by any other method of legal enforcement. The proceeding under review is an action by the plaintiff against the defendant to recover money claimed to be due, and if plaintiff recovers, she will have a new judgment enforceable according to the law of this state. The judgment upon which plaintiff relies is only evidence that her demand has been established in the courts of the State of New York, and if properly recovered in a court having jurisdiction of the person and subject-matter, which has not been imposed upon by fraud, and in which the court has acted fairly and without fraud, must, according to the federal constitution, be accepted in a sister state as conclusive of the matters thereby adjudicated, but if it lacks the necessary attributes of such a final and conclusive judgment, it should not be accepted on any theory of comity or public policy, as establishing conclusively any part of the matters thereby adjudicated in support of an action founded alone upon a decree which, to avail the plaintiff, must be a final and conclusive adjudication of the amount due.

The rule laid down in *Wigm. Ev.* § 1347, is this: "If the judgment is recognized as conclusive, then the plaintiff offering it is given his order to enforce it, or when it is pleaded in bar, is denied an order to enforce his claim. If the judgment is not recognized as conclusive, then an action or a defence based on it is rejected, and the state of facts as to the original claim is investigated in a practically distinct proceeding, in which the prior

judgment plays no part except in sometimes affecting the burden of proof."

We are also of opinion that the trial court fell into an error in holding that the decree under consideration was not such a final and conclusive judgment as to bring it within the full faith and credit clause of the federal constitution, as to past-due installments of alimony, and this was perhaps due to the fact that its attention was not called to the case of *Sistare v. Sistare*, 218 U. S. 1, 20 Ann. Cas. 1061, 30 S. Ct. 682, 28 L.R.A. (N.S.) 1068, in which Chief Justice White distinguishes [626] *Lynde v. Lynde*, 181 U. S. 183, 21 S. Ct. 555, 45 U. S. (L. ed.) 810, upon which the trial court relied, from *Barber v. Barber*, 21 How. 585, 16 U. S. (L. ed.) 226. In that case, the wife had a decree which required the husband to pay to her in quarterly installments the annual sum of \$360, and the defendant having defaulted, the wife brought suit to recover alimony past due, and having judgment in the District Court of the United States for the District of Wisconsin, the husband appealed to the Supreme Court of the United States. The decree was an adjudication of the Court of Chancery of the State of New York, and it contained the proviso, that the parties thereto might, by their joint petition, apply to the court to have the decree modified or discharged. The Supreme Court of the United States affirmed the judgment, holding that alimony decreed to a wife is as much a debt as any other judgment for money is. In the *Sistare* case the Chief Justice said: "When these two cases are considered together, we think there is no inevitable and necessary conflict between them, and in any event if there be, that *Lynde v. Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber* case. In the first place, in the *Lynde* case, no reference whatever was made to the prior decision, and it cannot be said that such decision was overlooked, because it was referred to in the opinion of the court below and was expressly cited and commented upon in the briefs of counsel submitted in the *Lynde* case. In the second place, in view of the elaborate and careful nature of the opinion in *Barber v. Barber*, of the long period of time which had intervened between that decision and the decision in *Lynde v. Lynde*, and the fact which is made manifest by decisions of the court of last resort of the several states that the rule laid down in the *Barber* case had been accepted and acted upon by the courts of the states generally as a final and decisive exposition of the operation and scope of the full faith and credit clause as applied to the subject with which the case dealt, it is not to be conceived that it was intended by the brief statement in the opinion in *Lynde v. Lynde* to announce a new and radical de-

parture from the settled rule of constitutional construction which had prevailed for so long a time. [627] . . . We think the conclusion is inevitable that the Lynde case cannot be held to have overruled the Barber case, and, therefore, that the two cases must be interpreted in harmony one with the other, and that on doing so, it results, first, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments. . . . Second, that this general rule, however, does not obtain where by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installment becoming due." The Chief Justice then proceeded to the discussion of the question of the finality of a judgment for installments of alimony under the statute of the State of New York as it existed in 1899 when the litigation in the *Sistare* case was instituted, and held that under the law as it then existed in the State of New York, there was no statute which expressly gave power to the court to revoke or modify an installment of alimony which had accrued prior to the application for modification, and that a decree for the payment of alimony was final and conclusive, as to past-due installments, and was therefore entitled to the benefit of the full faith and credit clause of the federal constitution. The cases bearing upon this question all appear in the opinion of the Chief Justice, and a discussion here of that question would be unseemly, because the question involved is an application of the federal constitution to the statutory law of one of the states of the Union, the principle of which is involved in the present controversy, and this court should and ought to be controlled by the determination of that high tribunal.

In *Taylor v. Stowe*, 218 Mass. 248, 105 N. E. 890, the Supreme Court [628] of Massachusetts held that where the statute of a sister state provided that where either of the parties contracted a new marriage, a new trial may be granted as to the alimony, that until an application has been made for a new trial in a case where one of the parties has remarried, the original decree remains in full force, and as such, has the protection of the full faith and credit clause, and the fact that the stat-

ute of the state where the decree was made gave the defendant the right to apply for a new trial as to alimony, did not deprive the decree of its final character, until application for a new trial was made.

The defendant in this case, however, claims that the statute of the State of New York has been amended since 1899 by the addition of the word "annul," which, it is claimed, has a broader signification than the words "vary" or "modify," and that therefore the reasoning of the Chief Justice, in the *Sistare* case, is not applicable, and this is based upon a quotation, in the opinion, of section 1771 of the New York code of Civ. Pro. in force in 1899, which omits the word "annul." This is clearly a misquotation, for section 1771, as it existed in 1899, as set out in the margin of the opinion, and as it actually existed, reads: "The court may, by order upon the application of either party to the action, after due notice to the other, to be given in such a manner as the court shall prescribe, at any time after final judgment *annul*, vary or modify such directions." That such was the statute which the Chief Justice was construing is not only manifested by his reference to it in the opinion as copied in the margin, but by the further fact that it was the law of New York relating to "separating the parties from bed and board forever, or for a limited time for either of the following causes," and in the *Sistare* case, the decree was one for separation "from the defendant, and from the bed and board of said defendant, on the ground of non-support and cruel and inhuman treatment of the defendant." Therefore, the Chief Justice was, in the *Sistare* case, dealing with a decree of separation, and from bed and board, in which cases the court of New York had power to annul, vary or modify the directions concerning alimony and the [629] power to annul was a necessary element of the decision. The statute to which the appellant here refers to as having been amended in 1900, was section 1759 of the New York code, which refers to a final judgment dissolving the marriage relation, the amendment being the introduction of the words "whether heretofore or hereafter rendered, annul," so that the statute as amended read, that the court might, on application of either party after due notice, "at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction," but this amendment of section 1759 did not affect cases prosecuted under section 1771, which was the section controlling the *Sistare* case. This amendment was reviewed by the Court of Appeals of New York in *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L.R.A. 800, where it was held that it was unconstitutional so far as it applied to any judgment theretofore rendered.

74 Oregon 1.

That was a case of an absolute divorce and the court held that when the decree was entered, the court had no statutory right to alter it, "although it existed where the action was for a separation," citing section 1771 of the Civ. Pro. code.

But if we assume that the word "annul" was not in the statute construed in the *Sistare* case, and has been since added so as to be applicable to the present decree, still the court has not, under the rule adopted in that case, power to annul, vary or modify the decree as to installments due and payable before any such annulment or variation is made, unless under the law of the state in which the decree is made, the right to demand past-due alimony is discretionary with the court to such an extent that no absolute vested right attaches to have the past-due installments paid. That no power to vary, or modify past-due installments was vested in the courts of New York by any statute of that state, prior to the amendment of 1900, was settled by the *Sistare* case, and the addition of the word "annul," by an amendment to the statute, would not give to the courts any additional retroactive power. If no power existed to vary or modify a decree with reference to past-due alimony, and such authority in the statute did not operate retroactively, as seems to be the rule established, not [630] only by the courts of New York, but also by the Supreme Court of the United States, certainly the addition of the word "annul" by statute, unless accompanied by an express power to revoke or modify an installment which had accrued prior to the exercise of such a power, would not be construed as a legislative intent to give a statute retroactive effect which it would not possess except for the use of the word "annul," for, in the absence of an express power, every reasonable implication must be resorted to against the existence of such power. It may be assumed, so far as the present case is concerned, that the courts of New York have the power to annul, vary or modify a decree for alimony, with reference to future installments, but it seems to be clearly settled by the cases above referred to that, under the statute of New York, its courts have no power to annul so much of a decree as relates to installments already due and payable, because the right thereto becomes absolute and vested upon becoming due. The decree, upon which this action is founded, being a final and conclusive judgment as to past-due installments, was therefore one entitled to the benefit of the full faith and credit clause of the federal constitution, and the refusal of the trial court to give it such effect was error, but the plaintiff being entitled to recover on her foreign decree as a judgment entitled to full faith and credit, would have prevailed if the proper rule had

been applied by the court below, and therefore the judgment will be affirmed, for the reasons indicated in this opinion.

For affirmance—The Chancellor, Chief Justice, Garrison, Swayze, Trenchard, Bergen, Kalisch, Black, Bogert, Vredenburg, Heppheimer, Williams, JJ.—12.

For reversal: None.

#### NOTE.

The reported case holds that a decree for alimony payable in instalments cannot be modified or vacated as to past-due installments and accordingly concludes that as to accrued instalments such a decree is entitled to full faith and credit when sued on in another state. The earlier cases discussing the power of a court to modify a decree for alimony already accrued are reviewed in the note to *Guess v. Smith*, Ann. Cas. 1914A 300.

#### HYLAND

v.

#### OREGON HASSAM PAVING COMPANY.

Oregon Supreme Court—December 22, 1914.

74 Oregon 1; 144 Pac. 1160.

#### Contracts — Intent of Parties — Variance from Terms of Contract.

A party writing a contract cannot reasonably contend that he did not intend to do all that the contract by its terms obliged him to do.

#### Contract to Precure Legislation.

Any person interested in any proposed legislation before any legislative body, including the common council or other lawmaking body of a municipal corporation, may legally employ an agent or an attorney to collect facts relating thereto, and to prepare a bill, and to explain the desired measure to the legislative body or any committee thereof fairly and openly, and have it introduced, and a contract to pay for such services, so rendered, is not a violation of law or of public policy.

[See note at end of this case.]

#### Same.

A contract whereby a paving company agreed to pay plaintiff 3 per cent of the contract price on all contracts for street improvement work entered into between it and a city, to be earned when the contracts should have been duly signed by the company and the city, and providing that plaintiff should "at all times do everything in his power"

to further the business of the company, under which plaintiff was to circulate petitions among property owners asking that streets be paved with the company's product, and obtain signatures of 20 per cent of the property owners, to present such petitions to the city council, to answer and fight remonstrances, and, by bringing property owners before the street committee and the council, to procure the passage of ordinances and resolutions authorizing the paving of streets, and assessing the expense on the adjacent lots, in effect a selling or promoting proposition, in view of the fact that the compensation was contingent, and was broad enough to cover services of any kind, secret or open, honest or dishonest, and the exercise of personal and private influence upon the city council, and of the fact that such compensation was probably included in the company's contract price, is invalid, as against public policy.

[See note at end of this case.]

Appeal from Circuit Court, Multnomah county: HAMILTON, Judge.

Action on contract. George M. Hyland, plaintiff, and Oregon Hassam Paving Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Stapleton & Sleight* for appellant.

*Omar C. Spencer, Carey & Kerr* and *Charles A. Hart* for respondent.

[2] **RAMSEY, J.**—The defendant is a corporation and engaged in the business of paving streets with a certain patented process. On January 10, 1909, the defendant and the plaintiff entered into a written contract by which the defendant employed the plaintiff to work for it for a stated length of time for a compensation stated in the said contract. A part of said contract is as follows:

"Said party of the first part agrees to pay said party of the second part, for and in consideration of the services rendered by said party of the second part, [3] as hereinafter specified, the sum of 3 per cent of the contract price on all contracts for street improvement work entered into by and between said party of the first part and the City of Portland, or any other city, firm, corporation or individual during the life of this agreement. The said contract price shall be the estimated amount of the total cost of such improvement according to the estimate supplied in plans and specifications therefor. The said remuneration shall be deemed to be earned by said party of the second part when the contract shall have been duly signed by said party of the first part and the City of Portland, or other city, firm, corporation or individual, and the amount due said party of the second part under this agreement shall become due

and payable thereafter on demand. It is further understood and agreed that the said party of the second part shall have the right to draw against an account, which shall be opened between him and the said party of the first part, the sum of two hundred fifty (\$250.00) dollars for each and every calendar month of any and all years during the life of this contract, and that said sum of two hundred fifty (\$250.00) dollars shall be charged against the account of said party of the second part, and shall be deducted from the sum or sums which are at any time due, or shall become due to the said party of the second part from said party of the first part.

"It is further understood and agreed that the party of the first part herein guarantees to the party of the second part that his annual compensation under the terms of this agreement shall be not less than three thousand (\$3,000.00) dollars during any one year of this contract, and the said party of the first part agrees in any event to pay to the party of the second part three thousand (\$3,000.00) dollars each and every year during the period of his employment, regardless of whether or not the commissions earned under the conditions of this agreement by the said party of the second part shall equal said sum. It being understood that commissions earned on business taken during any one year of this contract shall not be carried forward [4] to make up any part of compensation for a succeeding year, and that all commissions are to be credited to the year in which the contract was taken, and not otherwise.

"It is further agreed by the party of the first part that, in addition to the compensation of the party of the second part hereinbefore provided, said party of the first part shall pay unto the said party of the second part the sum of fifty (50) dollars a month for each and every month during the term of this agreement. Said sum to be an item of expense by said party of the first part, and in no way become a part of the compensation earned by said party of the second part under the other terms of this agreement.

"And the said party of the second part agrees to devote his time, and the whole thereof, and to give his best attention to the affairs and business of the said party of the first part. It is understood that said party of the second part shall at all times do everything in his power to accomplish the success of and aid the business of the said party of the first part; and it is expressly understood and agreed that the said party of the second part shall not at any time throughout the life of this agreement enter into any other employment in the interests of any other enterprise or parties, and shall devote his time and at-

tention to the affairs of the said party of the first part."

When the demand that is the basis of this action accrued, the said contract was in force and the plaintiff's rights are measured by said contract. The third, fourth and fifth paragraphs of the complaint are as follows:

"That the plaintiff performed services for the defendant under and in pursuance of said contract in securing street improvement work for the defendant from the City of Portland. That as a part of said services the plaintiff procured for the defendant from the City of Portland a contract for the improvement of a portion of Macadam Street, and that the defendant and [5] the City of Portland entered into a contract for such improvement work on the 29th day of September, 1910, by the terms of which and the plans and specifications thereunder, defendant agreed with the City of Portland that it would pave and improve said portion of Macadam Street, and the City of Portland agreed to pay the defendant therefor the sum of \$108,519.96. That under the terms of said contract the plaintiff earned the sum of \$3,255.59 as his commission and compensation for procuring the said contract, and that the same became due and payable on demand after the signing of said contract as aforesaid.

"That the plaintiff has duly performed all the conditions of said contract on his part to be performed.

"That on or about the 1st day of October, 1910, plaintiff demanded of said defendant payment of said sum earned under said contract, but no part thereof has been paid."

The defendant denies parts of the complaint, and alleges, *inter alia*, that said contract for the paving of Macadam Street stated in the complaint was void, and that the plaintiff, on the 24th day of February, 1911, executed and filed with the City of Portland, for and on behalf of the defendant, a written consent to the abandonment of all rights under said contract, and that the plaintiff agreed not to claim any commission on said contract. The plaintiff admits that the said contract was rescinded with his consent, and that the defendant did not improve or pave any part of said street. The defendant set up, *inter alia*, the following separate defense:

"Defendant, for a second, further and separate answer and defense to the first alleged cause of action contained in the complaint herein, alleges as follows: That the said pretended contract set out in the complaint as Exhibit 'A' is and was void and against public policy in this: That by the terms of said contract plaintiff undertook to do everything in its power to [6] accomplish the securing of paving contracts from the city council and the executive board of the City of Portland. That the said city council and said executive

board were and are public bodies, and plaintiff undertook to use and did use his personal influence, friendship and acquaintance to influence the deliberations and determinations of said bodies and the individual members thereof."

The reply admits portions of the answer, but denies other portions thereof, and sets up new matter. The plaintiff and one other witness testified in the case, and, the plaintiff having rested, the court, on motion of the defendant, granted a judgment of nonsuit, holding that the plaintiff's claim for commissions and the contract on which it is based are void as being contrary to public policy, etc. The plaintiff appeals.

The question for decision is: Are the plaintiff's claim for commissions and said contract void, as being contrary to public policy? The complaint states that the plaintiff's cause of action is for procuring for the defendant, from the City of Portland, a contract for the improvement of a portion of said Macadam Street. By this contract the defendant was to improve and pave a portion of said street, and said city was to pay the defendant therefore \$108,519.96. As stated supra, this contract was rescinded with the consent of the plaintiff, and the defendant received nothing from the city thereon. It is to be noted that the plaintiff demands from the defendant the said \$3,255.59 for obtaining from said city said contract. By the first paragraph of said contract the defendant agrees to pay the plaintiff 3 per cent of the contract price on all contracts for street improvement work entered into by and between the defendant and the City of Portland during the life of said contract (five years), and said contract provides that said remuneration shall be [7] deemed earned by said party of the second part (the plaintiff) when the contract shall have been duly signed by the defendant and the city. The following part of said contract has a material bearing on the point urged by the defendant and sustained by the trial court:

"And the said party of the second part (the plaintiff) agrees to devote his time and the whole thereof, and to give his best attention, to the affairs and business of said party of the first part (the defendant). It is understood that said party of the second part (the plaintiff) shall at all times do everything in his power to accomplish the success of and aid the business of the party of the first part" (the defendant).

1-3. It will be noted that the contract provides that the plaintiff shall at all times do everything in his power to accomplish the success of the business of the defendant. The plaintiff says that he wrote said contract, and hence he cannot reasonably contend that he did not intend to do all that the contract by

its terms obliged him to do. His duty was to obtain from the city paving contracts for the defendant. In order to obtain such contract, petitions had to be circulated among the property owners adjacent to the streets, asking that the streets be paved, and these petitions, it seems, were required to be signed by at least 20 per cent of the property owners. The plaintiff had charge of obtaining these signatures, and in order to obtain them it was necessary for him to convince at least 20 per cent of the property owners that the streets should be paved with the Hassam pavement. When the proper petitions were obtained, they were presented to the city council. The plaintiff had charge of that, too, and had to do it, or see that it was done. If a remonstrance was presented against the proposed improvement, it was his duty to fight that also. The following [8] extracts from the plaintiff's evidence show some of the work done by him in obtaining contracts:

"When a remonstrance was filed by certain property holders on the street which was having the improvement, they did not want our particular street, or they did not want any, and so on, I copied from the city records a list of those remonstrances and would get some of my help—whoever was working for me, I always paid my own help—and we went out and explained to the people as best we could that our street was superior, or that it was cheaper, or, if they were opposed to paving altogether, why the street should be paved; that is, as a matter of civic pride and improvement of their property. It was salesmanship in that respect. When we were getting these signers, we did not go to all of them, because it was a matter of expense to me, and time, and many men were working, and we could not see them. We were around all the time, but it was impossible to see all of them, and we did not know who objected until the remonstrances came in, and then we would go back and get them satisfied, if possible.

"I can only testify to the part I had and those things that I was concerned in with my company. For instance, I took in a petition that represented thirty (30) per cent of the property owners on the presumption that they were getting hard surface petitions as they had previously done on the twenty (20) per cent basis, and I presumed they would grant mine, and when did not and were discontinued and set back, and the company complained to me about the matter, I immediately went down to the property owners on the street and solicited them to go to the city hall and assist me in showing to the council this was the street they wanted. This was the one they preferred. And sometimes I would get as many as a dozen, twenty or thirty, and sometimes in some cases a hundred, to go up

with me and fight for the pavement I represented. That was my method. I took the property owners to the street committee and sometimes before the council itself. I did not interview a member of the committee [9] individually or a member of the council individually.

"Q. Did any of your property owners?

"A. I am not testifying to what they did."

The foregoing is a fair example of the plaintiff's activity in obtaining contracts. Contracts could not be obtained without petitions to the council, and the passage of ordinances and resolutions by that body. The plaintiff was charged with the duty of getting all these things done, and he represented the defendant therein.

Mr. E. H. Bauer was a director and treasurer of the defendant while the plaintiff was working for it under said contract. He was a witness for the plaintiff, and stated the plaintiff's duties under said contract as follows:

"He was to secure the contracts and, as I understood it, solicit petitions, handle the promotion end of it up to the time when the company should sign the contract. I understood that Mr. Hyland's work, soliciting petitions, and, in general, watching everything that might come up, as Mr. Hyland explained it, in furthering the contracts up to the time of signing—that we could sign the contracts with the city."

According to the complaint, the contract, and the evidence given in the plaintiff's behalf, it was the duty of the plaintiff to devote all of his time as a "promoter" to obtaining paving contracts for the defendant and he had charge of all the "promoting" business from the preparing and the circulating of petitions for paving until the contracts had been awarded to the defendant by the city and they were ready to be signed by the city and the defendant. He appeared before committees and the council, and, with all of his power, urged the awarding of contracts to his employer. The contract provides that the plaintiff "shall at all times [10] *do everything in his power to accomplish the success of and aid the business of* the defendant. According to the contract, there is no limit upon *what he is obliged to do*. He is required to do his utmost to obtain contracts for paving streets for the defendant. He shows, by his evidence, that he circulated petitions to have streets paved, and importuned lot owners to sign them. He appeared before the council and before the committees thereof, and presented these petitions, and urged favorable consideration of them, and pressed these matters for the defendant, in order to obtain paving contracts and earn his compensation of 3 per cent on the contract price of the work obtained by him. He was to have 3 per cent



of the contract price of all contracts that his company obtained in Portland or elsewhere in the state. However, the company guaranteed him at least \$3,000 per annum, and it furnished him, also, \$50 per month additional for "expenses." His compensation above \$3,000 per annum was contingent on his obtaining contracts for paving that aggregated more than \$100,000 per annum. The evidence of Bauer shows that he obtained plenty of business for the company. The plaintiff does not claim that he had not been well paid, outside of the matters stated in the complaint.

The trial court held that the contract sued on is contrary to public policy and void. There is an irreconcilable conflict in the decisions of the courts of the different states on this point. The plaintiff's right, in this case, to the 3 per cent commission was contingent on his success in obtaining contracts from the city. In order to obtain them, it was necessary, as stated *supra*, to procure the passage by the city council of ordinances and resolutions authorizing the paving of the streets and assessing the expense thereof on the [11] adjacent lots. The plaintiff was to be paid 3 per cent of the contract price of the work authorized by each contract obtained, and this was due him, under the contract, as soon as each contract was signed. The employment of the plaintiff as a "promoter" under this contract very likely added 3 per cent to the cost of the pavement, as what he was to be paid was probably reckoned as a part of the expense, when the amount to be charged for paving was determined by the company.

Any person interested in any proposed legislation before any legislative body may legally employ an agent or an attorney to collect facts relating thereto and to prepare a bill for the contemplated legislation, and such agent or attorney may explain the desired measure to the legislative body or any committee thereof fairly and openly, and have it introduced, and a contract to pay for such services, so rendered, violates no principle of law or of public policy: 15 Am. & Eng. Enc. of Law (2d ed.) p. 970. But public policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws or ordinances. This principle applies to common councils or other law-making bodies of municipal corporations to the same extent that it does to Congress or the legislature of a state: 15 Am. & Eng. Enc. of Law (2d ed.) p. 969. In the case of *Sweeney v. McLeod*, 15 Ore. 330, 339, 15 Pac. 275, 279, the plaintiff sought to recover for services rendered at the legisla-

Ann. Cas. 1916E,—60.

ture to prevent by "legitimate importunity" the passage of a law prohibiting the taking of salmon [12] by a fish-wheel. The judgment of the court below was reversed; the court saying, *inter alia*:

"Such contracts as the one sued on are always closely and rigidly scrutinized by the courts when sought to be enforced. Nothing wrong may have been intended in this particular case, nor was it necessary. If the terms of the contract required any services to be rendered, or if the party employed in furtherance of the general purposes of his employment rendered or designed to render any services, either to cause or to prevent any legislative action otherwise than by publicly presenting the subject before the legislature or some of its committees, such contract cannot be enforced in this state."

In *Crichfield v. Bermudez Asphalt Pav. Co.* 174 Ill. 486, 51 N. E. 552, 42 L.R.A. 347, the court had under consideration a contract substantially the same as involved in this case. The Supreme Court of Illinois held that the contract was against public policy and void, using this language:

"Upon the face of the contract the meaning of the expression 'to solicit and promote the asphalt paving business in the City of Chicago' is to solicit, by the exercise of influence and other means, the passage of ordinances and the letting of contracts by the members of the common council of the City of Chicago. . . . There are some salient features of this agreement which stamp it as being against public policy. A special assessment for public improvement under our statute is a species of taxation, and is authorized only as an exercise of the taxing power. A special assessment should not be levied, except for the purpose of making a needed public improvement. The property owner should not be assessed, and his property made to bear the burden of taxation except to secure the benefits of a needed public improvement. The idea of making a contract to promote the levying of a public assessment, not for the purpose of securing to the public a needed improvement, but for the purpose of enabling [13] a paving company to get a job, is not only against the public interests, but is abhorrent to all proper ideas of justice and honor. Property owners should not be assessed for the purpose of paying moneys into the pockets of paving contractors, and any contract by which parties agree to obtain ordinances by solicitation and by the exercise of influence upon public officials, and with a view of obtaining contracts which result in the end from the passage of such ordinances, is against public policy, and will not be enforced by the courts."

In *Wilbur v. New York Electric Construction Co.* 58 Super. Ct. 539, 12 N. Y. S. 456,

the contract under discussion was one wherein the plaintiff agreed to do certain work in soliciting, advocating and procuring from the City of Utica a three-year contract for the defendant for lighting said city, and for a franchise to be granted to the defendant permitting it to erect its poles and appliances in the streets. Plaintiff was not a lawyer, but described himself as being familiar with the electric light business. The court held the contract void, saying, *inter alia*:

"I think this contract is void. . . . It has long been settled that a contract to exert personal influence to induce a public officer or a member of a legislative body to do any official act is illegal and void, and this principle has been applied to all the departments of government, judicial, executive and legislative, and is placed on the broad principle that all contracts leading to secret, improper and corrupt tampering with official action are void."

In *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677, the contract relied upon was one wherein plaintiff agreed to perform services before the legislature in aid of an application for a charter for a bank. It was found that the contract was against public policy and [14] void, the court laying down the following test to be applied in such cases:

"The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done under it."

In *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 U. S. (L. ed.) 868, Norris entered into an agreement by the terms of which he agreed to obtain, cause or procure from the government of the United States contracts for the sale of muskets. The compensation to be paid Norris was *contingent* upon his success. Mr. Justice Field, delivering the opinion of the court, held the contract was against public policy and void, using the following language:

"The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other

elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."

[15] In *Mills v. Mills*, 40 N. Y. 543, 546, 100 Am. Dec. 535, the contract under discussion provided that the plaintiff should convey certain real property to the defendant as soon as a bill then pending before the Senate of the State of New York should become a law. The defendant promised that he would give all the aid in his power and spend such reasonable time as might be necessary and generally use his utmost influence and exertions to procure the passage of the law. The court held that the agreement to convey the property was against public policy and void, saying:

"It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply asked of the legislature the privilege or favor to be granted to him of building and operating a railroad upon certain streets of the City of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper and corrupt tampering with legislative action."

See also in this connection *Flynn v. Mineral Wells' Bank*, 53 Tex. Cix. App. 481, 118 S. W. 848.

In 2 Elliott, Contracts, Section 1051, the author says:

"The numerical weight of authority supports the doctrine that all contracts for procuring legislation are void, where the compensation to be received is contingent on the success of the promisee in obtaining either the passage or defeat of a proposed act, *even though the contract did not contemplate the rendition of improper services, and though no improper services were in fact rendered. A contingent fee is a strong and direct [16] incentive to the exertion of not merely personal, but sinister, influence upon legislation.* This rule is not, however, universal," etc.

1 Page, Contracts, Section 414, says, *inter alia*:

"So a contract whereby A employs B to act openly and legally in securing a reduction of an excessive claim against A for taxes is

valid. But if the agent is to use his personal influence with public officials whose favorable action he seeks to obtain, and is to resort to private solicitation therefor, the contract of employment is illegal, even if the fact of employment as lobbying agent is not a secret, and if no improper influence is to be used. Thus the employment of an attorney to render services which in part consist of personal solicitation of legislators is illegal. *The invalidity is specially clear when the compensation of the agent is in part or in whole dependent on his success in obtaining the passage of an ordinance.*"

2 Elliott, Contracts, Section 1042, says:

"Contracts 'to give all the aid in his power, to spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into a law' of a specific bill, to 'use his influence, efforts and labor in procuring the passage of a law by the said legislature,' or to procure legislation upon a matter of public interest in regard to which neither of the parties had any claim against the United States, have been declared void. It has been said that 'if the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself.' Nor will honest services substantially performed sanctify an unlawful contract."

In *Weed v. Black*, 2 MacArthur (D. C.) 263, 274, 275, 29 Am. Rep. 618, the Supreme Court of the District of Columbia says:

[17] "Honest contracts, however, whose character appears upon their face, are unaffected by the rule. *If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract.* But contracts which provide for compensation in consideration of particular services to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments in support of claims, are legitimate everywhere."

The fact that the compensation to be paid is wholly or in part contingent upon the payee's success in obtaining the passage of the ordinance or law is an important circumstance to be considered in determining the validity or the invalidity of the contract under consideration, and a majority of the adjudications seem to hold such a contract to be invalid: See 2 Elliott, Contracts, § 1051; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Marshall v. Baltimore, etc.* R. Co. 16 How. 314, 335, 14 U. S. (L. ed.) 953, 962; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767; *Wood v. McCann*, 6 Dana (Ky.) 366.

*Justice Grier, in Marshall v. Baltimore, etc. R. Co.* 16 How. 314, 335, 14 U. S. (L. ed.) 953, 962, after examining the cases upon this point, comes to the following conclusion:

"The sum of these cases is: *That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.*"

The following clause of the contract between the plaintiff and the defendant, as we view it, is about as strong as it could be made, and it was written by the plaintiff himself:

[18] "*It is understood that said party of the second part (the plaintiff) shall at all times do everything in his power to accomplish the success of and aid the business of the said party of the first part*" (the defendant).

No one could do or be required to do more than said contract required the plaintiff to do to accomplish the success of the business of the defendant. The business that the plaintiff was employed to do was to obtain paving contracts from the city, and this could not be accomplished without the passage of ordinances and resolutions by the city. The effect and import of the contract are that the plaintiff shall at all times do everything in his power to obtain the passage of all necessary resolutions and ordinances and to obtain contracts from the city. We think that this contract comes within the meaning of the court in *Weed v. Black*, 2 MacArthur (D. C.) 268, 274, 29 Am. Rep. 618, where the court says:

"If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services substantially performed sanctify an unlawful contract."

The terms of this contract are broad enough "to cover services of any kind, secret or open, honest or dishonest." They are broad enough to cover secret interviews with councilmen, and the exercise of personal and private influence with the councilmen and other city officials. The terms of the contract are broad enough to cover any act, whether honest or dishonest, legal or illegal that might be resorted to "to accomplish the success" in obtaining contracts. He promised to "do everything in his power" to succeed. Taking into consideration the fact that the plaintiff's compensation was contingent on his success in obtaining from [19] the city paving contracts, and his promise to do everything in his power at all times to obtain these contracts from the public, we conclude that said contract is contrary to public policy, and that the court below did not err in granting the judgment of nonsuit. This conclusion is not in conflict with the decision in *Obenchain v. Ransome*.

Crummey Co. 69 Ore. 547, 138 Pac. 1078, 139 Pac. 920.

The judgment of the court below is affirmed. Affirmed.

McBride, C. J., and Moore, J., concur.

Burnett, J., dissents.

#### NOTE.

#### Validity of Contract for Contingent Compensation in Procuring Legislation.

In *Hazelton v. Sheckells*, 6 Ann. Cas. 217, it was held that a contract for services in procuring legislation, which leaves the compensation for the services contingent, is void as against public policy, regardless of whether corrupt practices are resorted to or contemplated. This ruling is supported by the following recent cases: *Globe Works v. U. S.* 45 Ct. Cl. (U. S.) 497; *Burke v. Wood*, 162 Fed. 533; *Hogston v. Bell* (Ind.) 112 N. E. 883. See also *Flynn v. Mineral Wells' Bank*, 53 Tex. Civ. App. 481, 118 S. W. 848. And see the reported case. In *Globe Works v. U. S.* supra, the court said: "Contracts for the payment of a proportion of an amount recovered in case of success and nothing in case of failure have been held to be lawful. But contracts for a contingent compensation for obtaining legislation are void, as against public policy. . . . And the proposition is well established that every part of the consideration for a contract goes equally to the whole promise, and if any part of it be contrary to public policy the whole contract fails. It is immaterial whether anything improper be done or was expected by the assignor to be done. Such agreements are illegal and void because of the sinister influences which persons operating under such a contract may see fit to exert. In line with this statement there is express authority for further stating that, while compensation can be recovered on a contract for purely professional services when they stand by themselves, yet when blended and confused with those forbidden, the whole contract is a unit and indivisible, and that which is bad destroys the good; but compensation cannot be recovered for any part under a contract to take charge of a claim before Congress, where the services to be rendered amount to an agreement to procure the legislation by personal solicitation on the part of the agent where the contract includes 'lobby service.'" In *Burke v. Wood*, supra, which was an action to recover compensation for services in procuring the purchase of a water supply company's property by the city council, recovery was refused on the ground that the contract for services by the plaintiff was a "lobbying" contract and void as against public policy. On a motion for a new trial the

plaintiff contended that the services for which he sought recovery were not those of a "lobbyist" because the city council was not a legislative body, or at least its action in purchasing the property of the water company was not a legislative act because it required for its consummation the submission to the vote of the citizens of a proposition for a bond issue. As to that contention the court said: "That the council of a city or corporate town is the local legislature of that city or town I take it will not be questioned. A legislative body is any body of persons authorized to make laws or rules for the community represented by them. A legislative body is one capable of or pertaining to the enactment of laws. A legislator is one who makes laws for a state or community. It is a matter of judicial or common knowledge that the council enacts laws; establishes rules of action. They are called ordinances, but they are no less laws. There is no question that the council had legislative authority to purchase waterworks, and by one act of the legislature of the state to purchase these particular works. . . . But, while the city had the right to purchase, through its council, the waterworks, it had no authority to issue bonds with which to pay for them, unless such issue of bonds be first authorized by a majority vote of the qualified voters of the city. The proposition required to be submitted to the voters of the city was the bond issue only. It may be true, doubtless was true, that it was necessary in this instance to issue bonds in order to make the purchase determined on by the council and mayor effective, but it is not apparent how that in any way affected the right of the council to make the purchase. Without the authority of the voters to issue bonds, the city may have lacked the ability to consummate the purchase, but it in no way, as it seems to me, affected its right or authority to purchase the waterworks. The legislative department of the city of Mobile is vested by its charter in a mayor and general council. That charter provides that it shall be the duty of the council to prevent crimes, and protect the rights of persons and property, to guard the public health, etc. How can this be done without the enactment of laws for the purpose? The council is authorized to contract for, build, or purchase waterworks. How can it act in such case except in its legislative capacity, either by the adoption of an ordinance or resolution? Its legislative action is evidenced by its ordinances and resolutions, which are its laws." In *Hogston v. Bell*, supra, the court said: "There can be no doubt that the law is well settled in this and in other jurisdictions that, while contracts for the payment of fixed fees for legitimate professional services rendered

before legislative bodies are valid, yet, when the fees are made contingent on success in obtaining the desired results, the contract becomes so tainted with illegality as to render it void. . . . This rule is based on the ground, that, when compensation is directly or indirectly contingent on success before the legislative body, it must necessarily encourage and lead to the use of improper means and the exercise of undue influence." But in that case the facts were as follows: The testator Hogston had left a considerable estate and a will in which the State Board of Charities was named as major beneficiary. The appellant Hogston had brought an action to set aside the said will on the ground that the testator was of unsound mind at the time of its execution, which action had been dismissed on demurrer to a plea in abatement that, as a department of the state was a beneficiary under the will, and a necessary party defendant, such an action could not be maintained without the consent of the state. The appellant Hogston then retained the appellee Bell as counsel under a contract which made the said Bell's compensation contingent on a successful contest of the will. The appellee Bell then drafted and caused to be presented to the legislature for enactment a bill which should authorize the contest of a will in which the state, or an officer, or department thereof was named as beneficiary. The bill subsequently became law, and the appellee Bell then conducted the contest of the Hogston will and succeeded in having it set aside. The case at bar was a subsequent action by Bell to recover of Hogston his fees for services in the matter of the Hogston will and after a verdict for the plaintiff the defendant appealed on the ground that the contract on which Bell sought recovery, although fair on its face, in fact contemplated the performance of illegal services on the part of Bell in procuring legislation. The court held, on this state of facts, that the fact that the state or a department thereof was named as beneficiary in a will did not interfere with the right of contest, since an action to contest a will was in rem and not against parties; that therefore the services of Bell in procuring the legislation referred to were not necessary to the success of the action to set aside the Hogston will, that his right to compensation was therefore not contingent on the procuring of the legislation, and that the fact that he actually did procure the legislation did not bring his contract within the inhibition of the rule against contracts for compensation contingent upon procuring legislation. In *Flynn v. Mineral Wells' Bank*, supra, it was held that a contract whereby an attorney was to obtain compensation contingent on his procuring the award of bridge-building contracts by the county commissioners' court was

illegal and void as contrary to public policy, although the contract in terms stipulated that the said attorney was "to use his best efforts by all rightful and legal means to assist said Flynn in obtaining said contracts."

In the following recent cases a distinction has been made between lobbying services in procuring the passage of legislation and strictly legitimate services directed to that end, without any resort to or contemplation of corrupt or sinister influences or practices, it being held that a contract for contingent compensation for services of the latter kind is valid and enforceable. *Kansas City Paper House v. Foley Ry. Printing Co.* 85 Kan. 678, Ann. Cas. 1913A 294, 118 Pac. 1056, 39 L.R.A. (N.S.) 747; *Pennebaker v. Williams*, 136 Ky. 120, 120 S. W. 321, *opinion modified* 136 Ky. 143, 123 S. W. 672. See also *Obenchain v. Ransome-Crummey Co.* 69 Ore. 547, 138 Pac. 1078, 139 Pac. 920. In *Pennebaker v. Williams*, supra, it was held that the employment of a law firm, on a contingent fee, to prosecute a claim against the United States for property seized during the civil war, where an essential part of the services of the firm consisted in procuring the passage by Congress of an act allowing the collection of the claim, and in proving to committees of Congress that the owner of the property seized was a loyal citizen of the United States, was not an invalid "lobbying" contract, it appearing that only such services were rendered as any reputable lawyer might render under the circumstances. See also the note to *Cole v. Brown Hurley Hardware Co.* 16 Ann. Cas. 846, discussing the validity of contracts whose full performance requires as an incident the procurement of legislation.

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## STATE

v.

## MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Missouri Supreme Court—December 19, 1914.

262 Mo. 507; 172 S. W. 35.

### Judicial Notice — Public Fiscal Affairs.

The court judicially knows that the organized militia of the state, when traveling on orders from the Governor, travels at the expense of the state.

### Carriers — Regulation — Validity — Reduced Fare for Militia.

The one-cent militia fare law (Rev. St. 1909, § 8396) is not in violation of Const. art. 12, § 23, forbidding discrimination be-

tween or in favor of transportation companies and individuals, as it is a case of discrimination in favor of the state or the United States if it should be found that the latter recoups the state for the outlay.

[See note at end of this case.]

**Same.**

The one-cent militia fare law (Rev. St. 1909, § 8396) violates Const. art. 12, § 14, providing that the general assembly shall pass laws to prevent unjust discrimination in passenger tariffs, etc., conceding that a one-cent fare is unjust discrimination, as the legislature may not fail to carry out the command of the Constitution and do the diametrically contrary thing.

[See note at end of this case.]

**Validity of Discriminatory Regulations of Carriers.**

Const. art. 12, § 14, and Rev. St. 1909, § 3232, forbidding discrimination, is binding upon the state, notwithstanding that by the Constitution railroads are declared to be public highways.

[See 4 R. C. L. tit. *Carriers*, p. 606 et seq.]

**Same.**

That by Const. art. 12, § 14, railroads are made "public highways" does not nullify the provisions of Const. art. 2, § 21, which forbids the taking of private property for public use without just compensation.

**Same.**

Under Const. art. 12, § 14, forbidding unjust discrimination in railroad rates, it does not follow that because a discrimination is apparent it is an unjust discrimination.

**Same.**

It needs neither a statute nor a constitutional provision to make an unjust discrimination in railroad rates unlawful, for such discrimination is forbidden by common law.

**Same.**

If the difference in railroad rates is based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination.

**Reduced Fare for Militia.**

The one-cent militia fare law (Rev. St. 1909, § 8396) providing that railroads shall carry between points in the state the National Guard when ordered in military duty by the Governor at one cent a mile for each officer and enlisted man, with not to exceed 100 pounds of baggage or camp equipage, constitutes unjust discrimination under Const. art. 12, § 14, providing that the general assembly shall pass laws to prevent unjust discrimination in passenger rates, in view of Rev. St. 1909, § 3232, fixing the maximum fare for adult passengers at two cents a mile and for children under 12 at one cent a mile, as such rate is prima facie a reasonable rate, and there is nothing to show that the cost of transporting the National Guard would be cheaper than carrying any other passenger.

[See note at end of this case.]

Original action for mandamus proceedings. State of Missouri, plaintiff, and Missouri, Kansas and Texas Railway Company, defendant. The facts are stated in the opinion.

WRIT DENIED.

*John T. Barker, Lee B. Ewing and Wm. M. Fitch* for plaintiff.

*J. W. Jamison* for defendant.

[512] FARIS, J.—Mandamus, brought originally in this court. Plaintiff, upon filing a petition containing apt allegations, procured the issuance by us of an alternative writ of mandamus, the pertinent part of which reiterated the allegations of the petition, and, omitting caption and formal parts, is as follows:

"Comes now the State of Missouri and represents and shows to the court that the Missouri, Kansas & Texas Railway Company is a corporation duly organized and existing according to law and owning and operating a line of railway from Jefferson City to Nevada, Missouri, wholly within this State.

"Your petitioner further shows that this State has formed and maintains an organized militia known and designated as the National Guard of Missouri; and that, under and by virtue of section 8396 of Revised Statutes of 1909 of said State, it was and is the duty of all companies and corporations owning or operating lines of railroad in this State to transport said organized militia or National Guard over the lines of said railroads between points wholly within this State, at the rate of one cent per mile for each man belonging to said organization whenever said National Guard is ordered by the Governor of this State to travel on military duty in this State.

"Your petitioner further shows that on the 22nd day of May, 1914, a part of said National Guard, to wit, Capt. W. S. Moore and fifteen men of Company L. Second Regiment infantry, was ordered by the Governor of this State to go from Jefferson City to Nevada, [513] in this State, on military duty, to wit, for target practice at the Government rifle range near Nevada; that on said date Adjutant-General John B. O'Meara, by order of the Governor, and acting for this petitioner, applied to the said Missouri, Kansas & Texas Railway Company for transportation for the said sixteen members of said Company L. Second Regiment, National Guard, from Jefferson City to Nevada, over the line of said railway company at said rate of one cent per mile for each man so transported; that the distance from Jefferson City to Nevada over defendant's railway is 174 miles, and that said Adjutant-General tendered to said railway company the sum of \$27.84 for the transportation aforesaid.

"Your petitioner further states that said Missouri, Kansas & Texas Railway Company refused to accept said sum so tendered and refused to issue transportation to said organized militia, and failed and refused to transport said militia as by law it is required to do; and asserts that it will not in future transport said National Guard at said rate."

Defendants demurred to said alternative writ upon one ground and divers specifications, which demurrer that the said ground and the specifications thereunder may be clearly seen, we likewise set out, omitting caption and formal parts, to wit:

"1. Because it does not state facts sufficient to constitute a cause of action.

"2. Because the one-cent militia fare law, section 8396, Revised Statutes of 1909 of Missouri, is in violation of section 14 of article 12 of the Constitution of Missouri, being an unjust discrimination against other passengers in the State.

"3. Because said one-cent fare law deprived defendant of the equal protection of the law and takes its property without due process of law, and is in violation [514] of section 14 of article 14 of the Constitution of this State.

"4. Because said section is in violation of sections 12 and 23 of article 12 of the Constitution of this State, which prohibit discriminations in charges or facilities for transportation between companies and individuals, or in favor of either.

"5. Because said one-cent militia fare law is confiscatory and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and section 30 of article 2 of the Constitution of Missouri.

"6. Because the order to Capt W. S. Moore and fifteen men to go to Nevada, Missouri, and engage in target practice was not military duty within the meaning of said section 8396, Revised Statutes 1909."

From the pertinent part of the alternative writ as we set it out above, and from the above demurrer thereto, the points up for ruling will be clearly seen.

The statute, the constitutionality of which is the only bone of contention, will be found set out at length in the subjoined opinion, to which reference is likewise made for further facts, should such become necessary.

It is patent that the demurrer to the alternative writ of mandamus is well taken, if, as defendant contends, section 1 of "An Act to establish the maximum rates to be charged by railroad companies for transporting the organized military forces," (Laws 1909, pp. 368 and 369; now Sec. 8396, R. S. 1909), is unconstitutional. In the last analysis this is the only question in the case. Other matters of minor moment are

urged, but none of the latter is of any decisive importance in a final determination of the real question in issue.

[515] In order that we may have the matter under discussion plainly before us, we set out said section 8396 below:

"Sec. 8396. Whenever it shall be necessary for the organized militia of the State, designated the National Guard of Missouri, to travel on any railroad between points wholly within this State on military duty, ordered by the Governor, the rate charged shall not exceed one cent per mile for the transportation of each officer and enlisted man, with not to exceed one hundred pounds of baggage or camp equipage, and the individual, company or corporation owning, operating, controlling or leasing such road or part thereof shall be limited to such compensation therefor, and shall not charge, demand or receive any greater rate or compensation for such service."

Defendant, to escape the force of the above section, says that it violates the provisions of section 23 of article 12 of our Constitution, which reads thus:

"No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad company, or any lessee, manager or employee thereof, shall make any preference in furnishing cars or motive power."

And that it also violates the provisions of section 14 of article 12 of the Constitution of Missouri, which thus provides:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of [516] passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Other specific contentions of unconstitutionality are also urged, as the demurrer shows, which we shall discuss when—and if—we reach them.

I. It will be noted that section 23, supra, forbids discrimination as between, or in favor of, transportation companies and individuals. The discrimination here confronting us is not between "transportation companies and individuals," nor is it in favor of such companies or individuals. We judicially know that the organized militia of the State when traveling "on orders from the Governor" travels at the expense of the State, and that

therefore the conditions present a case of discrimination in favor of the State of Missouri. The suggestion urged on us that the United States in the end recoups the State of Missouri for these outlays, does not affect the argument; so we need not inquire whether this be true or not. Since if it be so, said section 8396 makes, in the last analysis, a prima facie case of discrimination in favor of the United States as against any and all persons who, not being members of the organized militia traveling on orders from the Governor, are required to pay fare at the rate of two cents per mile. Neither the State nor the United States is mentioned in said section 23, supra, so no ban thereby is laid against either, which forbids in their favor a discrimination. We do not think section 23 of article 12 of the Constitution is in point.

II. The applicable part of section 14, supra, of the Constitution, which defendant contends renders said section 8396 unconstitutional, is the inhibition contained [517] in the words: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State." It is contended that, since the Constitution in plain terms requires the Legislature to "pass laws to . . . prevent unjust discrimination . . . in the rates of . . . passenger tariffs on the different railroads," by this language and the unmistakable command of its converse it forbids the Legislature to pass any law, the effect of which is to produce a plain, and an alleged unjust, discrimination. May the Legislature having by the express command of the organic law a duty laid upon it to do a certain thing, not only fail to do that thing, but without any other authority from the Constitution, do the diametrically contrary thing? We do not think so. Such a conclusion in the light of our Constitution would serve as the mother in logic of a pestiferous brood of vicious, absurd and outrageous laws, which like chickens would come home to us to roost and vex us. For if the Legislature may validly pass a statute compelling the railroads to carry members of the organized militia for one cent per mile, and thus save to the State at the expense of the railroads, one cent for each mile traveled, it may, by the same token, pass an act requiring such transportation to be furnished for one mill per mile; likewise it may pass a statute requiring all transportation, both of freight and passengers, moving at the ultimate expense of the State, to be furnished at a merely nominal cost. We bear in mind of course such exceptions, if any, as might arise from the constitutional provision which forbids the giving of "free passes or tickets

at a discount" to State officers and others. [Sec. 24, art. 12, Constitution.]

Similar statutes, in the main features thereof, have been before the Supreme Court of both Kansas and [518] Minnesota. Though Kansas has no such constitutional provision as we have here under discussion, it was yet held in that State, *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 33 L.R.A. (N.S.) 956, that a statute which required railroads to furnish transportation to the officers and men of the Kansas National Guard when traveling to perform military duty under orders from competent authority, was invalid, for that it denied to the railroads the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States. In Minnesota, which likewise has no such section in its Constitution as section 23 of article 12, supra, a one-cent-per-mile fare statute for the benefit of the organized militia and State naval reserves was held, in the case of *State v. Chicago, etc. R. Co.* 118 Minn. 380, Ann. Cas. 1913E 494, 137 N. W. 2, 41 L.R.A. (N.S.) 524, not to violate either the Federal or State constitutions in the respect that it took the property of the railroad without compensation, or without due process of law, or that it deprived it of the equal protection of the laws. That these opposite and contrary rulings are irreconcilable goes without saying, but in the view we hold of this case, in the light of the inhibition directed to our State Legislature by section 14 of article 12 of our Constitution, we are not necessarily called on to reconcile the wide differences existing in the views held by the able jurists who wrote these adverse holdings. While the precise contentions held in judgment in the cases of *State v. Chicago, etc. R. Co.* supra, and *In re Gardner*, supra, to wit, that our statute violates those Federal and State constitutional provisions guaranteeing due process of law, and the Federal Constitution's provision guaranteeing the equal protection of the laws, are all raised by defendant in the instant case, we need not discuss them; since we have another constitutional provision equally in point, and not subject to doubt and contrariety of ruling.

[519] The Supreme Court of the United States, passing upon an analogous matter in the case of *Lake Shore, etc. R. Co. v. Smith*, 173 U. S. 684, 19 S. Ct. 565, 43 U. S. (L. ed.) 858, likewise held that a statute of Michigan requiring railroads to issue thousand-mile tickets and sell them at a price fixed by such statute, took the property of the railroad without due process of law and failed to afford to the railroad the equal protection of the laws, and thus violated the 14th Amendment to the Constitution of the United States. The Constitution of Michi-



gan was not, of course, under review or there held in judgment; since it was not the province of the Supreme Court of the United States to pass upon whether the statute violated the Constitution of Michigan. The latter matter was for the courts of Michigan to determine. The statute of Michigan, so held to violate section 1 of the 14th Amendment, provided in substance that all railroads in Michigan, whether intrastate or interstate, should keep for sale and sell at all principal ticket offices one-thousand-mile tickets at a price not to exceed twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula; that such tickets should be non-transferable, valid for two years from the date of the purchase thereof, and whenever required by the purchaser should be issued in the names of such purchaser and his wife and children, designating the names of the purchaser and each member of the family on such tickets.

The Court of Appeals of New York in the case of *Beardsley v. New York, etc. R. Co.* 162 N. Y. 230, 56 N. E. 488, likewise held that a thousand-mile ticket law, similar to that held in judgment in *Lake Shore, etc. R. Co. v. Smith*, 173 U. S. 684, 19 S. Ct. 565, 43 U. S. (L. ed.) 858, was invalid because it violated the provisions of section 1 of the 14th Amendment to the Constitution of the United States. The identical point has been similarly ruled in other jurisdictions; in fact, in every jurisdiction to which our attention has been called, and in which the question has arisen. [*State v. [520] Great Northern R. Co.* 17 N. D. 370, 116 N. W. 89; *Com. v. Atlantic Coast Line R. Co.* 106 Va. 61, 9 Ann. Cas. 1124, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L.R.A.(N.S.) 1086.] It may be objected that the opinions of the State courts following the ruling of the Supreme Court of the United States in the case of *Lake Shore, etc. R. Co. v. Smith*, supra, upon a Federal question, prove nothing of moment; that it is but a "piling of Pelion upon Ossa." This is conceded. The State courts are compelled to follow the Federal courts upon Federal questions. But it does show with some degree of certainty that the consensus of opinion is that the Supreme Court of the United States is still adhering to the views expressed in the *Lake Shore-Smith* case, supra, and that the case of *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 15 Ann. Cas 1034, 29 S. Ct. 192, 53 U. S. (L. ed.) 382, 48 L.R.A.(N.S.) 1134, is not in conflict, as certainly in our views it is not in point therewith, though counsel rely with much assurance thereon, as likewise does the Supreme Court of Minnesota in the *Simpson* case, supra. Briefly, the *Willcox* case, supra, held that so long as the total income of an established gas company, mo-

nopolistic as to its occupancy of the field, furnished an adequate profit upon the capital and plant employed, it did not legally matter that as to some customers, namely, the city and its departments, the profit was not enough to do so.

So if by reason of paucity of provisions in our organic law we had been compelled to resort (as counsel among other points urges us to do) to the inhibitions of the 14th Amendment against the passage of any State law which deprives a person of his property without due process of law, or which denies to such person the equal protection of the laws, we could in the above cases, and that of *In re Gardner*, supra, find authority well grounded and well-reasoned for our holding. But the makers of our own State Constitution, apparently zealous to prevent discrimination and preserve fairness of treatment, not only placed in our organic law the two sections which we quote above and with which we began this opinion, but also section 12 of article 12, [521] forbidding discrimination in short as opposed to long hauls; section 24 of article 12, which forbids the giving of passes, or the sale of tickets at a discount to certain stated officers, and section 30 of article 2, which forbids that any person shall be "deprived of life, liberty or property without due process of law." We merely mention these provisions *arguendo* to point the moral that the Constitution-makers labored to prohibit discriminations, rebates, combinations, monopolies and unfair practices which might confer upon some patrons of railroads advantages not attainable by others. We are not saying that they apply to the instant case. On the contrary, we say they do not. We mention them to emphasize the frame of mind of the Constitution-makers.

While Alabama (Sec. 243, Cons. 1901), Kansas (Sec. 10, Art. 17, Cons. 1874), Colorado (Sec. 6, Art. 15, Cons. 1876), Georgia (Par. 1, Sec. 2, Art. 4, Cons. 1877), Illinois (Sec. 15, Art. 11, Cons. 1870), Mississippi (Sec. 186, Cons. 1890), Pennsylvania (Sec. 3, Art. 17, Cons. 1874), South Dakota (Sec. 17, Art. 17, Cons. 1889), Texas (Sec. 2, Art. 10, Cons. 1874), Utah (Sec. 15, Art. 12, Cons. 1895), Washington (Sec. 18, Art. 12, Cons. 1889), and West Virginia (Sec. 9, Art. 11, Cons. 1872), each has provisions in their several constitutions, either making it the duty of their Legislature to pass laws to prevent unjust discriminations in freight and passenger rates upon railroads and common carriers, similar to our own constitutional provision (Sec. 12, Art. 12, Constitution 1875), or, providing that no such discrimination shall be permitted; yet our attention has not been called to, nor have we been able to find, any case in either of

these States on the precise point. Nevertheless, we feel neither hesitation nor doubt that section 8396, Revised Statutes 1909, is invalid, though we bear in mind the strict rule we are enjoined to follow in declaring [522] a law unconstitutional (*State v. Baszkowitz*, 250 Mo. 82, Ann. Cas. 1915A 477, 156 S. W. 945; *State v. Thompson*, 144 Mo. 314, 46 S. W. 191); for it contravenes the provisions of section 14 of article 12 of our Constitution; provided we shall conclude that the discrimination compelled by its provisions is an "unjust discrimination." Let us look to this point.

III. We do not understand that the defendant contends against the authority of the Legislature reasonably to regulate its rates of passenger fare. This authority is well-settled; but likewise is it well-settled that the exercise of such right must be accomplished by means which do not result in depriving the railroads of due process of law or of the equal protection of the laws. This is the general rule, based wholly upon a consideration of the Federal questions involved, and without any specific reference, as a rule of decision, to our own constitutional provision (Sec. 14, art. 12, Constitution 1875) now being considered.

In the year 1907 the General Assembly of Missouri passed an act (Laws 1907, pp. 170 and 171) so amending section 1192, Revised Statutes 1899 (now Sec. 3232, R. S. 1909), as to fix the maximum fare permitted to be charged by railroads of defendant's class, for the transportation of adult persons, at two cents per mile, and for children under twelve years of age at one cent per mile. A reference to section 3232, as this section now appears in our statutes, will disclose that it does not upon its face specifically purport to fix or "establish *reasonable* maximum rates of charges for the transportation of passengers," authority for which is conferred by section 1 of article 12, *supra*, of the Constitution, nor is said section 14, either specifically or by the language adopted, in anywise referred to in this statute. Since, however, the only constitutional power to establish a reasonable maximum rate of charge for such service comes from said section [523] 14 of the Constitution, and since said statute indubitably does, by its terms, fix a maximum rate of charges, it follows that the rate of two cents per mile per person so fixed by said section 3232, is *prima facie* a "*reasonable* maximum rate." The fixing of the passenger fares at such sum is presumptively a legislative determination that such sum is "reasonable," that is to say, a reasonable compensation for the service rendered. [*State v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156; *Atlantic, etc. R. Co. v. U. S. 76 Fed. 186*; *In re Gardner*,

*supra*.] Such presumption is only *prima facie*, and may, of course, be overthrown by an adequate showing in a proper proceeding of the value of the capital employed, and of expenses and receipts during an adequate period. [*Chicago, etc. R. Co. v. Wellman*, 143 U. S. 339, 12 S. Ct. 400, 36 U. S. (L. ed.) 176; *Dow. v. Beidelman*, 125 U. S. 680, 8 S. Ct. 1028, 31 U. S. (L. ed.) 841; *Budd v. New York*, 143 U. S. 517, 12 S. Ct. 468, 36 U. S. (L. ed.) 247; *Reagan v. Farmers' Loan, etc. Co.* 154 U. S. 362, 14 S. Ct. 1047, 38 U. S. (L. ed.) 1014.]

In passing and before coming to a discussion of the main question, we may say that we cannot lend our concurrence to the bold position assumed by the State here: That neither the Constitution nor the statute forbidding discrimination relates to, or is binding upon, the State of Missouri. On the contrary there is, we think, nothing in its alleged sovereignty, or in the fact that by our Constitution railroads are declared to be public highways, which will serve to absolve the State from the application to it of its own Constitution and statutes. Yet we gather that some such view is involved in the position of learned counsel for the State. For our attention is called to the case of *Atlantic, etc. R. Co. v. U. S. 76 Fed. 186*, wherein the ruling is made that the said railroad may be compelled to transport soldiers traveling at the expense of the United States at a fare fifty per cent less than that charged private persons for similar transportation and service. The latter case is no authority for the view that the State by virtue of its inherent sovereignty [524] may exact from a common carrier a discriminatory rate, or a rate less than that charged to a private person for a like service. The railroad affected by the ruling in the case of *Atlantic, etc. R. Co. v. U. S. supra*, was what is called a "Land Grant Railroad," as to which the right to exact a lower rate for service rendered to the United States lies in a solemn legislative contract to this effect. It is, we think, surely too unreasonable for dignified discussion, to consider whether section 14 of article 12 of our Constitution, which declares railroads to be "public highways," nullifies by the use of the word "public" the provisions of section 21 of article 2, which forbids the taking of private property for "public use without just compensation." Some such idea must have been in the minds of the makers of the Constitution as this: That since section 20 of article 2 of the Constitution forbids the taking of private property for private use, the railroads could not exercise the right of eminent domain in the absence of a provision thus fixing, in a sense, their public character. The nature of this character and the sense in which such railroads are public highways

may be deduced by the curious, pursuant to the "method of exclusion" by an examination of the cases construing said "public highway" provision in section 14, *supra*. [Heman Constr. Co. v. Wabash R. Co. 206 Mo. 172, 12 Ann. Cas. 630, 104 S. W. 67, 121 Am. St. Rep. 649, 12 L.R.A.(N.S.) 112; Nevada v. Eddy, 123 Mo. 546, 27 S. W. 471; Farber v. Missouri Pac. R. Co. 116 Mo. 81, 22 S. W. 631, 20 L.R.A. 350; Hyde v. Missouri Pac. R. Co. 110 Mo. 272, 19 S. W. 483.] We need not here pursue it further.

Is the discrimination unjust? If a discrimination be apparent, as it is in the instant case, it does not follow as an inevitable corollary that it is an unjust discrimination. It needs neither a statute nor a constitutional provision to make unjust discrimination unlawful, for such discrimination was forbidden by the common law. [Porcher v. Northeastern R. Co. 14 Rich. L. (S. C.) 181; Hannibal, etc. R. Co. v. Swift, 12 Wall. 262, 20 U. S. (L. ed.) 423; Great Northern R. Co. v. Shepherd, [525] 8 Exch. (Eng.) 30; 4 Elliott on Railroads, sec. 1467.] While the question has arisen as a rule in cases brought by a shipper, injured in his business by such alleged discrimination, to recover damages (Sloan v. Pacific R. Co. 61 Mo. 24, 21 Am. Rep. 397); or in proceedings against railroads for violations of statutory provisions forbidding discriminations (Louisville, etc. R. Co. v. Com. 108 Ky. 628, 57 S. W. 508), we can yet see no valid reason for not applying the learning in the other cases as a decisive test in determining whether the one-cent-militia-fare statute is unjustly discriminatory as the term is used in our Constitution. For if a railroad be forbidden by law, or by the Constitution, to make unjust discriminations, it follows surely that it cannot by law be compelled to make them.

Arbitrary discriminations alone are unjust; if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. [Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 18 S. Ct. 45, 42 U. S. (L. ed.) 414; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705; Bayles v. Kansas Pac. R. Co. 13 Colo. 181, 22 Pac. 341, 5 L.R.A. 480; Root v. Long Island R. Co. 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L.R.A. 331; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L.R.A. 674; Hoover v. Pennsylvania R. Co. 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L.R.A. 263.] Illustrating this view it was held in the case of Com. v. Interstate Consol. St. R. Co. 187 Mass. 436, 2 Ann. Cas. 419, 73 N. E. 530, 11 L.R.A.(N.S.) 973,

that a law requiring street railways to carry pupils of the public schools at rates not in excess of half the regular fare charged others for like hauls, was constitutional. In the course of its opinion, at page 438, the court said:

"The most important and difficult question in the case is whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reason for making a distinction, the provision would [526] be unconstitutional and void. As was said by Mr. Justice Brewer in Gulf R. Co. v. Ellis, 165 U. S. 150, 159 [17 S. Ct. 255, 41 U. S. (L. ed.) 666, 670]: 'Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.' The subject of compelling a railroad company to make an exception as to its rates, in favor of a certain class of persons, was considered elaborately in Lake Shore, etc. R. Co. v. Smith, 173 U. S. 684 [19 S. Ct. 565, 43 U. S. (L. ed.) 858], and it was held that ordinarily the Legislature has not power to compel such action. The subject is also referred to in Wisconsin, etc. R. Co. v. Jacobson, 179 U. S. 287, 301 [21 S. Ct. 115, 45 U. S. (L. ed.) 194, 201]. But if the difference is founded on a reasonable distinction in principle, such discrimination does not deny the equal protection of the laws. [Opinion of Justices, 166 Mass. 589; Pacific Exp. Co. v. Seibert, 142 U. S. 339 [12 S. Ct. 250, 35 U. S. (L. ed.) 1035]; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92 [21 S. Ct. 43, 45 U. S. (L. ed.) 102, 104].]

"In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is especially declared in chapter 5, section 2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. [R. L. ch. 44, sec. 1.] Money may be appropriated by cities and towns for conveying pupils to and from the public schools. [R. L. ch. 25, sec. 15.] It cannot be said that the Legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. [R. L. ch. 42, sec. 35.] So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. [527] As

a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination."

In the case of *In re Gardner*, 84 Kan. l. c. 267, 113 Pac. 1054, 33 L.R.A. (N.S.) 956, the Supreme Court of Kansas holding invalid a statute on all-fours with the instant one, in the course of its opinion, on the phase of discrimination, said:

"This court is not inclined to the view that the power of the Legislature is completely exhausted by a maximum rate regulation, and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the State's citizens and made a preferred class, unless they sustain some relation to transportation by rail which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification, to be valid, must be based upon differences in character, condition or situation which lead to that difference in regulation which the statute undertakes to make. Thus, in the case involving a reduced rate for school children on street cars (*Com. v. Interstate Consol. St. R. Co.* 187 Mass. 436), the considerations which moved the court to sustain the rate were, among others, that pupils [528] go to and from the public schools at hours when other persons make little use of the cars; that they are of such a size and age that they occupy much smaller spaces than other passengers; and that the difference in rate was of so much importance to parents that twice as many pupils would ride at half rate as at full rate, so that the revenue of the carrier would not be materially reduced. This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound."

Approving a similar view upon the principle under discussion, the Circuit Court of Appeals in the Seventh Circuit, in the case

of *U. S. v. Chicago*, etc. R. Co. 127 Fed. l. c. 792, 62 C. C. A. 465, quoted with approval the rule laid down by Elliott on Railroads, viz.:

"Neither at common law, nor under the Federal statute, does the mere fact that there is a difference in rates necessarily constitute an unjust discrimination, since there is no such discrimination in cases where the conditions and circumstances are essentially different. It is the English rule that, in passing upon the question of undue or unreasonable preferences, various facts and circumstances must be considered, and that an undue preference, within the meaning of the statute, is not shown by mere evidence of a difference in charges. The Federal courts have substantially adopted the rule declared by the English courts."

If members of the organized militia averaged in weight but one-half that which other members of the traveling public weigh, or if they traveled at fixed hours or times when other business is slack; or if they carried far less, rather than far more baggage, equipment and *impedimenta*, than the ordinary traveling person carries; or if they traveled at known and definitely fixed times, in large bodies, or by the trainload; or if travel with them were a matter of personal volition, to be exercised or not as a low rate might induce, [529] rather than as a matter of stern duty transacted under order; or if the service of transportation required to be furnished were of an inferior class by a slow, unscheduled train, rather than that furnished to regular passengers who are compelled to pay two cents per mile, there might be some valid reason for saying as a matter of law that the plain discrimination presented is not an unjust discrimination. [*Louisville, etc. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311. 18 L.R.A. 105; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754.]

Upon this identical phase of the case we are constrained to concur in what was said by the Supreme Court of Kansas in the similar case of *In re Gardner*, *supra*, at page 268:

"In accordance with the principle recognized, the Legislature might no doubt require that precedence be given to the transportation of troops over other traffic, that special facilities for the movement of troops be supplied, that special schedules be adopted and that other exceptional services be rendered whenever the public interest demands them. But the law in question has no such basis for the discrimination which it makes. Major Mills stood upon precisely the same footing, so far as the expected service to him was concerned, as any other individual. The times when members of the National Guard will travel are as uncertain as for other

people. The number who will travel at any particular time is wholly indefinite. They come to the railroad station singly, in groups or in larger bodies, just as other citizens come singly, in groups or in crowds sufficient to load the cars of one or more trains. They occupy the same space and have the same privileges as other persons. Their movements are controlled by duty and not by special inducements, and the matter of rate can have no effect upon the volume of traffic. They are taken up, carried and set down without any mark or circumstance whatever to distinguish [530] them from the general public, or to distinguish the subject of their transportation from that of the general public, except that they carry orders for transportation without payment of fare and at reduced rates. Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the State simply demands that its troops be transported by rail at a purely arbitrary rate, which, so far as the principle involved is concerned, might be one cent per hundred miles or nothing at all. No other corporation or individual in the State is obliged to conduct business upon any such partial and unequal conditions or to make any such sacrifice for the support of the National Guard or any other public institution or purpose. Therefore the act denies the railroads the equal protection of the laws."

It fairly follows then that if two cents per mile per passenger was a reasonable rate in 1907, as the General Assembly by legislative act by all fair intents presumptively determined and fixed, then in the absence of a showing of some change in conditions (and there is no such here in the instant case) one cent per mile per adult passenger was not reasonable in 1909, when the special act favoring the organized militia was passed, and is not reasonable now. The law prescribing such a rate was clearly a discrimination and violative of the provisions of said section 14, which provides for the passage of laws to prevent discriminations, and by its plain, cogent converse forbids the passage of a law compelling the railroads to discriminate; when, as we have concluded above, this discrimination was unjust, for that it laid an extra burden upon the railroads.

We think this view could easily be sustained by the great weight both of authority and reason on the ground that it violates the provisions of section 1 of the 14th Amendment to the Constitution of the United States, as was done by the Supreme Court of Kansas [531] in the case of *In re Gardner*, supra, and in the analogous cases of *Lake Shore*, etc. R. Co. v. *Smith*, supra, and the four or five cases which followed the

latter case; but fortunately we are saved from the embarrassment of deciding between the above cases and that of *State v. Chicago*, etc. R. Co. supra, by the provisions of said section 14 of our Constitution and so we may clearly hold it invalid for that it is in conflict with both the spirit and the letter of section 14, supra, of our Constitution.

IV. Having reached this conclusion we need not take up space to inquire whether said section 8396 is a bona fide effort to establish rates and regulate railroad transportation, or whether it is purely a revenue measure, ingeniously designed to shift from the taxpayers and from the State revenue fund, to the railroads of the State, a portion of the cost of maintaining the organized militia. [In *re Gardner*, 84 Kan. l. c. 269, 113 Pac. 1054, 33 L.R.A. (N.S.) 956.] The curious may read in the *Kansas* case, supra, an interesting discussion of this phase of the statute under criticism, and may learn therefrom under what conditions such special and unequal burdens may be imposed.

Other matters mooted, have by the conclusion reached become merely academic; for example, the contention that Captain Moore and his men were not engaged in this military duty as to bring them within the purview of the statute. If a statement of this contention, in the light of the fact that the Governor is the Constitution-appointed commander-in-chief of the National Guard, and upon a consideration of all the statutes providing for the government of the National Guard, does not plainly answer it, we will nevertheless leave it till it becomes a live question in a live case.

Furthermore, it is strenuously urged by learned counsel for plaintiff through many pages of an able [532] brief, that we erred most seriously in holding in effect that the power in a proper case to raise railroad rates, above the maximum fixed in section 3232, Revised Statutes 1909, is under our Constitution delegable by the Legislature, and that by the enactment of section 47 of the Public Service Commission Act (Laws 1913, p. 583), section 3232, supra, is conditionally repealed or temporarily suspended. [State v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156.] In this holding, it is contended, we overlooked the plain letter of the Constitution and in that case held (to quote the epigrammatic language of counsel) what we "thought the law ought to be rather than what it is." We do not think this question is in, or that it could ever get into, this case, having conceded, as we do, the prima facie reasonableness of the two-cent rate, till its unreasonableness be demonstrated. Be this as may be, however, having come to a conclusion by another path, we will leave this question where *State v. Public Service Com-*

mission left it, till it again becomes the "lion in the path."

It follows therefore that the demurrer of defendant to the alternative writ of mandamus should be sustained, and since said writ was improvidently granted, it should be quashed, and the issuance of a peremptory writ denied. It is so ordered. Lamm, C. J., Brown and Walker, JJ., concur; Woodson, J., concurs and also for reasons given in case of *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 33 L.R.A. (N.S.) 956; Graves, J., concurs in separate opinion; Bond, J., dissents.

GRAVES, J. (*concurring*).—I concur in the result reached by the majority opinion, and in most of the reasoning therein by our Brother Faris, the writer thereof.

I agree that section 14 of article 12 of the Constitution directs the Legislature to pass laws to prevent "unjust discrimination" in passenger and freight [533] rates. I agree that the converse of this should also be true, i. e., that the Legislature should not itself pass a law which makes "unjust discrimination," and if it passes such a law it should be condemned as violative of the spirit of this constitutional provision. It should be noted that the terms of this constitutional provision is mandatory, inasmuch as it uses the word "shall" in a mandatory sense. However, there is no way of enforcing this mandate of the Constitution, except by the voluntary act of a Constitution-loving Legislature. I agree further that the Legislature in passing section 3232, Revised Statutes 1909, was attempting to carry out that other mandate of said section 14, article 12, of the Constitution which imposed upon the Legislature the duty to "from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers." I also agree that when it did pass this law it was *prima facie* a reasonable *maximum* rate, and that without there being further showing, we have a right to say by comparison that the latter law is unjust and discriminatory, and therefore bad.

I do not agree to that portion of my brother's opinion whereat he says:

"Since, however, *the only constitutional power to establish a rate or charge for such service comes from said section 14 of the Constitution.*"

The italics are ours. This in my judgment is not the only constitutional source of power for the Legislature to pass maximum passenger or freight laws. Rate-making is a legislative power, and has always been so held and considered. When by article 3 of the Constitution the powers of State government were divided into three distinct departments, i. e., legislative, executive and judicial, and when by section 1 of article 4 of the legisla-

tive powers were vested in "the General Assembly of the State of Missouri," such General Assembly became fully possessed with the power [534] to pass rate laws of all kinds, such things being legislative in character rather than judicial or executive in character. So that I say the legislative branch had full constitutional power to pass all kinds of rate laws, had there been no section 14 of article 12 of the Constitution. This may be important in some future litigation where the real purpose of section 14 of article 12 will have to be discussed, and for that reason I do not want to be recorded as announcing that said section 14 is the only constitutional authority for legislative action as to maximum rates in Missouri.

I do not agree to another conclusion which my brother has reached. I think that the constitutionality of section 47 of the Public Service Commission Act is fairly lodged in this case, and that we should thresh it out at this time. It is only a question of a short time when we will be forced to thresh out the question. If the public print is to be believed, then at this very time the railroads of the State are asking the Public Service Commission to raise their rates under said section 47, and with a showing that they are justly entitled to such a raise in rates. The constitutionality of that section has never been adjudicated by this court. We did hold in *State v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156, that the Legislature by said section 47 intended to authorize the Public Service Commission to raise rates above the maximum fixed by section 3232, *supra*, but we did not pass upon the question as to whether or not the statute, thus construed, violated section 14 of article 12 of the Constitution. This question should be passed upon now so that these railroads may know whether they shall go to the Public Service Commission or to the Legislature for their needed redress. The question is squarely lodged in this case, and this is an opportune time for the judgment of the court upon this extremely intricate question as to whether or not the Legislature can, under section 14 of article 12, delegate to any commission the right to fix [535] *maximum rates*. We purposely, underscore the words "maximum rates." This delicate question might be stated otherwise, and perhaps be made plainer. If the Legislature had the constitutional power without section 14 of article 12 to fix rates, both *maximum* and *minimum*, then should said section 14 be construed as an express limitation upon the power of the Legislature to delegate such right to a commission or other body? But it is not my purpose to discuss the constitutionality of section 47 *supra*. It is my purpose to dissent from the majority views

in postponing the evil day, when in my judgment the time is ripe for us to act now.

I therefore concur in the result, and in such portions of the opinion as above indicated.

**NOTE.**

The reported case holds that a statute requiring railroads to transport at a reduced rate the state militia when traveling by the order of the Governor is invalid as an unjust discrimination. The earlier cases discussing the validity of a statute requiring a carrier to transport the militia or other public officers free or at a reduced rate are discussed in the note to *State v. Chicago*, etc. R. Co. Ann. Cas. 1913E 494.

**PEOPLE EX REL. MATTHIESSEN  
ET AL.**

v.

**LIHME.**

Illinois Supreme Court—October 27, 1915.

269 Ill. 351; 109 N. E. 1051.

**Corporations — Eligibility of Officer —  
Ownership of Stock — Stock Trans-  
ferred to Permit Election.**

Defendant held a certificate for one share of stock issued to him by a corporation upon the assignment to him of a share of stock by one who held as trustee for heirs under a will. The assignment was made under a provision of the will whereby the trustee was empowered to transfer stock to another person to enable him to act as director in the corporation. Defendant shortly after its issuance handed the stock certificate over to the trustee, with a memorandum wherein he acknowledged that he held the stock for the sole purpose of being qualified as a director, and declaring the beneficial ownership to be in the heirs under the trust. Held, that defendant was a stockholder within the statute requiring directors to be stockholders, since the transfer of the stock and issuance of the certificate to him in accordance with section 8 of the act under which the corporation was organized vested him, as to the corporation, with legal and equitable title.

[See note at end of this case.]

**Same.**

The fact that defendant surrendered his certificate to the trustee, together with the memorandum, does not affect his legal title, since he could be divested thereof only by transfer on the books of the company, in ac-

cordance with the express terms of Act Feb. 18, 1857 (Laws 1857, p. 163), § 8, under which the corporation was organized.

[See note at end of this case.]

**Same.**

The fact that defendant has no pecuniary interest in the success of the corporation does not disqualify him to act as director, since under the express terms of Act Feb. 18, 1857 (Laws 1857, p. 164), § 14, under which act the corporation was organized, providing for the voting of stock by fiduciaries, and under the general doctrine of the law, bare legal title in the absence of fraud qualifies the owner to act as director regardless of the trusts under which the stock may be held.

[See note at end of this case.]

**Necessity that Director Own Stock.**

A "director" in a corporation is a mere agent, and need not be a stockholder aside from statutory requirements.

Appeal from Appellate Court, Second District.

Information in nature of *quo warranto*. F. W. Matthiessen et al., relators, and C. B. Lihme, defendant. Judgment for defendant in Circuit Court, La Salle county: DAVIS, Judge. Judgment affirmed by Appellate Court. Relators appeal. The facts are stated in the opinion. **AFFIRMED.**

George Wiley, William J. Calhoun and M. F. Gallagher for appellants.

Montgomery, Hart, Smith & Steere, Charles S. Cutting, Louis E. Hart and Norman H. Pritchard for appellee.

[352] DUNN, J.—This was an information in the nature of a *quo warranto*, in the circuit court of LaSalle county, requiring C. B. Lihme to answer by what warrant he claimed to hold and execute the office of director in the Matthiessen & Hegeler Zinc Company, a corporation. A plea was filed and a trial had by the court without a jury, resulting in a judgment in favor of the defendant, which the Appellate Court for the Second District affirmed. A certificate of importance was granted and an appeal allowed to this court.

The appellants deny the eligibility of the appellee to be a director. The Matthiessen & Hegeler Zinc Company was organized in January, 1871, under "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," in force February 18, 1857, with a capital stock of \$426,000, divided into 426 shares, for a term of fifty years, for the purpose of mining, smelting, rolling and manufacturing zinc. Section 4 of the act provides that "the affairs of such company shall be managed by a board of not less than three nor more than seven directors, who shall be stockholders therein, and who shall, after the first year, be annual-

ly elected by the stockholders, to serve for one year and until their successors shall have been elected." Since its organization the stock has been equally divided between E. C. Hegeler and members of his family on the one part and F. W. Matthiessen and members of his family on the other part. E. C. Hegeler died in June, 1910, and by his will left all of his stock in the zinc company, consisting of 212 shares, to Hary Hegeler Carus, his daughter, as trustee for the benefit of his seven children. The provisions of the will creating the trust, so far as necessary to be set out, are as follows:

[353] "Said trustee shall cause to be transferred to her all of said shares and have new certificates of stock issued to her as trustee, and the said shares shall stand in her name, as trustee, upon the books of said company: *Provided, however,* that said trustee shall have the power and authority to transfer one or two shares, as may be necessary, to herself as an individual, or to one or two other persons, to enable such other person or persons to act as directors or director in said company. Said trustee shall continue to so hold and control said shares so bequeathed to her in trust until the expiration of the present charter of said company, and shall then convert said shares into cash and distribute such cash, in equal parts, among my children, and if any of my children be then dead leaving children of the body begotten then surviving, then such children of any such deceased child of mine shall take their parents' share. Until the expiration of the charter of said company said trustee shall collect and receive all the dividends upon all said shares so standing in her name as trustee, and out of said dividends shall pay (1) to herself, as compensation as such trustee, ten per cent of the amount of such dividends; (2) such additional sum as she may find necessary, to some suitable person selected by her to act as a director, as aforesaid; (3) such additional sum as she may find necessary to procure and pay for legal advice; and the remainder of such dividends shall be distributed, as soon as received by her, among my children in equal parts, and if any of my children die leaving children of the body begotten, then such children of any such deceased child of mine shall receive their parents' share of such dividends. I hereby declare that my intention and aim in placing all of the said shares of stock in the hands of a trustee, as above, is that all of said shares shall be voted and controlled as a unit, for the protection of the interest in said company represented by said shares."

[354] Mrs. Carus owned one share of stock individually at the time of her father's death. In the settlement of some controversy between the heirs it was agreed on October 12, 1910, that Mrs. Carus should transfer this share

to herself as trustee. Instead of doing so she assigned it to C. B. Lihme, to whom a new certificate was issued on December 17, 1910. The certificate stated on its face that it is transferable only on the books of the company upon the surrender of the certificate in person or by proxy. On December 21, 1910, Lihme signed the following instrument:

"I, C. B. Lihme, do hereby acknowledge and certify that the share of stock transferred to me in person for the purpose of qualifying me as a director in the Matthiessen & Hegeler Zinc Company is not held by me under any claim of ownership and is not to be construed as any part of my private estate, but I acknowledge that I hold the same merely for the purpose of qualifying me as a director in said zinc company, and that said share of stock is a part of and belongs to the 213 shares of stock held in trust under the agreement dated October 12, 1910, and signed by the seven children of the late Edward C. Hegeler, said agreement providing, among other things, for the holding and disposition of said zinc company stock.

Dec. 21, 1910.

C. B. Lihme.

Witnessed: C. Diesterweg."

At the same time Lihme signed a blank form of assignment indorsed on the back of the certificate of stock, as follows:

"For value received I hereby sell and assign to ..... all my interest in the within certificate, and appoint ..... my proxy on the books of said company .....

"Witness my hand and seal this 20th day of December, A. D. 1910. C. B. Lihme. (Seal)  
Attest: C. Diesterweg."

The certificate so indorsed by Lihme in blank and the above instrument signed by him were then deposited in the Illinois Trust and Savings Bank of Chicago, in a safety deposit box rented by all the heirs of E. C. Hegeler and standing in the joint names of Mary Hegeler Carus and Julius W. Hegeler, to which access could be had only by [355] the joint action of Mrs. Carus and Hegeler. In this box were kept the stock certificates representing the stock held by Mrs. Carus as trustee and other documents belonging to all of the heirs of E. C. Hegeler, and nothing else, it having been rented for that purpose. The stock stands in the name of C. B. Lihme, and the dividends have always been accounted for by him to the heirs in the same manner as the dividends on the stock held by Mrs. Carus as trustee. There have been several dividends, and Lihme always indorsed the identical check which he received, to Herman Hegeler, the treasurer of all the heirs, and mailed it to him as soon as received.

E. C. Hegeler was president of the company from its organization until December, 1903. Mary Hegeler Carus was president from



December, 1903, to December 18, 1913. A member of the Matthiessen family has been secretary ever since the organization of the corporation. From December 18, 1903, until December 18, 1913, George P. Blow was secretary. Throughout the existence of the corporation, until December 18, 1913, the board of directors was elected equally from the two interests.

On February 27, 1913, a contract was entered into between Mary Hegeler Carus, trustee under her father's will, party of the first part, and C. B. Lihme, party of the second part, whereby, after reciting that under the terms and provisions of the will aforesaid the party of the first part holds in trust, until the expiration of the present charter of the Matthiessen & Hegeler Zinc Company, all of the shares of the capital stock of said company owned by said Edward C. Hegeler at the time of his death and is authorized to select a suitable person to act as director in that company and to pay to such person such sum as she shall find necessary as compensation for his services as director, and the said party of the first part deems the said party of the second part to be a suitable person to act as said director and has selected said party of the second part to [356] act as director in the said company during the continuance of this trust, the party of the first part, as trustee as aforesaid, agrees to, and does, employ the party of the second part to act as director of the said company for the term of seven years from December 18, 1912, and to pay him, as full compensation for services to be rendered as such director, fifteen per cent of the net profits accruing each year to the stock in said company of which the party of the first part is trustee, and the party of the second part accepts the office of director for seven years, and agrees to give to the performance of his duties such time, attention and energy as shall be necessary for the best interests, advantage and success of the said company, and to faithfully, diligently and according to his best abilities, in all respects, use his utmost endeavors to promote the interests and profitable management of said company. At the annual meeting of the stockholders on December 10, 1910, immediately after receiving the certificate of stock issued to him, the appellee was elected a director, by the unanimous vote of all the stockholders, for the term of one year, and by the like vote was again elected at the meeting on December 18, 1911, and again on December 18, 1912. On December 17, 1913, the day before the annual stockholders' meeting in that year, the petition was filed in this case to oust him from office, on the ground that he was not a stockholder of the company and not eligible to be a director.

That the appellee was legally elected a director if he had the legal qualifications for  
Ann. Cas. 1916E.—61.

the office is conceded. The appellants' only contention is that he was not a stockholder within the meaning of the statute requiring directors to be stockholders. Section 8 of the act under which the zinc company is incorporated provides that the capital stock shall be transferable on the books of the company in such manner as its by-laws may prescribe, and it is to the stock register, therefore, that the corporation must look to ascertain who are its stockholders. When Mrs. Carus assigned [357] to the appellee the one share of stock which she owned and it was transferred to him on the books of the company and a certificate was issued to him for it he became a stockholder of the company. He was vested with the entire legal and equitable title, subject to the terms of any agreement by which he was bound. He still has such title except to the extent that he has voluntarily parted with it. The title could pass from him only by the surrender of his certificate and a transfer on the books of the company. He could confer an equitable title upon an assignee by a delivery of the certificate, with the blank assignment and power of attorney thereon, signed by the appellee, but the legal title would still remain in the appellee until a transfer was made on the books of the company. *Otis v. Gardner*, 105 Ill. 436. He still holds the legal title to this share of stock.

The appellants contend that appellee is only a sham or pretended stockholder, having no pecuniary interest whatever, arising from the ownership of stock, in the success of the corporation, and is therefore not qualified as a director. Counsel insist that a director must not only be a stockholder of record, but that he must also have a personal, pecuniary interest in the corporation, so that its affairs shall be managed by those having a financial interest in it. At the same time they concede, though insisting it has nothing to do with the case, that a trustee holding stock but having no interest therein other than as trustee may be a director. This is in accordance with the statute under which the Matthiessen & Hegeler Zinc Company is incorporated, for section 14 of that statute declares that every executor, administrator, guardian or curator shall represent the shares of stock in his hands at all meetings of the company and may vote accordingly as a stockholder. It is also in accord with the general doctrine that an executor may be a director, that trustees holding the legal title to shares are stockholders, and that eligibility to be a director [358] follows the legal ownership, irrespective of the trusts under which the shares may be held. *Cook on Corporations*, sec. 623; *Thompson on Corporations*, sec. 919; *Casper v. Kalt-Zimmers Mfg. Co.* 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101; *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72

Am. St. Rep. 427; *Grundy v. Briggs* [1910] 1 Ch. D. (Eng.) 444.

The foregoing authorities further hold that a stockholder to whom stock has been transferred for the express purpose of qualifying him to be a director is qualified. In *Clark & Marshall on Corporations* (sec. 661) it is said: "It has been held that beneficial ownership is not necessary, and that a person who holds the legal title to stock on the books of the company is qualified." Where it was required that a director should be the holder, in his own right, of one hundred shares, it was held that one having the requisite number of shares in his name, though he had been adjudicated a bankrupt and a trustee elected, was qualified, the shares not having been transferred upon the books of the company, the court saying that it was no longer open to question that one may hold as a registered owner in his own right though he has no beneficial ownership, and that holding as trustee without beneficial ownership will do. (*Sutton v. English, etc. Produce Co.* [1902] 2 Ch. D. (Eng.) 502; *Pulbrook v. Richmond Consol. Min. Co.* 9 Ch. Div. (Eng.) 610.) In *State v. Ferris*, 42 Conn. 560, a bankrupt was held entitled to vote stock standing in his name on the books of the company though the title had passed to his assignee under the provisions of the Bankruptcy act. The person in whose name stock is entered on the books of the company, whether as a trustee or individually, is, as between himself and the company, the owner to all intents and purposes and particularly for the purposes of an election. (*People v. Robinson*, 64 Cal. 373, 1 Pac. 156.) In *In re Argus Printing Co.* 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L.R.A. 781, it was held that one who had pledged his stock, which had been transferred on the corporate records by the pledgee, had no right to vote the stock, but that the pledgee in whose name the stock [359] stood had such right, and that a person to whom stock has been transferred for the sole purpose of qualifying him as a director is so qualified. One who holds stock for the express purpose of qualifying him as an official is qualified. In *re Leslie*, 58 N. J. L. 609, 33 Atl. 954; *State v. Leete*, 16 Nev. 242.

In answer to the argument that officers of a corporation should be personally interested in its welfare, and that that can be the case only when the legal and beneficial interests unite in the same person, the Supreme Court of Wisconsin said in *Casper v. Kalt-Zimmers Mfg. Co.* supra: "We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the

corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazard to stockholders."

A director of a corporation is only an agent and need not be a stockholder but for the statute. It may be desirable to have for a director a person who is not a stockholder. "A stockholder may have purchased stock with the view of becoming a director, or have obtained it by gift, or may hold it upon a trust, and be qualified to be a director. If the stock was legally issued and is not the property of the corporation and the legal title is in him he is *prima facie* capable of being a director, and his right to be a director by virtue of his legal title to such stock can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company or to [360] carry into effect some fraudulent arrangement with the company." In *re St. Lawrence Steamboat Co.* 44 N. J. L. 529.

The appellants contend that the transfer of the stock to Lihme by Mrs. Carus was a mere formal act; that all interest, title, possession and control were withheld from him, and that immediately after receiving the certificate he handed it to Mrs. Carus and it was deposited in the private box of Mrs. Carus and Julius Hegeler, to which the appellee had no access, and they therefore insist that the return of the certificate to Mrs. Carus re-invested her with the legal title if she had ever parted with it. The legal title, as has been said, could not be re-conveyed to Mrs. Carus without a transfer on the books of the company, but the certificate, when returned to Mrs. Carus, was accompanied by a written statement of Lihme which showed his exact relation to this share of stock. Counsel rely upon their construction of this statement to some extent as justifying their position, but they misconstrue it. It states, in substance, that he holds one share of stock, which has been transferred to him individually for the purpose of qualifying him as a director,—not as his individual property, but as a part of the trust property of the Edward C. Hegeler estate and subject to the provisions of that trust. Counsel insist that he declares emphatically that he has no personal interest in the share. He does, but that is immaterial. They say he holds no share and has no right to take possession of the certificate. This is an erroneous deduction. On the record he appears as owner, and while he has not the manual possession of the certificate it is deposited with the other trust certificates, and there is no reason to suppose that he could

not take possession of it if any occasion should arise, in connection with the trust, for his doing so. No one interested has ever refused, so far as appears, to recognize his right as trustee and his ownership of and authority over the certificate as such trustee. On the contrary, he has been recognized as the owner and the dividends [361] on the stock have been paid to him. Counsel say the appellee declares that the stock was registered in his name merely to qualify him as a director, (which is immaterial,) and that it was a part of and belonged to a trust held by another. He declares that it is a part of and belongs to a trust but not that the trust is held by another. What he does say is that the trust it belongs to is under the agreement of the seven children of Edward C. Hegeler, which provides, among other things, for the holding and disposition of the said zinc company stock. That agreement does not appear in the record, but it could not have been inconsistent with the will of Edward C. Hegeler, which provides that the stock must be held by Mrs. Carus except one or two shares, which she may transfer to one or two other persons. The appellee's share is one of those shares which Mrs. Carus was authorized to transfer, and he is the person to whom she transferred it under the power given by the will. By his acceptance he consented to hold it upon the same trusts as Mrs. Carus holds the shares held by her, and he is subject to the same obligation, so far as this share of stock is concerned, as she is in regard to the larger number of shares which she holds. Naturally, as stated by counsel, the appellee never claimed any benefit rising from the share, but immediately indorsed the checks for dividends to those who were entitled to receive them under the trust.

In order to secure an equal representation in the corporation with the Matthiessen interest, Edward C. Hegeler's will authorized his trustee to join one or two other persons, as she might find necessary, with her in the trust and to provide for their compensation. In pursuance of this authority she joined the appellee with her and by the contract in the record provided for his compensation. He holds one share of stock in the corporation as a trustee and is therefore eligible to be a director.

The judgment is affirmed.

Judgment affirmed.

#### NOTE.

**Eligibility of Officer of Corporation to Whom Stock Is Transferred for Purpose of Enabling Him to Become Officer.**

The rule laid down in the reported case, that a stockholder to whom stock has been

transferred for the express purpose of qualifying him to be an officer of the corporation is eligible, is the one most generally followed. *Kardo Co. v. Adams*, 231 Fed. 950; *In re St. Lawrence Steamboat Co.* 44 N. J. L. 529; *In re Leslie*, 58 N. J. L. 609, 33 Atl. 954; *State v. Leete*, 16 Nev. 242; *Casper v. Kalt-Zimmers Mfg. Co.* 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101. See also *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72 Am. St. Rep. 427; *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434; *Richards v. Merri-mack, etc. R. Co.* 44 N. H. 127. Thus in *Casper v. Kalt-Zimmers Mfg. Co.* supra, it was said: "One who holds stock in trust for the express purpose of qualifying him as an officer is eligible. . . . A rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in corporate enterprises, because they could not adequately protect such funds by participating in the active management of the business. The reason given for a contrary view is that officers of a corporation should be personally interested in its welfare, and that can be the case only when the legal and beneficial interest unite in the same person. We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazard to stockholders." And in the case of *In re St. Lawrence Steamboat Co.* 44 N. J. L. 529, it was said: "Independent of the statute, a person might be a director of a corporation without being a stockholder. The statute is guardedly expressed. It prescribes as the qualification of a director, that he shall be a bona fide holder of stock. A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and is not the property of the corporation, and the legal title is in him, he is, prima facie, capable of being a director, and his right to be a director, in virtue of his legal title to such stock can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company,

or to carry into effect some fraudulent arrangement with the company." The case of *State v. Leete*, 16 Nev. 242, involved a general incorporation law providing that the corporate power of a corporation should be exercised by a board of trustees who should be stockholders in the company. It appeared that a person whose name was on the books of a corporation as a stockholder was elected as one of its trustees and the evidence showed that the stock had been transferred to him by its owner for the purpose of making him eligible as a trustee, and that he had never paid anything for the stock. It was held that he was eligible as a stockholder.

In some jurisdictions the rule obtains that a transfer of the bare legal title of stock to one for the purpose of enabling him to become an officer of the corporation does not make him eligible. In *re Ringler*, 204 N. Y. 30, Ann. Cas. 1913C 1036, 97 N. E. 593 reversing 145 App. Div. 361, 130 N. Y. S. 62, which modified 70 Misc. 581, 127 N. Y. S. 938; In *re Elias*, 17 Misc. 718, 40 N. Y. S. 910; *Bartholomew v. Bentley*, 1 Ohio St. 37. See also *Lucas v. North Vancouver*, 18 British Columbia 239. Thus in the case of *In re Ringler*, supra, it appeared that when a corporation was organized the statute required the directors or trustees of corporation to be stockholders to the extent of one share of stock at least. The by-laws of the corporation provided that "no person shall be a trustee who is not a holder or owner of at least one share of stock," and that a transfer by a trustee of his entire stock in the company should work a forfeiture of his office and be equivalent to a resignation. Subsequently the statute was amended so as to provide in effect that directors need not be stockholders if the organizers or stockholders of a stock corporation so provided, either in its certificate of incorporation or its by-laws. After the amendment of the statute an election of directors was held and several directors were elected to whom stock had been transferred for the sole purpose of qualifying them, the stock being immediately assigned back to the true owners in blank. It was held that the directors were not validly elected. The court said: "We are not disposed to construe either the statute or the by-law so strictly as to inhibit the transfer of stock for the express and avowed purpose of qualifying the transferee for election to the office of director or trustee. That might be altogether too drastic a remedy for such evils as are complained of in the case at bar. And so, on the other hand, we cannot uphold the elections of Trommer, Strauss and Kugelman,

who were not stockholders at all, without ignoring the letter and spirit of the statute and the by-law. . . . When Trommer, Strauss and Kugelman took their respective assignments of stock it was with no thought of holding it even until they were elected, for they at once retransferred the stock to the owner. It was simply a fictitious transfer by which it was thought to comply with the naked letter of the law. Thus they were never qualified to become directors or trustees, because they were not stockholders when elected; and the result would have been the same if their retransfer of the stock had not been made until after their elections, for the by-law of the company, in that event, would have automatically vacated their offices. . . . Although at the time of their election the statute had been so amended as to permit nonstockholders to be directors or trustees in stock corporations, that permission was subject to the condition precedent that either the certificate of incorporation or the by-laws of the corporation must so provide. Here there was no such provision and we must, therefore, assume that there was no intention to change the corporate policy expressed in the original by-law which, at the time of its adoption, was in consonance with the statute as it then existed. We hold, therefore, that Trommer, Strauss and Kugelman were not stockholders when elected, and that they were not then eligible to the offices of directors or trustees." In *Bartholomew v. Bentley*, 1 Ohio St. 37, it appeared that stock of a bank was issued gratuitously to some persons to qualify them as directors in an attempted reorganization of the bank, the whole scheme being a conspiracy to defraud the public. The statute required the directors of the bank to be stockholders. It was held that the election of the directors was illegal.

In *Toronto Brewing, etc. Co. v. Blake*, 2 Ont. 175, it was held that it was immaterial as far as the qualifications of a director of a corporation were concerned that he had purchased shares in the corporation for the purpose of qualifying as a director as long as the shares were actually his property.

In *England* the rule seems to obtain that the requirement that a person in order to be qualified as an officer of a corporation must be a holder of shares in the corporation "in his own right," does not require a beneficial ownership of the stock. *Pulbrook v. Richmond Consol. Min. Co.* 9 Ch. D. (Eng.) 610; *Bainbridge v. Smith*, 41 Ch. D. (Eng.) 462; *Cooper v. Griffin* [1892] 1 Q. B. (Eng.) 740; *Howard v. Sadler* [1893] 1 Q. B. (Eng.) 1; *Grundy v. Briggs* [1910] Ch. D. (Eng.) 444.

## JONAS

v.

## SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY.

Kentucky Court of Appeals—January 15, 1915.

. 162 Ky. 171; 172 S. W. 131.

**Carriers of Passengers — Who Is Passenger — Person Attempting to Board Moving Car.**

Where plaintiff left a street car, when it stopped at a point where passengers were received and discharged, and after it was in motion attempted to board the car again, he was not then a passenger, and the conductor was under no duty to render him assistance, though bound, if he saw him in danger, to use ordinary care to prevent injury.

[See 104 Am. St. Rep. 587.]

**Negligence of Conductor — Seizing Person Attempting to Board Car.**

Where the conductor of a street car, in attempting to assist plaintiff to board it while it was in motion, seized plaintiff by the arm and dragged him along, the conductor was guilty of negligence, and the company was liable for injuries received by plaintiff from a fall resulting when the conductor loosed his hold.

**Same.**

In an action by one injured in attempting to board a moving street car, who claimed that the conductor negligently grabbed his arm, the questions of the conductor's negligence and of plaintiff's contributory negligence held for the jury.

**Negligence — Question for Jury.**

Where the facts are such that reasonable men may differ as to whether an act was negligent, the question is for the jury.

**Depositions — Right of Adverse Party to Use.**

When a party takes a deposition and files it, but declines to read it, his adversary may read it, but he must introduce the whole.

[See note at end of this case.]

Appeal from Circuit Court, Campbell county.

Action for damages. Frank Jonas, plaintiff, and South Covington and Cincinnati Street Railway Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Ramsey Washington and Howard M. Benton for appellant.

L. J. Crawford and L. J. Crawford, Jr., for appellee.

[172] SETTLE, J.—This action was brought by the appellant, Frank Jonas, against the appellee, South Covington & Cincinnati Street Railway Company, to recover damages for personal injuries caused, as alleged, by the negligence of a conductor in charge of one of its cars. At the close of the appellant's evidence the court directed a verdict for appellee. This appeal is prosecuted from the judgment entered upon that verdict. Two grounds are urged for a reversal: (1) That the giving of the peremptory instruction directing a verdict for appellee was error; (2) that the refusal of the court to allow appellant to read part of a deposition to the jury, without reading the whole of it, was error.

[173] The facts appear to be few and simple. The appellant, who is sixty-five years of age, and a resident of Newport, this State, boarded one of appellee's cars as a passenger in Cincinnati, for the purpose of returning to Newport. According to his evidence, when the car upon which he was a passenger crossed the bridge spanning the Ohio river between Cincinnati and Covington it stopped near the end of the bridge on the Kentucky side of the river to enable the motorman to go to appellee's ticket office, only a few feet from the railway track, for a drink of water. When the car stopped appellant, who had only a short distance further to go, alighted from it. What then followed can better be told in appellant's own language, which we here quote:

"Well, I got off of the car and had an idea of walking; I thought the car might stop a considerable time, but I had walked no more than about—well, hardly as far as the width of this room, and I seen the car started again, and when I seen that, I put myself in position to catch hold on the handle bar, but, as it happened, I missed getting a hold of it. I didn't have hold of the handle bar and wasn't dragged by the car—that's all a mistake; but the conductor got hold of my left arm and held on to me, and so, if I wanted to or not. I had to run after the car—the conductor made me. It wasn't my intention, though: I never did intend to run after the car, and, well—after plodding along a little bit that way—I forgot now exactly how far it was—maybe a couple of car lengths—then I was afraid my feet would get knocked so badly that they would be crippled up, and I hollered at the conductor to let me go, and, well—when he finally did let me go, I landed so hard that I fell and turned my left ankle. That's all there is to it, gentlemen."

By the fall he then received appellant's leg was broken. The only other evidence appearing in the record is that furnished by the deposition of George M. Jackson, who was a passenger on the car at the time of the accident. He testified as follows:

"The conductor was standing on the rear platform. The car was moving, I should judge, about eight miles an hour. I couldn't state exactly how far the car went—the motorman stopped as quick as he could, about fifty feet. . . . Well, the car stopped at the end of the bridge, at the ticket office. The motorman went off to get a drink or something. The passenger got off and [174] started to walk, and as the car started again, the man grabbed the car and tried to get on while the car was in motion. The conductor holloed at him to let loose and tried to reach and catch him. The old man fell on the side of the car and fell on the tracks. The car dragged him. The conductor rang for the motorman to stop and the car stopped about fifty feet and backed up and gathered him up and took him to Third and Monmouth streets, to Doctor Bonar."

From the cross-examination of Jackson we quote the following questions and his answers thereto:

"Q. State exactly where you were on the car; if seated, state what seat you were in? A. I was in the last seat in the rear, left hand side. Q. Did the conductor try to assist Frank Jonas (the man who was injured) on the car? A. Yes. He tried to grab him after he had holloed to him not to catch on the car. Q. Did the conductor catch hold of Jonas? If so, how did he have hold of him? A. He did. He had hold of his arm."

It will be observed that appellant and Jackson differ in one or two material particulars. The former testified that he did not take hold of the handle bar of the car and was not dragged by the car, but that the conductor got hold of his left arm and held on to him, which compelled him to run along with the car. Jackson testified that appellant did take hold of the car and try to get on while it was in motion, and that the conductor holloed to him to let loose before he reached out and caught him by the arm. Both agree that when the conductor let appellant go he fell to the ground, in doing which he sustained the fracture of the leg. They also agree that after the conductor caught hold of appellant the car ran twice its length before being stopped, but Jackson alone testified that it was running at a speed of eight miles an hour, appellant making no statement as to its speed.

It is insisted for appellant that he was in no wise to blame for the injuries he sustained; but that they were caused by the act of the conductor in catching him by the arm and holding him until he was forced to run with the car and then turning him loose in such a way as to cause him to fall; and that these acts of the conductor constituted negligence for which appellee is liable.

Considered as a whole, appellant's own testimony conduced to prove that while it was

his purpose to again [175] get upon the car as it passed him, he failed to grasp the handle bar and this failure ended his attempt to board the car, which would have moved on, leaving him on the bridge or ground in safety, but for the act of the conductor in catching and holding him by the arm and thereby dragging or compelling him to keep up with the car while in motion, until turned loose under such headway or momentum as to destroy his equilibrium and cause him to fall. On the other hand, according to Jackson's testimony in chief, appellant first put himself in danger by taking hold of the handle bar and attempting to get on the car while it was in motion, upon seeing which the conductor called to him to loose his hold on the car, and then attempted to prevent him from falling, by catching him by the arm, notwithstanding which attempt appellant did fall, when, in obedience to the conductor's command, he released his hold on the car.

If appellant's injuries were sustained in the manner testified by him, they were caused by the negligence of appellee's conductor. Appellant, upon leaving the car, ceased to be a passenger, and his attempt to again board the car as it passed him did not make him a passenger. The car was not then at a point where it was required or accustomed to stop to take on passengers, but had just left the ticket office, where passengers were allowed to get on and off. So, at the time of receiving his injuries appellant was a trespasser; therefore, the conductor was under no duty to render him assistance in getting on the car, but if he saw he was in danger, to use ordinary care to prevent his injuries. It was, therefore, his duty to refrain from catching hold of appellant, if such assistance, under the circumstances, served to increase appellant's danger; and, according to the latter's version of the transaction, the conductor by taking hold of his arm and continuing to hold it, not only increased, but wholly caused, the danger which resulted in his injuries. In this view of the matter the act of the conductor in catching and holding appellant was negligence. On the other hand, if, as Jackson's testimony conduced to show, the conductor did not catch or hold appellant until after he had grasped the car and failed to let it go when commanded by the conductor to do so; that such holding of appellant's arm by the conductor did not produce his injuries, but that they were alone caused by his holding to and being dragged by [176] the car, it may well be said that they resulted from his own negligence, or that such negligence so contributed thereto that but for same he would not have been injured.

In view of the plea of contributory negligence interposed by appellee's answer and the conflicting character of the evidence, the

case should have been submitted to the decision of a jury, under instructions properly presenting the issues between the parties. What is and what is not negligence in a particular case is generally a question for the jury and not for the court. The rule is that where the facts are such that there is room for honest difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inferences is for the jury. Therefore, whenever it is necessary to determine what a man of ordinary care and prudence would be likely to do in the emergency shown, involving, as it generally does, more or less of inference or conjecture, it should be settled by a jury. A satisfactory statement of the rule in question will be found in *Cincinnati, etc. R. Co. v. Rue*, 142 Ky. 694, 134 S. W. 1144, 34 L.R.A.(N.S.) 200:

"It is the province of a jury to pass upon and decide questions of evidence; and especially is this so if the evidence is contradictory or conflicting; but it sometimes becomes the duty of the trial court, even where there is evidence both for and against the party seeking a recovery, to enter a nonsuit or direct the finding of the jury. This duty the law imposes on the court when the evidence as a whole fails to show a right of recovery in the party seeking it; or, to explain our meaning in language employed by this court: 'To authorize an instruction as in case of a non-suit, it should appear that, admitting his testimony to be true, and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim.' *Shay v. Richmond, etc. Turnpike Road Co.* 1 Bush (Ky.) 108; *Morris v. Louisville, etc. R. Co.* 22 Ky. L. Rep. 1593."

It follows from what has been said that the circuit court erred in granting the peremptory instruction directing a verdict for the appellee.

Appellant's second and final contention, that the court's refusal to permit him to read a part of George M. Jackson's deposition to the jury without reading the whole of it was error, is without merit. It appears that [177] Jackson's deposition was taken by appellee in Los Angeles, California, his place of residence. On the trial and before the introduction of appellant's evidence, appellee's counsel advised his counsel and the court that it would not introduce or read Jackson's deposition. After testifying himself as a witness, appellant offered to read to the jury that part of Jackson's deposition containing the questions asked him on cross-examination and his answers thereto, to which appellee objected, unless he would read the whole of the deposition. The court sustained the objection and ruled that appellant could not read the cross-examination without reading the whole of the deposition. Appellant excepted to this ruling, but read the whole of the deposition.

It appears to have been repeatedly held by this court that when a party takes a deposition and files it, and declines to read it, the adverse party has the right to read the deposition. *Musick v. Ray*, 3 Mete. (Ky.) 427; *Weil v. Silverstone*, 6 Bush (Ky.) 698; *Sullivan v. Norris*, 8 Bush (Ky.) 519. But we have been unable to find, nor have we been referred to, any case in which the court has passed on the question whether the party has the right to use a part of the deposition taken by his adversary, without introducing it as a whole. In 13 Cyc. 983, it is said:

"The question whether a party has a right to use only a part of the deposition or must introduce it as a whole is one upon which the courts have not been uniform in their decisions. In some cases the courts have allowed the deposition to be read in part, leaving the remainder to be read by the adverse party if he so desires; but the better rule seems to be that a part of a deposition cannot be read and part omitted, but the entire deposition competent and pertinent to the issues involved should be read; and especially is this so where a party introduces a deposition taken in his own behalf. Where a party reads in evidence a part of a deposition taken at the instance of his adversary, he thereby makes it his own testimony to the same extent as if he had taken it, and his adversary is entitled to read the whole."

The footnotes following the above statement of the law contain numerous cases in other jurisdictions holding that it is error to permit the reading of a part of a deposition and to refuse to compel the party reading it to read the whole on demand of the adverse party. *State v. Raburn*, 31 Mo. App. 385; *U. S. Trust Co. v. [178] Lanahan*, 50 N. J. Eq. 796, 27 Atl. 1032; *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 621; *Grant v. Pendery*, 15 Kan. 236; *Kilbourn v. Jennings*, 40 Ia. 473; *Norris v. Brunswick*, 73 Mo. 256; *Hamilton Brown Shoe Co. v. Milliken*, 62 Neb. 116, 86 N. W. 913; *Barton v. Morphis*, 15 N. C. 240.

In view of the foregoing authorities, we think it safe to say that where a deposition has been taken by one party and filed in the cause, his adversary is entitled to use it in evidence, although the party taking it refuses to introduce it in his own behalf; but while this is so, it would be error to permit the reading of a part of a deposition and to refuse to compel the party reading it to read the whole, if demanded by the adverse party. There was no error in the ruling of the trial court requiring appellant to read the whole of Jackson's deposition.

For the reasons indicated the judgment is reversed and cause remanded for a new trial in conformity to the opinion. Whole court sitting.

**NOTE.**

The reported case adheres to the rule obtaining in the majority of jurisdictions that a deposition containing competent evidence and filed in court may be introduced in evidence against the party taking it. However, applying the rule applicable to depositions offered by the party taking them, the court holds that the adverse party cannot offer part of the deposition but must offer it as a whole. The admissibility of a deposition against the party taking it is discussed in the note to *Doggett v. Greene*, Ann. Cas. 1913B 1166.

**BARNES ET AL.**

v.

**ESSEX COUNTY PARK COMMISSION  
ET AL.**

New Jersey Court of Errors and Appeals—  
September 25, 1914.

*86 N. J. Law 141; 91 Atl. 1019.*

**Streets and Highways — What Is Public Highway.**

Under Act Feb. 16, 1870 (P. L. p. 181); authorizing the Essex public road board to lay out, construct, improve, and maintain certain avenues in the county of Essex, including Park avenue, and providing that such avenues when constructed shall be deemed and taken to be public roads or highways, Park avenue is a public highway.

**Exclusion of Business Vehicles.**

Under Act April 22, 1907 (P. L. p. 180), § 1, providing relative to the county park commissions authorized thereby to be appointed in certain counties that such board shall have full power and authority to pass rules and regulations for the protection, regulation, and control of parks and parkways, and Act March 5, 1895 (P. L. p. 175), § 6, providing that the board shall have power, not only to lay out and open roadways, parkways, etc., but to establish the grade thereof, etc., and regulate the use thereof, while a park commission may possibly have power to prohibit the use of parkways by business vehicles of such heavy draft as would tend to injure or destroy the road, it cannot prohibit the use of a parkway by ordinary grocery delivery wagons; the protection of the highway not requiring their exclusion therefrom.

[See note at end of this case.]

**Same.**

The legislature may impair the public easement in a public highway by prohibiting business traffic thereon, and may delegate such power.

[See note at end of this case.]

**Appeal from Supreme Court.**

Certiorari to review validity of ordinance. Robert Barnes et al., plaintiffs, and Essex County Park Commission et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AF-  
FIRMED.**

*Alonzo Church* for appellants.

*Borden D. Whiting* for respondents.

[142] WALKER, Chancellor.—The Essex County Park Commission on January 7th, 1913, passed an ordinance excluding from the parkway known as Park avenue in Essex county "omnibuses, express wagons, carts or other vehicles carrying or ordinarily used to carry merchandise, goods, tools, or rubbish, however propelled, . . . except as it may be necessary to carry supplies to or from residences on either side of the avenue, or in case of buildings being erected fronting on said avenue, when it shall be lawful to carry building materials thereto."

The prosecutors, respondents, engaged in the grocery business and having a store on Park avenue (the one in question) with customers located, some of them on the avenue, and more elsewhere, to whom they delivered goods by means of ordinary grocery delivery wagons, of which they run six in number, constantly using the avenue for delivery purposes, obtained a *certiorari* to review the validity of the ordinance.

The Supreme Court, after hearing, set the ordinance aside and the respondents appealed.

We agree with the Supreme Court that Park avenue, laid out under authority of the act of the legislature (Pamph. L. 1870, p. 181) is a public highway. This is so by the express language of that statute, which enacts that the avenues, when constructed by the board "shall be deemed and taken to be public roads or highways." It is true, too, that Park avenue has been used as a public road and highway without restriction until restricted use was attempted to be imposed upon it by the ordinance under consideration.

The Supreme Court in its opinion says that if the public enjoyment of the avenue is now to be impaired it can only [143] be because the legislature has passed some act under which power to that end has been clearly granted and expressed, and that this has not been done.

The act under which the commission is empowered to pass ordinances (Pamph. L. 1907, p. 180, § 1) provides:

"The said board shall have full power and authority and is hereby empowered to pass and enact, alter, amend, and repeal rules and



regulations for the protection, regulation and control of such parks and parkways."

And in section 6:

"That the said board shall have power and authority not only to lay out and open roadways, parkways and boulevards, connecting parks and open spaces as herein provided, but shall have authority to establish the grade of such highways and change and alter the same, to grade, curb, flag, pave and otherwise improve the said parkways, roadways and boulevards, and to regulate the use thereof."

The Supreme Court holds that "the power to regulate and control is not necessarily the power to prohibit." To this, as a general proposition, we agree, but are unwilling to concede that the statute, under which the ordinance in question was passed, is not broad enough to permit of prohibiting the use of the avenue by heavy business vehicular traffic.

In the opinion of the Supreme Court it is stated that the legislature may impair the public easement in a public highway by prohibiting business traffic thereon, and that such power may be delegated. And this is plainly the law.

Now the right of the legislature to impair the public easement in a public highway by prohibiting vehicular business traffic thereon is conceded; and, therefore, the question whether the park commission may prohibit vehicular traffic upon this particular highway depends upon whether or not the terms of the statute, under which it acts, are broad enough to include that power. If under the legislative authorization to enact rules for protecting, regulating and controlling the highway, business vehicles may be prohibited the use of the parkway, then it has such power, otherwise not. Of course the commission has not the power to prohibit [144] all traffic; but may it not for the protection of highways make a regulation that business vehicles of such heavy draught as would tend to injure and destroy the road shall not use the highway, save, perhaps, under exceptional circumstances? We think this question is at least debatable, and that, therefore, it should not be foreclosed.

Because of the use of Park avenue by grocery delivery wagons, such as are owned and used by the prosecutors, is not necessary for that highway's protection, the ordinance under consideration prohibiting such use is unreasonable. Protection of the highway in question does not require their exclusion therefrom.

The judgment of the Supreme Court setting the ordinance aside will therefore be affirmed.

For affirmance: The Chancellor, Chief Justice, Swayze, Parker, Bergen, Kalisch, Bogert, Vredenburg, Heppenheimer, JJ.—9.

For reversal: None.

#### NOTE.

#### Validity of Ordinance Prohibiting Use of Streets by Business Vehicles.

##### Majority Rule.

A majority of the cases hold that where a municipal corporation has been given control over its streets by a grant of general powers, it is competent for the municipality to restrict by ordinance the use of certain streets to pleasure vehicles, excluding business traffic. *Illinois Malleable Iron Co. v. Lincoln Park*, 263 Ill. 446, 105 N. E. 336, 51 L.R.A. (N.S.) 1203; *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607. See also *People v. Waldo*, 72 Misc. 416, 131 N. Y. S. 307, *affirmed* 149 App. Div. 927, 133 N. Y. S. 1139, which was *affirmed* 205 N. Y. 589, 98 N. E. 1111; *People v. Shellenberg*, 133 App. Div. 79, 111 N. Y. S. 820. See also *Greene v. San Antonio (Tex.)* 178 S. W. 6. In *Illinois Malleable Iron Co. v. Lincoln Park*, *supra*, the court held to be valid an ordinance which prohibited the use of a certain parkway boulevard by all vehicles carrying goods, merchandise, wares, or other articles, except in so far as might be necessary for the delivery of goods, merchandise, wares, or other articles to houses abutting on that boulevard. The court said: "So long as private rights are not invaded, the legislative authority may vacate streets, may limit their use, and may permit their use for any purpose not incompatible with the object for which they were established. . . . The ordinance, so far as the public is concerned, was clearly a valid exercise of power by the commissioners." And as to the claim of the appellant iron company that the ordinance was in effect an unlawful taking without compensation of its property right of access to its premises, the court said: "Owners of property bordering upon a street have, as an incident of their ownership, a right of access by way of the streets which cannot be taken away or materially impaired without compensation. . . . The inquiry, therefore, is as to the extent of this right of access. The ordinance, under the construction we have given to it, does not interfere with the appellant's use of Diversey parkway in the block in which its premises are situated. Its right of access to that extent is not interfered with, but it contends that its right as an abutting owner is to use the street upon which its property abuts as far as such street constitutes the most direct route to the destination, and that the requirement of taking a circuitous route constitutes an impairment of that right. . . . The inconvenience caused the appellant by the exclusion of traffic teams from the boulevard, though greater in degree, is precisely the same in kind as that to all other persons having occasion to do heavy

hauling from places in the neighborhood of the appellant's premises to places east, north-east or southeast of the intersection of the next street east of them. If the boulevard might be entirely closed to all passage by its vacation or complete obstruction, without any liability for damages, certainly its partial closure by the exclusion of traffic teams could not be the basis of a claim for damages or an injunction."

In *Greene v. San Antonio*, supra, the court said: "The highways of a state, including the streets in cities and towns, are under the paramount and primary control of the legislature, and all powers of cities and towns over streets must depend upon the authority granted in special charters or general laws applying to such municipalities. Whatever power the state has over its highways can be granted by it to the municipalities it has created, and in this instance 'exclusive control and power' over the streets, alleys, sidewalks, and public grounds within its bounds have been granted to the city of San Antonio, not only in the special charter granted it, but by the general laws of the state. The streets do not belong to the city or town in which they may be situated, but all powers over them are derived from the legislature by charter or statute. They are affected by a trust for the public use and benefit. The primary design in laying out and constructing streets is for the purpose of travel and passage for the public, and rights as to ingress and egress, nearly resembling private rights, are also given abutting owners. Having exclusive control over the streets, the legislature, or those to whom it has delegated powers over streets, have the right and authority to impose reasonable terms and conditions upon the right to use them. Subject to rights of abutting owners, streets may be closed to all business traffic, the speed of vehicles regulated, obstructions may be prevented or removed, licenses to use the streets may be required, travelers may be required to obey the directions of the police, vehicles having heavy loads may not be permitted on certain streets, or be required to have wide tires, the weight of loads may be limited, and hacks may be compelled to remain at certain stands. These are only a part of the many regulations that have been held valid."

In *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 31 S. Ct. 709, 55 U. S. (L. ed.) 815, affirming decree, 194 N. Y. 19, 86 N. E. 824, 21 L.R.A. (N.S.) 744, 16 Ann. Cas. 605, which affirmed 126 App. Div. 657, 110 N. Y. S. 1037, which affirms 58 Misc. 401, 111 N. Y. S. 759, it was held to be competent for the city of New York, by ordinance, to prohibit the use of the streets of the Borough of Manhattan by advertising trucks, vans, or wagons, and to prohibit the display of advertisements on wag-

ons and other vehicles except business notices on ordinary business wagons engaged in the usual business or work of the owner and not used merely or mainly for advertising. And in *Com. v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679, the court upheld as reasonable and valid a municipal ordinance which prescribed the routes which should be taken by omnibuses and prohibited the use of other streets by those vehicles. The court said: "Regulations of this nature are regulations as to the use of omnibuses and stage coaches, while passing over the public streets of the city, and are within the legitimate powers of the mayor and aldermen. The public safety and convenience of travelers may require regulations of this character. If new and unusual modes of transporting persons over the public streets are introduced, which from the methods made use of for propelling the carriage, or the size of the vehicle, or the number of horses attached thereto, will obviously endanger the public safety, or so engross the whole width of the street as virtually to exclude all other vehicles, or greatly to obstruct them in their passing thereon, it would certainly be reasonable and proper and within the legitimate powers of the mayor and aldermen, under the statute already cited, and the powers conferred by the city charter, to regulate the route of the streets over which such carriages were to run, and the rate of speed."

In several cases it has been held that ordinances prohibiting the use of certain streets by business vehicles of more than a specified weight are valid. *Nagle v. Augusta*, 5 Ga. 546; *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L.R.A. 750; *Com. v. Mulhall*, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387. In *Nagle v. Augusta*, supra, an ordinance was held to be valid which provided that no vehicle should be permitted to pass over the streets of a city which carried a load of more than a specified weight, a scale of weights being set out. In *Com. v. Mulhall*, supra, an ordinance was held to be valid which prohibited the hauling on the streets of a load of over three tons weight unless the load consisted of "an article which cannot be divided." And in *State v. Boardman*, supra, the court held to be valid a municipal ordinance which restricted the traffic by vehicles carrying a load in excess of 2500 pounds to a certain portion of a designated street. This was held to be a reasonable exercise of the power over streets delegated by the legislature to the municipality, the court saying: "All public ways and streets are for the accommodation primarily of travelers of all classes and kinds, but the traveler is not in all, or in many cases, entitled to the whole width of the street for his accommodation. He is entitled to a reasonably safe, convenient and practicable opportunity for travel and passage."

A portion of a way as located, not being needed for travel, may be left outside of the wrought road, another portion may be set off for sidewalks and the use of the remaining width of the way so regulated that heavily loaded teams and other vehicles shall use exclusively different portions thereof, and still no one would be deprived of his rights, but upon the other hand all might be very much benefited in the exercise of them."

Aside from the question of the general power of the legislature or of a municipality to pass a regulation prohibiting the use of streets by business vehicles, the reasonableness of the regulation is always in question, and such a regulation, though *intra vires*, will be declared invalid if it is considered unreasonable. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L.R.A. 696, wherein the court held that an ordinance passed by the town of Cicero, though *intra vires* as being within a valid legislative authorization, was unreasonable because it lodged with the board of trustees an arbitrary discretion to permit or to forbid the use of traffic teams on the designated boulevards. And see the reported case, in which was involved an ordinance, passed under the general power to regulate and control parks and parkways granted to the commission by the legislature, which prohibited the use of a certain parkway by all vehicles carrying or ordinarily used to carry merchandise, goods, tools, or rubbish except where necessary to carry supplies to buildings fronting on that avenue. The court refuses to decide whether the commission has the power to make such a regulation, specifically leaving that question open. It does hold, however, that the particular ordinance under consideration is unreasonable.

#### Minority Rule.

It has been held in at least two jurisdictions, that it is incompetent for a municipality to enact an ordinance prohibiting the use of certain streets to business vehicles, and making the test for exclusion the business use of vehicles. *State v. Waddell*, 49 Minn. 500, 52 N. W. 213; *Clausen v. De Medina*, 82 N. J. L. 491, 81 Atl. 924, reversing 80 N. J. L. 634, 77 Atl. 1045. In the case last cited, it appeared that a rule of the boulevard commissioners prohibited the use of the Hudson county boulevard to any vehicle used for business purposes, except to deliver and receive its loading, in which case it was compelled to leave the boulevard by the nearest cross street, the proviso being, however, that nothing therein should "prevent the use of said road to business wagons weighing, loaded, not more than five hundred pounds on each wheel, at all times when used solely for pleasure driv-

ing." By an act of the legislature the commissioners had been given the power to make rules and regulations as to the boulevard and "to limit and prevent the driving or travel thereon of loaded or heavy trucks, wagons, or carts." The court held that the criterion established by the enabling act was weight, that the rule of the commissioners changed that criterion to one of use for business or pleasure, and that the rule was therefore *ultra vires* and void. In *State v. Waddell*, supra, an ordinance of park commissioners restricting the use of a certain street to pleasure vehicles was held to be invalid. It appeared that the state legislature had, by statute, authorized the commissioners to appropriate grounds for parks and parkways and "to vacate and close up any and all roads and highways, excepting railroads, which may pass through, divide, or separate any lands selected or appropriated by it for the purpose of parks." The court construed this right to close up and vacate to apply only to streets passing through, or separating parks, and not to apply to "parkways," and held that the commissioners had no power to restrict to the traffic of pleasure vehicles a street which had for years been a public highway which did not pass through or separate parks, the commissioners' only claim of power to control which arose from the fact that they had purchased a strip of eleven feet along either side of it.

#### CARROLL ET AL.

v.

#### PARRY.

District of Columbia Court of Appeals—  
March 29, 1915.

43 App. Cas. (D. C.) 363.

#### Evidence — Telephone Conversation — Necessity of Identifying Speaker.

A telephone conversation with a person claiming to represent a party cannot be received against the party unless the identity and authority of the speaker are shown.

[See note at end of this case.]

#### Public Documents — Police Station Blotter.

A memorandum made by the officer in charge of a police station, showing the names of persons arrested, the charges preferred, etc., is not admissible as evidence of the facts therein stated.

**Malicious Prosecution — Probable Cause — Question of Law or Fact.**

The existence of facts tending to show probable cause for the institution of a criminal prosecution is for the jury, but their legal effect is for the court, and instructions advising the jury with respect thereto should be given.

**Appeal from Supreme Court.**

Action for damages. Jackson G. Parry, by his next friend, plaintiff, and Harry R. Carroll et al., defendants. Judgment for plaintiff. Defendants appeal. **REVERSED.**

[364] This is an action for false arrest and imprisonment brought by Jackson G. Parry, an infant, by his next friend, Richard L. Parry, against Harry R. Carroll and Louis D. Carroll, composing the Carroll Electric Company, charging in a declaration in three counts substantially that, for no reasonable or probable cause the defendants caused the plaintiff to be arrested upon the false charge of larceny, and caused the police officer to take the plaintiff under such arrest to Number 1 Precinct Station, and there detained for the space of two days, after which he was discharged from imprisonment. The plaintiff alleges he was brought into public scandal, infamy, and disgrace, and suffered and underwent great pain both of body and mind; claims \$10,000 damages.

Defendants pleaded not guilty, and facts constituting probable cause for the arrest.

Plaintiff testified that he had lived in Washington all his life, and had been employed by defendants for ten months, and was in charge of their electrical supply store and store-room, receiving a salary of \$40 per month. That the defendants were copartners. That on January 6, 1912, Detectives Springman and O'Brien brought Arthur Tyler, a colored driver employed by the defendants, into the defendants' store and took him upstairs; that later plaintiff was sent for, and upon arriving Louis D. Carroll, one of the defendants, asked Tyler if the plaintiff knew anything about the stealing of the defendants' cable from the warehouse. That Tyler replied "No, nothing at all."

Plaintiff was then asked how long it had been since he had been at the warehouse, and he said, "A month or so." "Q. You don't know anything about this colored fellow being crooked? A. No, sir." Plaintiff was then sent down stairs again. In about half an hour he was called upstairs again, and Louis Carroll asked the driver, Arthur Tyler, "Are you positively sure Mr. Jackson (meaning plaintiff) knew nothing of this affair?" Tyler answered "No, sir." The driver was asked again by Louis Carroll, "Are you sure?" and the driver replied "No, sir. [365] he doesn't

know anything about it. Plaintiff then turned to Harry Carroll, and said, "Mr. Carroll, do you think I am guilty?" and Harry Carroll said, "I don't know," and plaintiff said, "Whoever says so is a liar," and Harry Carroll said "I will prove that." Plaintiff then went down stairs and resumed his duties. About 4:30 o'clock Louis Carroll went out, and left a man there in charge, and locked the door; left a Mr. Tyler there to see that plaintiff did not run away; that plaintiff knew that Mr. Tyler was there to watch him to see that he did not run away, because Tyler said nothing, but walked up and down the floor all time he was there, until Louis Carroll came back with a bicycle policeman, and locked the door behind him, and said to plaintiff, "I want you," and plaintiff said, "What do you want me for?" and Louis Carroll said, "They say you are in it, all of them say you are in it," and plaintiff said, "I don't know anything about it. I will go down and tell you or anybody else you want to have investigate this thing," and plaintiff said, "You ought to know me, I have worked for you people too long and handled too much of your stuff to be accused of anything of this kind." That he was taken away from the place of business of the defendants by a bicycle policeman named Connors, and to Number One Precinct, where he was searched and everything taken from him; he was put behind the bars, and about 9 o'clock at night he was taken out of his cell into a room, and questioned by Detectives Springman and O'Brien in the presence of the Carroll Brothers and Arthur Tyler, and the colored man said to plaintiff, "You know something about it," and the detectives began questioning Arthur Tyler about his movements the morning the cable was stolen, and then Arthur Tyler was taken away, and Detective O'Brien said to plaintiff, "Jackson, do you deny all these allegations?" to which plaintiff said, "Yes, sir," and he said, "You know absolutely nothing about this thing?" and plaintiff replied "No, sir," and asked Harry Carroll if he was going to hold him for this thing, and Carroll replied "Sure. I am going to hold you." He pulled plaintiff in the toilet room, and said, "Now, Jack, if you 'fess up we will turn you loose," and plaintiff said "No, I will not 'fess up to a lie, and I will not own [366] up to a crooked lie," and thereupon plaintiff was put back in the cell and remained there from Saturday night until Monday morning; that plaintiff suffered in the cell from cold, and plaintiff asked for bedclothes to keep him warm, but suffered from cold for want of adequate bedclothes; that at about 12 o'clock at night a prisoner was brought in and put in the cell with plaintiff, making the situation more disagreeable; that he asked Detectives Springman and O'Brien to notify his people, but no one noti-

fied his father or mother, who found him in a cell on Monday morning and tried to get him out. That he was taken to the police court between Detectives Springman and O'Brien, and marched up the street from the First Police Precinct on Twelfth street to the police court on D; that when first arrested by Policeman Connors he was marched down Twelfth street, with Connors on one side and one of the Carrolls on the other, and put in a cell at the First Precinct; that he was in charge of Detective Springman at the police court, and was released without being tried; that plaintiff never went back into the employ of the defendants; that after his arrest he was out of employment for four months.

Cross-examination: He testified that prior to his arrest his relations with the Carrolls seemed to be friendly, and that he had no trouble with them, and they were satisfied with his work; that he had carried the keys to the store and warehouse until they had moved to the new store, and that he did not have the keys to the warehouse after that; they were hung on a nail beside him by Louis Carroll, who put the nail up and hung the key there, and that after the Carroll Brothers moved into the Twelfth street store the key to the warehouse was in the custody of whoever was in the store at the time, and Louis Carroll and his brother both had duplicate keys to the warehouse and every place in the building. He further testified that the keys were under his charge. They were put on a nail beside him.

Patrick O'Brien for plaintiff testified that he was a detective sergeant on the Metropolitan Police Force; that Louis Carroll called at detective headquarters, and reported that his goods were being stolen, and that witness and Springman were assigned to the case; that they followed Tyler, the driver, and [367] found where he had sold goods stolen by him from the defendants; that they arrested him and brought him to the defendants' store, where he admitted that he had been stealing and selling the goods; that he and Springman in the presence of the defendants asked Tyler if the plaintiff was connected with the stealing, and Tyler replied in the negative. Then witness told Mr. Carroll he would not arrest the boy. Had nothing against him. Insisted that his attorney told him that he would have to refuse to arrest anybody, he said on suspicion. He had nothing to do with the arrest of the plaintiff.

Springman testified that he and O'Brien were detailed to watch Tyler, who was under suspicion of stealing lead cable and electrical fixtures from the defendants' store; that they arrested Tyler on January 6, 1912, took him to defendants' store, where he confessed to stealing their goods from the warehouse. O'Brien brought the plaintiff up, and Tyler

positively stated that defendant had nothing to do with the stealing.

Joseph Carter, a police sergeant, said he was acting as chief inspector, on January 6, 1912, and received a telephone message purporting to come from the defendants' store to the effect that Tyler had made a confession, implicating the plaintiff in the stealing, and requesting that the plaintiff be arrested; that he informed the person calling that it was Springman and O'Brien's case, and that he would get into communication with them. He did not authorize anyone to make the arrest.

Joseph A. Connors testified that he was a bicycle police officer of Number One Station. That Officer Edwards, acting on orders from police headquarters given him by Sergeant Carter, had instructed him to go with Louis Carroll to his store, and arrest plaintiff. Carroll and he went to the defendants' store, and Carroll pointed out plaintiff, stating that he was the man he wanted arrested. That plaintiff denied having anything to do with the stealing, and voluntarily went with him and Louis Carroll to Number One Police Station, where Carroll put a charge of larceny against the plaintiff on the blotter; that the arrest was made without a warrant.

[368] Richard LeRoy Parry, plaintiff's father, was introduced as a witness. He was asked by his counsel.

Q. Did you get a telephone message upon the evening of January 6th, 1912, relative to your son?

A. Yes, sir, between 7 and 8 o'clock.

Q. From whom was this message?

A. From Mr. Carroll's office, but who directly sent the message, I don't know.

Q. Was it a man talking over the phone?

A. Yes, sir, it was a man's voice.

Q. Who did this party represent himself to be?

Counsel for the defendants objected to the witness stating this telephone communication unless he could identify the defendant, or one of the defendants, as the party talking over the phone. The court overruled the objection, and exception was noted.

Counsel proceeded with the interrogation.

Q. Who did the party at the telephone represent himself to be?

A. From Mr. Carroll's office.

Q. Who did the party talking to you over the telephone say he was?

A. He did not say.

The court asked:

Q. What was the call, what did he say to you over the telephone?

A. He called up and said Jackson would be working late that evening.

Counsel said, that is his son, the plaintiff.

Q. Tell what this voice said over the Telephone?

A. He said that Jackson would be working late, and would be late getting in. Of course, we had had him late home to supper before. He was late getting home before, and we thought nothing of it.

Q. Did you know the voice, or do you know the voice of either of the Carrolls?

[369] A. I do not know one of them when I see them. I do not know a thing about their voices.

That on the day following, which was Sunday morning, witness called up the office of Carroll Brothers, and asked for Mr. Carroll, and someone talked with him on the phone in a man's voice; did not know who was talking, but it was the voice of the person who answered the phone; that witness inquired about his son, saying, "Have you seen Jackson this morning? Is he still at work?" and the man's voice said he supposed so. Witness did not know whether the voice said he was working or not, but took it for granted he was, and thereupon remarked that "it is rather hard to work all day Saturday and Saturday night and then work Sunday, and if it is his own choice; I have no word to say about it;" and it was between 8 and 9 Sunday night before witness knew that his son, the plaintiff, was under arrest, and he received the notice of his son's arrest at that time from the office of Carroll Brothers.

Plaintiff closed, and one of the defendants, Harry R. Carroll, testified that Tyler was arrested by Springman and O'Brien, and brought to his store, and asked if any other employee was implicated with him in the stealing; that neither he nor Louis Carroll asked him anything about plaintiff's connection with the stealing; that he did not request O'Brien or any other person to arrest plaintiff; that he did not state that Mr. Diggs had told him that the officer would be compelled to arrest any person he desired arrested; that he never at any time ordered or authorized the plaintiff's arrest; that Tyler stole cable from his store to the value of \$85, for which offense he was arrested. That plaintiff had the custody of the key to the warehouse from which the goods were stolen.

On cross-examination he said that on the statement of Tyler he believed plaintiff to be guilty of participating in the crime with Tyler; that he did not prosecute plaintiff in the police court, because Officer O'Brien told him Tyler had denied what he had previously said respecting plaintiff's guilt; that he did not telephone plaintiff's father on January 6th, 1912; that he [370] and his brother, Louis Carroll, were under the impression all the time that the police department was conducting the case, as they had applied to it for assistance in detecting the person guilty of stealing their goods; that neither O'Brien nor Springman ever told him there was no evi-

dence against the plaintiff upon which to base his arrest. That plaintiff had been working for the firm for eight or nine months; that he was an absolutely satisfactory clerk, and that the witness had always found him honest; that he knew that the plaintiff had a father who would be interested in the arrest of the plaintiff, but that he did not telephone him on Saturday, but did telephone him on Sunday of his son's arrest; telephoned plaintiff's father between 10 and 12 o'clock Sunday morning, and told him that his boy was in trouble, but did not mention the kind of trouble; that plaintiff had told the witness that he did not have anything to do with the stealing, but that after that witness made no effort to have the plaintiff released. After the plaintiff was released the witness told the plaintiff that he might have his position if he wished it.

Defendant Louis D. Carroll testified that Springman and O'Brien were endeavoring to ascertain the persons who were stealing their goods; that on the morning of January 6th, 1912, he, in order to assist them, followed Tyler, saw him approach their warehouse, take out a key, unlock the door of the warehouse and enter, and shortly afterwards reappear with cable belonging to the defendants of the value of \$80; that plaintiff was the sole custodian of the key to the warehouse; that Tyler was arrested and brought into their store; nothing was said at the store concerning plaintiff's connection with the crime; during the afternoon of January 6th, 1912, a Mr. Schlegel came into the defendants' store and stated he had been to Number One Police Station to see Tyler, who was being held there for stealing defendants' cable, and that Tyler had stated that the plaintiff was implicated in the crime, and that, acting on this information, he went to see Tyler, and was told by him that plaintiff and he had divided the proceeds of the crime; and that [371] after the confession of Tyler, Officer Edwards directed Officer Connors to arrest plaintiff; that he accompanied Connors to the store and pointed out the plaintiff. That he did not order his arrest. Did not call plaintiff's father over the telephone on January 6, 1912.

Cross-examined, he said that when the colored boy Tyler was sent to the warehouse by the plaintiff, there was no objection to Tyler having the keys of the warehouse, and that for any proper purpose the plaintiff had a right to give Tyler the keys to the warehouse. When asked if he did not place on the blotter at Number One Precinct a charge of larceny against the plaintiff, witness answered, "I cannot recall that I did. Does the record show it?" That he saw plaintiff on Saturday at the police precinct; that he did not at any time after the arrest of plaintiff notify plain-

tiff's father or call up the house where plaintiff and his father lived. Plaintiff had worked for him about eleven months. Did not know that a charge of larceny had been made against the plaintiff on the blotter at Number One Precinct.

Harry F. Schlegel testified that he had some business with Tyler, and learned he was locked up at Number One Police Precinct; that he called there, saw Tyler, and was told by him that a young white man was implicated with him in the stealing of defendants' goods, and that this young white man had fixed the stuff so he could get it; that he communicated this fact to Louis D. Carroll.

Arthur Tyler testified that he was formerly employed by defendants; that after he was arrested for stealing their goods, he was locked up in Number One Police Station, and Mr. Schlegel called to see him; that afterwards Louis D. Carroll called, and witness told him that witness and the plaintiff were acting together in stealing the cable; that he stole the cable from the warehouse, and got the key from the plaintiff; and that plaintiff was the only one who had the custody of the key.

Cross-examined, he said that Parry was in with him.

[372] Q. How was he in with you?

A. We were both working together on this stuff.

William J. Kerns testified that he was a police officer stationed at Number One Police Station; that Louis Carroll called at the station between 3 and 4 o'clock January 6th, 1912, that he and Carroll went to Tyler's cell, and that Tyler then and there confessed that he had been stealing defendants' goods, and that he and the plaintiff were acting together in dividing the spoils.

Louis H. Edwards, police officer, stated that Louis D. Carroll called at the station, and asked for the arrest of the plaintiff; that he called up Sergeant Carter, who asked if he had heard the confession of Tyler; upon his answering no, he left the phone and talked with Tyler, and then went back to the phone, and told Carter that he had talked with Tyler, who had stated that plaintiff was his confederate in the crime. Carter ordered plaintiff's arrest, and that, acting on the authority of Carter, he directed plaintiff's arrest.

On cross-examination witness said he had never seen Louis Carroll before January 6, 1912, and that Carroll came to the station that day for an officer to go to his place of business and arrest the plaintiff. That was the first he knew about the case.

In rebuttal, plaintiff offered Edwin B. Hess, who testified that he was chief clerk of the Police Department. He was shown a book, and stated it was a record of the arrest kept

in the detective bureau at police headquarters. That he had a record there of the arrest of Arthur Tyler. This is a book of original entry. Witness is in charge of the records. Did not make the entry. His attention was called to an entry dated January 6th, 2:20 P. M., "Arthur Tyler, 1912 Tenth street, was arrested on charge of petit larceny, 24, black, U. S., married, can read and write, complainant Louis Carroll, 514 Twelfth street, N. W. Officers Springman and O'Brien."

Shown another record that Arthur Tyler was convicted of larceny in eight other cases arising out of the same offense. He was then asked to look for the name of Parry. He said, "I [373] find on January 6th, at 6 o'clock P. M. Jackson G. Parry." Memorandum is "Jackson G. Parry, 712 F street N. W., arrested on charge of grand larceny, 20 years old, white, U. S. clerk, single, can read and write, complainant Louis D. Carroll, 514 Twelfth street N. W. Officers Springman and O'Brien, disposition dismissed."

Asked who was the prosecutor or complainant in each case, he said Louis D. Carroll.

Defendants objected to the introduction of this record, because it was not shown to be made by them or either of them.

Jackson G. Parry, being recalled, testified that the colored boy Tyler had stated to him that he got in the warehouse to steal the cable by pulling the staple, and that Tyler had made this statement in the presence of both of the defendants, Harry and Louis Carroll.

The jury returned a verdict for \$5,000. On motion for new trial, the plaintiff consented to a remittitur of \$2,500. The motion was overruled, and judgment entered for that amount. Defendants have appealed.

*J. J. Darlington and Charles F. Diggs for appellants.*

*Thomas M. Baker, Robert I. Miller and Crandal Mackey for appellee.*

[374] SHEPARD, C. J. (after stating the facts).—1. The first assignment of error is on the exception taken to the admission of the testimony concerning the alleged telephone conversation between plaintiff's father and the office of the defendants.

The materiality of this testimony is shown by the following recital in the bill of exceptions: "In the presentation of the case to the jury, counsel for the plaintiff argued that the telephone message of Saturday, January 6th, 1912, testified to by the witness Richard Le Roy Parry, had been sent by the defendants for the purpose of keeping the plaintiff's relatives in ignorance of his arrest and imprisonment, and to prevent steps to procure his release, by giving bail or otherwise, and in order that the police officials might have an

opportunity to obtain a confession from him that he was guilty of the offense charged." This argument was evidently taken by the jury as showing express [375] malice in making the arrest, and was reflected in the verdict, one half of which was remitted.

We think the exception well taken. *Young v. Seattle Transfer Co.* 33 Wash. 225, 63 L.R.A. 988, 99 Am. St. Rep. 942, 74 Pac. 375; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 107 Md. 556, 571, 16 L.R.A.(N.S.) 746, 69 Atl. 405; *J. Oberman Brewing Co. v. Adams*, 35 Ill. App. 540.

The bill of exceptions shows that a call purporting to come from the office of the defendants was answered by plaintiff's father. The conversation is set out in the foregoing statement. There was no identification of the person talking to the witness, and nothing to indicate that it was one of the defendants who called him up. As said in *Young v. Seattle Transfer Co.* supra: "When material to the issues, communications through the medium of the telephone may be shown in the same manner and with like effect as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons, in response to calls at the telephone from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line."

Cases cited on behalf of the appellee are not in point. *Wolfe v. Missouri Pac. R. Co.* 97 Mo. 473, 481, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49. The question arose incidentally, and it does not appear how the party was called or the circumstances attending the identification.

[376] *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 201, 27 Am. St. Rep. 861, 17 S. W. 608. In that case a demand was made upon a railroad office for goods. Party could not tell who it was that answered him. He recognized the voice as one of the employees of the office with whom he had done business before. The question was one simply of demand of goods that had been shipped.

*General Hospital Soc. v. New Haven Rendering Co.* 79 Conn. 581, 583, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168. The action in that case was by a hospital society to recover of the rendering company for the treatment of two of its injured employees in the hospital. Mannel, who was in the plaintiff's employ and in charge of telephone calls at the hospital, and as agent of the hospital, received a telephone call purporting to be from the defendant company, asking for the despatch of an ambulance for two men who had been severely burned. The court found that the message had in fact been sent from the office of the defendant. The court said: "The fact that a person in the defendant's office, apparently in charge as its representative, told the plaintiff to send an ambulance as testified, is a fact relevant to the issues raised by the pleadings. The defendant, however, did not object to this testimony, and it was received by the court without objection. The witness further testified that he asked who would pay for the treatment of these men, and was informed that the defendant would take care of the expense. The defendant objected to so much of the witness's testimony as stated the answer to the witness's question as to who would pay for the care of the injured men. The court overruled this objection, and the defendant excepted." The men were delivered to the hospital society, who sent their ambulance as requested, for the purpose of receiving and treating them.

2. The second assignment relates to the memorandum entered on the blotter of the police department. It does not appear that this was written by either one of the defendants, and it is a memorandum made in accordance with the duties of the office, showing the names and charges, etc., when parties are arrested. [377] The record is inadmissible. *Prigg v. Lansburgh*, 5 App. Cas. (D. C.) 30, 36; *National Union v. Thomas*, 10 App. Cas. (D. C.) 277, 292; *Snell v. U. S.* 16 App. Cas. (D. C.) 501, 517.

3. The last assignment of error is on the refusal of the court to give an instruction asked by defendants, stating the facts relied on to show probable cause. It is unnecessary to set out this instruction, for the court did not give the jury a charge telling them what facts, if found to be true, would constitute probable cause, but left the question entirely to the jury. When the facts relied on to constitute probable cause are in dispute, as they were in this case, their existence is for the determination of the jury, but their legal effect, if found to be true, is for the court. As the case is to be reversed it is unnecessary to elaborate the point. *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556, 562; *Slater v. Taylor*, 31 App. Cas. (D. C.) 104, 18 L.R.A. (N.S.) 77; *United Cigar Stores v. Young*, 36



App. Cas. (D. C.) 409; *Staples v. Johnson*, 25 App. Cas. (D. C.) 155, 160; *Mark v. Rich*, 43 App. Cas. (D. C.) 182, present term.

For the errors pointed out, the judgment will be reversed, with costs, and the cause remanded for a new trial.

Reversed.

# NOTE.

## Conversations by Telephone as Evidence.

Scope of Note, 977.

Generally, 977.

Sufficiency of Identification of Parties, 977.

### Scope of Note.

The earlier cases relating to telephone conversations as evidence are collated in the notes to *McCarthy v. Peach*, 1 Ann. Cas. 801; *Gzowski v. Forst*, 20 Ann. Cas. 704; and *Barrett v. Magner*, 127 Am. St. Rep. 531. The present note reviews the more recent decisions.

### Generally.

With respect to its admissibility in evidence a conversation by telephone stands on the same footing as an ordinary conversation. *Com. v. Phelps*, 209 Mass. 396, Ann. Cas. 1912B 566, 95 N. E. 868; *Jenderson v. Hansen*, 60 Mont. 216, 146 Pac. 473; *Williamson-Halsell-Frasier Co. v. King* (Okla.) 158 Pac. 1142; *White v. State*, 61 Tex. Crim. 498, 135 S. W. 562; *Memphis First Nat. Bank v. Clarendon First Nat. Bank* (Tex.) 134 S. W. 831; *Delaware Ins. Co. v. Wallace* (Tex.) 160 S. W. 1130; *Olds Motor Works v. Churchill* (Tex.) 175 S. W. 785. And see *Monarch Livery v. Luck*, 194 Ala. 518, 63 So. 656.

But to entitle a party to a conversation by telephone to testify thereto, the identity of the other party must be shown, the fact that in the course of the conversation he stated that he was a certain person not being enough. *Stewart v. Fisher* (Ga.) 89 S. E. 1052; *Fred Miller Brewing Co. v. Jones*, 190 Ill. App. 169; *Mankes v. Fishman*, 163 App. Div. 789, 149 N. Y. S. 228; *Albany Homeopathic Hospital v. Chalmers*, 94 Misc. 600, 157 N. Y. S. 1000; *Harris v. Raskin*, 142 N. Y. S. 342; *Williamson-Halsell-Frasier Co. v. King* (Okla.) 158 Pac. 1142.

A corporation cannot be bound by a declaration against interest made by telephone unless the person making the admission is identified and it is shown that he was authorized to bind the corporation. *Crosswhite v. Chattanooga Brewing Co.* 10 Ala. App. 425, 65 So. 208. Compare *Kansas City, etc. R. Co. v. West* (Tex.) 149 S. W. Rep. 206 (evidence of authority sufficient).

A bystander may testify to so much of a telephone conversation as he heard in corroboration.

oration of the testimony of a party thereto, *Kent v. Cobb*, 24 Colo. App. 264, 133 Pac. 424. *Rees v. Gair*, 144 App. Div. 294, 120 N. Y. S. 213; though he did not know who was the other party to the conversation, *Warren v. Forst*, 46 Can. Sup. Ct. 642, affirming 22 Ont. L. Rep. 441, 20 Ann. Cas. 704. So in *Hancock v. Hartford F. Ins. Co.* 81 Misc. 159, 142 N. Y. S. 352, it was said: "To corroborate the defendant's version of the telephone conversation, the defendant offered the testimony of a second employee, who claims to have overheard what the first employee spoke into the telephone at the time of the alleged conversation with the plaintiff. This testimony was excluded, apparently because the second employee could not state of his own knowledge who was at the other end of the telephone wire. It seems to me that the exclusion of this testimony is erroneous. Of course, ordinarily, no telephone conversation can be admitted unless the person with whom the conversation is held is identified. A conversation with an unidentified person is obviously immaterial. The testimony, however, of the first employee as to the telephone conversation was admitted, and we must therefore assume that the trial justice held that this employee sufficiently identified the plaintiff to make this conversation admissible. The testimony of an auditor who heard only the one side of the conversation could obviously not be considered corroboration upon the issue of whether the plaintiff took part in the conversation; but the important issue in this case was, not whether the parties did have some telephone conversation at that time, but as to whether at that conversation the defendant's employee said anything about canceling the policy, and upon this issue the testimony as to what the second employee overheard would be entirely material, and I can see no logical reason for its exclusion." In *Brooks v. State*, 8 Ala. App. 277, 62 So. 569, it was held that a telephone conversation may be proved by the testimony of a bystander if from the tenor of the conversation and other circumstances he is able to identify the parties.

### Sufficiency of Identification of Parties.

Testimony to the identity of the person with whom a telephone conversation is had, based on recognition of his voice, is sufficient. *Kent v. Cobb*, 24 Colo. App. 264, 133 Pac. 424; *Johnson v. Hernig*, 48 Pa. Super. Ct. 484; *Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87; *Collins v. State* (Tex.) 178 S. W. 345. As was said in *Murphey-Hardy Lumber Co. v. Roder*, 83 N. J. L. 34, 83 Atl. 769: "In view of the commercial use of the telephone and its general trustworthiness as tested by average experience, the rule to be adopted is that where in the course of a business trans-

action one party calls up another by his telephone number, recognizes and identifies his voice and discusses with him some phase of the business they have together, it is for the jury to determine, if the conversation is denied." In *People v. Dunbar Contracting Co.* 215 N. Y. 416, 109 N. E. 554, it was held that a subsequent recognition of the voice of a person as that of one with whom a telephone conversation was previously held was sufficient, the court saying: "A voice heard over the telephone may be compared with the voice of a speaker whom one meets for the first time thereafter as well as with the voice of a speaker whom one has known before. The difference affects the weight rather than the competency of the evidence (*People v. Strollo*, 191 N. Y. 42)."

A record of the telephone company showing with whom the connection was made is sufficient to identify the parties. *Spivey v. State*, 114 Ark. 267, 169 S. W. 949, wherein the court said: "The state, however, proved by the telephone operator that Mr. Lynch had a conversation with his wife on that evening, and that the records of their office show a telephone call between Mr. and Mrs. Lynch on that evening at about the same hour as that testified to by the daughter of the deceased, and also that Mr. and Mrs. Lynch were accustomed to talking to each other over the telephone. This testimony sufficiently identified the conversation over the telephone."

The identification may be by circumstances. Thus where a person calls an establishment with which he has had dealings and the person answering the telephone exhibits familiarity with the business in hand it is sufficient to show that he is connected with the establishment called. *Medlin v. Adams Grain, etc. Co.* 100 S. C. 359, 84 S. E. 867. So it has been held that where a person purporting to represent a telegraph company read over the telephone a telegraphic message and as read it corresponded with the message as received later by mail, a finding that the conversation was with the office of the telegraph company would be sustained. *Clough v. Western Union Tel. Co.* 99 S. C. 484, 83 S. E. 916. In like manner the fact that a check is received by mail from a certain person is sufficient to show the genuineness of a telephone conversation on the previous day in which a speaker claiming to be that person promised to send the check. *Tabor Coal, etc. Co. v. Cohen*, 189 Ill. App. 190.

In a number of cases it has been held that if a person calls on the telephone a business establishment the fact that the telephone is answered by a person who claims to represent that establishment and carries on a conversation as to a matter of business is prima facie evidence of the identity and authority of the

person so answering. *Tonkin-Clark Realty Co. v. Hedges*, 24 Idaho 304, 133 Pac. 669; *Wicks v. Wheeler*, 157 Ill. App. 578; *Stewart v. Soenksen*, 173 Ill. App. 1; *Gallagher v. Singer Sewing Mach. Co.* 177 Ill. App. 198; *Trapp v. Rockford Electric Co.* 186 Ill. App. 379; *Gardner v. Hermann*, 116 Minn. 161, 133 N. W. 558; *Heckman v. Davis* (Okla.) 155 Pac. 1170. And see *Northern Assur. Co. v. Morrison* (Tex.) 162 S. W. 411. See also *Fidelity Oil, etc. Co. v. Janse Drilling Co.* 34 West. L. Rep. (Alberta) 370 (automatic telephone). There are however recent cases maintaining the contrary view. *Barber v. City Drug Store* (Ia.) 155 N. W. 992; *Funk v. Bruenn*, 142 N. Y. S. 291; *Polstein v. Morse*, 147 N. Y. S. 62. The cases upholding the rule first stated almost invariably quote and follow *Wolfe v. Missouri Pac. R. Co.* 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L.R.A. 539, wherein the court said: "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and to other testimony in support or in contradiction of it." The contrary view was stated in *Barber v. City Drug Co.* (Ia.) 155 N. W. 992 as follows: "Mr. Odle, over the telephone, 'called for this man, the defendant Otto Kucharo at the drug store;' that Odle says that Kucharo answered and talked with him, and said he was the operator of the place. Assume this is evidence, does it remain so in view of the admission of Mr. Odle that he does not know appellant personally, nor know his voice, and that he cannot swear the man who answered was appellant. It is true we held in *Conkling v. Standard Oil Co.* 138 Ia. 602, 116 N. W. 822, that the mere fact the witness could not positively identify the one who talked with him should not exclude the talk from the jury as matter

of law where, as is expressly pointed out, there was corroboration as to who was talked with. But here is no case of lack in positiveness in identification, but one of no identification and of no corroboration. The naked statement that the talker is a named person, where the witness knows neither the man nor his voice, is a naked conclusion without the exhibition of one fact for its basis, with all basis negatived; and here is not even the question, is there enough so that a jury may pass on whether there is sufficient identification? but whether we shall give the alleged talk weight as evidence in a de novo hearing. We have never gone so far as that, and should not." In *Orlando v. Great Eastern Casualty Co.* 91 Misc. 539, 155 N. Y. S. 20, the majority rule was applied to a municipal department by a court which denied it application to business houses. In that case the court said: "While, in this state, a witness may not, usually, at least, testify to a conversation with a particular person over the telephone, unless the voice of such person was recognized by the witness, yet when a person in the ordinary way calls up a city department, like the police department, to give notice of some fact, I think the giving of such notice may be proved by the testimony of the person giving it."

damages; the suit in which such injunctive relief was granted having been brought before the new cross-arms were put up and before any extra wires had been strung, authorizing a use of the means of communication in the interest of the public.

[See note at end of this case.]

**Same.**

Where a telegraph company has acquired a prescriptive right to maintain its poles on the border between defendants' land and a railroad right of way with the cross-arms extending three feet over defendants' land, it cannot be enjoined from using its wires for telephone purposes, though Act Cong. July 24, 1866, c. 230, 14 Stat. 221 (7 Fed. St. Ann. p. 205) authorizing any telegraph company to construct and operate telegraph lines over and along post roads does not give the right to maintain telephone lines, as the use of the wires for telephone purposes cast no additional burden upon defendants' premises.

[See note at end of this case.]

Appeal from Circuit Court, Linn county: GALLOWAY, Judge.

Action for injunction. Postal Telegraph Company, plaintiff, and Georgiana Forster et al., defendants. Judgment for defendants. Plaintiff appeals. MODIFIED.

[122] This is a suit by the Postal Telegraph Company, a Corporation, against Georgiana Forster, M. L. Forster and Bessie S. McDonald, to enjoin interference [123] with an easement. In 1886 the plaintiff's predecessor built through Linn County, Oregon, a telegraph line setting, without grant or license, in land now owned by the defendants, three poles and putting up a little east thereof and on the border between such land and the right of way of the Oregon & California Railroad Company 15 other poles. A cross-arm six feet in length was bolted in the middle of each pole about a foot from the top and 19 feet from the ground, whereby four wires could be supported. When the line was constructed there was spiked to each pole, about a foot below the cross-arm, a wooden bracket to sustain a line of wire, and thereafter another like bracket was placed opposite the first. When the poles were put up two wires were strung, and three other wires have subsequently been added. The joint use of the poles to maintain ten additional wires was let to the Home Telephone Company, to accommodate which the plaintiff's agents, on February 1, 1913, undertook to place on the poles, about 16 feet from the ground, other cross-arms, so that two feet thereof would extend over the right of way and eight feet over the defendants' land. The longer end of the arm was to be upheld by an iron brace 8 feet long, the

**POSTAL TELEGRAPH COMPANY**

v.

**FORSTER ET AL.**

Oregon Supreme Court—November 10, 1914.

73 Oregon 122; 144 Pac. 491.

**Telegraphs and Telephones — Right to Maintain Poles — Acquirement by Prescription.**

Where a telegraph company, without grant or license, sets its poles on the border of land owned by defendants with the cross-arms extending three feet over such land, the prescriptive use of the easement for a time exceeding the statutory period of limitation does not give it a right to attach cross-arms extending eight feet over such land for the purpose of stringing additional wires.

[See note at end of this case.]

**Same.**

Where a telegraph company, which has acquired a prescriptive right to maintain its poles with the cross-arms extending three feet over defendants' land, is about to attach cross-arms extending eight feet over such land, defendants are entitled to injunctive relief and are not limited to a recovery of

lower end of which was to be fastened to the pole at a point 11 feet from the ground. As the placing of wires on the new projection would have interfered with the limbs of fruit trees growing on their premises, the defendants forcibly prevented the putting up of long cross-arms, whereupon this suit was begun. The cause being at issue was tried, resulting in a decree perpetually enjoining the use of the proposed cross-arms and from maintaining any wires for telephone purposes, and the plaintiff appeals.

*Holman & Hampson and Gale S. Hill* for appellant.

*Weatherford & Weatherford* for respondents.

[124] MOORE, J. (*after stating the facts*). —1. No authority having been given to set poles or maintain a telegraph line on the land referred to, does such prescriptive use of the easement for a time exceeding the statute of limitations carry with it the right to attach extended cross-arms to the poles and to string thereon such additional wires as may be necessary to meet the demand of increased business, and can any of the wires that have been or may be put up be used for telephone purposes? As tending to uphold the right undertaken to be exercised, reliance is placed upon the decision rendered in *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 29 L.R.A.(N.S.) 465, 102 C. C. A. 105. In that case the plaintiff's predecessor, pursuant to an act of the legislature of New Jersey authorizing the construction of a telegraph line on public roads but not to interfere with travel thereon, set in 1846, in a highway, telegraph poles about 150 feet apart and added extra cross-arms, stringing thereon wires to meet the necessary demand therefor. In 1903 a severe storm threw down the wires for quite a distance, and in order to prevent a recurrence of the prostration the plaintiff began setting an extra pole midway between every two poles in front of the defendants' premises, but not so as interfere with the use of the public road. The defendants denied the [125] right to set extra poles without compensation for the supplemental burden to the easement, and, no payment therefor having been made, they cut down the additional poles that had been put up. In order to enjoin such interference, a suit was commenced in the Circuit Court of the United States for the district of New Jersey resulting in a decree denying the relief sought: *Western Union Tel. Co. v. Polhemus*, 167 Fed. 231. Thereupon the cause was reviewed in the Circuit Court of Appeals, Third District, which reversed the decree, holding that the plaintiff's predecessor having acquired a right of way for its tele-

graph line, whether by condemnation or by grant without limitation, the easement thus secured could be used in the future in any manner that might be incidentally necessary or convenient for the principal purpose for which it was acquired. In deciding the case, the court observes:

"It seems that strengthening the line by additional poles was an incident to the enjoyment of the easement originally acquired. It was conducive to the advancement of the purpose for which the land was originally taken; for a company vested with the right of eminent domain it is not to be restricted to such limited exercise of that power that the public use, the full enjoyment of which alone justifies the grant of the high power of eminent domain, will be crippled in enjoyment. On the contrary, the scope of the power is commensurate with the full use of the end in view. And as in condemnation, so also, when an easement for a public use exists by grant, or presumption of grant, such grant, unless in some way restricted, is presumed to embrace every incident conducive to the entire enjoyment of the grant."

Though the decision referred to sustained the placing of twice as many telegraph poles as had previously been set in the highway, the fee of which was undoubtedly [126] in the proprietors of the abutting lands, such an additional burden upon the existing public easement as evidently necessary adequately to support the wires then in use. In the case at bar, however, the plaintiff undertook to extend the longer end of the cross-arm over the defendants' land five feet beyond the original projection, not to sustain wires then in use or to prevent their prostration by severe storms, but to suspend wires to be used by its lessee, thereby interfering with the limbs of fruit trees growing on the defendants' premises. The authority of the plaintiff's predecessor to build and maintain a part of its telegraph line over the land now owned by the defendants, not having been secured under color of title so that the use would be coextensive with the grant, but the right having been initiated by prescription is limited in its operation by the notice of the adverse use which was given by placing the three-foot projection of the cross-arm over such land and cannot now be extended so as further to encroach upon such premises without condemnation: *Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832.

2. It is maintained by plaintiff's counsel that the defendants' remedy was an action to recover the damages for the injury which their premises would have sustained by placing the new cross-arms and stretching wires thereon, and, such being the case, an error was committed in granting the injunction herein. Thus in *Wirth v. Postal Tel. Cable*

Co. 4 Ohio Cir. Dec. 601, 7 Ohio Cir. Ct. 290, the plaintiff undertook to enjoin the stringing in the street in front of his premises of additional wires upon a pole which had been continuously used by the defendant for nine years before the plaintiff purchased his property, and it was held that his remedy was at law. The decision in that case proceeds upon the [127] theory that as a telegraph line was a means of transporting messages in which the public had an interest, and such instrumentality had been constructed and was in operation, equity would not enjoin the use thereof, and hence an action at law to recover the damages sustained was the proper remedy. Somewhat analogous to the rule thus recognized is the principle that, when a railway line has been built and is operated over land to which no right of way has been secured, an action by the owner of the real property to recover the damages sustained does not entitle him to obtain from the railway company the value of the improvements which it has placed or made upon his premises: Oregon R. etc. Co. v. Mosier, 14 Ore. 519, 13 Pac. 300, 58 Am. Rep. 321; Larsen v. Oregon R. etc. Co. 19 Ore. 240, 23 Pac. 974. The rule invoked herein is without merit for the new cross-arms had not been put up when this suit was commenced, and for that reason no extra wires had been strung beyond the three feet of the original cross-arms so as to authorize a use of the means of communication in the interest of the public. The right to construct the main line of a railway upon a narrow strip of land granted for that purpose does not authorize the railway company to build a sidetrack on land of an abutting owner without compensation therefor. Neither does the use by the plaintiff of an easement three feet wide across the defendants' premises authorize a further appropriation of five additional feet without paying the damage which may be caused thereby.

3. It will be remembered that the plaintiff was perpetually enjoined from using for telephone purposes any wires then or thereafter to be put up over the defendants' land. This part of the decree was evidently predicated upon the rule announced in the case [128] of Richmond v. Southern Bell Telephone, etc. Co. 174 U. S. 761, 43 U. S. (L. ed.) 1162, 19 S. Ct. 778, where the defendant, relying upon the Act of Congress of July 24, 1866, Chapter 230, 14 Stat. 221, which authorized any telegraph company to construct and operate telegraph lines over and along post roads, claimed the right to maintain telephone lines over and along the streets of the City of Richmond in the absence of any consent on the part of the municipality and without applying to it for any permission to transmit messages in such man-

ner. In that case it was held that when such act became operative telephones were unknown, and, this being so, companies thereafter organized to transmit articulate speech by such means did not come within the purview of the law. That decision proceeds upon the theory prevailing in such cases that the provisions of the act of Congress granting the right to construct and maintain telegraph lines was to be construed strictly. In the case at bar, though the complaint stated that the plaintiff assented to the terms of the act referred to, no right to trespass upon the defendants' premises could be legally asserted under that enactment, and, as no advantages could thus have been secured by the plaintiff, no detriment therefrom should result to it. The use of telegraph wires for telephone purposes is not such a different employment of electricity as would necessarily cast upon the defendants' premises an additional burden from that already imposed. The degree of danger reasonably to be apprehended from the use of wires to communicate audible language can be no greater than the use of such wires to represent by signals written expressions. By the use of wires for telephone purposes no supplemental impediment would be placed upon the defendants' real property, and such employment [129] of the wires for that object may be legally made by the plaintiff, provided, however, that in doing so the cross-arms which support the wires do not extend more than three feet over their land.

Whether or not longer poles can be used than those now set upon the defendants' premises so that the proper number of wires can be suspended upon cross-arms of the length indicated is not necessary now to determine, for the question is not involved.

The decree will be modified so as not to prohibit the use of any of the wires for telephone purposes. This change, however, is not deemed of sufficient importance to authorize an award to plaintiff of the costs and disbursements which it incurred in this court.

Modified.

McBride, C. J., and Burnett and Ramsey, JJ., concur.

#### NOTE.

**Acquirement by Prescription of Right to Maintain Telegraph, Telephone or Electric Light Pole.**

*View that Right May Be Acquired by Prescription.*

It has been held in some instances that the right to maintain telegraph, telephone or electric light poles may be acquired by prescription. *Essex v. New England Tel. Co.* 239 U. S. 313, 36 S. Ct. 102; *Western Union*

Tel. Co. v. Georgia R. etc. Co. 227 Fed. 276. See also Postal Telegraph-Cable Co. v. Ingraham, 228 Fed. 392. And see the reported case. Thus in Western Union Tel. Co. v. Georgia R. etc. Co. supra, a telegraph company instituted suit in equity to enjoin the defendants from removing its wires and poles erected and maintained along the lines of the defendant's railroads. The petition alleged, inter alia, the construction, maintenance, and operation of telegraph lines on the right of way from a period antedating the war between the states, continuously up to the time of the action, at great cost and expense to complainant and its predecessors; that these telegraph lines were intended to become and did become permanent and important parts, unlimited in duration and existence, of the systems of telegraph belonging to the various telegraph companies constructing and operating the same; that neither the railroad companies nor any other person at any time objected to the construction, maintenance, and operation of these telegraph lines, but that same was well known to the defendants, and to the public generally, and that they assented to the same; that different telegraph companies in succession owned and operated these telegraph lines, until they were duly conveyed, together with all their appurtenances and easements, to the complainant. The court said: "This case is now before me on motion filed by the defendants to dismiss the bill of complainant. . . . The first question to be determined is whether, under the allegations of the bill, the telegraph company obtained a perpetual and irrevocable easement in and upon the right of way of the railroad company for the construction, maintenance, and operation of its telegraph lines. The telegraph company alleges that it and its predecessors derived title to such an easement in several different ways, . . . to wit: (a) By an executed parol license; (b) by express grant; (c) by prescription; and (d) by express or implied dedication to public use. If the allegations of the bill are sufficient to show by reasonable intentment and construction that the telegraph company acquired title to the easement in question in either of the four ways above mentioned, its title would be sufficient to withstand the attack made on it." After discussing the right of the telegraph company to acquire an easement by virtue of a parol license, the court continued: "The telegraph company also claims title to said easement by prescription. Section 4170 of the Code of Georgia of 1910 is in the following language: 'An incorporeal right which may be lawfully granted, as a right of way or the right to throw water upon the land of another, may be acquired by prescription.' . . . The bill alleges that complainant

and its predecessors in title have been in possession of the easement in question for from 20 to 50 years, and that such possession has been public, continuous, open, notorious, exclusive, uninterrupted, and peaceable, and accompanied by a claim of right. These allegations satisfy the statutes and the decisions of the highest court of this state, [Georgia] on the subject. . . . The principal argument of counsel for defendants on this point is that the possession of the complainant and its predecessors was permissive, and not adverse, and they rely upon the concluding sentence of section 4164 of the Georgia Code, which is in the following language: 'Permissive possession cannot be the foundation of a prescription, until an adverse claim and actual notice to the other party.' This expression of the law, however, does not mean that the possession must not originate in permission. If, for instance, a grantor executes a deed to his grantee, and in pursuance thereof permits him to take possession of the property granted, or if a licensor gives a parol license to a licensee for a right of way over his premises (upon the faith of which the licensee makes an outlay of money in improvements necessarily permanent in their nature), then in both of these instances the possession originates in permission, but it thereupon becomes adverse, and does not continue to be permissive. . . . Counsel for defendants insist in their motion that the allegations of the bill as to a prescriptive title are fatally defective, for the reason that complainant nowhere alleges that its possession was 'adverse.' . . . We think that, while complainant has not used the word 'adverse' in the allegations of its bill, still it has used expressions which are tantamount thereto, and that therefore the allegations of the bill are sufficient to show title by prescription." In Postal Telegraph-Cable Co. v. Ingraham, 228 Fed. 392, it was held, inter alia, that where a telegraph company has erected and maintained its poles and wires in the streets of a municipality for a period of twenty-five years, the municipal authorities will not be permitted to claim that the original permit under which the poles were erected was invalid because of an irregularity. Any irregularity must be held to have been made good by so long a period of acquiescence. In Essex v. New England Tel. Co. 239 U. S. 313, 36 S. Ct. 102, the appellant, the Town of Essex, was enjoined by a decree of the lower court from interfering with the operation of lines owned by the appellee telegraph company, and situated in the highways of the municipality. The controversy arose under the Act of Congress of July 24, 1866 (c. 230, § 14, Stat. L. 221, Rev. Stat. §§ 5263 et seq. 7 Fed. St. Ann. p. 205) which declares that

companies accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post roads of the United States," provided they do not interfere with ordinary travel. A Massachusetts statute providing, *inter alia*, that "no enjoyment by a person or corporation for any length of time of the privilege of having or maintaining telegraph posts, wires, or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof," was also involved. It appeared that in 1884 the appellee made a written application to the Essex selectmen for a right of way, but their records disclosed nothing concerning the matter. Directly thereafter, without opposition, the existing lines were constructed along 4 miles of the town's highways. During many succeeding years no objection was made to their operation, and, until a short time before the suit was begun, their presence was acquiesced in. There was evidence indicating that half the poles were relocated under direction of a selectman, about 1895, when an electric railway was laid down. In 1902, repairs being needed, the selectmen were petitioned to locate the poles and license their future maintenance. This request was not granted. In 1905, repairs having become imperative, another petition for a location was presented. This was refused; officers of the town then denied the appellee's right to use the highways, and threatened to prevent repairs, by force if necessary, and to take action against future operation of the lines within its limits. The court said: "With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejection. . . . There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations, and treat the company as a naked trespasser. Its rights under the Federal law

would be violated by the threatened arbitrary interference."

The holding of the reported case to the effect that no authority having been given to set poles or maintain a telegraph line on the land of a third person, the prescriptive use of such an easement for a time exceeding the statute of limitations does not carry with it the right to attach longer or extended cross-arms to the poles and to string thereon additional wires over the land of the third party, is apparently one of first impression. The holding is based on an earlier decision of the Oregon court, *Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832, wherein it was said: "It is axiomatic that the right acquired by prescription is exactly commensurate with the right enjoyed; that is, the extent of the enjoyment measures the extent of the right. Furthermore, the right gained is always confined to the right as exercised during the full period required by the statute of limitations." In *Wirth v. Postal Teleg. Cable Co.* 4 Ohio Cir. Dec. 601, 7 Ohio Cir. Ct. 290, commented on by the court in the reported case, the plaintiff sought to enjoin the defendant company from stringing additional wires on poles erected in front of his property and which had been maintained by the defendant company for a period of nine years prior to the purchase of the land by the plaintiff. The court said: "Now, there is no proof so far as I can find in the testimony one way or the other, as to how, and under what right, this telegraph line was erected in front of the premises. There is the allegation on the part of the plaintiff that it was done without authority or without appropriation, which is denied by the defendant, who says it was with the full acquiescence of the then owner of the land. There is this fact that to me has significance. The plaintiff is not seeking to attack the right to maintain that line in front of these premises; he concedes by the relief he asks, and by his allegations, that they might go on using the pole that is up there, and the wires that are now strung, but he seeks the interposition of a court of equity to prevent the renewal of that pole or the stringing of other wires. That is just about what there is of it. Here was a right of way that it does not appear whether it was rightfully or wrongfully obtained, whether this occupancy is rightful or wrong, but that it has been in operation for nine years as a part of a general system extending from New York to Chicago, and they seek now, instead of attacking the right to maintain any wires there or any poles, or seeking to make them appropriate the right of way, or to recover any relief because the whole thing is wrong, they simply stand upon the ground that, although the pole and the wires now strung

as a part of this system or right of way may be maintained, you cannot string and must not string other wires; and they desire a court of equity to take cognizance of this, and grant an injunction upon that ground. Now, we do not think it is a case for a court of equity to interfere. If this party has any complaint as to the right of way of this company in toto, and seeks to make them appropriate any rights they are using of his, or seeks to call them to an account for damages done to his property, then we think he should be left to that remedy, and we do not undertake to say he has no such remedy; but what we do undertake to say is, that this trifling difference between eight wires and thirteen is not a case that a court of equity is called upon to prevent, and that is all I need to say about it. The decree will be dismissing the petition." Likewise in *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L.R.A.(N.S.) 465, which is set forth at some length in the reported case, it appeared that the respondents denied the right of a telegraph company to place additional poles on the highway in front of their property without compensation. The court said: "Now, the telegraph line being authorized, a recognized factor of commerce . . . and being a public use . . . and having been in use all these years, it is to be presumed that the right so to do, with reference to abutting land owners, was acquired from the predecessors of these respondents who then owned the abutting lands here concerned, in which event due compensation for present and future use thereof was either paid to or waived by them. . . . When an easement for a public use exists by grant, or presumption of grant, such grant, unless in some way restricted, is presumed to embrace every incident conducive to the entire enjoyment of the grant."

***View that Right Cannot Be Acquired by Prescription.***

There are other authorities which tend to sustain the view that the right to maintain telegraph, telephone, or electric light poles cannot be acquired by prescription. *Merced Falls Gas, etc. Co. v. Turner*, 2 Cal. App. 720, 84 Pac. 239; *Andrews v. Delhi, etc. Telephone Co.* 36 Misc. 23, 72 N. Y. S. 50, *affirmed* without opinion 66 App. Div. 616, 73 N. Y. S. 1129. See also *Pittsburgh, etc. R. Co. v. Beck*, 152 Ind. 421, 53 N. E. 439; *Bradley v. American Tel. etc. Co.* 54 Pa. Super. Ct. 388. Thus in *Merced Falls Gas, etc. Co. v. Turner*, *supra*, the plaintiff company instituted proceedings to obtain an injunction restraining the board of trustees and superintendent of the streets of a city from changing the position of certain electric light poles on a street in the city. For ten years prior to

the commencement of the proceeding the corporation had been and then was furnishing the city and its inhabitants with electric light and in so doing had maintained nine electric light poles, at as many different corners on the street mentioned by permission of the city trustees and without hindrance from the defendants or their predecessors in office, until shortly before the bringing of the action when the board of trustees, by resolution, ordered that the poles should be changed to other positions than those previously occupied, and the company failing to remove the poles as directed and required by the resolution, the superintendent of streets, by another resolution, was ordered to make the change, and proceeded to do so. In denying the right of the plaintiff to enjoin the municipal authorities the court said: "The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that lapse of time creates no prescriptive right to public property."

In *Pittsburgh, etc. R. Co. v. Beck*, 152 Ind. 421, 53 N. E. 439, it appeared that a railroad company attempted to justify the taking of a certain strip of land on the theory that it had acquired title thereto by the maintenance of a line of telegraph poles across the property. The court said: "The erection of a line of telegraph poles within the corporate limits of a city or town, and the maintenance and use of a telegraph line along the same by a railroad corporation, in the absence of other evidence of the intention of the railroad company to appropriate the strip of land between the telegraph poles and the lines of the bed of the railroad, or the right of way of the company, are not sufficient, in our opinion, to authorize the conclusion that such interjacent strip of land has been appropriated by the railroad corporation." In *Bradley v. American Tel. etc. Co.* 54 Pa. Super. Ct. 388, it appeared that the owner of land, who had refused to sign any agreement or accept any compensation, permitted a telephone company to erect poles and maintain its wires on his land with the alleged understanding that they were to be removed on request. The court held that the company having acquired possession under such conditions was not in a situation to assert that it had an executed license in perpetuity, the court saying that it would be a fraud on the owner to enter in that manner and afterward hold possession under a claim of a different title. In *Andrews v. Delhi, etc. Telephone Co.* 36 Misc. 23, 72 N. Y. S. 50, *affirmed* without opinion 66 App. Div. 616, 73 N. Y. S. 1129, an action of ejectment brought for the purpose of removing from the plaintiff's



land certain telephone poles and wires, and to restrain the further use and occupation by the defendant of the plaintiff's line, it appeared that the poles and wires were erected in the year 1870, and the line was in occupation and use by the defendant as a telephone and telegraph line since that time. The poles were erected and the line was strung along the public highway on the premises owned and occupied by the plaintiff and his grantors. The plaintiff, desiring to make improvements on the premises in the vicinity of his residence, procured the consent of the proper town authorities of his town to change the location of the highway, so as to straighten an angle in said highway in front of his premises. The highway was thereupon changed, and the plaintiff commenced to improve and ornament the premises in the vicinity of his house, laying out a lawn and private approaches, planting shade trees, grading, ornamenting, and adorning the premises in question as a country summer residence. The highway originally ran very close to the farm buildings, and, as the highway was then situated, it afforded very little opportunity for lawns, paths, and ornamentation. After the road was changed, the defendant's telephone line ran directly through the lawn, and close to the defendant's dwelling house, on said premises. The plaintiff sought to have the defendant remove its line to some more convenient location. This the defendant refused to do, except on certain onerous conditions imposed by it. The action was brought by the plaintiff to compel the removal from his premises of said line and the poles on which the wires were strung. The defendant claimed that, the line having been erected and used for more than 20 years, and peaceably occupied by the defendant company, the defendant had acquired title to the location in question, first, by original consent, subsequently by adverse possession. There was no direct evidence in the case to show that consent was originally given for the erection of the poles and the stringing of the wires thereon by defendant corporation. It was claimed by the defendant corporation that it had been in open, actual, and notorious possession of that portion of the premises used by it during all of the time since 1870, under a claim of title adverse to the plaintiff and his grantors; and that from that occupation the presumption arose that the defendant originally did have a license to erect its poles and lines in the public highway upon and along the premises in question. The court said: "It is a principle of law that permission cannot be inferred from a superficial occupation of another's premises. . . . The presumption rather is that the occupation was and is subordinate to the rights of the person hav-

ing the actual title to and being in possession of such premises. . . . Adverse possession cannot be obtained against the owner in fee except by one having a claim of title. . . . Assuming that the defendant had acquired its charter from the legislature of the state to run its line along the public highway, still the legislature had no power to grant to the defendant title in the premises, nor could the legislature impose upon the premises an additional burden without the consent of the owner in fee. . . . The poles and wires having been erected in a public highway outside of a city or village, the statute of limitations does not run against the title of the real owner and occupant of the premises, and the bar of the statute does not apply. . . . If it could be assumed that a parol permission was ever granted to the defendant corporation by the original owner of said premises, when the written conveyance was made from that owner to the plaintiff's grantor, that deed revoked the license or the permission so given. A parol license conveyed no title to the premises in question."

Cases discussing the acquisition of title to land within the right of way of a railroad by adverse possession or prescription are collated in the notes to *McLucas v. St. Joseph, etc. R. Co.* 2 Ann. Cas. 715; *Roberts v. Sioux City, etc. R. Co.* 10 Ann. Cas. 992, and *Dulin v. Ohio River R. Co.* Ann. Cas. 1916D 1183.

## DENVER AND RIO GRANDE RAILROAD COMPANY

v.

MILLS.

Colorado Supreme Court—April 5, 1915.

59 Colo. 198; 147 Pac. 681.

### Eminent Domain — Appeal — Finality of Order.

Where, in a condemnation proceeding, the court made an order granting the petitioner's motion for leave to dismiss, but reserving for further consideration its motion for the return of a deposit made to obtain possession of the property, and subsequently an order was made granting the right to dismiss, denying the application for a refund of the deposit, and ordering the payment of the deposit to the defendant, the order with respect to the deposit is not one relating merely to costs, and for that reason not appealable, as the disposition of the deposit is essential to a final disposition of a condemnation proceed-

ing, and until it was disposed of the rights of the parties were not fully determined.

[See Ann. Cas. 1915D 548.]

**Same.**

The order is not a conditional order, the dismissal of the proceeding not being upon the condition that the deposit should be paid to defendant, and the order for the payment of the money to defendant not being conditional upon the dismissal of the proceedings, as the court definitely reached its conclusion as to the right to a dismissal before determining the disposition of the deposit.

**Dismissal of Proceeding — Allowance to Land Owner.**

On the dismissal of a condemnation proceeding, even though the court had power to allow to defendant attorney's fees, traveling expenses, and other expenses incurred in preparing to defend the proceeding, it is error to make such allowance, in the absence of proof as to the amount expended or incurred for such expenses or fees, other than that the total was in excess of the amount of the deposit.

[See note at end of this case.]

**Deposit to Secure Award — Allowance Out of Deposit on Dismissal**

Under Rev. St. 1908, § 2420, providing, relative to condemnation proceedings, that the court shall appoint a commission to ascertain and determine the necessity for taking the land, and to appraise and determine the damages and compensation to be allowed, and that the judge or court shall determine the amount the petitioner shall be required to pay or deposit pending any such ascertainment, and section 2456, providing that immediately upon the filing of the petition, accompanied by the deposit of the amount which the court or judge shall determine to be compensation proper to be made, the court or judge shall authorize the petitioner to take or keep possession of the property during the pendency of the proceeding, the deposit is required for the sole purpose of making secure the award of compensation for the land taken, and the court has no authority to require a deposit to be applied on costs accrued or to accrue.

**Dismissal of Proceeding — Allowance to Land Owner.**

There being no special statutory authorization for an allowance of costs in condemnation proceedings, though the court may allow court costs, it cannot allow attorney's fees and other expenses incurred by defendant.

[See note at end of this case.]

**Bad Faith in Bringing Proceeding.**

Where a railroad company instituted a condemnation proceeding for the purpose in good faith of constructing its line across the lands in question to supply a public necessity, bad faith is not shown by the fact that the petition, without expressly alleging defendant's title to the property in question, alleged a dispute between plaintiff and defendant as to such title, and an adjudication by another court that defendant had acquired title by possession under color of title and by regis-

tration of his title, though an objection sustaining an attack on the petition for failure to allege defendant's title was sustained by the court, as the railroad company had a right to institute the proceeding, and the exercise of such legal right could not be a legal wrong to defendant, and its motive, in the absence of any legal wrong, was immaterial.

Error to District Court, Huerfano county.  
HUNTER, Judge.

Condemnation proceeding. Denver and Rio Grande Railroad Company, plaintiff, and Ogden Mills, defendant. Judgment of dismissal. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

*E. N. Clark* and *R. G. Lucas* for plaintiff in error.

*James M. McKeough* and *Bartels & Silverstein* for defendant in error.

[199] SCOTT, J.—On the 11th day of July, 1912, the plaintiff in error [200] filed its petition in condemnation of a right of way for the construction and operation of a branch line across certain lands of which the defendant in error claimed to be the owner. This petition in all respects conformed to the statutes in such a proceeding, except that it did not declare that the defendant in error was the owner of the premises. The petition on the contrary set forth that both plaintiff and defendant claimed title to the premises, and that theretofore and on the 12th day of June, 1912, the defendant in error filed his bill of complaint in equity in the District Court of the United States for the District of Colorado, claiming that he was the owner and in peaceable possession of the premises, and praying an injunction against the alleged trespass of the plaintiff. The petition of the plaintiff in this case further alleged:

"That upon the return of said temporary restraining order and in order to show cause in said District Court of the United States on the 21st day of June, 1912, your petitioner filed its return hereto, wherein and whereby your petitioner denied the alleged ownership, title and possession of the defendant herein of, in and to the above described premises, and denied any trespass, actual or threatened, on any premises of the defendant herein, and claimed that the title to the 200-foot strip on which it was proposed to construct said alleged spur track was originally vested, by an act of Congress of the United States, in the Denver and Rio Grande Railway Company, and that the said strip had been used by said The Denver and Rio Grande Railway Company for many years, and that your petitioner was the successor in interest to, and was vested with full title to, and to the possession

and right of possession of, all and singular the property rights and franchises of every kind and character whatsoever which had theretofore in any manner vested in said The Denver and Rio Grande Railway Company and your petitioner claimed that the ownership, [201] title and possession of said 200-foot strip upon which it was proposed to construct said track was in your petitioner, under and by virtue of said act of Congress, and subsequent conveyances and proceedings with reference to said The Denver and Rio Grande Railway Company; and defendant also alleged that said proposed track to be constructed by your petitioner on said 200-foot strip was for a public use.

"That thereafter, and on the 26th day of June, 1912, the said District Court of the United States made and issued its order holding that your petitioner and its predecessors in interest had abandoned the title and possession to said 200-foot strip above mentioned, and that the defendant herein was in possession thereof, and that the defendant herein had acquired title thereto by seven years' actual possession under color of title, and that by registration under the 'Torrens Act,' of the State of Colorado an indefeasible title to said strip was vested in the defendant herein, and that the defendant herein, on filing a bond, was entitled to an injunction *pendente lite*, restraining your petitioner from entering upon or using said 200-foot strip, thereby rendering the institution of these present condemnation proceedings by your petitioner necessary."

On the day of filing the petition for condemnation, the court entered an order for immediate possession, and providing that before the order should go into effect, "the petitioner shall deposit with the court, to be held subject to its order, and to abide said condemnation proceedings in accordance with the statute in such case made and provided, the sum of \$500.00." This sum was at once deposited in accordance with the order of the court.

The defendant thereafter filed his motion to vacate the order for immediate possession, upon the grounds stated therein, chiefly dealing with the disputed title to the premises, and the proceedings in the United States District Court in relation thereto.

[202] The strip of land proposed to be condemned in this proceeding was 50 feet wide, being 25 feet wide on each side of the center line of the original narrow gauge track of the Denver and Rio Grande Railway Company.

The court entered an order upon the hearing of the motion to vacate, in substance to the effect, that if the above named petitioner amends its petition heretofore filed herein within fifteen days from the date of this or-

der, so as to unequivocally allege the ownership of the strip of right of way sought to be condemned herein, in the above named defendant, then, and in that event, said order for immediate possession heretofore made herein shall stand, otherwise the same shall be vacated.

Thereafter and on the 31st day of July, 1912, the plaintiff in error filed its motion for a dismissal of the condemnation proceeding, without prejudice to the rights of the petitioner to proceed in such other manner, as it may see fit in accordance with law. Upon the hearing of this motion the court entered the following order:

"It is therefore ordered, adjudged and decreed that that part of petitioner's motion asking to dismiss and discontinue said condemnation proceeding be and the same is hereby granted, and that said condemnation proceeding is hereby dismissed and discontinued at the cost of petitioner. It is further ordered, adjudged and decreed that that part of petitioner's motion asking that said deposit of \$500 be refunded and the same is hereby reserved for further consideration."

Later, and on the 9th day of January, 1913, the court made the following findings and entry of judgment:

"The court, after being advised by argument of counsel on behalf of petitioner as well as respondent, and further consideration of said matter, finds:

First. That the petitioner should be granted right to dismiss said proceeding. That petitioner should be denied [203] to a right of refund of its deposit of five hundred dollars made herein.

It is therefore ordered, adjudged and decreed that petitioner be and is hereby granted the right to dismiss the condemnation proceedings herein.

And it is further ordered, adjudged and decreed that the application of petitioner to a refund of the deposit of \$500 made herein be and the same is hereby denied, and that the clerk pay said sum of \$500 to Ogden Mills, the respondent herein."

The only assignment of error is as to that part of the order and judgment, directing the clerk to pay to the defendant in error the \$500 so deposited by the plaintiff at the institution of the proceeding.

The record discloses that the plaintiff did not at any time enter into possession, and did not disturb the premises nor the possession of the defendant thereto. There was no finding or award as to damages, and the defendant does not claim damage to the land, but does claim an allowance for his costs and expenses, including counsel fees in defending the proceeding. The court costs had been taxed and paid. There was no testimony taken in the matter, but the several motions

were supported and opposed by affidavits. The court made no finding as to the amount of attorneys' fees incurred by the defendant, nor as to any other matter of expense, but simply ordered the full sum so deposited in the condemnation proceeding to be paid to the respondent.

The defendant in error raises the question that the part of the order to which the plaintiff objects is not reviewable; that the order of August 14th, 1912, dismissing the proceeding, was final, and that the order of January 9th, 1913, related only to costs, and for such reason is not appealable. But it is plain that the \$500 judgment was not for costs, as that term is understood within the rule of this court, denying the right to a writ of error to review an order for the [204] payment of costs alone. The motion was for a refund of the deposit.

The deposit and its disposition was a part of the proceeding, and the court in its order of August 14th, expressly stated that it was not satisfied as to the right of the plaintiff in error to have the same refunded, and for such reason reserved the question for further consideration. This left the rights of the parties as to the specific sum of money still undetermined, and the cause was continued pending a further consideration of the motion. There was still something further for the court to do, in order to determine the rights of the parties involved. *Denver County Court v. Eagle Rock Gold Min. etc. Co.* 50 Colo. 365, 115 Pac. 706.

It is apparent that the court intended his decree of January 9th, to be the final judgment as to the entire matter, for this contains a dismissal of the proceeding together with the award of the deposit. The disposition of the deposit in a condemnation proceeding is essential to a final disposition of the cause. *Denver, etc. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582.

It is further contended by the defendant in error, that the order of the court dismissing the proceeding was conditional, and authorities are cited applicable to conditional dismissals. But the dismissal of the proceeding in this case was not upon the condition that the deposit should be paid to the defendant, nor upon any other condition. Nor was the order for the payment of the money to the defendant conditional upon the dismissal of the proceeding. It is plain that the court definitely reached and announced his conclusion as to defendant's right of dismissal before he had determined the question of disposition of the deposit.

These questions were clearly determined by the court, each independent of the other, and wholly without any relation of one subject-matter to the other.

It is at least open to grave questions whether the court [205] had the power in any event

to impose a condition to the dismissal of a condemnation proceeding.

The settled rule in this respect is that in the absence of a statutory provision showing a legislative intent to the contrary, the condemning party may discontinue the condemnation proceedings at any time before the right of the property owner to compensation or damages has become complete. 15 Cyc. 935.

Under our own statutes it has been held that the privilege of abandonment may be exercised at any time prior to the payment or deposit in the manner provided by law of the sum awarded *Denver, etc. R. Co. v. Lamborn*, supra. But the privilege to so abandon the proceeding does not relieve the condemning party from the payment of such costs and damages as may be lawfully recovered.

We come now to the paramount question in the case. Did the court err in denying the motion of the plaintiff for a return to it of the deposit, and in awarding such deposit to the defendant, as payment for the "cost, damages and expense incurred by him by virtue of the institution of the proceedings."

The only claim of the defendant to the deposit was as follows:

"That he was compelled by the institution of these proceedings to employ counsel to come from Denver to Trinidad, and to employ counsel at Trinidad, Colorado, and to have his representative, J. A. Ownbey, come to Trinidad, all at a great expense, and that the damage and expense and cost to which this respondent has been put, legitimately and reasonably, by virtue of the institution of these proceedings, is largely in excess of the sum of five hundred dollars so deposited by the said petitioner."

There is no statement as to the amount of attorneys' fees paid or incurred, nor as to the expense of the agent in coming to Trinidad. It is not even stated from whence such [206] agent came. There was no testimony upon this subject. The court simply ordered the payment of the deposit of \$500 to be made to the defendant. This not only without proof, but without statement of the amount separately or otherwise expended or incurred, either as to traveling expenses, or for attorneys' fees, other than that the total of these was in excess of the \$500 deposit.

There is neither authority of law, nor reason or justice, for the rendition of such a judgment upon this showing, even though such expenses were properly allowable in the case. The showing does not even permit of respectable speculation as to the amount, either in the matter of attorneys' fees or traveling expenses. The order was therefore without basis and arbitrary in the extreme.

Our eminent domain statute, sec. 2420, provides that the court shall appoint a commission "to ascertain and determine the necessity

for taking such lands, franchises or other property, and to appraise and determine damages, and compensation to be allowed to the owner and person interested in the real estate or property proposed to be taken or damaged in such county, for the purposes alleged in the petition." And further: "That the judge or the court before or wherein any such proceedings are had shall determine the amount such petitioner shall be required to pay or deposit pending any such ascertainment."

Section 2456 provides:

"Immediately upon the filing of the verified petition provided for by section 1716 of Mills' Annotated Statutes, accompanied by the deposit with the clerk of the court for the use of the respondent of that amount of money which the court or judge thereof, from the affidavits of two disinterested persons selected by the petitioner and from such other evidence as the court or judge thereof may require, shall determine to be compensation proper to be made to any person or corporation holding or owning any right, title, [207] interest, claim, lien or estate in, to or upon any lands, real estate, mining claim or any interest therein, the court or judge thereof shall, by rule in that behalf made, authorize the petitioner if not in possession to take possession of such right of way, and if already in possession to maintain and keep such possession and in all cases to use and enjoy such right of way during the pendency and until the final conclusion of such proceedings, and shall, by rule in that behalf made, stay all actions and proceedings against such petitioner on account thereof."

The statute is silent upon the question of the payment of attorneys' fees, or of any such expense as is claimed in this case by the defendant in error.

It is plain that the deposit under the statute is required for the sole purpose of making secure the award of compensation to be made for the taking of the land. The court has no authority to require the petitioner in a condemnation proceeding to deposit a sum to be applied on costs accrued or to accrue. *Teller v. Sievers*, 20 Colo. App. 109, 77 Pac. 261.

The nature and character of the preliminary deposit in a condemnation proceeding was considered by this court in the case of *Clelland v. McCumber*, 15 Colo. 355, 25 Pac. 700, where it was said:

"It seems clear that the petitioner making such deposit has an immediate and direct interest therein at all times until the final adjudication, and until the same is finally applied to its ultimate purpose. Such deposit is essential to petitioner's right of entry and possession. If by any means it is withdrawn before the final determination of the controversy, petitioner's right of possession is suspended. The preliminary deposit is not

payment, nor part payment, until it is actually so applied. It is in the nature of a continuing tender, and must at all times be kept good by petitioner, though it lacks some of the incidents of tender, in that the [208] owner is not bound to accept it or incur the risk of being mulcted in costs, if it proves sufficient. In receiving the preliminary deposit, the court, or its proper officer, acts as the depository of the petitioner, who thereby, in pursuance of the statute, acquires the privilege of immediate entry and possession of the premises sought to be taken. The owner is an involuntary party to the proceeding. If by any means the deposit fails, petitioner's statutory privilege is at once imperiled, and the possession may be actually terminated unless the deposit be replaced. The deposit, therefore, must be considered as held by the public official at the risk of the petitioner, until the same is actually applied to its ultimate purpose, or is otherwise legally disposed of."

Then under the law as heretofore determined by this court, the deposit was the property of the railroad company, in custody of the law, and to be used only for the payment of damage by reason of the taking, and not for costs of the suit.

Whether by its order alone the court in this proceeding could levy on the deposit, in payment of lawful costs incurred by the proceeding, or whether such costs must be recovered in an independent action, as held in some jurisdictions, we do not find it necessary to determine.

A proceeding in condemnation is a special proceeding, and it has been generally held that to authorize an allowance of costs in special proceedings, some special statutory authorization is necessary. That these proceedings are not within the purview of statutes authorizing the allowance of costs in actions generally. 11 Cyc. 53.

In some jurisdictions statutes have been enacted authorizing allowance of costs in special proceedings, or in a designated class of such proceedings, and in some states the matter of the allowance of costs in such cases has by statute been placed within the discretion of the court. There is no statute of either character in this state.

But notwithstanding such general rule this court has [209] held that court costs may be allowed. *McClain v. People*, 9 Colo. 190, 11 Pac. 85; *Dolores No. 2 Land, etc. Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378. But the court has never gone so far as to hold that attorneys' fees, and such other expenses as are involved here, may be recovered in a condemnation proceeding. Indeed, in the only case where the question has been raised it was held that such expense could not be recovered under our statute. In the case of *Schneider*

v. Schneider, 36 Colo. 518, 86 Pac. 347, which was a condemnation proceeding for the right of way for an irrigation ditch, it was said:

"Appellant complains bitterly because the trial court did not compel plaintiff to pay defendant's attorney fees, amounting to \$250.00. The statute makes no provision for the payment of such attorney fees, and the trial court would not have had the right to make such an order."

This view is supported by the overwhelming weight of authority. In *Stevens v. Danbury*, 53 Conn. 9, 22 Atl. 1071, it was said:

"The plaintiffs claimed also to recover for counsel fees and other expenses incurred in the hearing before the appraisers. These very clearly they had no right to recover in any circumstances. The borough was acting within the law in applying for an assessment of the damages, and the law under which the proceedings were had made no provision for costs on either side, while the abandonment of the taking of the property by the borough could not create an obligation to pay these costs where no legal obligation existed before. There was no negligence on the part of the borough; no misrepresentation; no action that was not in every respect according to law. There was nothing upon which to found a claim for damages for a consequential injury in any form."

The Supreme Court of Utah in *McCready v. Rio Grande Western R. Co.* 30 Utah 1, 8 Ann. Cas. 732, 83 Pac. 331, wherein it was said that the [210] decisive question presented was, whether a party who in good faith commences an action under the eminent domain act, is liable upon dismissal of the suit by such party, to the owner of the land for expenses he was put to in employing counsel, hiring witnesses and his own loss of time and expenditures made in defense of the suit; that is, such expenditures made in defense of the suit; that is, such expenditures as a party may be put to in preparing his defense, said:

Counsel for appellant do not question the general proposition that in civil cases generally the defendant is not entitled, upon a dismissal of a suit brought in good faith, to recover for expenses made by him in preparing his defense which are not taxable as costs in the case; but they contend that in eminent domain proceedings to condemn land, because the plaintiff is given the right to acquire the title and possession of land without the owner's consent, a different rule should govern, and, in addition to expenditures which the landowner is permitted to tax as cost upon a dismissal of the action, he should be permitted to recover for whatever other damages or losses he may have sustained by the institution of the suit. We know of no reason—and certainly none has been suggested or pointed out—why the exception contended

for should be made in this class of cases. For aught that appears in the record, the defendant acted in perfect good faith in bringing its suit to condemn; and so long as it acted in good faith, it cannot be held to be guilty of a legal wrong, as suits of this character are expressly authorized by the laws of this state, and if the defendant in that case necessarily incurred expenses in preparing his defense that were not taxable as costs in the action, it is a case of *damnum absque injuria*, for which no recovery can be had."

And in *Andrus v. Bay Creek R. Co.* 60 N. J. L. 10, 36 Atl. 826, the court gave as reason for the rule, that "the [211] difficulty with the case laid is that it exhibits a loss to the plaintiff produced by entirely legal conduct on the part of the defendant. It is clear case of *damnum absque injuria*. There was no legal wrong done to the plaintiff by the institution of this procedure nor of its discontinuance. In all this there was no abuse of legal process. That an action will not lie in such a condition of facts has always been the doctrine of the courts of this state."

In *Lincoln Northern R. Co. v. Wiswell*, 8 Cal. App. 578, 97 Pac. 536, it was said: "Appellant makes the point that the court should have required payment of attorneys' fees as part of the costs. Section 1255 provides that 'costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.' These costs are such as ordinarily attend the trial of causes."

See also *Winkelman v. Chicago*, 213 Ill. 360, 72 N. E. 1066; *Coburn v. Townsend*, 103 Cal. 233, 37 Pac. 202; *San Jose, etc. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522; *In re Moyer St. & Phila.* 81, 22 Leg. Int. 365; *Lincoln Northern R. Co. v. Wiswell*, 8 Cal. App. 578, 97 Pac. 536; *North Carolina R. Co. v. Goodwin*, 110 N. C. 175, 14 S. E. 687; *Jones v. Liberty Tp. School Board*, 140 Ia. 179, 118 N. W. 265; *Hester v. Detroit Park, etc. Com'rs*, 84 Mich. 450, 47 N. W. 1097; *Bergman v. St. Paul, etc. R. Co.* 21 Minn. 533.

There are cases holding that attorneys' fees and other expenses in condemnation may be allowed, but with only an occasional exception, this is based upon statutes authorizing such allowance. Thus in the case of *Woodcock v. Wabash R. Co.* 135 Ia. 559, 113 N. W. 347, referring to a statute authorizing attorneys' fees in the lower court, it was said: "Without this section plaintiffs would not be entitled to have attorneys' fees taxed to defendant for services either here or in the district court, as such fees are not, in the absence of statute, regarded as taxable costs."

"It is urged by counsel that this proceeding was not [212] brought in good faith by the plaintiff in error, and that the petition dis-

closes an attempt to withhold from the court the true status of the title to the land in question. With this we cannot agree. The record discloses a good faith purpose of the railroad to construct its line across the lands in question to supply a public necessity. The petition on its face sufficiently disclosed the disputed title. At least the defendant in error by its motion attacked it, and the court sustained the objection. The order of the court commanding an allegation of unquestioned title in the defendant, went to the insufficiency of the pleading, and not to bad faith upon the part of the petitioner. Bad faith cannot be imputed to an action because of the insufficiency of the pleading alone.

The railroad company had a legal right to institute the proceeding. The exercise of a legal right by one cannot be a legal wrong to another. *Cooley on Torts*, p. 638. The motive with which one does an act furnishes no cause of action, unless there be some legal wrong. *Kelly v. Chicago*, etc. R. Co. 93 Ia. 437, 61 N. W. 957. A man's motive will not make wrongful an act which is not wrongful in itself. *Heald v. Carey*, 11 C. B. 977, 73 E. C. L. 977.

The court erred in refusing to return to the plaintiff in error the amount of its deposit, and also in ordering the payment of such deposit to the defendant in error.

The judgment is reversed with direction to enter an order for the payment of the sum deposited to the plaintiff in error.

Gabbert, C. J., and Garrigues, J., concur.

#### NOTE.

It is held in the reported case that the condemnor may discontinue an eminent domain proceeding at any time before the right of the landowner to compensation becomes vested, but that in so doing he is liable to the landowner for all damages caused by the commencement of the proceeding. It is however held, in passing on an application by the condemnor for leave to withdraw its deposit, that attorney's fees incurred by the landowner cannot be allowed as damages on the discontinuance. The stage at which an eminent domain proceeding may be discontinued is discussed in the note to *Cunningham v. Memphis R. Terminal Co.* Ann. Cas. 1913E 1058; and the right of the landowner to damages on the discontinuance of eminent domain proceeding is considered in the notes to the following cases: *McCready v. Rio Grande Western R. Co.* 8 Ann. Cas. 732; *Ford v. Park Com'rs*, Ann. Cas. 1912B 940; *Gibbs v. Rex*, Ann. Cas. 1916D 709. See also the note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 288, 313, which discusses the expense incurred by a landowner as a proper element of damages in eminent domain proceedings.

#### CROWNFIELD

v.

#### PHILLIPS ET AL.

Maryland Court of Appeals—January 12, 1915.

125 Md. 1; 92 Atl. 1033.

#### Appeal and Error — Stay Pending Appeal — Discretion of Trial Court.

The supreme court has no power to review the refusal of the lower court to annul the effect of an appeal from an order refusing to grant a preliminary injunction; such being a matter expressly left to the discretion of the court in which the proceedings are pending.

#### Partnership — Right of Partner to Engage in Competing Business.

A partner, without the consent of his co-partners, cannot carry on a business of the same nature and competing with that of the firm, and, if he does so, equity may enjoin its continuance.

[See note at end of this case.]

#### Same.

Where after disagreement between partners, and pending dissolution, the outgoing partner sets up a competing business which seriously interferes with the business of the firm, the continuing partner is entitled to a preliminary injunction restraining the continuance of such competing business pending settlement of the partnership affairs.

[See note at end of this case.]

Appeal from Circuit Court No. 2 of Baltimore city: AMBLER, Judge.

Action for injunction. Albert C. Crownfield, plaintiff, and Howard M. Phillips et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Geo. Moore Brady for appellant.

[2] CONSTABLE, J.—This appeal grows out of the refusal of the Court below to issue an injunction forthwith, upon a petition filed by Albert C. Crownfield, in the cause of Phillips v. Crownfield, 124 Md. 443, 92 Atl. 1030.

The petition sets out the facts which were alleged in the bill and answer in the original proceedings, which need not be repeated here, since they are quite fully set forth in the opinion filed in that appeal; and in addition alleges that the complainants, after the dissolution of the injunction by the lower Court, took an appeal from the decree and filed an appeal bond, thereby staying the operation of the decree; and thus, have been enabled to keep in possession of the property in controversy for a great length of time, through

their delay in prosecuting this appeal. It was further alleged that the complainants, after the decree adverse to them, and after this appeal from the same, leased a storeroom on the same floor of the building in which the partnership business of the parties was carried on, and are therein conducting a business similar to, and in competition with, the partnership business.

The petition states the objects of the petition to be (first) to have the Court exercise the discretion granted to it by section 29 of Article 5 of the Code, and pass an order directing that the appeal shall not stay the operation of the [3] decree; (secondly), that the complainants may be enjoined from carrying on the business they have opened, in competition with the partnership business.

The Court refused on the petition and affidavit to issue an order annulling the usual effect of an appeal, and also refused to grant a peremptory injunction, but passed an order directing the complainants to show cause. From said last mentioned order, this appeal was taken.

This Court has no power to review the refusal of the lower Court to annul the effect of the appeal, for it is a matter that is expressly left, by the statutes, to the discretion of the Court where the proceedings are pending. *Washington County v. Board of County School Com'rs*, 77 Md. 292, 28 Atl. 115. The only question presented to us for determination is whether the lower Court was correct in not ordering an injunction to issue immediately, but allowing the complainants time to show cause before acting upon the allegations.

The rule of law is universal, that a partner, without the consent of his copartners, cannot carry on a business of same nature and competing with that of the firm. If this rule is violated, equity may enjoin him from doing so; and some jurisdictions have held that he may be compelled to account and pay over to the firm all profits thus made. *Christian, etc. Grocery Co. v. Hill*, 122 Ala. 490, 28 So. 149; *Grafton v. Paine*, 7 App. Cas. (D. C.) 255; *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826; *Metcalfe v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478; *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69; *American Bank Note Co. v. Edson*, 56 Barb. (N. Y.) 84; *Marshall v. Johnson*, 33 Ga. 500; *Van Deusen v. Crispell*, 114 App. Div. 361, 99 N. Y. S. 874; *Troy Manufacturers' Nat. Bank v. Cox*, 59 N. Y. 659. This rule is not only well established, but founded in reason.

If, then, the allegations were sufficiently definite, specific and verified by affidavit, we think such a case would be presented for immediate relief. To ascertain, let us examine in detail just what the allegations set forth,

and, for this [4] purpose, we cannot do better than set out verbatim all references thereto. The first mention is as follows:

"The second object is to enjoin the complainants from carrying on a business which they have recently entered upon on North Charles street, adjoining and immediately to the north of the premises occupied by the aforementioned store, called 'The Lyric.'

. . . That the appellants (Phillips) are conducting the Lyric apparently for the benefit of themselves and the defendant (petitioner), and, in an adjoining store on Charles street, they are conducting a similar store on their own behalf, thereby wilfully competing between themselves, on the one hand, and themselves and the defendant, on the other, the details of which are hereinafter set forth." The details are then set out as follows:

"That in spite of their actual possession of 'The Lyric,' situate at the northeast corner of Charles and Preston streets, the complainants leased, during the summer, the rear of the first floor of the same building in which 'The Lyric' store is situate, and they have opened up there a tea room and delicatessen store. They have a lease from the same party from whom the complainants and the defendant have a lease. Their lease runs for five years, at forty dollars a month, and the lessees are the complainants, together with Ella W. Mitchell, the mother of said Amy G. Phillips, and the bondswoman in the injunction bond and in the appeal bond. The two stores are in direct competition, and yet they are connected together in the same building by direct passageway. They both sell cigars, ice-cream, ginger ale, crackers, cake, etc. The complainants remove articles from one store to the other, so that it is practically impossible to keep an accounting. It is hard, from the street, to tell where one store begins and the other ends. The show windows of the stores are largely dressed alike, [5] and the complainants go first from one store to the other, acting as salesmen in both. The stores are in competition, one, the tea room and delicatessen store, being owned by Howard M. Phillips and the members of his family, and the other being run by said Howard M. Phillips and Amy G. Phillips, although, as decreed by Court, the property of the defendant."

It needs no further comment to show that according to the allegations of the petition, the complainants are violating flagrantly the above rule, and therefore the petitioner was entitled to immediate relief by way of a preliminary injunction. And we will, therefore, reverse the ruling of the lower Court and remand the cause so that an injunction can be issued by the lower Court.

Order reversed and cause remanded, with costs to the appellant.



## NOTE.

**Right of Partner to Carry on Business  
in Competition with Firm.***Rule Stated.*

As is stated in the reported case, the rule of law is universal, that a partner is not, without the consent of his copartners, entitled to carry on a business of the same nature and competing with that of the firm. *Marshall v. Johnson*, 33 Ga. 500; *Levine v. Michel*, 35 La. Ann. 1121; *Reber v. Pearson*, 155 Mich. 533, 119 N. W. 897, 15 Detroit Leg. N. 1111; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Troy Manufacturers' Nat. Bank v. Cox*, 2 Hun 572, *affirmed* 59 N. Y. 659; *Van Deusen v. Crispell*, 114 App. Div. 361, 99 N. Y. S. 874; *Halladay v. Faurot*, 8 Ohio Dec. (Reprint) 633, 9 Cinc. L. Bul. 92. See also *Latta v. Kilbourn*, 150 U. S. 524, 14 S. Ct. 201, 37 U. S. (L. ed.) 1169, *reversing* on other points 5 Mackey (D. C.) 304; *Grafton v. Paine*, 7 App. Cas. D. C. 255; *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478, *affirming* 43 Ill. App. 286; *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826; *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 60; *Skolny v. Richter*, 139 App. Div. 534, 124 N. Y. S. 152, *reversing* 66 Misc. 376, 123 N. Y. S. 788; *Bishop v. Riddle*, 51 Tex. Civ. App. 317, 113 S. W. 151; *Fletcher v. Ingram*, 46 Wis. 204, 50 N. W. 424. Thus in *Troy Manufacturers' Nat. Bank v. Cox*, *supra*, the court said: "The principles upon which the relationship of copartners is founded are strict and exacting, demanding entire good faith toward each other, and the highest standard of morality, integrity and fair dealing. They occupy a position of trust and confidence, far above the ordinary standard of trade morality, in their dealings with each other. They are both trustees and agents, and have no right to deprive the partnership of the benefit of any portion of their capital, diligence, skill and industry, by engaging in any other kind of business. These principles are familiar and well settled. But above all, they are not allowed to engage in any other business, which gives them an interest adverse to that of the firm. Nor can one of them make a profit privately, by dealing with himself, or clandestinely carry on another trade or business, which may prove injurious to the interests of the copartnership." And in *Todd v. Rafferty*, 30 N. J. Eq. 254, the Vice Chancellor in delivering the opinion of the court said: "In the absence of an express stipulation to the contrary, the parties to a contract of copartnership always understand, from the very nature of the relation, that all gains made by either in the prosecution of the com-

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mon business, shall be joint property. Generally, a copartnership is a combination of the capital, skill, industry and influence of two or more persons for the prosecution of a particular business for their mutual benefit, and a claim by one that he has a right to carry on a part of the joint business for his own advantage and to the manifest injury of his associates is so utterly destructive of the rights and duties legally incident to the relation, that it will never be sanctioned by a court until it is clearly shown that he holds such right by the assent of his associates. It is certain that the existence of such right should not be inferred from slight circumstances." In *Norwood v. Norwood*, 4 Har. & J. (Md.) 112, it was said by Hanson, C.: "If two persons agree to set up, at their joint expense, a ferry, for the accommodation of travelers, on a certain road, and the ferry is accordingly set up, and then one of them sets up another ferry for his own emolument, at the distance of 20, 30, 50, or 100 yards from the old ferry, to accommodate the same set of travelers, who is there that will not conceive the act to be in direct violation of the rights and interests of his partner? But if the new ferry be only at a small distance, and yet is only for the accommodation of travelers on another road who would not otherwise cross at the old ferry, it cannot be supposed that the partner is entitled to have it suppressed." In *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478, *affirming* 43 Ill. App. 286, the court, while holding that a member of a law firm was not accountable to his partner for commissions collected in his trust capacity as executor or administrator of several estates, said: "We are not unmindful of the well-settled rule, that a partner will not ordinarily be permitted, for his own profit, to enter into business in competition with his firm. Thus, he cannot, without the consent of his copartners, embark in a business that will manifestly conflict with the interest of his firm."

It has been held, however, that, in the absence of actual fraud or deceit, a special partner in one firm may also become a special partner in a competing business, and that that act of itself does not furnish a sufficient ground for the dissolution of the first copartnership. *Skolny v. Richter*, 139 App. Div. 534, 124 N. Y. S. 152 (*reversing* 66 Misc. 376, 123 N. Y. S. 788) wherein the court said: "That it would be an act of bad faith on the part of one general partner to engage without the consent of or against the objections of his copartner in the competing business is undoubtedly true, and the question now to be considered is whether the same rule is to be applied to a special partner. Limited partnerships in this state are solely creatures of statute. . . . The element of

mutual trust and confidence which is the keynote in the relation between general partners is wholly and conspicuously lacking. In its absence we can find no foundation for the plea that the mere fact that a special partner in one firm becomes a special partner in a competing firm furnishes a sufficient ground for the dissolution of the first copartnership, for it involves no necessary inconsistency with the statutory or implied obligation resting upon a special partner. It might happen, of course, that a person who is special partner in two firms might be guilty of actual fraud or deceit towards one which would justify a dissolution. So might one who is a special partner in a single firm. . . . The sole proposition upon which the judgment appealed from rests is that defendant's mere act in becoming a special partner in a competing firm was of itself an act of bad faith justifying a dissolution of plaintiff's firm. To this proposition, for the reasons above stated, we cannot agree."

Where it is a part of the terms of the partnership that one of its members shall be at liberty to engage in business and take interests in the same line in which the firm is engaged, on his own individual account, he is entitled to subscribe for stock and hold it as an individual in a corporation in which the firm is interested. *Kelley v. Shay*, 206 Pa. St. 215, 55 Atl. 927.

#### *Remedies of Aggrieved Partner.*

On the theory that equity will interpose to restrain one partner from doing acts prejudicial to the interests of others, injunctive relief has been granted to one partner to restrain another from engaging in or continuing a business in competition with that of the firm. *Marshall v. Johnson*, 33 Ga. 500; *Levine v. Michel*, 35 La. Ann. 1121; *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Reber v. Pearson*, 155 Mich. 593, 119 N. W. 807, 15 Detroit Leg. N. 1111; *Halladay v. Faurot*, 8 Ohio Dec. (Reprint) 633, 9 Cinc. L. Bul. 92. And see the reported case. Thus in *Marshall v. Johnson*, *supra*, the court said: "The material facts . . . established are these: On the 1st June, 1862, the parties entered into an agreement . . . to establish and operate, for two years, in copartnership, in the city of Atlanta, a brass foundry; each party being bound to do certain things, and being entitled to half the profits. Among other things, it was stipulated that the defendant in error shall give all necessary attention to the superintendence and management of said foundry. Each party so far performed his undertakings that the foundry was actually put into operation, and so conducted until April, 1863 (when this litigation arose), that both allege a wish and purpose to con-

tinue the business during the full term stipulated. But about the time specified it was discovered that defendant in error, without consulting his partners, was about to establish in Atlanta, on his individual account, another brass foundry, which, it is alleged, must necessarily come in competition with the joint enterprise. This is the grievance of which plaintiff in error complains, and the prayer is that the defendant be enjoined from so doing. A rule nisi was granted, requiring the defendant to show cause why the injunction should not issue. By way of showing cause, defendant filed his answer to the bill, and, after argument, the rule was discharged, and the injunction refused; and to this ruling exception is taken. . . . These are the grounds upon which the defendant resists the prayer for injunction, viz.: that he is not restricted by the articles of partnership from carrying on for his sole benefit, in a separate establishment, the same business, at the same locality; that the limited operations of joint foundry are insufficient to occupy his time, and that there is at Atlanta abundant demand for brass castings to furnish employment for both foundries. On the other side, it is replied, that the articles of partnership do not limit the extent of the joint operations by specifying either the amount of capital or the number of furnaces to be employed. They stipulate that H. Marshall & Co. 'shall provide the buildings for carrying on said foundry, with suitable furnaces and flasks, free of rent;' that the said W. W. Johnson shall 'provide, free of cost, all crucibles and pots for melting the brass, and give all necessary attention to the management of said foundry.' Further, it is replied, that H. Marshall & Co., since the foundry went into operation, have actually enlarged the building and increased the number of furnaces, etc., and have proposed still further to multiply them, in order to meet the demands upon the foundry, which proposition the defendant has declined. . . . If then, the joint foundry is to be operated under the exclusive management of Johnson, and alongside of it another of which he is the sole proprietor and manager, what is the predicament of the partners in the former. All orders for castings must go to Johnson. Of these some will be more, others less, desirable, yet with Johnson alone would rest the distribution of them between the two. But suppose the parties giving orders should select the place where they should be filled, what elements would enter into their choice? Comparative prices and comparative qualities of castings produced by the rival establishments; yet these, in both, would depend upon the volition of Johnson. Would he be likely to maintain between the two, one of which rendered him half its profits, and the other the

whole, a position of strict impartiality? Under the circumstances, will equity hold one man, against his will, to trust another to this extent. . . . It is a well-established rule that equity will interpose to restrain one partner from doing acts prejudicial to the interest of the others. . . . We do not say that under all circumstances equity would restrain one partner from carrying on the same business at the same place for his individual benefit. It is of the very essence and spirit of equity jurisprudence, in the application of its benign principles, to scrutinize closely the circumstances of each case. Should a case arise wherein it was manifest that such a proceeding, by one partner, did not prejudice the interest of the others, in the absence of express contract prohibiting it, equity would not interpose. But in the case at bar, the position in the business given to Johnson by the articles—the power conferred on him for weal or woe, and the corresponding obligation assumed by him, as effectually preclude him from setting up a private, rival establishment, as would a distinct restrictive covenant.” And in *Halladay v. Fautot*, 8 Ohio Dec. (Reprint) 633, 9 Cinc. L. Bul. 92, the court said: “The case before us is one of unusual importance, as well on account of the gravity of the interests involved as the novelty of the remedy sought. So far as my own reading and experience goes it is the first case in our state where the remedy by injunction has been invoked by one partner against his copartners, the partnership still continuing, to restrain them from engaging personally and with their capital in an enterprise in the same locality, the purpose and scope of which is claimed to be similar, and therefore adverse to and at variance with the business and interests of the partnership. . . . In substance the plaintiff sets out in his petition that on the 1st of January, two years ago, he entered into a written contract of partnership with B. C. Fautot and S. W. Moore, the principal defendants, for the purpose of carrying on a general banking business in the city of Lima, Ohio, for the period of five years from that date; that immediately thereafter the business was entered upon by the partnership and has been so continued by it to the present time, doing a general banking business as provided in and contemplated by the partnership contract, and which business has been extensive and profitable, with three years yet unexpired for the continuance of the partnership; that in violation of the terms of said partnership contract, and in violation and disregard of the plaintiff’s rights thereunder, the defendants, Fautot and Moore, are about to engage in a similar business in the same locality, to wit: a National bank; that said National bank is in process of organization and is about to be opened for the purpose of

doing a general banking business by their aid, procurement and assistance, and against his wishes and protest, and that these defendants propose to invest their capital in this institution and to give to it their personal attention and influence. . . . By that which is proposed to be done by the defendants, unless restrained by the interposition of the law, the Allen County Bank would be left soulless and lifeless, as a skeleton without flesh or blood. . . . I have . . . endeavored to fully and carefully consider all matters that have been presented and urged on behalf of the respective parties in this case, to the end that my conclusions might at least command the respect and confidence of all interested, if not concurrence on the part of those against whom they are drawn. A temporary injunction will be granted against the defendants, Fautot and Moore, to the full extent prayed for in the petition.”

Likewise where one of the members of a firm has engaged in a business within the scope of the partnership and in competition with the business of the firm, he may be compelled to account and pay over to the firm the profits thus made. *Grafton v. Paine*, 7 App. Cas. (D. C.) 255; *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Troy Manufacturers’ Nat. Bank v. Cox*, 2 Hun 572, *affirmed* in 59 N. Y. 659; *Van Deusen v. Crispell*, 114 App. Div. 361, 99 N. Y. S. 874. See also *Holmes v. Darling*, 213 Mass. 303, 100 N. E. 611; *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69. And see the reported case.

However, it has been held that where two partners agreed to engage in the warehouse business, one to provide the buildings and the other to conduct the business, the latter could not be held responsible for profits realized from engaging in the same business individually, where it appeared that the partnership warehouses were filled and the copartner would not join in building the additional warehouses and that no damage had resulted to the firm. *Parnell v. Robinson*, 58 Ga. 26.

A third person cannot hold the partnership responsible for the liabilities incurred by an individual member who has entered into a transaction for his own benefit even though it is within the scope of the partnership business. While a copartner may claim the benefit resulting from such a transaction, it is a right which he alone can assert and it is not available to third persons for the purpose of fixing a liability on the partnership, when such claim has not been asserted. *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69, wherein the court said: “While it is true that a partnership may be bound by a transaction in the name of one partner, as well as by the joint name, if it be within the scope of the partnership business, yet this is only true when the transaction is one in behalf of the

partnership, and not of a member. If a member enter into a transaction of his own behalf, which is within the scope of the partnership business, his copartner may insist that it is a fraud upon him, and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and is not available to third parties for the purpose of fixing a liability upon the partnership, when such claim has not been asserted. Nor, under such circumstances, will the acts and declarations of the partner actually engaged in the transaction in his own name bind the partnership so as to affix a liability upon it."

In *England*, it is provided by statute that if a partner without the consent of the other partners carries on any business of the same nature and as competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business. Partnership Act 1890 (53 & 54 Vict. c. 39), § 30. See Halsbury's Laws of England, Vol. 22 Page 47. Prior to the enactment of that statute it was held that a member of a firm was accountable to his copartner for profits realized from engaging in a similar and competing business without the knowledge or consent of his copartner where by the terms of the partnership agreement such conduct was expressly prohibited. *Dean v. MacDowell*, 8 Ch. D. 345, 47 L. J. Ch. 538, 38 L. T. N. S. 862, 26 W. R. 386. And see to the same effect *Somerville v. Mackay*, 16 Ves. 382. In *Aas v. Benham* [1891] 2 Ch. 244, it was said by Lindley L. J.: "It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his copartner from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection; but the facts of this case do not bring it within the principle. It is equally clear law that if a partner without the consent of his copartners carries on business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business, but the facts of this case do not bring it within this principle. *Dean v. MacDowell* (cited supra) shows that a partner is not bound to account to his copartners for profits made by him in carrying on a separate business of his own, unless the case can be brought within one or other of the two principles to which I have alluded, even if he carries on such separate business contrary to one of the partnership articles. As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing

business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business."

Cases discussing generally the question of the duty of a partner to account for secret profits are collated in the note to *Hurst v. Brennan*, 1914D Ann Cas. 428.

## LOUISVILLE RAILWAY COMPANY

v.

KENNEDY.

Kentucky Court of Appeals—February 5, 1915.

162 Ky. 560; 172 S. W. 970.

### Carriers — Passenger Alighting from Street Car — Crossing Parallel Track without Looking.

A person, passing behind a west-bound street car from which she had just alighted and going upon the east-bound track without looking for an approaching car, was not guilty of contributory negligence as a matter of law, where her attention was directed towards another approaching west-bound car, and her view of the east-bound car, which struck her, was obscured by the standing car, as she had a right to presume that proper warning of the approaching car would be given, and that the car would be under proper control, and was not required to anticipate negligence on the part of those in charge of the car; and hence whether she was negligent is a question for the jury.

[See note at end of this case.]

### Street Railways — Care Required of Pedestrian — Crossing Tracks.

A pedestrian crossing street car tracks is required to exercise such care as an ordinarily prudent person would exercise, under like circumstances, to learn of the approach of a car and to keep out of its way, and such care necessarily varies with the circumstances of each particular case.

[See Ann. Cas. 1915B 690.]

### Duty of Street Railway — Passing Car Discharging Passengers.

In view of the reasonable certainty that some of the passengers alighting from a street car will attempt to cross the track parallel to that on which the car is standing, and in view of the lack of opportunity for such passengers to observe an approaching car or for the motorman to observe them, it is the duty of a motorman in charge of an ap-

proaching car on the parallel track to have the car under such control that it may be stopped on a moment's notice, and it is not improper to so tell the jury, notwithstanding the contention that the word "moment" means a space of time incalculable or infinitely small, and that the instruction imposes on the street car company a duty impossible of performance.

[See Ann. Cas. 1912B 863.]

**Carriers — Who Is Passenger — Person Alighting.**

A passenger alighting from a street car is still a "passenger" until he has had a reasonable opportunity to reach a place of safety.

[See 104 Am. St. Rep. 589.]

Appeal from Circuit Court, Jefferson county.

Action for damages. Blanche Kennedy, plaintiff, and Louisville Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Frank P. Straus, Howard B. Lee and Alfred Seligman* for appellant.

*O'Doherty & Yonts* for appellee.

[561] CLAY, C.—This is a personal injury case, in which plaintiff, Blanche Kennedy, recovered of the defendant, Louisville Railway Company, a judgment for \$800. The railway company appeals.

Refusal to direct a verdict in favor of the defendant, and error in one of the instructions, are relied on as grounds for a reversal.

The facts are these:

On July 8, 1913, plaintiff was a passenger on a west bound Bardstown Road car, which was moving on the north side of Jefferson Street along one of two parallel tracks. When the car reached the northeast corner of Jefferson and Third Streets, it stopped for the purpose of permitting passengers to alight. Plaintiff got off at this point, and passing around the rear end of the car, started to cross the parallel track for the purpose of reaching the opposite side of the street. When she reached the parallel track, she was struck and injured by a Fourth Street car then being operated on the Second Street line. There is substantial evidence to the effect that the Fourth Street car was being operated at a high rate of speed, and that no warning of its approach was given.

It is insisted that because plaintiff did not look at the approaching Fourth Street car before she stepped on the parallel track she was guilty of contributory negligence as a matter of law. It may be conceded that while a different rule formerly prevailed, a number of the courts now make no distinction between steam railroads and street railroads with respect to the obligation of the pedestrian to

look for an approaching car, because they say the danger from stepping on street car tracks where the cars are run by electricity and at a rapid rate and with greater frequency, is quite as great as the danger from stepping on steam railroad tracks, where the cars do not run so often; and common prudence requires that the care on the part of the pedestrian shall be increased in [562] proportion to the dangers to be apprehended; and they therefore hold that a person who, upon alighting from a street car, passes around the rear end of the car without looking for a car approaching from the opposite direction on the parallel track, and is struck by such car and killed or injured, is guilty of contributory negligence which will defeat a recovery for the injury. *Creamer v. West End St. R. Co.* 156 Mass. 320, 31 N. E. 391, 32 Am. St. Rep. 456, 16 L.R.A. 490; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L.R.A. 819; *Hornstein v. United Rys. Co.* 195 Mo. 440, 92 S. W. 884, 113 Am. St. Rep. 693, 6 Ann. Cas. 699 and note, 4 L.R.A. (N.S.) 729 and note; *Eagen v. Jersey City, etc. R. Co.* 74 N. J. L. 699, 67 Atl. 24, 12 Ann. Cas. 911 and note, 11 L.R.A. (N.S.) 1058; *Yersack v. Lackawanna, etc. R. Co.* 221 Pa. St. 493, 70 Atl. 837, 128 Am. St. Rep. 746, 18 L.R.A. (N.S.) 619. In other jurisdictions, however, a different rule prevails, and it is held that a failure to look does not bar a recovery, but the question of contributory negligence is for the jury. *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L.R.A. 126; *Smith v. Union Trunk Line*, 18 Wash. 351, 51 Pac. 400, 45 L.R.A. 169; *Cincinnati St. R. Co. v. Snell*, 50 Ohio St. 197, 43 N. E. 207; *Birmingham R. Light, etc. Co. v. Landrum*, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25; *Bremer v. St. Paul R. Co.* 120 Minn. 326, 120 N. W. 382, 21 L.R.A. 887. The same rule prevails in this State. *Louisville R. Co. v. Hudgins*, 124 Ky. 79, 98 S. W. 275, 7 L.R.A. (N.S.) 152; *Creamer v. Louisville R. Co.* 142 Ky. 340, 134 S. W. 193; *Louisville R. Co. v. Mitchell*, 138 Ky. 190, 127 S. W. 770, 161 S. W. 506. Indeed, with the single exception of a person who was stone deaf and therefore unable to discover the approach of the train except by the use of his eyes, we have never held, even in the case of steam railroads, that a failure to look would constitute contributory negligence. *Cincinnati, etc. R. Co. v. Winningham*, 156 Ky. 434, 161 S. W. 506; *Smith v. Cincinnati, etc. R. Co.* 146 Ky. 568, 142 S. W. 1047, 41 L.R.A. (N.S.) 193. There is, therefore, no necessity on our part to change the rule with respect to street railways, in order to keep pace with the progress of the times, as was the case with the Supreme Court of Missouri. Under our rule, the pedestrian is required to exercise that

degree of care that an ordinarily prudent person would exercise, under like or similar circumstances, to learn of the approach of the car and keep out of its way. The degree of care will necessarily vary with the circumstances of each particular case. It is therefore our rule to let the jury determine [563] the question in the light of all the circumstances. The reason for our position is well illustrated by the facts of this case. Here the parallel tracks lay close to each other. The plaintiff's attention was directed towards a second street car approaching on the north track from the rear. Her view of the car which struck her was obscured until she passed from behind the rear of the car on which she was riding. She had a right to presume that proper warning of the approaching car would be given, and that the car itself would be under proper control, and was not, therefore, required to anticipate negligence on the part of those in charge of the car, and to regulate her conduct accordingly. The question, therefore, was whether or not plaintiff, acting on the presumption that the company would not be negligent, failed to exercise proper care under the circumstances. Viewed from this standpoint, we think plaintiff's conduct afforded room for honest difference of opinion among intelligent men, and the court did not err, therefore, in submitting the question of contributory negligence to the jury.

(2) It is next insisted that the court erred in instructing the jury that it was the duty of the motorman in charge of the approaching car to have it under such control that it might be stopped at a moment's notice. It is argued that the word "moment" means a space of time incalculable or infinitely small, and that the instruction imposes on the street car company a duty impossible of performance. In spite of counsel's strong argument to the contrary, we see no reason to depart from the rule thus laid down, which, after due deliberation, was declared in the case of *Louisville R. Co. v. Hudgins*, 124 Ky. 79, 7 L.R.A.(N.S.) 152, 98 S. W. 275, and thereafter approved in *Louisville R. Co. v. Mitchell*, 138 Ky. 190, 127 S. W. 770, and *Creamer v. Louisville R. Co.* 142 Ky. 340, 134 S. W. 193. Where a car on a parallel track is approaching another car which has stopped to discharge passengers, other courts have recognized the necessity for a high degree of caution under the circumstances. Thus it is said that "when a train is stopped to let off or take on passengers, a train on the reverse course should not be allowed to pass the stopping train except it be on such caution and noticeable signals as will be reasonably calculated to avoid the possibility of injury to passengers. *Capital Traction Co. v. Lushy*, 12 App. Cas. (D. C.) 295. In the case of

*Bremer v. St. Paul R. Co.* supra, a duty was imposed on the motorman of having his car under such control that he could stop it [564] "upon the appearance of danger." The reason for the rule is apparent. When a car stops to permit a passenger to alight, he is still a passenger until he has had a reasonable opportunity to reach a place of safety. He has no opportunity to observe the approach of a car until near the parallel track. He cannot be seen by the motorman of the approaching car until he emerges from behind the waiting car. The fact that the car is stopped to discharge passengers makes it reasonably certain that some of the passengers will attempt to cross the parallel track. It being reasonably certain that passengers will attempt to cross the parallel track, and that their presence cannot be detected until they emerge from behind the waiting car, there is necessarily great danger from accidents. Since there is neither opportunity for the passenger to observe the approaching car, nor for the motorman on the approaching car to observe the passenger until he suddenly emerges from behind the waiting car, the danger is even greater than if he were actually standing on the parallel track. In view of these circumstances, proper care is not exercised unless the approaching car is under such control that it may be stopped on a moment's notice. *Louisville R. Co. v. Mitchell*, supra. Judgment affirmed.

#### NOTE.

##### **Contributory Negligence of Passenger in Alighting from Street Car and Passing to Rear of It across Parallel Tracks without Looking for Approaching Car.**

The rule laid down in *Eagen v. Jersey City*, etc. St. R. Co. 74 N. J. L. 699, 12 Ann. Cas. 911, that a passenger who, on alighting from a street car passes behind the car and across a parallel track without looking to see if a car is approaching on that track is guilty of contributory negligence as a matter of law, finds support in the recent case of *Davis v. Sagnaw-Bay City R. Co.* (Mich.) 157 N. W. 390, wherein the court said: "At the point where plaintiff alighted and for a considerable distance in each direction, Washington street is one hundred feet wide, and forty feet of the width are paved. Plaintiff was thirty years old, in health, with unimpaired hearing and vision. He was reasonably familiar with the surroundings, knew of the double tracks and the use which was constantly made of them. There were neither vehicles nor people interfering with his progress nor demanding his attention. Except as the car from which he alighted interfered with observation, the view

to the north was unobstructed. He could have seen a car 1,700 feet away. It follows necessarily that he did not look for an approaching car at all, or, if he looked, it was from a point where his view was obstructed by the car from which he alighted. Whatever the legal consequences may be, what plaintiff did not do is put beyond question by the undisputed physical facts. He did not look to the north for an approaching car from a place where his view was for any considerable distance unobstructed by the north-bound car from which he alighted. If he had done so, he would have seen the approaching car. In the line of his progress to the west, and while he was in a place of safety, he would have seen the approaching car if he had looked for it. The case must be considered as though plaintiff had testified that, if he had looked from the space between the rails, and while he was in a place of safety, he could and would have seen the on-coming car, and did not look. Under the circumstances, what did ordinary care for his personal safety demand of him? That passengers alighting from street cars often pass to the rear of the cars and cross the street is a circumstance, a fact, affecting the conduct of those using the street with vehicles. The view of persons alighting from the car and the view of drivers of vehicles approaching from the direction in which the car is moving are alike interfered with for a time by the standing or moving car. Drivers of street cars, traveling in the same street, in opposite directions, on parallel lines of track, cannot, in prudence, ignore the fact that they are approaching a car from which passengers are alighting. But the duties arising from the circumstances are reciprocal. The alighting passenger, desiring to cross the street, owes the duty to exercise reasonable vigilance for his own safety. He knows that an approaching car cannot turn out for him; that it is heavy and cannot be instantly stopped. He knows that until he is in a position to see an on-coming car he cannot be observed by its driver. He can in an instant put himself in a position where the sharpest lookout and most careful management will not save him."

On the other hand the reported case holds that the question of contributory negligence is for the jury. In accord with that decision is the recent case of *Washington, etc. R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035. In that case it appeared that the plaintiff was a passenger on an interurban electric car, that the car stopped at his destination on the opposite side of the road from the station, and that while passing behind the car and across a parallel track to get to the station, in the nighttime, he was struck by a car having no headlight and giving no signals. The court held that the plaintiff was not guil-

ty of contributory negligence as a matter of law "even if he failed to look and listen for approaching trains before he crossed the track."

## CONA

v.

## HENRY HUDSON COMPANY.

New Jersey Court of Errors and Appeals—  
June 15, 1914.

86 N. J. Law 154; 90 Atl. 1031.

### Constitutional Law — Legislative Power over Real Property Titles.

The conditions of ownership of real estate whether the owner is a citizen or alien, resident or nonresident, are subject to the laws of the state where situated.

### Partition — Service by Publication.

Under Chancery Act, §§ 10, 11 (1 Comp. St. 1910, p. 413), providing that a suit in equity may proceed against a defendant by name and his heirs where complainant is unable to ascertain whether defendant is dead and is unable to ascertain the names or residences of his heirs, provided notice as is required by law to be published against absent defendants is given, the Court of Chancery has jurisdiction on notice by publication to nonresident owners and persons believed to be dead, their heirs, devisees or personal representatives, to decree a partition or a sale in lieu of partition and make good title thereto by decree for actual partition or through deed by a master in chancery in pursuance of a decree for sale.

[See note at end of this case.]

Appeal from Circuit Court, Hudson county.

Action for damages. Giovanna Cona, plaintiff, and Henry Hudson Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*McDermott & Enright* for appellant.

*Frederick K. Hopkins* for respondent.

[155] *WALKER, Ch.*—This was a suit in the Hudson Circuit Court to recover damages for an alleged breach of covenants of seizin and right to convey.

The defendant company, on November 23d, 1912, made, executed and delivered to the plaintiff a conveyance for certain land in West Hoboken, Hudson county, which deed contained a covenant that the defendant, at

the time of the sealing and delivery thereof, was lawfully seized in its own right of a good, absolute and indefeasible estate of inheritance in fee-simple in the described lands, and had good right, full power and lawful authority to convey the same. The land mentioned was conveyed by John S. Mabon, Esq., special master in chancery, September 22d, 1911, to a predecessor in title of the defendant. The sale was made in pursuance of a decree for sale in partition in the Court of Chancery. The gravamen of the complaint was that a portion of the land, viz., four-thirtieths thereof, was at the time of filing the bill for partition vested in James B. McRae, and that in the proceedings in partition it was averred that McRae was dead and that he left heirs, devisees and personal representatives who were unknown, but who were, by virtue of the relationship mentioned, seized in fee and entitled to the undivided four-thirtieths parts of the premises; that McRae was not served with process; that his heirs, devisees and personal representatives were not, nor [156] were any one of them, specifically named or served with process; that under an order of publication made in the cause, notice, as required by the Chancery act and the rules of the Court of Chancery, directed to "James B. McRae, his heirs, devisees and personal representatives," were published but not served on him, them or any of them. No complaint is made of defective proceedings under the act, but only that the act is powerless to confer jurisdiction.

The special master to whom the cause was referred reported, and the decree for sale adjudged, that the heirs, devisees and personal representatives of McRae, who were unknown, were seized in fee and entitled to the undivided four-thirtieths parts of the premises sought to be partitioned. After sale, upon distribution made, the net proceeds of the four-thirtieths parts were paid into the Court of Chancery by the special master making the sale.

It is averred that the partition proceedings, so far as they related to the undivided share or interest in the premises which was of James B. McRae, deceased, were imperfect and defective, and failed to vest a good title thereto in the grantee to whom the special master conveyed, who was a predecessor in title of the defendant, by whom the premises were conveyed to the plaintiff with covenants of title and right to convey.

The Chancery act (Comp. Stat. p. 413, § 10) provides that in actions in the Court of Chancery whenever it shall appear that any person mentioned, or his heirs, devisees or personal representatives, are proper parties defendant, and that complainant, after diligent and careful inquiry therefor made

as in the case of absent defendants, has been unable to ascertain whether such person is still alive or if known or believed to be dead has been unable to ascertain the names or residences of his heirs, devisees or personal representatives, such action may proceed against such person by name and his heirs, devisees or personal representatives as in the case of absent defendants whose names are known; and such notice as is required by law to be published against absent defendants, in default of personal service, addressed to such person by name [157] and to his heirs, devisees and personal representatives, shall be published and mailed, etc., and such action may proceed in all respects as if such person or his heirs, devisees and personal representatives had been named and described and served with process of subpoena and had failed to plead, answer or demur within the time allowed by law. And section 11 provides, that all such defendants and all persons who fall within the description of heirs, devisees or personal representatives of the defendant supposed to be dead, shall thereupon be bound by all orders and decrees as if they had been duly named and served with process in this state.

Defendant in its answer averred that the complaint failed to disclose any cause of action and moved the court to determine the question so raised before trial; whereupon the court, after hearing, ordered that the complaint be struck out and dismissed, with costs, and the plaintiff thereupon appealed to this court.

It was argued on behalf of appellant that, under the authority of *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554, the proceedings in partition upon which the master's deed was founded, were void as to the four-thirtieths interest of McRae. On the contrary we regard *Hill v. Henry* as authority for the validity of those proceedings.

That case (*Hill v. Henry*) was one to quiet title to land, and Vice Chancellor Stevens held that sections 10 and 11 of the Chancery act had no application to such a case because of the provisions of the act to quiet titles, remarking (at p. 160):

"The act throughout contemplates a proceeding against definite individuals known to have an actual existence, not an indefinite class whose membership and whose very existence are unascertained. Thus construed, the act is in harmony with well established procedure, in a particular involving fundamental rights."

That *Hill v. Henry* is an authority for the respondent in this case is apparent from the observations of the Vice Chancellor (at p. 154):

"Fourth. In suits strictly *in rem*, that is, where the property [158] itself, conceived of



as having done the wrong or as having been the instrument of its commission, is being proceeded against; and in suits *quasi in rem*, that is, where the suit is against the person in respect to the *res*—where, for example, it has for its object partition or the sale or other disposition of defendant's property within the jurisdiction, to satisfy plaintiff's demand by enforcing a lien upon it—personal service within the jurisdiction or appearance is not necessary. The decree can, however, extend only to the property in controversy. But there is this distinction between these two classes of proceedings: in the former, public citation to the world is all that is necessary and the decree binds everybody; in the latter, defendant's interest is alone sought to be affected; he must be cited to appear and the judgment therein is conclusive only between the parties. *Freeman v. Alderson*, 119 U. S. 185 [7 S. Ct. 165, 30 U. S. (L. ed.) 372].

"Fifth. Both of the classes of cases last mentioned have this in common. The *res* the subject of the controversy, is within the jurisdiction, and it is because it is so that the court is able to affect defendant's interest in it. There is a further case, illustrated, so far, by proceedings to quiet title. The case is based upon a denial of any '*res*' in the defendant. In this class of cases the Supreme Court has taken a distinction. If the decree sought be a decree operating in *personam* only, to be made under the ordinary jurisdiction of equity—a decree, for instance, that the defendant make or cancel a conveyance; that defendant be restrained from asserting his claim—it can only be made after personal service within the jurisdiction or after appearance. *Hart v. Sansom*, 110 U. S. 151 [3 S. Ct. 586, 28 U. S. (L. ed.) 101]. But if the decree be taken under a statute which authorizes the court to determine the question of title and to decree it to the party entitled, then it binds without such service or appearance if the statute has provided 'a reasonable method of imparting notice.' *Arndt v. Griggs*, 134 U. S. 316 [10 S. Ct. 557, 33 U. S. (L. ed.) 918]."

Nor is there anything in the learned Vice Chancellor's observations concerning the difference between proceedings strictly *in rem* and those *quasi in rem* to the effect that the [159] latter are more doubtful as to validity (citing *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 U. S. (L. ed.) 918, and *Freeman v. Alderson*, 119 U. S. 185, 7 S. Ct. 165, 30 U. S. (L. ed.) 372), which militates against our view that that case (*Hill v. Henry*) is an authority for the respondent in the case at bar.

In *Arndt v. Griggs*, the Supreme Court of the United States decided that a decree quieting title against a defendant brought in by publication under the statute of Nebraska,

was good because the act of that state permitted constructive service by publication in that class of cases. Mr. Justice Brewer, who wrote the opinion, speaking of a state's power over titles to land within its borders, said (at p. 320):

"The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is [160] not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the federal courts. In *U. S. v. Fox*, 94 U. S. 315, 320 [24 U. S. (L. ed.) 192], it was said: 'The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the

case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.' "

Freeman v. Alderson decided that while the costs of an action against a nonresident may be satisfied out of property within the jurisdiction of the court, no personal liability for them can be created against him. That was in respect to a personal demand. The case conflicts with nothing laid down in Arndt v. Griggs, and, in fact, is not cited in the latter case. Nor is the oft-cited case of Pennoyer v. Neff, 95 U. S. 714, 24 U. S. (L. ed.) 565, at all at variance with the propositions laid down by the learned Vice Chancellor in Hill v. Henry, which were by him predicated upon Freeman v. Alderson and Arndt v. Griggs. In fact Pennoyer v. Neff is cited by Mr. Justice Brewer in Arndt v. Griggs as being in harmony with the decision then and there rendered.

Every sovereign state has control over property within its borders. The conditions of the ownership of real estate in a given country, whether the owner be citizen or alien, resident or nonresident, are subject to the laws of that state concerning the holding and transfer thereof, and of establishing title thereto. Partition, including sale in lieu of actual partition of lands in New Jersey, is within the doctrine stated; and [161] notice by publication, etc., to nonresident owners and persons believed to be dead, their heirs, devisees or personal representatives, under the provisions of the Chancery act, clothes our Court of Chancery with power to decree a partition or sale in lieu of partition, and make good title thereto, whether by decree for actual partition, or through a deed of conveyance made by a master in chancery in pursuance of a decree for sale.

The judgment appealed from will be affirmed, with costs.

For affirmance: The Chancellor, Chief Justice, Swayze, Trenchard, Parker, Bergen, Min-turn, Kalisch, Bogert, Vredenburg, White, Heppenheimer, JJ.—12.

For reversal: None.

#### NOTE.

#### Validity of Service by Publication in Action for Partition.

##### Generally.

In numerous jurisdictions statutes have been enacted which provide for service by publication, in partition proceedings, on unknown defendants, nonresident defendants, or defendants who after due diligence cannot be found within the jurisdiction, and the courts have

quite generally held that service by publication under such a statute is valid. Patton v. Childs, 78 Ga. 352; Thornton v. Houtze, 91 Ill. 199; Mason v. Messenger, 17 Ia. 261; Williams v. Westcott, 77 Ia. 332, 42 N. W. 314, 14 Am. St. Rep. 287; Platt v. Stewart, 10 Mich. 260; Van Wyck v. Hardy, 4 Abb. Dec. (N. Y.) 496; Guyer v. Raymond, 8 Misc. 606, 29 N. Y. S. 395; Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766, 134 Am. St. Rep. 976; Rogers v. Tucker, 7 Ohio St. 418; Sankey's Appeal, 55 Pa. St. 491; Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191; Foote v. Sewall, 81 Tex. 659, 17 S. W. 373; Gillon v. Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014; Pool v. Lamon (Tex.) 28 S. W. 363; Hess v. Webb (Tex.) 113 S. W. 618; Kane v. Rock River Canal Co. 15 Wis. 179; Tucker v. Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101. And see the reported case. *Compare* Walters v. Bray (Tex.) 70 S. W. 443. In Lawrence v. Hardy, supra, the court said: "Our statute on the subject (Revisal 1905, sec. 2490) clearly contemplates and provides that in proceedings for partition by sale, or otherwise, publication may be made 'for persons interested in the premises whose names are unknown to and cannot, after due diligence, be ascertained by the petitioner.' And, while the hardship of some particular case has not infrequently provoked judges of ability and repute to strong expressions of condemnation, the decisions as to such legislation, and in proceedings of this character, i. e., *in rem* or *quasi in rem*, have generally upheld it, and always when the necessity for it was made to appear, and the notice provided was such as to render it reasonably probable that the parties concerned would be apprised of the proceeding and afforded an opportunity to appear and protect their interest."

Under a statute providing for service by publication on nonresidents in partition proceedings, it has been held that such service is sufficient to acquire jurisdiction over nonresident minors. Williams v. Westcott, 77 Ia. 332, 42 N. W. 314, 14 Am. St. Rep. 287. Similarly it has been held that where authorized by statute, service by publication in partition proceedings is valid to acquire jurisdiction over an insane nonresident. McCormick v. Paddock, 20 Neb. 486, 30 N. W. 602.

The English cases seem to be in conflict as to whether service by publication on nonresidents in partition is valid. In Teall v. Watts, L. R. 11 Eq. 213, it was held that in a proceeding for sale under the Partition Act an immediate decree of sale could be made although one of the parties was out of the jurisdiction; but that the sale could not be proceeded with until the decree for sale had been served on the absent party, and the court seems to hold that advertisement of the decree would not be sufficient service in

the absence of proof that the advertisement had actually been brought to the notice of the nonresident. See also *Silver v. Udall*, L. R. 9 Eq. 227. But compare *Peters v. Bacon*, L. R. 8 Eq. 125, 38 L. J. Ch 571, 20 L. T. N. S. 729, 17 W. R. 782, wherein it was said: "I cannot allow you to proceed in the absence of these parties, but can give you leave to give them notice of the decree by advertisement, and after the advertisements have appeared, if they do not come in, you may have liberty to apply as to proceeding with the sale. It had better go to Chambers for the chief clerk to settle the advertisements, and the papers in which they shall appear, and the number of times they are to appear." In *Grassmeyer v. Beeson*, 13 Tex. 524, 18 Tex. 764, 70 Am. Dec. 309 (*approved* in *Lawler v. White*, 27 Tex. 250), the court held service by publication in a partition proceeding to be valid without any statutory authorization. "By a law of the State of Coahuila and Texas (Decree 277, art. 98) provision was made for proceeding to judgment against absentees and nonresidents by appointing an attorney ad litem to represent them. But by the general repealing clause of the act of the 16th March, 1840, introducing the common law as the rule of decision, all laws in force prior to the 1st of September, 1836, not expressly excepted were repealed; and the provision in question is not included among the exceptions to the effect of the repeal. In so far as the common law or any statute of the Republic then in force afforded a remedy, that unquestionably furnished the rule, by which the remedy was regulated, and must have been pursued from the period of its adoption. But where it furnished no remedy as a substitute for the remedy given by the former law for the enforcement of existing rights, and none was provided by the legislature, it may well be questioned whether the general repeal could be held to take effect so as wholly to deprive a party of an existing right and remedy. It is competent for the legislature to regulate the remedy as to them may seem proper; but there is high authority for holding that the legislature has not the power wholly to deprive a party of all remedy whatever, for that would be in effect to impair vested rights. *Bronson v. Kinzie*, 1 How. 311 [11 U. S. (L. ed.) 143]; *Green v. Biddle*, 8 Wheat. 1 [5 U. S. (L. ed.) 547]. And such would be the consequence of giving effect to the repeal in this instance. . . . The common law . . . afforded no remedy in a case like the present, and if the repealing clause of the act of 1840 operated a repeal of the law authorizing the appointment of a curator, and also of the provision for the appointment of an attorney ad litem, it took away all remedy in cases like the present, and left the citizen wholly without any remedy whatever for the enforce-

ment of his rights of action against absentees and nonresidents, unless it was competent for the courts, as matter of practice, to adopt a mode of making parties where the law prescribed none. . . . From the necessity of the case the courts were compelled to adopt some course of procedure and rule of practice to be applied in a case like the present, in order to administer justice and adjudicate the causes of citizens having rights of action against the nonresidents. And the course very generally, if not universally, adopted was that of service by publication, which was adopted in this instance, and which has since received the sanction of legislative enactment."

But while service by publication under a statute authorizing it is valid as to unknown or nonresident parties who are joint owners with the petitioners of the estate to be partitioned, such service has no validity to estop persons who are the sole owners of the estate to the exclusion of the petitioners. *Savary v. Da Camara*, 60 Md. 139, wherein it was held that where maternal heirs of an intestate filed a petition for the partition of the intestate's lands, making publication against all other unknown heirs, the partition proceedings pursuant to that petition and publication were no estoppel on paternal heirs of the intestate who failed to appear, the paternal heirs being, under the rules of descent of the state, the takers of all the real estate of the intestate to the exclusion of the maternal heirs.

In *Lochrane v. Equitable Loan, etc. Co.* 122 Ga. 433, 50 S. E. 372, it was held to be error for the trial judge to grant an order for service by publication on a nonresident, where no pleading had been filed by the plaintiff but merely a petition setting forth the petitioner's intention to make application for partition of land at a certain time. The court said that until some kind of pleading had been filed sufficient to give the trial court jurisdiction in the cause, it had no power to grant the order for publication under the statute allowing such service in partition proceedings.

Service by publication, though valid where authorized by statute to secure jurisdiction over unknown, unfound, or nonresident defendants for the purpose of adjudicating their rights in the land, will not give jurisdiction for the purpose of making a judgment *in personam*, as for costs. *Gillon v. Wear*, 9 Tex. Civ. App. 44, 28 S. W. 1014; *Pool v. Lamon* (Tex.) 28 S. W. 363.

#### *Defects of Procedure.*

Statutes authorizing service by publication are strictly construed, and must be strictly followed, the courts holding a service to be invalid when the publication fails to comply

fully with the statutory requirements. *Keil v. West*, 21 Fla. 508; *Kantner's Estate*, 24 Pa. Co. Ct. 310, 16 Montg. Co. Rep. 215; *Kane v. Rock River Canal Co.* 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 397. In *Keil v. West*, *supra*, service by publication under a statute was held to be invalid because it failed to set out a description of the premises as required by the statute. In *Kantner's Estate*, *supra*, a notice published first on July 12 and last on August 18 was held not to comply with the statutory requirement of six weeks' publication. In *Kane v. Rock River Canal Co.* *supra*, the court said: "The statute provided that an order of publication might be made where there were parties having an interest who were 'unknown', etc., and the 'fact was made to appear by affidavit', etc. R. S. 1849, ch. 108, sec. 11. This statute does not expressly say to whom these owners must be 'unknown', but it obviously intended that they must be unknown to the plaintiff in the suit, as nobody else's knowledge or want of knowledge on the subject would be material. The affidavit appearing in this partition record was made by Charles I. Kane, one of the complainants, and states merely in the general language of the statute that there were parties interested in the premises who were unknown. It did not even say that they were unknown to him, though perhaps that would be the fair interpretation of it. But we do not think its construction could go beyond that, or that it could be held to show that there were not other owners known to the other complainants in the suit. It does not purport to state that there were not, and probably the person making the affidavit could not have sworn to the knowledge of his complainants on the subject. The question then is, whether, where there are several complainants in a partition suit, an affidavit by one of them that there are parties interested who are unknown, which by its most favorable construction can be only held to mean that they are unknown to him, is sufficient to authorize an order of publication which will give jurisdiction over unknown owners, there being nothing to show that there were not other owners known to the other plaintiffs? We think it is not, and the statute never intended to allow any party to be proceeded against as an unknown owner, who might have been a known owner to some of the plaintiffs in the suit."

In *Ashley v. Brightman* 21 Pick. (Mass.) 285, a service by publication against persons unknown, made pursuant to an order of court requiring publication for three weeks successively, was held to be invalid where the petitioner in proof of the service produced only two successive papers containing the published notice.

In *Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751, it was held that

service by publication was valid where it was based on an affidavit which was sufficient to advise the court of the nature of the action, and to show that the action was one in which jurisdiction could be acquired by publication.

It was held in *Bergen v. Wyckoff*, 84 N. Y. 659, that a general statute providing for service by publication against certain classes of defendants was intended to include all actions wherein service of that kind could be had, and that service by publication pursuant to that statute was valid in partition proceedings. And in *Allen v. Allen*, 11 How. Pr. (N. Y.) 277, it was held that a statute providing in general that service by publication might be had against unknown owners, and that those so unknown might be designated by any name, included partition proceedings and authorized a proceeding in partition against unknown defendants served by publication.

Where judgment has been had in a partition proceeding, in which service was by publication, it is presumed that the court in which the judgment was obtained had before it all the facts necessary to the exercise of its jurisdiction, and the judgment will not be set aside on a collateral attack for want of proper publication unless it affirmatively appears that the facts essential to jurisdiction did not in fact exist. *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80, wherein it was held that the fact that a defective affidavit was found in the record and no other affidavit appeared to have been preserved was not sufficient ground for setting aside the judgment, for in the absence of any affidavit at all the presumption *rite esse acta* would be indulged, and so it would where a defective affidavit appeared.

In *Gillon v. Wear*, 9 Tex. Civ. App. 44, 28 S. W. 1014, the court held that a judgment in a partition proceeding reciting on its face that service by publication had been had, imported absolute verity in case of a collateral attack.

#### IN RE CONTEST OF SPECIAL ELECTION AT VILLAGE OF CHAGRIN FALLS.

Ohio Supreme Court—March 2, 1915.

91 Ohio St. 308; 110 N. E. 491.

#### Elections — Time of Closing Polls — Statute Directory

The provision of the statute fixing the time for opening and closing the polls at an election is directory and not mandatory. (Fry

v. Booth, 19 Ohio St. 25, approved and followed.)

[See 90 Am. St. Rep. 78; 9 R. O. L. tit. Elections, p. 1107.]

**Validity of Votes Received after Closing Time.**

An election will not be invalidated by reason of the fact that the election officers, instead of closing the polls at 5:30 P.M. as directed by statute, kept the same open until 6 o'clock P.M., where there was no fraud or collusion and where there were no illegal votes cast after the time fixed by statute for closing sufficient to change the result of the election.

[See note at end of this case.]

(Syllabus by court.)

Error to Court of Appeals, Cuyahoga county.

Election contest. Judgment for defendant reversed by Court of Appeals. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

*Spear, Mills, Knight & Godfrey* for plaintiff in error.

*David & Heald* for defendant in error.

[309] **NEWMAN, J.**—The only question for determination in this case arises upon a demurrer to the petition filed in an election contest proceeding begun in the probate court of Cuyahoga county. The demurrer filed by the mayor of the village of Chagrin Falls was sustained by the probate court and the contestant not desiring to amend or plead further judgment was rendered against him. Error was prosecuted to the court of common pleas and the judgment of the probate court there affirmed. This judgment of the court of common pleas was reversed by the court of appeals and the cause remanded to the probate court with instructions to overrule the demurrer and for further proceedings according to law. The mayor of the village has filed a petition in error in this court and seeks a reversal of the judgment of the court of appeals.

An election was duly and legally called to be held in the village of Chagrin Falls on August 2, 1913. The mayor in his proclamation, published according to law, notified the voters of the village to meet at the usual places of voting, two in number, on Saturday, August 2, 1913, between the hours of 5:30 o'clock A.M. and 5:30 o'clock P.M., central standard time, to vote upon the question as to whether the sale of intoxicating liquors should be prohibited in the village. On the day of the election a cloth banner was displayed in each of the polling places containing in large black type the [310] following:

"Special Election today, Polls open from 5:30 A.M. to 5:30 P.M."

The above facts appear in the petition and then follow these allegations:

"Your petitioner further represents to the court that the duly appointed judges of said special election, or one of them, caused to be erased on said printed banner, the printed figures 5:30, and under said figures in lead pencil, marked 6:00, so as to make said banner read as follows: '5:30 A.M. to 6:00 P.M.'"

"Your petitioner further represents to the court that when the votes cast at said special election were counted, it was found and determined by the officers canvassing the votes of said special election, that the sale of intoxicating liquors as a beverage in said village was prohibited by a majority of two votes.

"Your petitioner further represents that the judges and clerks of said election, contrary to law, and in violation thereof, and contrary to the mayor's published proclamation of said special election, and contrary to the printed banners required to be displayed on each polling place, kept the polls open thirty (30) minutes longer than is provided by law, and as provided for and published in said proclamation, and on said printed banners.

"Your petitioner further represents to the court that after 5:30 P.M.; central standard time, being the time fixed by law, by said proclamation and by said printed banners, a large number of votes were cast by the legally qualified voters of said village in favor of prohibiting the sale of intoxicating [311] liquors as a beverage, in said village, which said votes so received by the election officers, after the lawful time for closing said polls, changed the result of said election; and had the law been observed and the polls closed at the time provided by law, by said proclamation and by said printed banners, the result of said special election would have been different than now appears upon the face of the poll books of said special election, and the sale of intoxicating liquors as a beverage in said village would not have been prohibited at said special election."

The petition prayed that notice be given to the mayor of the village of the pendency of the action and that on final hearing the court declare the election to be void and the returns certified by the election officers to be of no force and effect.

The sufficiency of the petition was challenged because of the failure to allege the presence of fraud or deception, that any legal voters were deprived of the opportunity to vote or that illegal voters were permitted to vote.

It is the contention of counsel for the contestant, the defendant in error here, that if,

after the legal time for closing the polls, enough votes were cast to make different the result of the election from that result as computed from the votes cast at the hour the polls should have been closed according to law, then the election was void. It is alleged in the petition that had the polls been closed at 5:30 P.M. the sale of intoxicating liquors would not have been prohibited at said election.

[312] This election was held under the Beal local-option law, in which it is provided that the election shall be conducted as provided by law for the election of members of council of the municipal corporation where the local-option election is held.

Section 5056, General Code, as amended February 6, 1913 (103 O. L. 21), reads: "The polls shall be open at five thirty o'clock forenoon and kept open up to, and closed at, five thirty o'clock, central standard time, in the afternoon of the same day." Prior to the amendment the time of closing the polls was fixed by the statute at 6 o'clock.

There are certain provisions of law relating to elections and the conduct thereof which are mandatory, but those fixing the time for the opening and closing of the polls have been held uniformly to be directory merely, unless such provisions are declared to be essential by the statute itself. *Fry v. Booth*, 19 Ohio St. 25; *Montgomery v. Henry*, 144 Ala. 629, 6 Ann. Cas. 965, 39 So. 507, 1 L.R.A. (N.S.) 656, and the cases cited.

The purpose of a popular election is to ascertain the will of the electors as to a given proposition submitted to them or as to who shall serve them as officers. Where there is a fair and honest expression of the will of the electors and where there is no fraud and where no substantial right is violated, an election will not be invalidated by reason of a failure to follow directory provisions of the law. In the instant case it is not claimed that any votes were cast after the legal time for closing the polls which were not entitled to be cast had they been cast within the hours fixed by statute. [313] It is conceded that the polls were not kept open by the election officers after the time fixed by law for the purpose of altering, changing or affecting in any way the result of the election, nor was there any fraud or collusion. It was simply an innocent noncompliance on their part with the directory provision of the statute relating to the closing of the polls, unaware, perhaps, of the fact that Section 5056 had been amended.

Was the purpose of this election—the securing of a fair and honest expression of the will of the electors as to whether intoxicating liquors should be sold as a beverage in the village—interfered with? From aught that appears in the petition every elector in the

village voted. No one was deprived of his vote. No illegal vote was cast. There was no impediment or obstruction to a fair expression of the will of the electors.

In *Fry v. Booth*, *supra*, where the polls were closed "for the hour spent at dinner," the court say that a departure from a strict observance of the provisions of the statute as to keeping open the polls does not necessarily invalidate the election where it appears that no fraud has been practiced and no substantial right violated.

Were the polls closed at a time earlier than that fixed by law and qualified voters were thereby prevented from voting, and it could be shown that the result of the election would have been materially changed had the polls been kept open up to the time fixed by law, then it might be said that there was an interference with the free and full expression of the majority. But keeping open the polls after [314] the time fixed by law and permitting no one to vote except qualified voters does not have that effect.

The failure of the election officers to observe this directory provision of the statute did not render the votes of qualified electors cast after the time fixed by law illegal. Those cast after the time fixed by law were as expressive of the will of the electors as those cast before.

It not appearing in the petition that there was fraud, or that illegal votes were cast after the time fixed by law for closing the polls, or that any substantial right was violated, or that there was any interference with a fair and honest expression of the will of the electors, a cause of action is not stated. The probate court was correct in sustaining the demurrer, and the judgment of the court of appeals is therefore reversed and that of the common pleas affirmed.

Judgment of the court of appeals reversed and that of the court of common pleas affirmed.

Nichols, C. J., Johnson, Donahue, Wanamaker, Jones and Matthias, JJ., concur.

#### NOTE.

It is held in the reported case that the keeping open of the polls for half an hour past the statutory closing time does not invalidate an election if there is no fraud and no illegal votes are cast. Votes cast after the time fixed by law for closing are said to be valid, for the reason that they are "as expressive of the will of the electors as those cast before." The validity of a ballot cast after the time for the closing of the polls is discussed in the note to *Lane v. Fern*, Ann. Cas. 1913B 155, from which it appears that the weight of authority is against the decision in the reported case.

## IN RE LUNDY.

Washington Supreme Court—November 5, 1914.

82 Wash. 148; 143 Pac. 885.

### Juvenile Courts — Purpose and Construction of Law.

The Juvenile Court Law (Laws 1913, p. 520), declaring that certain minor children shall be considered delinquents and wards of the state, should be given a liberal construction, so as to give effect to the beneficent purpose of the law, except in so far as it purports to restrain the liberty of infants, in which case it should be construed with all the strictness of a criminal statute.

[See note at end of this case.]

### Jurisdiction — Married Infant.

The Juvenile Court Law (Laws 1913, p. 520), declaring that the law shall apply to all minor children under the age of 18 who are delinquent or dependent, and that the words "dependent children" shall mean any child under the age of 18 who habitually visits any pool room, saloon, or place where intoxicating liquors are sold, etc., applies to a girl of 17 who had previously been married to a man of full age, though the marriage had been annulled.

[See note at end of this case.]

### Infants — Employment Forbidden — Singing in Cafe.

Under the Juvenile Court Law (Laws 1913, p. 520), a girl of 17 cannot sing in a cafe where intoxicants are sold, even though she gains her livelihood in that manner, and notwithstanding it is elsewhere provided in the act that children under the age of 12 shall not participate in any entertainment for hire.

[See note at end of this case.]

Appeal from Superior Court, Spokane county: SULLIVAN, Judge.

Complaint charging Lyndelle Lundy with being juvenile delinquent person. From judgment rendered, delinquent and her mother appeal. The facts are stated in the opinion. **AFFIRMED.**

*E. O. Connor* for appellants.

*Laurence H. Brown* for respondent.

[149] **ELLIS, J.**—On October 9, 1913, a complaint was filed in the superior court of Spokane county, charging Lyndelle Lundy, a female child, under the age of eighteen years, with being a juvenile delinquent person. She answered, admitting that she is under the age of eighteen years, but alleged that she was married on March 1, 1913, to a man thirty-two years old; that her mother gave written consent to the issuance of the marriage license, and to the marriage, and

that, on July 14, 1913, a decree annulling the marriage was entered. A demurrer to this answer was sustained.

The cause was tried to the court upon a statement of agreed facts stipulating that the girl is under the age of eighteen years, to wit, of the age of seventeen years; that she has been married to a man of full age; that the marriage has been annulled by a valid decree; that Lyndelle Lundy has been engaged in singing for wages in two restaurants, to wit, the St. Germain Cafe and the Silver Grill, in the evenings; that in each of these restaurants wines, liquors, and beer were sold and served and there consumed by the patrons and diners, and the girl was supporting herself and assisting in the support of her mother by the wages earned in singing in such restaurants. The court held that the girl, being only of the age of seventeen years, is "a minor child under the age of eighteen years," and subject to the jurisdiction of the juvenile laws and authorities until she shall become of the age of eighteen years. The delinquent and her mother prosecute this appeal.

As we view the matter, but two questions are presented for our consideration: (1) Is a girl under the age of eighteen years within the purview of the juvenile law, and subject to the jurisdiction of the juvenile court whether she be married [150] or single? (2) Does that law apply to a vocalist for hire who sings in a public restaurant where liquors are sold and consumed? Both of these questions must be determined by the terms of the act construed with reference to its manifest purpose and intent.

The scope of the act is determined by its first section which, so far as here material, reads as follows:

"Section 1. This act shall be known as the 'Juvenile Court Law' and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for or contribute to, the delinquency or dependency of such children.

"For the purpose of this act the words 'dependent child' shall mean any child under the age of eighteen years. . . .

"(10) Who habitually visits any billiard room, or pool room; or any saloon, or place where spirituous, vinous, or malt liquors are sold, bartered, or given away; or . . .

"(16) Who from any cause is in danger of growing up to lead an idle, dissolute or immoral life; or . . .

"(18) Any child under the age of twelve years found peddling or selling any article, or singing or playing on any musical instrument for gain upon the public street, or giving any public entertainment, or who accompanies, or is used in aid of, any person

so doing: *Provided*, That this act shall not prohibit the giving of entertainments by regularly organized schools or societies where twelve or more musical instruments are used.

"The words 'delinquent child' shall include any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, county or city and county of this state defining crime; or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct; or who is found in or about railroad yards or tracks; or who jumps on or off trains or cars; or who enters a car or engine, without lawful authority.

"For the purpose of this act only, all delinquent and dependent children within the state shall be considered wards of this state and their persons shall be subject to the custody, care, guardianship and control of the court as hereinafter provided." Laws 1913, p. 520, § 1; 3 Rem. & Bal. Code, § 1987-1.

[151]The act, in its application to the delinquent, is not punitive in its nature or purpose. The policy underlying this law is protection, not punishment. Its purpose is not to restrain criminals to the end that society may be protected and the criminal perance reformed; it is to prevent the making of criminals. Its operation is intended to check the criminal tendency in its inception, and protect the unformed character in the facile period from improper environment and influences. In short, its motive is to give to the weak and immature a fair fighting chance for the development of the elements of honesty, sobriety and virtue essential to good citizenship. While no person, whether minor or adult, should ever be restrained of liberty without due process, and in that respect the statute must be construed with all the strictness of a criminal law (*Weber v. Doust*, 81 Wash. 668, 143 Pac. 148) in other respects it should be liberally construed to the end that its manifest beneficent purpose may be effectuated to the fullest extent compatible with its terms. The act, taken as a whole, will admit of no other view.

We are asked to hold that because another statute, Rem. & Bal. Code, § 8744 (P. C. 69, § 3) declares "All females married to a person of full age shall be deemed and taken to be of full age," the admitted prior marriage of the child here involved caused her to become and remain of full age for all purposes, and that the annulment of the marriage did not restore her former status as a minor child, within the purview of the juvenile court law. The statute referred to, however, in removing the disabilities of minority, does not use the words "for all purposes" which we are asked to read into it.

That statute merely removes the common law disabilities of minority. It was never intended to prohibit a classification of minors for the purposes of legislation, nor to limit the meaning of the word "minor" in acts relating to minors as a class without that exception. As we view the juvenile court law, we find it unnecessary to enter into a lengthy discussion of this point, or to determine whether the annulment [152] of the marriage restored the delinquent's status as a minor for all purposes, or for any purpose. Viewed as a remedial rather than a punitive statute, we would not be justified in holding that the definition of a delinquent or dependent person, found in the language of the first section of the act which we have quoted, is dominated and controlled by the single word "minor," taken in its technical legal significance as found in other connections, and as applied in relation to other things. The purposes of the juvenile court law have a clear and distinct connection with age as related to discretion and character. In passing it, the legislature indulged the usual presumptions arising from human experience that there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under the age of eighteen years; hence, it does not apply to all minor children, but only to "all minor children under the age of eighteen years." Moreover, the very next sentence of the act omits the word "minor" and says "For the purposes of this act the words 'dependent child' shall mean any child under the age of eighteen years," thus defining its own terms. The same omission occurs again in subdivision 18 of this section, in defining the words "delinquent child" as including "any child under the age of eighteen years," etc. Clearly, the age is the controlling element, not the minority. That the purposes of the act are broader and more comprehensive than statutes applicable to minors merely as minors is made clear in the closing clause of this first definitive section, which declares "for the purpose of this act only," all delinquent and dependent children (presumably as just before defined), shall be the wards of the state and "subject to the custody, care, guardianship and control of the court." When the beneficent purposes of the act are recognized as the controlling motive of the legislature in passing it, we can hardly conceive that the members of that body intended to exempt from the purview of the act those females under the age of eighteen years who had already evinced, by marriage at a tender age, that native [153] recklessness or indiscretion, too often the concomitant of mere physical precocity, which it is one of the objects of the act to guard against and control. Suppose the act applied only to "minor



children" or "any child," as later stated, "under the age of eighteen years," "found living or being in any house of prostitution or assignation," eliminating all save the ninth subdivision; would any one suppose that the state's guardianship or the court's tutelage would be held abrogated by any prior marriage of the habitue?

We hold that a girl under eighteen years of age is within the purview of the juvenile law and within the jurisdiction of the juvenile court, notwithstanding her prior marriage to a person of full age. There are authorities which take the opposite view, but we adopt this construction of the act advisedly, and believe that in so doing we are carrying out the legislative will and preserving the sound public policy portrayed by the whole tenor of the act.

Does the juvenile court law apply to a singer for hire in a public restaurant where liquors are sold and consumed? Every consideration which calls for a broad interpretation of the act in its application to persons calls equally for the same breadth of interpretation in its application to places. This hardly needs to be amplified. It seems too plain for argument. But the words of subdivision 10 of the first section of the act, even standing alone, without a consideration of the broad purposes of the act as a whole, will hardly admit of a construction excluding such restaurants. That subdivision applies to one "who habitually visits any billiard-room or pool-room; or any saloon or place" where liquors are sold. Broader language could hardly be framed. If it had been the intention of the legislature to exclude other places than saloons, the words "or place" would necessarily have been omitted. If it had been intended to exclude any place where meals were sold as well as liquor, it would have been easy so to state. In short, if there had been any intention to except restaurants, the exception, in appropriate [154] language, was so obviously necessary to exclude such places from the language already used, that the legislature would doubtless have made the express exception. No exception having been made, the language must be given its plain, ordinary meaning, which is the inclusion of every place where liquors are sold. It may be argued that there are many—perhaps a majority—of restaurants and hostleries where liquors are dispensed to patrons with their meals which are conducted in an orderly and circumspect manner at all times, and patronized by thoroughly respectable and moral people. This is true, but it is also true that there may be, and doubtless are, many restaurants where liquors are sold which are not orderly, where there is drunkenness, and where the surroundings would

have a direct tendency to corrupt the young and immature. It is the purpose of the law, as shown by the eighteen subdivisions of section one of the act, to specify, as nearly as any general law can, the exact things which fall within its purview. As between places, if there is to be any specification of places, the line must, of necessity, be drawn somewhere. The legislature has drawn it between places where liquors are sold and those where they are not. For a court to draw the line elsewhere would be to legislate, not to construe. We are constrained to hold that, both by the terms of the act, and by a consideration of its purposes, one who habitually visits any place, whether a saloon, restaurant or cafe, where liquors are sold, is within the purview of the act.

But it is argued that subdivision 10, above quoted, does not include a singer for hire; that one who visits such a place, though every evening, for the purpose of singing for hire, does not "habitually visit" it within the meaning of the act. The words of that subdivision, however, do not exclude, either expressly or by inference, persons whose habitual visits are inspired by a desire for gain any more than those inspired by a desire for pleasure. Suppose this singer had nightly visited a saloon to sing for pay. Would any one contend that she would not be an habitual visitant within the meaning [155] of the act? The law recognizes neither poverty nor cupidity as an excuse in such a case, any more than in the case of one who, for pay, "frequents the company of reputed criminals . . . or prostitutes," included in the act of by subdivision 8, or one who, for pay, lives in, or is "in any house of prostitution or assignation" included by subdivision 9. These are, of course, extreme illustrations, and the parallel is drawn not for the purpose of showing that every person under the age of eighteen years who habitually visits a restaurant or hotel dining room where intoxicants are served to patrons necessarily falls within the purview of the act, but only as showing that no such person is *necessarily* excluded, and that the incident of singing for hire has no exculpatory effect in any case. It may be urged that, unless this would exclude the singer from the purview of the act, then every person under eighteen years of age who visits such a restaurant or hotel dining room for the purpose of partaking of meals would be within its purview. But this by no means follows. The serving of meals is the legally recognized business of hotels and restaurants. The employment of a singer, much less a juvenile singer, is no necessary part of such business. The juvenile court law by no construction could ever have been intended to prevent any member of the public from visiting such places habitually to patronize them

in the exercise of the lawful function of providing meals. In such a case, whether the habitual visits of a person under eighteen years of age are, in good faith, for such purposes only or whether such purpose is merely the ostensible purpose, the real purpose being for lounging, amusement or idling, is a question of fact to be determined by the court upon evidence in each case. The distinction is this: Visiting in good faith for the purpose of procuring meals is always an exculpatory element, since it is often a practical necessity and has no inevitable tendency to corrupt even the young. Visiting by the young for hire can never be, in itself, an exculpatory element, since it has in it no element of necessity and may have a corrupting [156] tendency. This distinction is found in the very purpose of the act, and is sustained by the broad discretion to determine who is a delinquent vested in the court by subdivision 16 of section 1 (3 Rem. & Bal. Code, § 1987-1) of the act, which includes any such person "who from any cause is in danger of growing up to lead an idle, dissolute or immoral life." The effect of the distinction is this: Where the place falls within the terms of the act, yet, where, from the nature of the place and business, there can be an habitual visiting for a purpose not running counter to the beneficent intent of the act, the burden is upon the visitor to show that his visits are for such purpose, but he does not show it as a matter of law by showing that the habitual visits are to sing for hire. That excuse is in law no excuse and a person under the age of eighteen years, who gives no other, comes, as a matter of law, within the purview of the juvenile law and is subject to the jurisdiction of the juvenile court. The other view would invite evasion, court fraud, and place a burden not imposed by the statute upon those responsible for its enforcement. Our construction of the law imposes no hardship. It permits the operation of hotels and restaurants with every right essential to such operation as now permitted by other laws and without the loss of any patronage offered in good faith. Even assuming that singing is an essential adjunct, no stretch of imagination can require that the singer be under eighteen years of age.

There is no merit in the suggestion that because subdivision eighteen prohibits any child under twelve years of age from singing for gain upon the public street or giving any public entertainment, therefore, an older child may sing for gain in a place where liquors are sold. The consequence of the conclusion is self-evident.

The judgment is affirmed.

Crow, C. J., Main, Chadwick, and Gose, JJ., concur.

## NOTE.

### Juvenile Courts.

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#### I. Introductory.

It is the purpose of this note to review the decisions dealing with the nature and purpose of juvenile courts, their powers, and the procedure therein. The validity of statutes creating those courts is discussed in the note to *Lindsay v. Lindsay*, Ann. Cas. 1914A 1222, and the constitutionality of the statutes providing for the commitment of wayward children to institutions or to a proper guardianship without a jury trial is considered in the notes to *Com. v. Fisher*, 5 Ann. Cas. 92, and *Pugh v. Bowden*, 14 Ann. Cas. 816.

#### II. Nature, Purpose and Establishment.

It is not the purpose of the statutes creating juvenile courts to provide additional courts for the punishment of crime. The purpose is to establish special tribunals, having jurisdiction within prescribed limits, of cases relating to the moral, physical and mental well-being of children to the end that they may be directed away from paths of crime. *Ex p. Januszewski*, 196 Fed. 123; *Moore v. Williams*, 19 Cal. App. 600, 127 Pac. 509; *In re Turner*, reported in full, post, this volume, at page 1022; *Marlow v. Com.* 142 Ky. 106, 133 S. W. 1137; *Lindsay v. Lindsay*, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A. (N.S.) 908; *State v. Eisen*, 53 Ore. 297, 101 Pac. 282, 100 Pac. 257; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935; *Webster v. Doust*, 84 Wash. 330, 146 Pac. 623; *Ogden v. State*, 162 Wis. 500, 156 N. W. 476. "Juvenile courts, . . . are the creation of modern philanthropic endeavor, and are designed

to and in fact do provide a most excellent means of restraining and reforming wayward persons who, unchecked, may become a menace to society." *Moore v. Williams*, supra. "The purpose of the children's court, . . . is not to convict, or punish, but to protect. Starting with the innovation of hearings of juvenile cases in a separate room, a new court followed, wherein it was often found that the first step was to take the child from the corrupting influence of bad surroundings. Justification for such a power to take the child away from depraved parents was taken from the old chancery jurisdiction, exercised as *parens patriae*—in former times invoked chiefly for children with property, or in connection with matrimonial decrees. On behalf of infancy, suffering from poverty, vice, and neglect, this ancient chancery doctrine was now laid hold of and turned to wider service. The interests of the child, not the punishment of crimes, are the subjects of the jurisdiction of children's courts." *In re Antonopoulos*, 157 N. Y. S. 589. "The juvenile court law of 1905 (Laws 1905, ch. 59; Comp. St. 1911, ch. 20, art. II) . . . substantially in its present form has been adopted by many of the other states, and the courts of those states have often been called upon to determine its nature, scope, policy, and validity. It may be said that its purpose is to help, not punish, the child. Its functions are largely parental, and it acts in the interests of the child, not adversely thereto. The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help." *State v. Bryant*, 94 Neb. 754, 144 N. W. 804.

In a number of jurisdictions separate juvenile courts are not created by the juvenile court acts, the jurisdiction under the statutes being conferred on existing courts, provision being made for separate dockets and records and permitting the courts to be designated as juvenile courts when proceeding under the statutes. *People v. Budd*, 24 Cal. App. 176, 140 Pac. 714; *In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L.R.A. (N.S.) 886; *State v. Drury*, 25 Idaho 787, 139 Pac. 1120; *Lindsay v. Lindsay*, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A. (N.S.) 908; *DeKay v. Oliver*, 161 Ia. 550, 143 N. W. 508; *Marlowe v. Com.* 142 Ky. 106, 133 S. W. 1137; *State v. Ragan*, 125 La. 121, 51 So. 89; *Van Leuven v. Ingham Circuit Judge*, 166 Mich. 115, 131 N. W. 531; *In re Broughton* (Mich.) 158 N. W. 884; *State v. Klasen*, 123 Minn. 382, 143 N. W. 984, 49 L.R.A. (N.S.) 597; *State v. Bryant*, 94 Neb. 754, 144 N. W. 804; *Travis v. State*, 31 Ohio Cir. Ct. Rep. 492; *In re Powell*, 6 Okla. Crim. 495, 120 Pac. 1022; *Com. v. Fisher*, 213 Pa.

St. 48, 62 Atl. 198; *State v. Issenhuth*, 34 S. D. 218, 148 N. W. 9; *Ragsdale v. State*, 61 Tex. Crim. 145, 134 S. W. 234.

### III. Compensation of Judge.

In *State v. Brown*, 132 Tenn. 685, 179 S. W. 321, it appeared that the statute creating the office of judge of the juvenile court failed to provide a salary for the occupant of the office. After the election of a judge an amendatory act was passed, fixing the salary of the judge. It was held that this was no violation of the constitutional provision forbidding an increase or diminution of the salary of judges during the term for which they are elected.

### IV. Probation Officers.

In some jurisdictions the juvenile court has the power to parol a delinquent child during a probation period in the care of the probation officer. *In re Broughton* (Mich.) 158 N. W. 884; *Board of Children's Guardians v. Juvenile Court*, reported in full, post, this volume, at page 1019. See also *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378, wherein it was held that it was not error on the trial of a habeas corpus proceeding involving the custody of a child held under a commitment of a juvenile court to remand the custody of the child to the keeping of the probation officer.

In *State v. Police Jury*, 128 La. 911, 55 So. 572, it was held that the right and power to fix the salary of a probation officer is legislative in character and that the power of a juvenile court judge to fix the salary of a probation officer cannot be deduced from his power to appoint the officer.

The Oklahoma statute relating to juvenile courts provides that the court has authority to appoint or designate, by and with the consent of the county commissioners, one discreet person of good character, to serve as probation officer. (Sec. 4420, Rev. Laws 1910.) Under that statute the only question for the board of commissioners to pass on is whether a person appointed as a probation officer is a discreet person of good character. *Seminole County v. Cobb*, 31 Okla. 196, 120 Pac. 913; *Buffington v. State*, 152 Pac. 853.

### V. Jurisdiction.

#### 1. IN GENERAL.

It seems that a juvenile court is a court of special and limited jurisdiction. *U. S. v. West*, 34 App. Cas. (D. C.) 12 followed in *Zinkham v. Linaweaver*, 34 App. Cas. (D. C.) 19; *Ogden v. State*, 162 Wis. 500, 156 N. W. 476. And its powers will not be enlarged by implication. *U. S. v. West*, supra. In that case it appeared that the defendant was

charged in the juvenile court with failing to support his wife under the Act of March 23, 1906 (chap. 1131, 34 Stat. L. 86), making it an offense "for a husband to fail to support his wife" who is in destitute or necessitous circumstances. The statute cited also makes it an offense for "any person who shall, without just excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her minor children . . . in destitute or necessitous circumstances," but it does not confer jurisdiction on the juvenile court of cases arising under it. It was held that whether or not the juvenile court had jurisdiction of a person charged with failing to support his children, it did not have jurisdiction of the charge against the defendant.

Juvenile courts are generally empowered to dispose of the custody of delinquent or neglected children. *Lindsay v. Lindsay*, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A.(N.S.) 908; *State v. Johnson*, 131 La. 8, 58 So. 1015; *In re Broughton* (Mich.) 158 N. W. 884; *Re Maher*, 28 Ont. L. Rep. 419, 4 Ont. W. N. 1009, 12 Dominion L. Rep. 492; *Re Kenna*, 29 Ont. L. Rep. 590, 5 Ont. W. N. 392. But this power is not an unlimited one. *Lindsay v. Lindsay*, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A.(N.S.) 908; *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733. *Compare* *Re Kenna*, 29 Ont. L. Rep. 590, 5 Ont. W. N. 392. Thus in *Lindsay v. Lindsay*, supra, it was held that the fact that a mother was a member of the Mazdaznan religious society was not sufficient to justify the juvenile court in depriving her of the custody of her child. The court said: "The juvenile court statute . . . should not be held to extend to cases where there is merely a difference of opinion as to the best course to pursue in rearing a child. There should be evidence of neglect, abandonment, incapacity or cruelty on the part of the parent or that the child is being exposed to immorality and vice. The right of parents to the society of their offspring is inherent, and courts should not violate that right upon slight pretext nor unless it is clearly for the best interests of the child to do so." And in *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733, it was held that the juvenile court had no right to interfere with the custody of a child on the ground that she was a "dependent" child, where it appeared that she had a comfortable home with her foster parents who were able and willing to provide for and educate her.

It seems that the power of a juvenile court over children of the class defined by the statute is not limited to those children having a technical residence in the state, where they are actually within the jurisdiction of the court. *Henn v. Children's Agency*, 204 Fed.

766, 123 C. C. A. 216; *In re Maginnis*, 102 Cal. 200, 121 Pac. 723. See also *Lindsay v. Lindsay*, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A.(N.S.) 908.

Where a statute relating to proceedings in a juvenile court limits the inquiry and judgment to cases of children under a specified age, the court has of course no jurisdiction over children who are beyond that age. *De Kay v. Oliver*, 161 Ia. 550, 143 N. W. 508; *State v. Lanassa*, 125 La. 687, 51 So. 688; *Arrendell v. State*, 60 Tex. Crim. 350, 131 S. W. 1096. Thus under a statute giving the juvenile court jurisdiction over neglected and delinquent children, they being defined by the statute as those "seventeen years of age and under," it was held that the court had no jurisdiction over minors who were above the age of seventeen, but had not yet reached the age of eighteen years. *State v. Lanassa*, 125 La. 687, 51 So. 688. And in *Arrendell v. State*, 60 Tex. Crim. 350, 131 S. W. 1096, it was held that a minor charged with a crime, who was under the specified age when the crime was committed but had reached that age before the time of his trial in an ordinary court, could not claim the benefit of the juvenile court law. *Compare* *Sams v. State* (Tenn.) 180 S. W. 173.

It is generally held that the jurisdiction of a juvenile court of a charge of delinquency against a minor is not affected by the fact that the minor is a married person. *Stoker v. Gowans*, reported in full, post, this volume, at page 1025; *Ex p. Willis* (Cal.) 157 Pac. 819. And see the reported case. *Compare* *State v. Hennepin County*, 118 Minn. 170, 136 N. W. 746; *State v. Eisen*, 53 Ore. 297, 99 Pac. 282, 100 Pac. 257. In *State v. Hennepin County*, supra, it was held that the juvenile court had no jurisdiction to forbid a girl, who was arrested on a charge of delinquency and set at liberty under bail, to enter into a contract of marriage, and to forbid her parents from giving their consent to the marriage.

The Juvenile Court Law of Nevada (St. 1909, c. 180) provides that the juvenile court may commit dependent, neglected or delinquent children "to some suitable state institution." The statutes relating to the State Orphan's Home provide for the admission to that institution of orphans and, at the discretion of its board of directors, of children whose parents are unable to support them. It has been held that the juvenile court has no jurisdiction to commit a delinquent and neglected child to the institution. *McKinnon v. Second Judicial District Ct.* 35 Nev. 494, 130 Pac. 465.

On the abolition of a juvenile court, a minor who is within the provisions of the statute creating it is triable in the court having general jurisdiction of the offense

charged against him. *Ex p. Perryman*, 156 Ala. 625, 48 So. 866; *Hampton v. State*, 167 Ala. 73, 52 So. 659.

## 2. CONCURRENT, CONFLICTING AND EXCLUSIVE JURISDICTION.

The statutes of several jurisdictions relating to juvenile courts do not take away the jurisdiction of the ordinary criminal court to try juvenile offenders for crime where the welfare of the public requires it. *Com. v. Fisher*, 213 Pa. St. 48, 5 Ann. Cas. 92, 62 Atl. 198, *affirming* 27 Pa. Super. Ct. 175; *Ragsdale v. State*, 61 Tex. Crim. 145, 134 S. W. 234; *McCallen v. State* (Tex.) 174 S. W. 611; *Ex p. Bartee* (Tex.) 174 S. W. 1051; *Townser v. State* (Tex.) 182 S. W. 1104. See also *Ex p. Januszewski*, 196 Fed. 123 (construing Ohio statute).

A statute establishing juvenile courts will not be held to repeal by implication a prior statute conferring jurisdiction on another court to provide for the custody and control of children not properly cared for. *In re Quinette*, 81 Neb. 30, 115 N. W. 545. On the other hand it has been held that though another court has been given exclusive jurisdiction of misdemeanors conferred on it by a statute, a juvenile court has jurisdiction of offenses committed under the statute defining its jurisdiction, notwithstanding the fact that they are defined as misdemeanors, the exclusive jurisdiction of the court originally having jurisdiction over misdemeanors being to that extent taken away. *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

The fact that a court has made an order relating to the disposition of a child in a suit between its parents for divorce or separation does not exclude the jurisdiction of the juvenile court as to the support and custody of the child as a delinquent or neglected child. *Spade v. State*, 44 Ind. App. 529, 39 N. E. 604; *State v. McCloskey*, 136 La. 739, 67 So. 813; *Children's Home v. Fetter*, 90 Ohio St. 110, 106 N. E. 764.

Under several of the juvenile court acts, juvenile offenders who are within the age specified by the statute may be tried by the courts ordinarily having jurisdiction of the crime, but only after the juvenile court has determined the necessity for the prosecution. *Com. v. Yungblut*, 159 Ky. 87, 166 S. W. 808; *Com. v. Franks*, 164 Ky. 239, 175 S. W. 349; *Talbott v. Com.* 166 Ky. 659, 179 S. W. 621; *State v. Burt*, 75 N. H. 64, Ann. Cas. 1912A 232, 71 Atl. 30; *In re Powell*, 6 Okla. App. 495, 120 Pac. 1022. *Compare Ex p. Thomas*, 56 Tex. Crim. 68, 118 S. W. 1053.

The statutes of several jurisdictions make it the duty of a criminal court to transfer a cause to the juvenile court when it appears that a person charged with crime is

under a specified age. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165; *In re Tom*, 17 Cal. App. 678, 121 Pac. 294; *State v. Thomas*, 250 Mo. 189, 157 S. W. 330. In the case of *In re Tom*, supra, it was held that a statute of that nature did not affect the jurisdiction of the superior court to enter a judgment of imprisonment against a minor charged with a crime, who had entered a plea of guilty without making a claim that he was of an age entitling him to the benefit of the juvenile court. In *People v. Oxnam*, supra, a minor under the age of eighteen was tried for murder in the superior court. It was held that the mere fact that some evidence on the trial tended to show the age of the minor did not require the court of its own motion to certify the proceedings to the juvenile court. In *State v. Thomas*, 250 Mo. 189, 157 S. W. 330, it was held that a court trying a minor for a crime did not err in refusing to pass on his application for a change of venue to the juvenile court before determining his age.

Under the *Louisiana* statutes it seems that children under the age of seventeen who are charged with a criminal offense can be proceeded against only in the juvenile court except in capital cases. *State v. Ragan*, 125 La. 121, 51 So. 89; *State v. Prater*, 125 La. 573, 51 So. 647. In *State v. Ragan*, supra, it was held that the exclusive jurisdiction of the juvenile court was not affected by the fact that the state and the different parishes had neglected to furnish proper means and facilities for carrying into effect the provisions of the statute relating to the care, custody and disposition of neglected and delinquent children. To the same effect see *State v. Prater*, 125 La. 573, 51 So. 647. But the juvenile courts have no jurisdiction of a case in which a minor is charged with the commission of a murder. *State v. Howard*, 126 La. 353, 52 So. 539; *State v. Howard*, 127 La. 435, 53 So. 677.

The *Tennessee* Juvenile Court Law (chap. 58, Acts of 1911) provides that if a child under the age of sixteen years violates any law of the state and is arrested and taken before a court having jurisdiction of the offense, it is the duty of the court to transfer the case to the juvenile court. It gives the juvenile court discretion to remand the child for trial for the crime charged against him to the proper court if he is found to be incorrigible. The statute also provides that the jurisdiction which the juvenile court acquires shall continue until the child shall have attained its majority. Under that statute it has been held that where a minor under the age of sixteen years is arrested and indicted for a crime, a circuit court does not have jurisdiction to try him for the crime in the first instance, but the fact that he is

tried in that court does not defeat the jurisdiction of the juvenile court which is acquired from the time of the arrest of the minor. And it is the duty of the circuit court to transfer the case to the juvenile court which has jurisdiction although the minor in the meantime has reached the age of sixteen years. *Sams v. State*, 180 S. W. 173.

### 3. OFFENSES AGAINST MINORS.

Juvenile courts are generally given jurisdiction of acts committed by adults which cause or contribute to the delinquency or dependency of children. In *re Mills Sing*, 14 Cal. App. 512, 112 Pac. 582; In *re Goldsworthy*, 22 Cal. App. 354, 134 Pac. 352; *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376; *Murphy v. State* (Ind.) 111 N. E. 806; *State v. Ragan*, 125 La. 121, 51 So. 89; *State v. Fink*, 127 La. 190, 53 So. 519; *State v. Locicero*, 127 La. 1035, 54 So. 342. Compare *State v. Drury*, 25 Idaho 787, 139 Pac. 1129. Thus where a defendant was charged with inducing a girl under the age of fifteen years to commit an act of delinquency in that he had illicit sexual intercourse with her, it was held that the juvenile court had jurisdiction. *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376. And it has been held that a juvenile court has jurisdiction to try a person charged with selling intoxicating liquors to a delinquent child. *Murphy v. State* (Ind.) 111 N. E. 806; *State v. Locicero*, 127 La. 1035, 54 So. 342. But where an information charged that the mother of the children alleged to be dependent sustained immoral relations with the defendant and deserted and abandoned her children to live an immoral life with the defendant, leaving the children without a proper home, it was held that the information did not charge the offense of contributing to the delinquency of the children. *People v. Bergotini* (Cal.) 158 Pac. 198. And in *State v. Rose*, 125 La. 1080, 52 So. 165, it was held that the juvenile court had no jurisdiction of an offense consisting of the violation of a statute forbidding the employment of a child in a theatre in the absence of an allegation that the child was delinquent or neglected.

Under some of the statutes juvenile courts have jurisdiction of offenses committed by parents in deserting or failing to support their children. *Moss v. U. S.* 29 App. Cas. (D. C.) 188; *State v. Tujague*, 134 La. 576, 64 So. 417; In *re Antonopulos*, 157 N. Y. S. 587. But in *Moss v. U. S.* supra, it was held that a juvenile court had no jurisdiction of a charge against a man for being the father of an illegitimate child and failing to provide for its support.

Under a statute giving the juvenile court jurisdiction over persons charged with con-

tributing to the delinquency of minors "seventeen years of age and under," it has been held that the juvenile court has no jurisdiction of a charge against a person for contributing to the delinquency of a minor who is above the age of seventeen, but less than eighteen years of age. *State v. Lanassa*, 125 La. 687, 51 So. 688.

The fact that an offense is committed against a child does not necessarily give the juvenile court jurisdiction to punish the wrongdoer, where the crime in no way contributes to the delinquency of the child. *State v. Jacobs*, 130 La. 245, 57 So. 905; *People v. Zmudzinski*, 80 Misc. 28, 141 N. Y. S. 542. Thus in *State v. Jacobs*, supra, it was held that the juvenile court had no jurisdiction of a charge of assault committed on a child alleged to be delinquent. And in *People v. Zmudzinski*, supra, it was held that a children's court had no jurisdiction of an offense charging the defendant with handling an automobile in such a careless and imprudent manner that he inflicted personal injuries on a child.

Under the *Colorado* statute (chapter 149, Laws of 1907) the jurisdiction of the juvenile court extends only to cases involving the disposition, custody or control of a minor under acts concerning delinquent, dependent or neglected children or under acts which relate to the welfare of children or to the duties of parents or those responsible for the children. In *Colias v. People*, 60 Colo. 230, 153 Pac. 224, it was held under that statute that a juvenile court had no jurisdiction of a crime against nature committed on a minor.

Under the *Washington* statute relating to "Delinquent Children and Juvenile Courts" (Rem. & Bal. Code, sections 1987-2004) a prosecution for contributing to the delinquency of a minor has been held to be properly triable in the criminal department of the superior court. *State v. Williams*, 73 Wash. 678, 132 Pac. 415.

### 4. CONTEMPT.

It seems that juvenile courts have the same power as other courts to punish for contempt. *Lindsay v. Lindsay*, 255 Ill. 442, 99 N. E. 608. See also *Frowley v. Superior Ct.* 158 Cal. 220, 110 Pac. 817; *State v. Hennepin County*, 118 Minn. 170, 136 N. W. 746.

## VI. Procedure.

### 1. IN GENERAL.

While proceedings in the juvenile court need not be conducted in conformity with the strict rules of procedure obtaining in other courts, there should not be an entire disregard of those rules. *Mill v. Brown*, 31

82 Wash. 148.

Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935, wherein it was said: "While we do not wish to be understood as holding that investigations before juvenile courts must be conducted as trials usually are, still these courts should not disregard all rules of procedure. The law requires a written complaint to be filed, hence there should also be an investigation of the matters set forth in the complaint and witnesses examined, under oath, with the right of cross-examination. Since there is no appeal and can be none in these cases, there should be as thorough an examination into the matters complained of as the nature of the case admits, under all the circumstances. We desire to observe also that while the parent or guardian is not legally a necessary party to the proceedings, and should not and cannot be bound by any judgment rendered in the juvenile court respecting his rights to the custody and control of the child, yet, in view that he is affected, it perhaps were better that a formal notice of the hearing be served on him, if he can be found, to the end that all the facts may be elicited by the investigation. The whole proceedings should be conducted so as to subserve the rights and best interests of all, while in no way minimizing the beneficent purposes of the law itself. While in the very nature of things, these courts cannot conform to the rigorous rules of criminal and law courts, their proceedings should still be conducted as a legal investigation. . . . While juvenile courts cannot, and are not expected to, be conducted as criminal or other courts usually are, the judge should still not wholly disregard all wholesome rules in an attempt to establish guilt which he suspects, or, worse yet, merely imagines. Most of the rules of evidence and procedure were established, and their observance is necessary, to curb the propensities of the inquisitor, and it would, no doubt, better subserve the best interests of all if the most important of these rules were observed by respondent in his investigations. The fact that the American system of government is controlled and directed by laws, not men, cannot be too often nor too strongly impressed upon these who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided."

Proceedings in the juvenile courts against neglected and delinquent children are ordinarily not regarded as criminal proceedings and the statutes of several jurisdictions provide that they are not so to be regarded. U. S. v. Behrendsohn, 197 Fed. 953; In re Turner, reported in full, post, this volume, at page 1022; Marlowe v. Com. 142 Ky. 106, 133 S. W. 1137; State v. Ragan, 125 La. 121, 51 So. 89; In re Broughton (Mich.) 158 N. W. 884; Travis v. State, 31 Ohio Cir. Ct. Rep.

492; Childress v. State, 133 Tenn. 121, 179 S. W. 643. See also Lindsay v. Lindsay, 257 Ill. 328, Ann. Cas. 1914A 1222, 100 N. E. 892, 45 L.R.A.(N.S.) 908; State v. Eisen, 53 Ore. 297, 99 Pac. 282, rehearing 53 Ore. 302, 100 Pac. 257; State v. Dunn, 53 Ore. 304, 99 Pac. 278, rehearing 53 Ore. 315, 100 Pac. 315. Compare Robison v. Wayne, 151 Mich. 315, 115 N. W. 682, 14 Detroit Leg. N. 945; State v. Tincher, 258 Mo. 1, Ann. Cas. 1915D 696, 166 S. W. 1028.

But it seems that proceedings in the juvenile court against adults for contributing to the delinquency or neglect of children are to be taken as criminal in their nature and consequently the ordinary rules of criminal procedure must be observed. State v. Barilleau, 128 La. 1033, 55 So. 664; State v. Eisen, 53 Ore. 297, 99 Pac. 282, rehearing 53 Ore. 302, 100 Pac. 257; State v. Dunn, 53 Ore. 304, 99 Pac. 278, rehearing 53 Ore. 315, 100 Pac. 258. See also Robison v. Wayne, 151 Mich. 315, 115 N. W. 682, 14 Detroit Leg. N. 945.

## 2. COMPLAINT, PETITION OR INDICTMENT.

The failure to commence a proceeding in the juvenile court by a complaint, petition or indictment as required by the statute is generally held fatal to its jurisdiction. DeKay v. Oliver, 161 Ia. 550, 143 N. W. 508; Cullins v. Williams, 156 Ky. 57, 160 S. W. 733; Mansfield's Case, 22 Pa. Super. Ct. 224. See also Moss v. U. S. 29 App. Cas. (D. C.) 188. Compare Weber v. Doust, 84 Wash. 330, 146 Pac. 623, reversing on rehearing 81 Wash. 668, 143 Pac. 148, wherein it was held that where a child thought to be a juvenile delinquent is taken into custody against his will and detained without a complaint being filed and the procedure outlined in the law relative to delinquent children and juvenile courts is followed, it is not false imprisonment as a matter of law if the officer proceeds in good faith and in the execution of the duties put on him by the spirit or the letter of the juvenile act; and that whether there is an outrage of the rights of the person restrained should be made to depend on the will, purpose and motive of the one who restrains him.

In the case of In re Turner, 94 Kan. 115, 145 Pac. 871, a complaint alleging a child to be incorrigible, verified by a probation officer on information and belief, was held to be sufficient.

In California a proceeding in the juvenile court can be only by an indictment or information after a preliminary examination. A verified complaint is insufficient to give the court jurisdiction. In re Mills Sing, 13 Cal. App. 736, 110 Pac. 693; Gardner v. Superior Ct. 19 Cal. App. 548, 126 Pac. 501; People v. Budd, 24 Cal. App. 176, 140 Pac. 714. See

also *Edgington v. Superior Ct.* 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338. And facts showing the delinquency or dependency of the child must be set forth. *People v. Pierro*, 17 Cal. App. 741, 121 Pac. 689; *Edington v. Superior Ct.* 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338; *Moore v. Superior Ct.* 22 Cal. App. 156, 133 Pac. 990; *In re Goldsworthy*, 22 Cal. App. 354, 134 Pac. 352; *People v. Oliver* (Cal.) 156 Pac. 1005; *Ex p. Burner*, 23 Cal. App. 637, 139 Pac. 90. Compare *People v. Cruse*, 24 Cal. App. 497, 141 Pac. 936.

In *Louisiana* an allegation in general terms as to the neglect or delinquency of the child is sufficient. *State v. Fink*, 127 La. 190, 53 So. 519; *State v. Johnson*, 131 La. 8, 58 So. 1015.

In *Oregon* it seems that an indictment against a person for contributing to the delinquency of a minor child is sufficient if the act charged "manifestly tends to cause any child to become a delinquent child." *State v. Dunn*, 53 Ore. 304, 99 Pac. 278, *rehearing* 53 Ore. 315, 100 Pac. 258.

### 3. PLEA OR ANSWER.

In the case of *In re Cannon*, 27 Cal. App. 549, 150 Pac. 794, a petition was filed in a juvenile court by a father for the purpose of setting aside a judgment declaring his minor children to be neglected persons. It was held that the want of an answer to the petition did not have the effect of establishing its averments as true. The court said: "The juvenile court statute introduced a rule under which the reviewing court may determine the issues upon the preponderance of the evidence, and appellant claims that there is a clear preponderance of the evidence in support of the petition. He also claims that as there was no written opposition or answer to the petition its averments must be taken as established. Upon this latter point no answer to the petition was necessary, for by it Cannon presented the entire matter of his right to have the custody of the children based upon his fitness in every way for having such custody. It was within the power of the court, and its duty as well, to inquire into all matters having any bearing upon the claims presented by petitioner. Mrs. Cannon was served with process and appeared as a witness and by counsel, though making no written opposition, and the district attorney appeared *amicus curiae* on behalf of the people. The investigation took a wide range and petitioner was given full opportunity to establish his case."

### 4. APPOINTMENT OF COUNSEL.

The juvenile court statutes of several jurisdictions authorize the court to appoint counsel to represent juvenile offenders tried

by them. *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378; *State v. Issenbuth*, 34 S. D. 218, 148 N. W. 9. In *Rooks v. Tindall*, *supra*, it was held that the judge was not obliged to appoint an attorney to represent a child on trial for its commitment as a delinquent or wayward child.

### 5. NECESSITY FOR JURY.

Under the *Georgia* statute (Penal Code, § 890) the judge of a children's court may proceed without the intervention of a jury on a trial for the commitment of a child as a delinquent or wayward child in the absence of a demand for a jury trial. *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378.

Under the *Texas* statute (chap. 55, Acts of 31st Leg., p. 101) the juvenile court is authorized to have a jury summoned to determine the guilt or innocence of a defendant. *Windham v. State*, 150 S. W. 613.

### 6. EVIDENCE.

It seems that the ordinary rules of evidence are applicable to proceedings in a juvenile court. *People v. Fowler*, 148 N. Y. S. 741, *reversed* on other grounds 166 App. Div. 605, 152 N. Y. S. 261. See also *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. Thus in *People v. Fowler*, *supra*, it was said: "It is urged that there was no error committed because the proceeding in question is not strictly a criminal proceeding, and the rules of evidence relating to the prosecution of crime are therefore not applicable. It cannot be denied that there is some force to this contention. I am inclined to agree with the learned counsel for the society that the proceeding is not a criminal trial, yet it is certainly a judicial inquiry, in which the state steps in, seeking to prove the child a fit subject for institutional confinement and the parent or parents of the child proceeded against as unfit to exercise control. Upon the state proving its case, the parent is deprived of the society of the child and the child of its home and the society of its parent or parents, the child is further deprived of its liberty for years perhaps and forever branded as an inmate of an institution: the parents stigmatized as possessing a child, who, upon a judicial inquiry, was incarcerated in an institution. So it will be seen that in a proceeding or inquiry of this kind whether in referring to it we use the terms trial, sentence, proceeding, quasi criminal proceeding, or any other term, is, in the final analysis, a proceeding in which are involved basic and fundamental rights of the parent and of the child, which should be safeguarded by all the forms of law. There is no stronger tie than the tie which binds a parent and a child, and the strong arm of the state as



parens patriae should only be extended in forcing a child from its parent, after all the requirements of law have been complied with. In this case, the record shows that the mother pleaded with the court for the possession of her child. She was willing to maintain and support it, to use her own words, 'until her death,' and, in so far as the record discloses, is a hard-working, honest woman, without a husband, employed in one of our large department stores, and using the salary earned towards the support of her home, the apartment from which the defendant was taken. There should be no straining in our courts in favor of an institution as against a home or a mother. The learned trial court, on April 1st, found the infant, Lillian Fowler, likely to become morally depraved, and as guilty of associating with dissolute and vicious persons, upon the bare statement of the infant and Officer Curran of the society, on that day, and, for all purposes of the finding, the proceeding was then and there concluded. . . . The question then is: Was there sufficient legal evidence upon which to find that at the time of the arraignment the defendant was in danger of becoming morally depraved and associating with dissolute and vicious persons. . . . While I do not believe that the statements made by various persons on April 3d, the day of disposition and commitment, should be considered in deciding this question as to whether the defendant should have been found unfit to live at home, yet it may be said in passing that the statements there, not under oath, are just as consistent with innocence as with guilt; and, although a proceeding of this kind is not strictly speaking a criminal trial, yet I believe, in view of the possible consequences involved, that the constitutional safeguards provided under our law, the presumption of innocence and the benefit of every reasonable doubt, should be applied."

By the *California* statute relating to juvenile courts any conduct on the part of a person toward a minor which either causes or tends to cause the minor to become or remain a dependent or delinquent person may be shown, and the conduct may consist of one act only or a series of acts. Under that statute it has been held that where a person is charged with the offense of contributing to the dependency of an alleged dependent child, it is proper to admit evidence showing that the defendant on other occasions than the specific date laid in the information had been guilty of improper conduct with the minor. *People v. Oliver*, 156 Pac. 1005.

#### 7. JUDGMENT.

The judgment of a juvenile court having jurisdiction of the subject-matter and the

parties is as conclusive and final as the judgments of other courts of record. *Board of Control v. Mulertz*, 60 Colo. 468, 154 Pac. 742; *Tullis v. Shaw*, 189 Ind. 662, 83 N. E. 376; *In re Broughton* (Mich.) 158 N. W. 884; *Children's Home v. Fetter*, 80 Ohio St. 110, 106 N. E. 761; *Foster v. Myers*, 59 Ore. 549, 117 Pac. 806; *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560. See also *In re Antonopoulos*, 157 N. Y. S. 587. But where the court is without jurisdiction it seems that its judgment is wholly void and may be attacked either directly or collaterally. *U. S. v. West*, 34 App. Cas. (D. C.) 12; *Zinkham v. Linaweaver*, 34 App. Cas. (D. C.) 19.

A judgment of delinquency against a minor child does not bind its parents or guardian where they are not parties to the proceeding. *In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L.R.A.(N.S.) 886; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935; *Ex p. Sahlberg*, 31 Utah 489, 88 Pac. 616.

In the absence of a statutory provision a juvenile court has no more power over a judgment after the expiration of the term at which it was rendered than another court of record. *Board of Control v. Mulertz*, 60 Colo. 468, 154 Pac. 742. *Board of Children's Guardians v. Juvenile Court*, reported in full, post, this volume, at page 1019. Thus in *Board of Control v. Mulertz*, supra, it was held that a juvenile court could not set aside a judgment two and one-half years after its rendition by a nunc pro tunc order directing a petition for a rehearing to be filed.

Some statutes expressly provide that when a juvenile court has once acquired jurisdiction its jurisdiction shall continue until the child shall have attained majority. *Sams v. State* (Tenn.) 180 S. W. 173; *Stoker v. Gowans*, reported in full, post, this volume, at page 1025.

#### 8. APPEAL.

No appeal lies from the orders and judgments of a juvenile court in the absence of a statute granting it. *Ex p. Januszewski*, 196 Fed. 123; *Marlowe v. Com.* 142 Ky. 106, 133 S. W. 1137; *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733; *Foster v. Myers*, 59 Ore. 549, 117 Pac. 806; *Ex p. Bartee* (Tex.) 174 S. W. 1057; *Horn v. State* (Tex.) 181 S. W. 727; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. Thus in *Marlowe v. Com.* supra, it was said: "As to the second proposition, that appellant was entitled to prosecute an appeal from the judgment of the county court, committing her to the home of the Good Shepherd, a sufficient answer is found in the statement that the act known as the juvenile court act makes no provision whatever for an appeal, and, as it contains the entire procedure relative to

dependent or delinquent children, it must be presumed that the legislature did not intend that an appeal should lie; otherwise provision would have been made for it. And, indeed, no good reason is assigned or shown why an appeal should be granted, for the judgment is not one of imprisonment, but merely a provision of the government, standing in loco parentis, for the protection, correction and care of the child. . . . The right of appeal not being guaranteed by the Constitution, but wisely left to legislative discretion as to when it should be granted, and when not, no ground of complaint is afforded appellant because provision for an appeal is not found in the act. . . . The juvenile court act is a complete compendium of the law upon this subject and no provision being made therein for an appeal, the trial judge properly held that no appeal could be prosecuted from the order of the county court."

But it seems that relief from improper judgments may be had by the extraordinary writs. *Marlowe v. Com.* 142 Ky. 106, 133 S. W. 1137; *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733. See also *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935.

In some jurisdictions an appeal is allowed from the orders and judgments of the juvenile court. In *re Turner*, reported in full, post, this volume, at page 1022; *Tullis v. Shaw*, 169 Ind. 662, 83 N. E. 376; *Spade v. State*, 44 Ind. App. 529, 89 N. E. 604; *State v. Nicolosi*, 128 La. 836, 55 So. 475; In *re Broughton* (Mich.) 158 N. W. 884; *People v. Fowler*, 166 App. Div. 605, 152 N. Y. S. 261, reversing 148 N. Y. S. 741; *People v. Di Steffano*, 156 N. Y. S. 679; *State v. Issenhuth*, 34 S. D. 218, 148 N. W. 9. But the right exists only as to proceedings within the terms of the statute conferring it. *Van Leuven v. Ingham Circuit Judge*, 166 Mich. 115, 131 N. W. 531. And a review of the proceedings can be had only in the manner pointed out by the statute. *Myers v. U. S.* 39 App. Cas. (D. C.) 36; *State v. Nicolosi*, 128 La. 836, 55 So. 475; *Ogden v. State*, 162 Wis. 500, 156 N. W. 476. Compare *U. S. v. West*, 34 App. Cas. (D. C.) 12; *Zinkham v. Linaweaver*, 34 App. Cas. (D. C.) 19. The record must be prepared and authenticated as required by the statute. In *re Fowler*, 24 Cal. App. 529, 141 Pac. 1053; *Eddy v. State*, 54 Ind. App. 93, 102 N. E. 277.

On appeal from a judgment of a juvenile court, reasonable presumptions will be indulged in by the reviewing court in support of the proceedings in the lower court. In *re Cannon*, 27 Cal. App. 549, 150 Pac. 794; *Murphy v. State* (Ind.) 111 N. E. 806. Thus in the case last cited a finding made by the juvenile court judge recited that he "does

now make the following finding of facts . . . to wit: The evidence of the state showed the following facts, etc." It was held that while the form of the special finding was not to be commended, it would not be presumed that the judge considered only the evidence produced by the state. And in the case of *In re Cannon*, 27 Cal. App. 549, 150 Pac. 794, the rule was applied although the statute relating to juvenile courts provided that the reviewing court might determine the issues on the preponderance of the evidence. The court said: "The juvenile court statute introduced a rule under which the reviewing court may determine the issues upon the preponderance of the evidence, and appellant claims that there is a clear preponderance of the evidence in support of the petition. . . . Notwithstanding the rule above referred to, the reviewing court must accord to the trial judge the superior advantage of looking into the faces of the witnesses and observing their demeanor, thus giving him the better opportunity to pass upon their credibility when testifying which is denied on the hearing of the appeal."

In some jurisdictions the finding of facts by the juvenile court is conclusive in a proceeding to review its judgment. *State v. Johnson*, 131 La. 8, 58 So. 1015; *State v. McCloskey*, 136 La. 739, 67 So. 813; *Brana v. Brana* (La.) 71 So. 519.

## 9. COSTS.

In the absence of a statutory provision costs cannot be awarded in a proceeding in the juvenile court. *Pierce County v. Magnuson*, 70 Wash. 639, Ann. Cas. 1914B 889, 127 Pac. 302, wherein the court said: "The juvenile court act, chapter 190, Laws of 1909, page 668 (Rem. & Bal. Code, sec. 1937), makes no provision for the awarding or payment of costs, except the provision authorizing the publication of notice when the person standing in the position of natural or legal guardian of the person of the alleged delinquent child is a nonresident, or the whereabouts of such person is unknown. In cases of such publication of notice, it is provided that the cost of such publication shall be paid by the county. Another section provides for the payment by the county of salaries to probation officers. Otherwise the act is silent on the question of fees and costs. The awarding and payment of costs is purely a matter of statutory regulation. The recovery of costs was unknown to the common law, and no provision could be made for their payment except as expressly authorized by statute. This rule has been one of such universal application that it has become the settled doctrine of the courts that costs are the creature of the statute merely, and that

the allowance of them in any case would depend entirely upon the terms of some statute. . . . There being no provision in the act creating the juvenile court for the awarding of costs against the county, the authority to do so, if it exists, must be found in some other statutory provision."

## BOARD OF CHILDREN'S GUARDIANS

v.

## JUVENILE COURT.

District of Columbia Court of Appeals—  
May 28, 1915.

43 App. Cas. (D. C.) 599.

### Juvenile Courts — Procedure — Vacating Commitment.

A juvenile court has no power to vacate a commitment after the expiration of the term at which it is entered.

[See note at end of this case.]

Error to Juvenile Court.

Order entered by Juvenile Court revoking commitment of minor to Board of Children's Guardians. The Board brings error. REVERSED.

[600] This is a writ of error to the juvenile court to determine the question whether that court has the power to remove a child from the custody of the Board of Children's Guardians before the expiration of the term of commitment.

On August 28, 1914, an information was filed in the juvenile court against George Roat, a boy of fourteen, charging him with petty larceny. On the same day a plea of guilty was entered and the boy was committed to the Board of Children's Guardians during minority. On February 22, 1915, a half-sister of the boy filed a petition in the juvenile court asking for his custody and control. The court, after hearing and over the protest of the board, revoked the previous order of commitment, and allowed the boy "to return to the home of the said Mary E. Poole under probation." This writ of error followed.

The act of February 13, 1885 (23 Stat. at L. 302, chap. 58) "For the Protection of Children in the District of Columbia and for Other Purposes," extended the power of the Humane Society to the protection of children. The officers of the society were empowered

to take children who were subjected to cruel treatment, wilful abuse or neglect, or any child under sixteen found in a house of ill fame, before the police court, which might commit such children "to an orphan asylum or other public charitable institution in the District of Columbia, with the consent of the constituted authorities of such asylum or institution, or make such other disposition thereof as now is or may hereafter be provided by law in cases of vagrant, destitute, or abandoned children." The Board of Children's Guardians was created by the act of July 26, 1892 (27 Stat. at L. 268, chap. 250). It is there made a body corporate, consisting of nine members appointed by the judges of the police court and of the supreme court of the District of Columbia. The members serve without compensation, hold office for stated terms, and are removable [601] for cause. The Board is given power, subject to the approval of the Commissioners of the District, "to employ not more than two agents, at an annual compensation not exceeding \$2,400 for the two, and prescribe their duties, and to conclude arrangements with persons or institutions for the care of dependent children at such rates as may be agreed upon." Section 4 of the act provides "that said board shall have the care and supervision of the following classes of children," when not over sixteen years of age: Children committed under said act of February 13, 1885; those destitute of suitable homes and adequate means of earning an honest living; abandoned and immoral children; children of unfit parents found begging on the streets or from door to door; and children known to be vicious or incorrigible, "whenever such children may be committed to the care of the board by the police court or the criminal court of the District." This section further authorizes the Board of Trustees of the Reform School for Boys or the Reform School for Girls (now called training schools), in their discretion, to commit to the board any inmate of their respective institutions "conditionally upon the good behavior of the child so committed." Further authorization is given by this section to receive children temporarily, "pending investigation or judgment of the court." Section 5 reads as follows: "That the board shall be the legal guardians of all children committed to it by the courts, and shall have full power to board them in private families, to board them in institutions willing to receive them, to bind them out or apprentice them, or give them in adoption to foster parents. Children received from the reform schools shall be placed at work, bound out or apprenticed, and at any time before attaining majority may be returned to the school from which they came, if in the judgment of the Board of Guardians such a course

is demanded by the interest of the community or the welfare of the child. All children under the guardianship of the board shall be visited not less than once a year by an agent of the board, and as much oftener as the welfare of the child demands. Children received temporarily may not be kept longer than one week, except by order of the police [602] court or the criminal court." Section 7 authorizes the Commissioners of the District to prescribe the form of records to be kept, methods of accounting, and requires an annual report to be made by the board to the superintendent of charities, which official is given "full powers of investigation and report regarding all branches of the work of the board, as well as over all institutions in which children are placed by the board; and it shall be his duty to recommend annually the appropriations which in his judgment are necessary to the carrying on of its work." The act of March 1, 1901 (31 Stat. at L. 843, chap. 670), carries an appropriation "for board and care of all children committed to the guardianship of said board by the courts of the District, and for the temporary care of children pending investigation or while being transferred from place to place . . . ; Provided, that when the Board of Children's Guardians place any of such children in private families, as far as practicable, such children shall be placed only in such families as are of the same religious denomination or belief as the parents, or last surviving parent of the child, and this appropriation shall not be otherwise available." The act of March 3, 1901 (31 Stat. at L. 1095, chap. 847), "To Enlarge the Powers of the Courts of the District of Columbia in Cases Involving Delinquent Children," provides that the judges of the criminal court and the police court may, in their discretion, commit petty offenders under seventeen years of age "to the custody and care of the Board of Children's Guardians." Section 2 prohibits the commitment of such a child to a jail, workhouse, or police station, and authorizes its commitment "to the Board of Children's Guardians temporarily or permanently, in the discretion of the court," and the board is required to make some suitable provision for such children outside the inclosure of any jail, workhouse, or police station. Under sec. 3, for the purpose of aiding the court in the proper disposition of the cases above referred to, the Board of Children's Guardians is "authorized and directed to designate one of its employees as a probation officer, whose duty shall be to make such investigation in cases involving children under seventeen years of age as the court may [603] direct, to be present in court in order to represent the interests of the child when the case is heard, to furnish the court such information and assistance as the judge may

require, and to take charge of any child before and after trial as may be directed by the court." Section 5 of the act provides "that whenever petition or information shall have been filed in any court of the District of Columbia authorized to commit children to the care, custody and guardianship of the Board of Children's Guardians for such commitment of any child," it shall be made to appear that the child is entitled to be committed as aforesaid, and the evidence tends to show that the child has a father or mother, either of whom is able to contribute to its support, but who fails or neglects to do so, steps may be taken to compel such support.

The foregoing constitutes a review of the statutes bearing upon the question in issue down to the time of the enactment of the juvenile court act of March 19, 1906 (34 Stat. at L. 73, chap. 960). Section 4 of that act authorizes the appointment of two probation officers, who are to perform such duties and be governed by such regulations as may be prescribed by the presiding judge. Section 5 clothes the court with power to defer sentence in his discretion in the case of any juvenile offender under the age of seventeen years, "and *parol such child under the care of the chief probation officer* for a probation period discretionary with him, who shall cause said child to return to said court at the end of such term either for sentence or dismissal. *Such paroled child* shall be under the jurisdiction of the juvenile court for such period and shall be subject to such reasonable rules and regulations touching the welfare of the child as may be prescribed by it. In case *such paroled child* shall fail to keep or shall disregard the terms of his or her parole the said court shall have full power to cause said child to be brought before it for further proceedings." Section 8 confers upon the court original and exclusive jurisdiction of all crimes and offenses of persons under seventeen years of age committed against the United States, not capital or otherwise infamous, and not punishable by imprisonment in the penitentiary, committed [604] in the District, except certain other specified offenses, and the jurisdiction under the various acts hereinbefore mentioned is transferred to that court. By this section the court is authorized to "try and determine all cases of persons less than seventeen years of age charged with habitual truancy from school, and, in its discretion to commit them to the Board of Children's Guardians, who are hereby given the care and supervision thereof when so committed." The section further provides that no person under seventeen years of age shall hereafter be placed "in any institution" supported wholly or in part at the public expense, until the fact of delinquency or dependency has been ascertained and declared by the court, and

that all children of the classes liable to be committed to the training school for boys and the training school for girls shall be committed by the juvenile court. All other children delinquent, neglected, or dependent (with the exceptions heretofore stated), "shall hereafter be committed . . . to the care of the Board of Children's Guardians, *either for a limited period on probation or during minority*, as circumstances may require, but no child once committed to any public institution by the order of the juvenile court shall be discharged or paroled therefrom or transferred to another institution without the consent and approval of the said court." The last-mentioned provision as to the parole of children was repealed to the extent that it applied to the training schools by the acts of February 26, 1909 (35 Stat. at L. 657, chap. 217, Comp. Stat. 1913, sec. 9407), and April 15, 1910 (36 Stat. at L. 300, chap. 164, Comp. Stat. 1913, sec. 9423). The remaining provisions of the juvenile court act throw no additional light upon the question before us.

*Conrad H. Syme and F. H. Stephens* for plaintiff in error;

*John E. Laskey and W. O. Clephane* for defendant in error.

[605] ROBB, J. (*after stating the facts*).—Logically the first inquiry will be whether, prior to the establishment of the juvenile court, any court was clothed with the power now claimed to reside in the juvenile court. And, in determining this question, we must have in mind the general rule that a final judgment cannot be set aside after the close of the term at which it was entered by the court which rendered it, because the case has then passed beyond the control of the court. *Tubman v. Baltimore, etc. R. Co.* 190 U. S. 38, 47 U. S. (L. ed.) 946, 23 S. Ct. 777. Specific authority, therefore, must be found in the statutes for the exercise of such power. The Board of Children's Guardians, as we have seen, is composed of nine members who serve without compensation. It is to be presumed that they were to be selected because of special fitness for the work, and that Congress was satisfied that they would act wisely and unselfishly in the interests of the children intrusted to their care. The act of 1892 specifically provides that the board shall have the "care and supervision," and that it shall be the "legal guardian of all children committed to it by the courts." The act clothes the board with power to place children in private families, board them in institutions, bind them out, or apprentice them or give them in adoption to foster parents. It provides for two paid agents of the board, and requires that all children under its guardianship shall be visited not less than

once a year by an agent of the board, "and as much oftener as the welfare of the child demands." All those provisions evidence a purpose and intent on the part of Congress to place upon the board responsibility for the care and custody of children committed to it. For the fourteen years prior to the establishment of the juvenile court, over which period the activities of the board had extended, we find no word in the statutes authorizing any court to interfere with the authority of the board over children committed to it for definite periods.

We will now examine the juvenile court act to determine whether that act contains a grant of the power claimed. We find that under sec. 5 power is given that court to *defer sentence* [606] in the case of any offender under the age of seventeen years, and to parole *such child* under the care of the chief probation officer of the court for a probation period, and it is provided that "*such paroled child*" shall be under the jurisdiction of the court during the probation period. The fact that Congress deemed it necessary to make the specific grant of special power to the juvenile court as to this particular class of children negatives the idea of a previous grant to that court of general power in this connection, for had such general power been granted its subsequent mention would have been necessary only by way of limitation or exception in specific instances. Section 8 centers in the juvenile court the powers over juvenile offenders theretofore granted to other courts. In addition, it clothes the court with power to commit truants from school "to the Board of Children's Guardians, who are hereby given the *care and supervision* thereof when so committed." The section further provides that certain delinquent, neglected, or dependent children "shall hereafter be committed" by the juvenile court "to the care of the Board of Children's Guardians, either for a limited period on probation or during minority, as circumstances may require." The prohibition against the discharge, parole, or transfer of any child committed "to any public institution" obviously does not refer to the board, for throughout the acts quoted a careful distinction has been made by Congress between the board and an institution.

We find, therefore, that Congress has clothed the court with continuing jurisdiction over children under deferred sentences, and who are out on parole for a probation period, but that no such power has been given the court over children committed to the Board of Children's Guardians. To find that the court possessed such power would not only do violence to well-established rules of statutory construction and interpretation, as already intimated, but, on the other hand, the independence of the board in this respect is

consistent with the juvenile court act, as well as with all other legislation concerning the board, and the express intent of Congress to place upon the board responsibility for the care and supervision of children committed to it. [607] As to the wisdom or unwisdom of the policy of Congress in this regard we have nothing to do. It is our sole duty to determine and give expression to the intent of the lawmaking power. We think it clear that when the court, in the present case, committed the child in question to the Board of Children's Guardians during minority, the court, at the expiration of the term in which the commitment was made, had no power to set aside the commitment.

The judgment must be reversed and the cause remanded for appropriate proceedings. Reversed and remanded.

#### NOTE.

In the reported case the court, in applying the general rule that a final judgment cannot be set aside after the close of the term at which it is rendered, holds that a statute clothing the juvenile court with continuing jurisdiction over children under deferred sentences and who are out on parole for a probation period does not give the court power to remove a child from the custody of the Board of Children's Guardians to which the child has been committed at a prior term. The power of a juvenile court over its judgments rendered at a former term is discussed in the note to *In re Lundy* reported ante, this volume, at page 1007.

#### IN RE TURNER.

Kansas Supreme Court—January 9, 1915.

94 Kan. 115; 145 Pac. 871.

#### Juvenile Courts — Procedure — Verification of Complaint.

A girl 15 years old found by the probate judge, sitting as the juvenile court, to be delinquent and incorrigible, to associate knowingly with immoral persons, to be growing up in idleness and crime, and violating the city ordinances by remaining out until late hours at night, was ordered committed to the Industrial School for Girls at Beloit. Her parents appeared without service of process on them, but the child was taken into custody by the probation officer upon a warrant based upon a complaint verified on information and belief. A hearing followed, and the testimony abundantly supported the

findings of the court. Held, that such child is not entitled to a writ of habeas corpus because of failure to verify the complaint positively.

[See note at end of this case.]

#### Purpose of Statute.

The juvenile court act (Gen. St. 1909, §§ 5099-5113) has for its object, not the punishment of juvenile offenders for misconduct, criminal or otherwise, but their removal from the path of temptation and their direction into the paths of rectitude by preventive and corrective means.

[See note at end of this case.]

#### Same.

The act is an assertion of the state's power as *parens patriae* and its right to exercise proper parental control over those of its minor citizens who are disposed to go wrong.

[See note at end of this case.]

#### Procedure Approved.

In the charge, apprehension, investigation and order involved herein, the child was not denied any of her constitutional rights.

[See note at end of this case.]

#### Proceedings Not Criminal.

By express declaration of the statute in question, and by the settled decisions applicable to similar enactments, all such proceedings, orders and judgments are deemed to have been taken and done in the exercise of the state's parental power, and neither the stigma nor the penalty for crime can be held to accompany such proceedings or order.

[See note at end of this case.]

#### Parens Patriae — Definition.

The words "*parens patriae*," meaning "father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability.

Original habeas corpus proceeding. Mary Turner, petitioner. The facts are stated in the opinion. WRIT DENIED.

W. E. Atchison for petitioner.

Edwin D. McKeever, Leonard S. Perry.

Thomas F. Doran and John S. Dean for defendant.

[116] WEST, J.—Mary Turner, a girl fifteen years of age, by her father and next friend, alleges that she is restrained of her liberty by certain officers of Shawnee county, acting under color of authority from the probate court, who are unlawfully holding and imprisoning her "solely under and by virtue of an insufficient complaint and void warrant, and under a void order and commitment committing said Mary [117] Turner to the Industrial School for Girls at Beloit;" that she was arrested upon a warrant issued upon a complaint which charged no crime warranting her arrest and was not positively verified; that no summons was issued to her or either of her parents, neither of whom voluntarily

appeared; that the evidence taken upon the hearing was insufficient to show probable cause of the commission of any crime to warrant her commitment to the school named. The exhibits attached to the petition together with the return of the matron of the county jail show that a probation officer filed a complaint verified on information and belief that Mary Turner did on or about the — day of the — month of 1914 violate the laws of the state and the ordinances of the city of Topeka, and did then and there unlawfully remain out late at night; that she is incorrigible and knowingly associates with thieves, and vicious and immoral persons, and is growing up in idleness and crime. Upon this complaint a warrant was issued by the judge of the juvenile court commanding the matron to arrest Mary Turner and bring her before the judge at his office, then and there to abide the order of the court in the premises. After the hearing a final order was made setting forth that it was found by the court "that the above named child was a delinquent child and is incorrigible; that said child knowingly associates with immoral persons, and is growing up in idleness and crime; that said child violated the ordinances of the city of Topeka by carrying what is commonly known as knucks." Also, "that said child knowingly and wilfully violated the ordinances of the city of Topeka by remaining out until late hours of the night." And it was ordered that she be committed and delivered to the superintendent of the Industrial School for Girls at Beloit, there to be safely kept under the direction and control of the authorities having charge of such institution until discharged according to law. In the paper called "Commitment to Industrial Schools" it is recited that the [118] petition and complaint coming on to be heard Mary Turner and her parents and the probation officer were present in court and it was found that due and legal notice had been given to the probation officer, "Mr. and Mrs. Pete Turner having appeared voluntarily upon service of the warrant on said child."

The transcript of the evidence shows abundant ground for the finding already mentioned touching the delinquency and conduct of the child. The probation officer testified that he informed the judge "that she would not be here for trial if we did not take her into custody." The copy of the warrant attached to the petition accords with the allegation of the latter, that the girl was imprisoned and deprived of her liberty solely upon a warrant based upon a complaint verified on information and belief.

It must be taken as true, therefore, that while the parents appeared without service of process upon them, the daughter was taken into custody by the probation officer on the strength of the warrant based upon the com-

plaint, both of which have already been described. It must also be taken as true that the intention of the officers is to place the child in the industrial school as indicated.

Section 8680 of the General Statutes of 1909, enacted in 1889, provides that probate courts shall have power to commit to the school in question: "Third, any girl under sixteen years of age who is incorrigible and habitually disregards the commands of her father, mother or guardian, and who leads a vagrant life, or resorts to immoral places or practices, and neglects or refuses to perform labor suitable to her years and condition, and to attend school." The only other grounds applicable are liability to punishment by imprisonment under any existing law of the state. Section 2782 makes it a misdemeanor punishable by fine or imprisonment or both to carry on one's person knucks in a concealed manner. But there is no evidence whatever that Mary Turner made any attempt [119] at concealment of the knucks carried by her, hence the only ground of the section in question which applies is the third already quoted. This section further provides that before such girl shall be committed the probate court shall cause a complaint to be filed setting forth the charges complained of in writing, and before he shall investigate such charges shall give at least five days' notice to all persons interested in the filing of such complaint.

Section 1 of the juvenile court act passed in 1905 (Laws 1905, ch. 190, Gen. Stat. 1909, §§ 5099-5113) provides that the probate judge shall be in charge of the juvenile court, which shall have authority among other things, to issue all process necessary in any case "the same as justices of the peace are authorized to do in misdemeanors." All writs and process are to be served by the probation officer. Section 2 defines a "delinquent child" as one who, among other things, is incorrigible or knowingly associates with thieves, vicious or immoral persons, or is growing up in idleness or crime. Section 3 provides that any probation officer may, without warrant or other process, at any time until the final disposition of the case of any child over whom the court shall have jurisdiction, take the child placed in his care by the court and bring the child before the court, "or the court may issue a warrant for the arrest of any such child; and the court may thereupon proceed to sentence or make such other disposition of the case as he may deem best." Section 4 authorizes a petition in writing when filed to be verified upon information and belief. Section 5 requires that unless the parties voluntarily appear in court, it shall issue summons requiring the child and the persons having custody thereof to appear. If the person so summoned fails, without reasonable cause,

to appear and abide the order of the court or to bring the child, he may be proceeded against for contempt, or a warrant be issued against such person "or against the child itself." Section 12 provides for an appeal from the [120] order of commitment upon the demand of the child's parent, guardian, custodian, or any relation within the third degree of kinship. Section 14 places all punishments and penalties imposed by law upon persons for the commission of offenses against the laws of the state or ordinances of a city by delinquent children under sixteen within the discretion of the juvenile court. Section 15 expressly provides: "And in no case shall any proceedings, order or judgment of the juvenile court in cases coming within the purview of this act, be deemed or held to import a criminal act on the part of any child; but all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state."

At first blush the claim of the petitioner, that his daughter is unlawfully restrained and was unlawfully arrested, appeals strongly to one's sense of liberty, but a close examination into the matter discloses that the juvenile court, while a modern institution, is provided for in numerous acts which have been before the courts for interpretation. In a general way, it may be said that these statutes, instead of attempting to punish juvenile offenders for misconduct, criminal or otherwise, try to remove them from the path of temptation, and by preventive and corrective means seek to direct them in the paths of rectitude. It is an assertion upon the part of the state of its right to exercise its power as *parens patriae* for the welfare of such of its minor citizens as are deprived of proper parental control and oversight, and are disposed to go wrong. These words, meaning "Father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability. When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. "The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the *parens* [121] *patriae*. . . . The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States." (Fontain v. Ravenel, 58 U. S. 369, 384, 15 U. S. (L. ed.) 80.) In the case cited Mr. Chief Justice Taney, in a concurring opinion, said:

"And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercised over infants, lunatics, or idiots, or charities, has not been conferred. These prerogative powers, which belong to the sovereign as *parens patriae*, remain with the States." (p. 393.)

While the old Spartan theory that the child and the citizen are for the state has been reversed by our civilization, which regards the state as an institution for the good of the child and the citizen, still the state as *parens patriae* may exercise over the child parental care and authority in order that he may receive the highest good from the state and achieve the best results for himself thus guarded and directed in youth. As said in Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422:

"Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered." (p. 665.)

The authorities are nearly all to the effect that statutes of this kind are parental rather than criminal, so [122] that a jury may not be demanded as a matter of constitutional right. This, together with the express declaration of the closing section, that all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state, makes it clear that neither the stigma nor the penalty of crime should be held to accompany the proceeding and order in this case.

The following are among the numerous authorities touching the interpretation and effect of similar statutes: Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422; Com. v. Fisher, 213 Pa. St. 48, 62 Atl. 108, 5 Ann. Cas. 92, and Note, 96; Ex p. Januszewski, 196 Fed. 123; In re Sharp, 15 Idaho 120, 96 Pac. 563, 18 L.R.A.(N.S.) 886, and Note; Lindsay v. Lindsay, 257 Ill. 328, Ann. Cas. 1916A 1222, 100 N. E. 892, 45 L.R.A.(N.S.) 908, and Note; Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 7 Ann. Cas. 821, and Note, 831, 3 L.R.A.(N.S.) 564, and Note; Pugh v. Bowden, 54 Fla. 302, 45 So 499, 14



Ann. Cas. 816, and Note, 819; 1 Wharton's Criminal Law, 11th ed. §§ 368-375.

The state had the same right to bring Mary Turner before the juvenile court that her parents had, and when once there by proper compulsion of either sort of parental authority the court had jurisdiction to proceed as it did.

Finding in the record no infringement upon her legal and constitutional rights the petition for her discharge is denied.

**NOTE.**

The reported case, basing its decision partly on the express declaration of the statute, holds that proceedings against a delinquent child in a juvenile court are not criminal in their nature. This question is considered in the note to *In re Lundy* reported ante, this volume, at page 1007.

**STOKER**

v.

**GOWANS.**

Utah Supreme Court—April 1, 1915.

45 Utah 556; 147 Pac. 911.

**Marriage — Evidence Insufficient.**

In a habeas corpus proceeding to obtain the release of a juvenile delinquent from the custody of the superintendent of the State Industrial School, evidence held insufficient to establish any legal marriage between the delinquent and plaintiff.

**Juvenile Courts — Jurisdiction — Married Infants.**

The operation of the law governing juvenile delinquents is not suspended merely because a delinquent enters into the marriage relation.

[See note at end of this case.]

**Review of Proceedings.**

Under the juvenile statute, as amended and re-enacted by Laws 1913, c. 54, giving the juvenile court jurisdiction over delinquents under the age of 18, and making its judgments operative until the delinquent reaches the age of 21 years, and providing that all orders of the court shall be under its control until the delinquent reaches such age, the delinquent or any one in her behalf may apply for a modification of the judgment, and determination of the right of her custody with a right of appeal as provided in section 11, so that the rights of delinquents may be enforced without recourse to habeas corpus proceedings.

[See note at end of this case.]

Ann. Cas. 1916E.—65.

**Order for Probation.**

Under the juvenile delinquent statute providing that the juvenile court may order that the juvenile be committed to the State Industrial School, that the court may commit a juvenile to the care of a probation officer, subject to return to court for further proceedings, or may dispose of the matter in any way deemed for the best interests of the delinquent, the act of the juvenile court in making an order of commitment upon the first hearing, and then conditionally suspending it by an order of probation, and, after violation of the conditions of probation, ordering that she be committed, while somewhat irregular, is not void.

[See note at end of this case.]

**Notice to Parent.**

Where the juvenile court, after notice of proceedings to the mother of a delinquent, and a finding of her unfitness, which was not disputed or appealed from, made an order of commitment, and suspended it by an order of probation, and having control of the delinquent and authority to modify its orders, it may on a showing of the delinquent's violation of the probation conditions order her commitment without further notice to the mother.

[See note at end of this case.]

Appeal from District Court, Salt Lake county: LQOFBOUOW, Judge.

Habeas corpus proceeding. J. F. Stoker, plaintiff, and E. G. Gowans, defendant. Writ denied. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

J. W. Rozzelle and Willard Hanson for appellant.

A. R. Barnes, E. V. Higgins and G. A. Iverson for respondent.

[557] FRICK, J.—This is an appeal from a judgment of the District Court of Salt Lake County denying a writ of *habeas corpus*. The facts disclosed by the record filed in this court, briefly stated, are as follows:

On the 25th day of March, 1912, one Guardello Brown, a probation officer, pursuant to our juvenile court act, filed a complaint under oath before Alexander McMaster, Judge of the Juvenile Court of the Third Judicial District, in and for Salt Lake County, in which one Fern Markham, a minor [558] child thirteen years of age, was duly charged with delinquency; the facts constituting the same being stated in general terms. Notice was duly issued as provided by the act, service of which was duly waived by Anna Markham, the mother of said child. On the 26th day of March, 1912, a hearing was had by said court upon said complaint as provided by the act. After hearing the evidence the juvenile court found that said Fern Markham was of the age of thirteen years; that she was a delinquent

child within the purview of the juvenile act; and that said Anna Markham, the mother, was an unfit person to have custody and control of said child. The court thereupon entered the following order:

"It is ordered, adjudged, and decreed by the court that until the further order of this court said Fern Markham be adjudged a delinquent child. It is the order of the court that she be sentenced to the State Industrial School at Ogden, Utah. The sentence, however, is suspended during good conduct and that she discontinue the company she has been keeping. It is the further order of the court that she report to this office once a week."

On the 22nd day of April, 1914, Guardello Brown, "chief probation officer," filed a complaint in writing, but not under oath, before the juvenile court, in which it was alleged that said Fern Markham had violated her promise and the terms and conditions upon which sentence was suspended, and that she continued "to be immoral and to associate with corrupt and immoral people," and the officer prayed that the sentence aforesaid be no longer suspended, and that said Fern Markham be committed to the State Industrial School. Pursuant to said complaint the juvenile court, on the 22d day of April, 1914, made the following order:

"Now, therefore, on motion of Guardello Brown, and it appearing to me for the best good of said Fern, it is ordered that sentence in this case be no longer suspended, and that a commitment to the Industrial School be and hereby is issued."

A commitment in due form was accordingly issued directed to the proper officer, who executed the same by taking said Fern Markham into custody and delivering her to the defendant, [559] the superintendent of the State Industrial School, in whose custody she remained until the *habeas corpus* proceedings were commenced, at which time she was produced before Hon. F. C. Loofbourow, one of the judges of the district court of Salt Lake County. We remark that on the hearing it was claimed that during the suspension of said sentence said Fern Markham, without the knowledge or consent of said juvenile judge, and without the knowledge or consent of her mother, had married one J. F. Stoker, who is the plaintiff in this proceeding. After a hearing before said district judge upon the return made by the said superintendent in which the foregoing facts, except the alleged marriage, were made to appear, said judge denied the writ, and made an order remanding the said Fern into the custody of said superintendent.

Plaintiff appeals, and has assigned a number of errors. It is insisted that the court erred in refusing to hold that by said alleged marriage the right of custody in said super-

intendent and said juvenile court was *ipso facto* terminated. The district court made no findings of fact; at least there are none in the record.

We have searched the record in vain to find any legal evidence of a marriage between Fern Markham and the plaintiff. All that is contained in the record upon that subject is this: Anna Markham was called as a witness on behalf of plaintiff, and she testified:

"I am the mother of Fern Stoker. She is a married woman. She was married to J. F. Stoker on the 15th day of August, 1913. . . . She was married without my knowledge or consent."

Fern Stoker was also called as a witness by the plaintiff, but she said nothing about the marriage; nor did plaintiff or any one else testify concerning the same. Now, the question is pertinent: How did the mother know that the plaintiff and Fern were married if the marriage, as she says, took place "without my knowledge or consent?" There is, therefore, not a word of competent evidence in this record showing a marriage. Moreover, under our statute (Comp. Laws 1907, section 1189) it is provided:

[560] "No marriage shall be solemnized without a license therefor issued by the county clerk of the county in which the female resides at the time."

The record discloses that the female in this case resided in Salt Lake County. It is claimed, however, that the marriage occurred in Davis County, an adjoining county of Salt Lake. Our statute also provides that the license issued as aforesaid must be returned to the county clerk within thirty days after the marriage ceremony takes place. It is somewhat strange, therefore, that when there must have been an abundance of competent evidence respecting the marriage, if it was solemnized, that none was produced, not even an eyewitness. Not even the parties in interest testified, although one of them was a witness at the hearing. If the district judge, therefore, had found that no marriage was proved (which he may have done), the finding would not only have been justified by the record, but, in our judgment, it would have been the only finding he could legally have made. The contention, therefore, made by counsel that Fern should be discharged from the custody of the superintendent of the Industrial School because she is a married woman is not borne out by the record.

But, assuming that she did marry, as contended, yet there is nothing in the law governing juvenile delinquents which suspends its operation merely because a delinquent enters into the marriage relation.

Under our juvenile statute, as amended and re-enacted by chapter 54, Laws Utah 1913, the juvenile court has jurisdiction over all de-

linquent children under the age of eighteen years, and its judgments and decrees are operative until "the child reaches the age of twenty-one years." It is also provided by that act that:

"All orders, judgments, and decrees so made and entered by the court shall be under its control, and may be modified, amended, or recalled at any time until the child reaches the age of twenty-one years."

The law, in almost every sentence, indicates that it was the intention of the lawmaking power to place the custody and control of juvenile delinquents entirely under the jurisdiction [561] of the juvenile courts of this state until such time as they may be legally discharged by those courts, or by this court on appeal, as provided by section 11 of said chapter 54. If, for any cause, therefore, said Fern should no longer have been held in custody as a delinquent child, she, or any one in interest asking in her behalf, could have made application to the juvenile court for a modification of the judgment in which her status was fixed and the right of her custody determined, and that court could then have ordered a hearing upon such application, and have modified its former order or judgment in accordance with the facts. If, upon such a hearing, said court had refused to act in accordance with the facts, or had deprived the "parent, custodian or guardian" (perhaps this would have included her husband, if she had one) of any right, an appeal could have been taken to this court from such order as provided in said section 11. There is ample opportunity given in the act to all interested persons to apply to the juvenile court for the modification or amendment of any order or judgment, and ample power vested in that court to make any change that may seem expedient, proper, or necessary at any time to the end that the rights of all delinquents, as well as those of society, may be safeguarded and enforced without having recourse to *habeas corpus* proceedings.

What has been said, in a measure at least, also answers the contention that the juvenile court lost jurisdiction over the person of said Fern by the suspension of the sentence whereby she was ordered to be committed to the Industrial School. The act provides that the juvenile court may order that the "juvenile be committed to the State Industrial School." It also provides that the court may commit the child to the care of a probation officer, allowing it to remain in its own home subject to the visitation of the probation officer, or such child to report to the court or probation officer as often as may be required, and subject to be returned to the court for further proceedings whenever such action may appear necessary. Further, the court may order that "the juvenile be disposed of in

any other way, except to [562] commit it to jail or prison, that may, in the discretion and judgment of the court, under all the circumstances, be for the best interests of the child, to the end that its wayward tendencies shall be corrected and the child be saved to useful citizenship."

We thus have an act which practically confers parental powers and duties upon the juvenile court. How can another court thus be called on to review every act of the juvenile court which may in some way and by some parents or guardians be considered inimical to the delinquent? Moreover, how can a law be framed so as to define and provide for every act the court shall take or order that it shall or may make respecting the care, custody, control, or conduct of all delinquent children? To attempt this would be as impossible as it is impractical. It seems to us that by suspending the supposed sentence the court did no more than if it had in the first instance committed Fern to the custody of the probation officer, and had required her to report to the court from time to time, and had thereafter, upon application of such officer, modified the original order or judgment by ordering her committed to the Industrial School. The only difference is that the court made the order of commitment upon the first hearing, and then conditionally suspended its operation, and, after the probation officer made application to the court in which he alleged that Fern had violated the conditions imposed by the court upon which sentence was suspended, then ordered that she be committed. The proceeding may have been somewhat irregular, but, under the provisions of the law, it was not void.

It is, however, also contended that the court exceeded its power by acting without again giving notice to the mother, etc., and in not again giving all concerned a hearing before modifying the order of suspension of sentence. Let us assume that it would have been proper and better to have notified the mother of the officer's application and to have given her, as well as Fern, an opportunity to be heard; yet the failure to do that did not affect the jurisdiction of the court. The juvenile court, after the original notice, always retained jurisdiction of Fern, and, in view that it had found that the mother was an unfit person to have custody and control [563] of her, and had thus substituted itself as her custodian, under the law (*Mill v. Brown*, 31 Utah 473, 38 Pac. 609, 120 Am. St. Rep. 935), we cannot see how the court exceeded its power or jurisdiction. The mother did not dispute the court's findings respecting her unfitness, nor did she appeal from that decision, as she might have done. She, and all others, are therefore bound thereby until modified or vacated. But the order or judgment suspending

sentence was, and continued to be, subject to modification and amendment to the same extent as any other orders made by the juvenile court. If, therefore, there is any good reason why the order of suspension and of commitment should be modified or amended in any way, the application should be made to the juvenile court, and that court should be given an opportunity to correct its mistakes, if any have been made. That is manifestly the purpose of the law. If, therefore, an application, by the probation officer or otherwise, is made for a modification, suspension, or change of any order or judgment affecting the custody, control, or conduct of a juvenile delinquent, and although such juvenile is constructively in the custody of such court, yet we think the court should require both the juvenile and those who may be interested in his welfare to be notified of the application, and, if a hearing is demanded, that one should be given before the modification, etc., is made; but the failure to do that is not jurisdictional. At most, it is merely an irregularity which cannot be reviewed on *habeas corpus* proceedings. While it is true that the act provides "the court may hear evidence in the absence of said juvenile," and, no doubt, in many instances it may be necessary to do so, yet it were better if it can be done that the children, especially those over the age of ten years, were permitted to be present and to be heard in their own defense respecting their custody, conduct, and control. The parents or guardian should also be permitted to be present at any hearing affecting the change of custody of the child.

For the reasons stated, therefore, we are clearly of the opinion that the judgment of the district court should be affirmed. Such is the order.

McCarty, J., concurs. Straup, C. J., dissents.

#### NOTE.

In the reported case it appears that a child found to be delinquent was sentenced to an industrial school by an order of the juvenile court, the sentence being suspended, however, during the good behavior of the child. Afterwards the probation officer made an application to the juvenile court in which he alleged that the child had violated the condition imposed by the court on which the sentence was suspended, and the court then ordered that she should be committed to the industrial school. It is held that the want of notice to the mother of the application of the officer did not affect the jurisdiction of the juvenile court as the statute expressly provides that the orders and judgments of the juvenile court relating to delinquent children shall be under the control of the court until the child

has reached its majority. The question of the power of a juvenile court over its orders and judgments is discussed in the note to *In re Lundy* reported ante, this volume, at page 1007.

DAVIS

v.

MIAL ET AL.

New Jersey Court of Errors and Appeals—  
March 16, 1914.

86 N. J. Law 167; 90 Atl. 315.

#### Mechanics' Liens — Persons Entitled — Materialman.

A materialman, who is not the contractor, may maintain a mechanic's lien claim suit against the building and land of the owner when the specifications do not accompany and are not filed with the written contract.

#### Estates Subject to Lien — Remainder.

An estate in remainder is a legal estate and will support an action under the mechanic's lien act.

#### For What Lien May Be Had — Transportation of Materials.

Under our statute, a mechanic's lien claim suit may be maintained for the transportation and delivery of materials, as for labor performed, for the erection and construction of a building.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Circuit Court, Hudson county.

Action on mechanic's lien claim. Harriet Davis, plaintiff, and Kate A. Mial et al. defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Samuel A. Besson for appellants.

Rudolph Schroeder and John D. Pierson for respondent.

[167] WALKER, Ch.—This was an action in the Hudson County Circuit Court upon a mechanics' lien claim by a materialman who was not the contractor.

*First.* A building and the land whereon it stands are liable to the contractor alone when the contract and specifications accompanying the same are filed in the office of the clerk of the county. Mechanics' Lien Act, Comp. Stat. p. 3291, § 2. In this case the contract, but not the specifications, was filed. The plaintiff, therefore, had standing to bring her suit and acquire a special lien against the building and land. Nor was this right

at all interfered with by the subsequent filing of an "addenda" to the contract which altered the unfilled specifications.

[168] *Second.* It was urged in defence of Mrs. Mial that she did not have such an estate in the lands as would support the judgment. A man named Hankins died seized of the property and by his will devised the remainder to her after another's enjoyment of it for life. The estate of Mrs. Mial was a legal estate. And the lien given by the act extends to legal estates and interests. *Dalrymple v. Ramsey*, 45 N. J. Eq. 494, 18 Atl. 105. By section 16 it is expressly provided that the claim shall contain the name of the owner of the land or of the estate *therein* on which the lien is sought. Mrs. Mial's estate was one in remainder, as remarked. Besides, she had an agreement with the owner of the life estate regarding the property, in which the latter appears to have conveyed that right to her, and under which she, Mrs. Mial, was in possession and exercising acts of ownership. This estate, if it did not merge into the remainder—a question not argued—was a legal estate, and subject to lien under the act. If it merged into the remainder the defendant's estate was one of fee-simple absolute, and, of course, subject to lien. If it did not merge both it and the estate in remainder were subject to lien and sale.

*Third.* The remaining question is as to whether a lien claim suit may be maintained in our state for the transportation and delivery of materials for the erection and construction of a building. In deciding this question in the trial court, Judge Speer, in his opinion, among other things, said:

"After a careful consideration of the textbooks, the cases decided elsewhere than in New Jersey, and the arguments of counsel, I have come to the conclusion that a lien should be allowed for the charge of transportation of the materials to be used in the construction of the building.

"Section 1 of the statute, under which this claim falls, provides 'for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction' of a building. It is perfectly manifest that this claim is *not* for 'materials furnished for the erection and construction of a building,' and that if sustainable at all it must be 'for labor performed for the erection and construction of the building.'

[169] "The statute is remedial in its nature and must by its terms receive a liberal construction. It is designed for the protection of a needy and most meritorious class of persons and should receive such construction as will further the benign purposes which the legislature had in view in its passage. Looking first to the language itself employed by the legislature, we observe that the lien will

lie 'for labor performed for the erection and construction of a building.' The labor need not necessarily enter into the erection or construction, it is sufficient if it be for the erection and construction. The construction contended for by defendant would oust the hod-carrier from the protection of the act, for ordinarily, he merely carries the material from the street, where it is mixed to the scaffold where the masons are employed. It would also exclude the architect, and yet *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, decides that he is entitled to a lien under our statute. When a man furnishes materials he is nominally being paid for the materials, as materials, and not for the labor that went into them, as labor. He charges so much for materials, and, if unpaid, his lien claim is not nominally for labor performed in the erection and construction of the building, but for materials furnished for the erection and construction of the building. Can anyone doubt, however, that, in substance, the lien is being maintained for labor. When the manufacturer fixes his price at so much 'delivered at the building' does anyone doubt that the price includes an allowance for cartage. In the case at bar it is sought to subject the building to a lien for labor performed in the erection and construction of the building because, had the transportation charges been included in the price of the goods, there could have been no doubt of the right to a lien. I am clear that such service constitutes labor performed for the erection and construction of a building.

"This is the view enunciated in 27 Cyc. 44, where the following language is used: 'A lien is usually allowed for transportation of the materials to be used in the construction of a building.'

"This is the view supported by the following cases: *McClain v. Hutton*, 131 Cal. 1132, 61 Pac. 273, 63 Pac. 182, 622; [170] *Fowler v. Pompelly* (Ky.) 76 S. W. 173; *McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195; *Hill v. Newman*, 38 Pa. St. 151, 80 Am. Dec. 473, and many others.

"The only openly antagonistic decision that I have found is *Webster v. Real Estate Imp. Co.* 140 Mass. 526, 6 N. E. 71. I cannot adopt the reasoning used in that case. It is against the great weight of authority. The reasons upon which it rests would oust a hod-carrier and an architect of a lien.

"No other court has followed it, and there were circumstances which would seem to vindicate the decision upon the ground that the real *ratio decidendi* was that the materials carted were not furnished for the building, or not to be used in its erection and construction."

With reference to the point last considered our construction of the statute coincides with that of the learned trial judge in the court

below; and, for the reasons given by him, as well as those firstly and secondly hereinabove expressed, the judgment under review in this case should be affirmed.

For affirmance: The Chancellor, Chief Justice, Swayze, Trenchard, Parker, Bergen, Minturn, Kalisch, Bogert, Vredenburgh, Congdon, White, Heppenheimer, JJ.—13.

For reversal: None.

#### NOTE.

#### Right to Mechanic's Lien for Transportation of Materials to Be Used in Connection with Improvement.

##### General Rule.

Though the subject is governed wholly by statute, one who transports materials to be used in connection with an improvement is ordinarily allowed a mechanic's lien for his services. *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182; *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157; *Hill v. Twin Falls Salmon River Land, etc. Co.* 22 Idaho 274, 125 Pac. 204; *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272; *Page v. Grant*, 127 Ia. 240, 103 N. W. 124; *Fowler v. Pompelly*, 76 S. W. 173, 25 Ky. L. Rep. 615; *McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195; *Price v. Merritt*, 55 Mo. App. 640; *Tizzard v. Hughes*, 3 Phila. 261, 15 Leg. Int. 357; *Hill v. Newman*, 38 Pa. St. 151, 80 Am. Dec. 473; *Holeman v. The Redemptorist Fathers*, 4 Pa. Co. Ct. 233; *Kehoe v. Hansen*, 8 S. D. 198, 65 N. W. 1075, 59 Am. St. Rep. 759; *Brace, etc. Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803; *Barker, etc. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 130 N. W. 866, 36 L.R.A.(N.S.) 875. See also *Landreth Machinery Co. v. Roney*, 185 Mo. App. 474, 171 S. W. 681; *Eccleston v. Hetting*, 17 Mont. 88, 42 Pac. 105; *Upson v. United Engineering, etc. Co.* 72 Misc. 541, 130 N. Y. S. 726. And see the reported case. Compare *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008; *Webster v. Real Estate Imp. Co.* 140 Mass. 526, 6 N. E. 71; *Farmer v. St. Croix Power Co.* 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914. In *Hill v. Twin Falls Salmon River Land, etc. Co.* supra, the court applied a statute giving a lien to every person performing labor on a structure. A person who hauled cement to a dam site was held to be within the statute. The court said: "So, in the present case the labor and services of the respondents became a part of the construction of the dam to the same extent as the labor of any other individuals and gave the respondents the same right to a lien. The respondents hauled the cement to the place of use for the purpose of use, and it was accepted

by the appellant and so used in the construction and as a part of the construction the same as any other material or any other labor contributing to the erection and improvement of said property. It is a well-recognized principle that a materialman who makes a contract for the delivery of material to be used, and which is actually used in the construction of an improvement, may include in a claim of lien not only the value of the material but the cost of delivery to the place of use, and this being the general rule, there can be no reason why, when the labor is done and the material furnished by different persons, each person should not be entitled to a lien. . . . The respondents knew where the cement was to be used, and their labors were in delivering it for that specific use and at the place and for the purpose for which the services were rendered. There certainly can be no reason why any class or kind of labor, and it matters not what it is, which is intended to aid and enhance the construction of any particular improvement, and is received and used in such improvement, should not be and is not entitled to a lien upon such improved property under the statute of this state."

The leading case which denies a lien for the transportation of materials to be used in connection with an improvement, is *Webster v. Real Estate Imp. Co.* 140 Mass. 526, 6 N. E. 71. The statute therein involved gave a lien to any person to whom a debt was due for labor performed in the erection, alteration or repair of a building. It was held not to apply to a claimant who hauled sand and lumber. The court gave the reason for its decision as follows: "The petitioner does not allege that he performed any labor upon material which became part of the structure, so as to change its shape or character, in order to adapt it to the building. He did nothing with the sand, to make it fit and proper to enter into the construction of any part of the house, nor did he perform any labor by which the lumber was fitted and adapted to any section of the structure. What he did was to draw the sand to these premises, so that the contractor, if he saw fit, with other material could make it into mortar, and use it in the construction of the building. So with the lumber; when delivered, the contractor could do with it as he pleased. He could sell it, as his assignee in insolvency afterwards did as to a part of it, or he could use the sand in making mortar, and then sell it, as was done by his assignee as to a portion thereof, or he could employ them in the erection of the house. We think this labor of the petitioner does not come within the terms of the statute; that it was not connected with the building of the structure; and that it was too remote to enable him to establish

a mechanic's lien therefor. It is difficult to distinguish the claim of the petitioner for a lien from that of the railroad for transporting the lumber, or from that of the teamster who carted it to the railroad, or from the claim of the woodcutter who felled the trees, provided they stood in other respects towards the respondent as does this petitioner." In *Farmer v. St. Croix Power Co.* 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914, it appeared that a statute gave a lien to a principal contractor, subcontractor, or an employee of either, who performed work in the construction of a building. The claimant contracted with a subcontractor to haul cement. The claimant did no personal services, but he employed servants to do the hauling. He was denied a lien because he was a subcontractor and not an employee.

In *California* the decisions are in conflict. In one case it appeared that a claimant's employers contracted to supply the bricks for a building. The claimant hauled the brick, and then sought to obtain a mechanic's lien to collect his charges. He was denied a lien on the ground that the owner was not liable to him. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640. Relative to the claimant's position, the court said: "It is not perceived that Tucker was entitled to a lien. He did not perform labor upon the building or furnish materials therefor, but was employed by the brick-men to haul brick for them, and had no connection with the contractor, who owed him no liability. His position is not different from that of laborers who made the brick." The decision in the case of *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008, is directly contrary to the general rule. It holds that one who hauls slate to the building does not perform labor on or furnish material for the structure. But see the later case of *McClain v. Hutton*, 131 Cal. 132, which distinguishes *Adams v. Burbank*, supra, and which accords with the general rule.

In *Canada* the right to a mechanic's lien for the transportation of materials to be used in connection with an improvement has been twice in issue. *Vannatta v. Uplands*, 18 British Columbia 197, 25 West. L. Rep. 85; *Mylrzyuk v. North-Western Brass Co.* 6 Alberta 413, 27 West. L. Rep. 508. In the case first cited, the statute which gave a lien to a person doing work on the land, was given a narrow interpretation. It was held not to apply to a person who hauled cement to the premises. The court said: "It was urged that Vannatta is entitled to a lien as having 'placed' material under sec. 6; but I have come to the conclusion that the expression 'places' is not equivalent to 'delivers,' for it imports the handling of such material after the bare delivery on the ground. The reasoning in *Webster v. Real Estate Imp. Co.*

[140 Mass. 526], 6 N. E. 71, seems sound, and the true distinction is drawn between helpers, hod-carriers, and conveyers of material upon the premises, and the bare conveyers of material to the premises; and it makes no difference in principle if the helper or hod-carrier should have to carry the material to the work from, e. g., a heap or pile of such material deposited for convenience upon the highway outside of the boundary of the lot upon which the work was being done. At the same time, I recognize that in all matters where the question of degree is an important feature it is hard to draw precisely the real line of demarcation." In *Mylrzyuk v. North-Western Brass Co.* supra, the statute involved gave a lien to every laborer doing or causing work to be done, or placing any materials to be used in or for the construction of any building, or doing or causing work to be done on or in connection with or placing materials. It was held to give a lien to teamsters who hauled sand to the premises under the employ of the subcontractor. In allowing the lien the court said: "On the other hand, I think the laborers or teamsters referred to in question 2 are entitled to the benefit of the word 'placing' where it occurs in the section quoted. I see no reason why that word should not be held to qualify the word 'laborer' as well as the words 'furnisher of material.' Even aside from that, I think that they must be treated as doing 'work upon the construction.' They had to drive their teams upon the land, they had to unload their load or assist in doing so. It is true that they spent a part of their time going off the land for their loads, but I can see no logical distinction between such a case and the case of a carpenter or bricklayer or hod-carrier working upon a building, who must in some cases have to go to the adjoining land, either street or vacant lot, for his material and carry it to the building being constructed. The hod-carrier goes, it may be, to the street for his hod full of mortar, and does nothing but empty it at the mason's feet. But, I think, no one could deny his right to a lien under the act merely because he had to go to some other land for his load. The teamsters are on principle and logically in the same position."

#### *Application of Rule.*

Under a similar statute, giving a lien to any person performing labor on a structure, it has been said that the work of hauling materials is just as necessary as the labor of carpenters and materialmen. *Fowler v. Pompelly*, 76 S. W. 173, 25 Ky. L. Rep. 615. And one who hauled cross ties to be used in the construction of a railroad has been given a lien for his services under a statute which gave a lien to every person who should do

any work and labor on a railroad. The claimant's labor was held to go into the structure as much as did that of the men who cut and dressed the ties. *Eccleston v. Hetting*, 17 Mont. 88, 42 Pac. 105. Under a statute which gave a lien on a house for all debts contracted for or work done and materials furnished for or about its erection, a drayman has been held to have a lien for transporting materials. The decision was narrowed by limiting the lien to draymen who were not mere hirelings under the contractor or subcontractors, that qualification, however, not being involved in the case. *Hill v. Newman*, 38 Pa. St. 151, 80 Am. Dec. 473, wherein the court said: "The law is, that every building may be subjected to a lien for the payment of all debts contracted for work done and materials furnished for or about its erection; and this may very fairly be taken to include the work of hauling the materials to the place of building. We think we should have to unduly strain the language in order to exclude it. It is work about the erection of the house, and is of course charged for by the materialman, when he has the lumber, stone, brick, sand, or lime delivered by his own carters. The hauling away of the clay dug out of the cellar and foundation is always considered proper work for him; and we know not why the carter may not be a proper man to claim it, if he did the work at the request of the owner or the contractor, and not as a mere hireling under the contractor or under a subcontractor."

A statute giving a lien for labor has been held to include the transportation by means of a hoist of materials already on the premises. *Tizzard v. Hughes*, 3 Phila. 261, 15 Leg. Int. 357. When materials are improperly placed on the premises, a stone layer may move them to a more convenient place, and his lien will cover the cost of the transportation under a statute giving a lien to every person performing work or labor on a building. *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157. In that case the court said: "The labor of removing cut stone furnished for the second story in order to reach that required for the first, and the work of transferring such stone from the Larimer street front to the front on Sixteenth street, where it belonged, became necessary in the erection of the structure. It cannot properly be termed extra work, wholly outside of the principal contract. It had to be done before Armstrong could go on with his work of setting the stone into the respective walls. Had Cook himself employed some day-laborers to do this work, they would, in our judgment, have been as much entitled to a lien as is the man who does any other work preliminary or incidental but essential to and directly connected with the actual laying of the foundation walls, or erection of the superstruc-

ture. And we can discover no good reason for applying a different rule to Armstrong merely because he happens to be a subcontractor instead of laborer."

A teamster who hauls pipe and materials for the construction of a gas well is a laborer within a statute giving a lien to mechanics, laborers and materialmen. *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272, wherein the court said: "The spirit and intention of this statute is to prefer laborers as a class, and not to prefer one class of laborers over another, nor one kind of manual or mechanical toil over another, if all come within the general scope of its provisions and comply with its terms. The law was enacted in the interest of such wage earners generally, and should be liberally construed so as to effectuate the object intended."

A statute which gives a lien to every mechanic or other person who shall do any work on a building applies to a cartman who hauls lumber. *Kehoe v. Hansen*, 8 S. D. 198, 65 N. W. 1075, 59 Am. St. Rep. 759, wherein the court said: "Ordinarily, the contractor for the material delivers the same, and includes the expense of hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of hauling in the price of the material. If it may be so included, and the lien made to cover the same, why may not the cartman make a separate contract for hauling, and acquire a valid lien therefor? We can discover no valid reason why, if the contract to haul the lumber is made directly by the owner with the cartman, he may not enforce a lien therefor. The hauling of the material, in many instances, constitutes a large item in the expense of the building, especially where the same is built of stone or brick. Labor, therefore, in getting the material together upon the ground, ready for the structure, is fairly within the meaning of our mechanic's lien law of work upon the building—work that enters into, and constitutes labor upon, the building."

Where the cost of transportation can be connected with the purchase price of the materials, the lien will extend to the former item. *Page v. Grant*, 127 Ia. 249, 103 N. W. 124; *Brace, etc. Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803; *Barker, etc. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 130 N. W. 866, 36 L.R.A.(N.S.) 875. In *Brace, etc. Mill Co. v. Burbank*, supra, the court said: "Among items of claimed cost of the material furnished by several of the lien claimants was a small charge for cartage. This, counsel for appellants insists, is not properly a lien item. In the light of the fact that the material to be furnished was to be furnished upon the ground at the place of the construction of the house, we are unable to



see why this item of cartage does not properly enter into and become a part of the cost of the material as much as any labor performed upon the material in the production of it. Manifestly the lien claimants furnishing material were to be paid the cost of the material at the place of construction. Under such circumstances, we think that cartage may be regarded as a part of the cost of the material." In *Barker, etc. Lumber Co. v. Marathon Paper Mills Co.* supra, it appeared that the vendor of materials advanced the freight charges on them. This sum was considered to be connected with the purchase price. The court said: "It is objected that it was not agreed in advance that the freight charges were to be part of the price of the goods. Looking at the substance of things rather than their names, we think that the item was properly allowed as a part of the purchase price of the material, although it may be called an advance of money. Had the contract been to deliver the goods in Wausau, freight prepaid, the plaintiffs would unquestionably have added the freight to the purchase price, and it would as unquestionably have been allowed."

LAMAR ET AL.

v.

CROSBY ET AL.

Kentucky Court of Appeals—January 26, 1915.

162 Ky. 320; 172 S. W. 693.

**Wills — Construction — "Children" as Including Posthumous Child.**

Deceased devised land to his wife, with directions that if she should leave the land or remarry, it should be rented out for the benefit of his "children," and, on their coming of age, equally divided between them. At deceased's death, he had two children; a posthumous child being born thereafter. Held, that the posthumous child took by virtue of the will, being in esse and included in the expression "children," and hence was not entitled to claim as a pretermitted child, under Ky. St. § 4848.

[See note at end of this case.]

**Lapsed Legacy — Descent — Right of Ancestor of Deceased Legatee.**

Where a father devised land to his children, and one died without issue while still an infant, the surviving children take as heirs, under Ky. St. § 1401, prescribing the rules of descent, to the exclusion of the mother.

Appeal from Circuit Court, Hancock county.

Action by William Crosby et al., plaintiffs, against Vitula Lamar et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

W. Scott Morrison and J. R. Higdon for appellants.

G. D. Chambers for appellees.

[321] HANNAH, J.—Z. T. Crosby, a resident of Hancock county, died there domiciled on November 9th, 1893. His last will and testament, dated May 17, 1893, contained the following language, in so far as pertinent upon this appeal:

"It is my will that, after my funeral expenses and all my just debts shall have been paid, that my beloved wife, Vitula A. Crosby, shall live on my farm and have full control of same; but, if she shall leave said farm, I desire that it shall be rented out for the benefit of my children; or, if she should marry again and thereby cease to be my widow, then she is to have no further control or benefit of the farm; but, in that case, I desire that it shall be rented out for the benefit of my children until they become of age, when it may be equally divided between them."

At the date of this will Crosby had two children, William and Artie. Six months after his death another child, Ruth, was born to Mrs. Crosby.

The widow accepted the provisions of the will and continued to reside upon the farm mentioned in the will until May, 1897, at which time she married B. H. Lamar and left the farm. After several years, however, she returned and took possession of it.

Ruth Crosby, the posthumous child, married Larus Rice, but died before reaching the age of twenty-one years, and without issue.

On June 27, 1913, William Crosby, Artie Crosby, Ruth Crosby Rice and her husband, Larus Rice, instituted an action against Vitula Lamar and B. H. Lamar, in the Hancock Circuit Court, to recover possession of the farm mentioned.

On March 2, 1914, an amended petition was filed therein by plaintiffs, William Crosby, Artie Crosby and Larus Rice, reciting the fact of the death of Ruth and claiming the ownership of the farm to be in William Crosby and Artie Crosby, subject to the interest of Larus Rice as surviving husband of Ruth Crosby Rice.

The defendants answered, claiming that the defendant, Vitula Lamar, was the owner of an undivided one-third interest in the farm by descent from her daughter, Ruth Crosby Rice.

A demurrer to this answer was interposed and the cause being submitted thereupon the same was sustained and defendants, refusing to plead further, the court adjudged [322] that William Crosby and Artie Crosby were the owners of the farm subject to the statutory life estate of Larus Rice in one-ninth thereof. From that judgment the Lamars appeal.

1. It is claimed by appellant, Mrs. Lamar, that her daughter, Ruth Crosby Rice, was a pretermitted child, and that, under Section 4848, Kentucky Statutes, she took an undivided one-third interest in the farm, not by descent from her father, however, but by contribution from her two brothers; it being the contention of appellant that the two brothers took each a one-half interest in the farm as devisees under their father's will, but, by virtue of the statute mentioned, were required to make up their sister's share, as a pretermitted child, by contribution; that, therefore, the interest of the daughter Ruth descended, under Sub-section 2 of Section 1393, Kentucky Statutes, to her mother.

Appellees seem to concede that their sister Ruth is a pretermitted child; but they contend that, although under the statute, her share is made up by contribution, yet, in point of fact, it was derived by descent from her father by virtue of the statute; and that, therefore, it descended to them under Section 1401, Kentucky Statutes.

Ruth Crosby Rice was a posthumous child, but she was not a pretermitted child. By his will her father devised the farm "to his children" as a class, without specifically naming them. Had he named William and Artie Crosby in the will as his "children," and had Ruth Crosby (of whose existence *en ventre sa mere* the law presumes her father had knowledge at the time of his death) not been provided for or expressly excluded by the will, then she would have been, in law, a pretermitted child within the purview of Section 4848, Kentucky Statutes.

The statute on pertermittance was enacted to relieve against unintentional disinheritance of a testator's children; but in the case at bar the testator did not unintentionally omit to make provision for Ruth Crosby; he devised the farm to "his children," and at the time of his death, in law, she was one of them.

Subject to the qualification that it must be born alive, a child *en ventre sa mere* is, in law, considered *in esse* from the date of its conception, for all purposes beneficial to it. And the weight of authority in the United [323] States and in England is that, where a devise is made to the "children" of the testator, as a class, a child of the testator, *en ventre sa mere* at the time of the death of the testator, will be considered as included within the designated class, and will

take under the devise. Such a child is included within the motive of the gift. *Adams v. Logan*, 6 T. B. Mon. (Ky.) 175; 119 Am. St. Rep. 946, note; 7 Ann. Cas. 134, note; 43 Am. Dec. 474, note; 4 Kent's Comm. 13th Ed. Section 412; 40 Cyc. 1452, 1479.

In this State the court has gone so far as to hold that where there is a general devise to "the children" of another than the testator, such devise includes all the children of such person living at the death of the testator as well as any that may thereafter be born. *Lynn v. Hall*, 101 Ky. 738, 19 Ky. L. Rep. 996, 43 S. W. 402, 72 Am. St. Rep. 439; *Gray v. Pash*, 66 S. W. 1026, 24 Ky. L. Rep. 963; *Goodridge v. Schaefer*, 68 S. W. 411, 24 Ky. L. Rep. 219; *Caywood v. Jones*, 108 S. W. 888; *U. S. Fidelity, etc. Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993. In *Barker v. Barker*, 143 Ky. 68, 135 S. W. 396, it seems, however, that the rule laid down in the foregoing cases may be limited to devises to the children of a near relative, and not necessarily applicable where the devise was to the children of a stranger in blood to the testator.

These authorities are here mentioned only for the purpose of illustrating the rule that where a devise is to "the children" of a designated person, without specifically naming them, they take as a class.

So, although the child Ruth was *en ventre sa mere* at the time of her father's death, she was, nevertheless, his child at that time *in esse*, and she took as a devisee under the will in equal measure and in the same manner as the testator's other children, her brothers.

And, by Section 1401, Kentucky Statutes, her undivided one-third interest, which she acquired by devise under her father's will, descended to her brothers, subject only to the statutory life estate of her surviving husband in one-third of her interest.

The judgment of the lower court to this effect is, therefore, affirmed.

#### NOTE.

#### When Gift to "Children" and Like Includes Child *En Ventre Sa Mere*.

The rule recognized in *re Salaman* [1908] 1 Ch. (Eng.) 4, 12 Ann. Cas. 199, that a gift to "children" ordinarily includes a child who is at the time when the gift takes effect *en ventre sa mere*, is supported by the few recent cases which have discussed the question. *Norton v. Mortensen*, 88 Conn. 28, 89 Atl. 882; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *James v. James* (Tex.) 164 S. W. 47. And see the reported case. "A child *en ventre sa mere* will be considered

in being from the time of its conception where it will be for its benefit to be so considered." Norton v. Mortensen, supra. "The phrase 'surviving grandchild' when used in a gift to grandchildren includes any grandchild who may at the time of the death of the testator be *en ventre sa mere*." Hewitt v. Green, supra. So in James v. James, supra, there was involved the following provision: "I desire that all my property of every kind be divided in equal shares to my children excepting Scott H. James, his share to go to his children—he receiving nothing." The court said: "As no period was mentioned by the testatrix for the vesting of the devise to Scott H. James' children, the same vested at the death of the testatrix, and only the children in being at the time of her death were included in the devise to Scott H. James' children as a class, but a child *en ventre sa mere* is included among those in being, and therefore Mary Josephine James took under the will."

In Stachelberg v. Stachelberg, 192 N. Y. 576, 85 N. E. 1116, affirming 124 App. Div. 232, 108 N. Y. S. 645, it was held, under a statute, that a child of the testator born after the testator's death was entitled to succeed to the same portion of his father's estate as would have been distributed to him had the father died intestate, where he was not mentioned in the will and no provision was made for him therein. Similarly In re Griffiths [1911] 1 Ch. (Eng.) 246, it was said: "Now s. 33 of the Wills Act provides that 'where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.' The defendant Edith Mary Griffiths is issue of the testator's son Arthur, and she was living although not born at the testator's death, and I do not hesitate to decide that s. 33 applies to such a case."

PEOPLE EX REL. CARUS

v.

MATTHIESSEN.

Illinois Supreme Court—October 27, 1915.

269 Ill. 499; 109 N. E. 1056.

Corporations — Stockholders' Meeting — Necessity of Notice.

On quo warranto to require a defendant to show by what right he acted as director in a corporation, it appeared that the by-laws of the corporations provided for an annual meeting of the stockholders to elect directors on December 18th; that ever since its organization the stockholders of the company by mutual consent met about 10 A.M. on that day without notice as required by Laws 1857, p. 162, § 6, under which act the corporation was organized; that at the meeting so held which elected defendant two stockholders appeared, one of whom protested against the meeting, the other saying nothing, and upon the failure of the protest both withdrew. Held, that defendant's election was void, since the meeting was illegal for want of notice as required by the act.

[See 7 R. C. L. tit. Corporations, p. 336.]

Same.

The facts that the stockholders for 20 years had held meetings by common consent without notice, and that the two stockholders being present at the meeting in question might have participated, and hence were not injured by want of notice, does not render the meeting valid, since the notice required by the act is indispensable, unless waived either expressly or by participation in the meeting.

Waiver of Notice.

The action of the stockholder in continuing to remonstrate after business had been taken up by the meeting is not a participation therein waiving the right to legal notice.

[See note at end of this case.]

Same.

The action of the other stockholder in being present until after the assumption of business, but remaining mute and withdrawing upon the failure of the first stockholder's remonstrance, is not a participation in the meeting waiving the right to legal notice.

[See note at end of this case.]

Effect of Failure to Give Notice.

The correct rule is that, where required by statute, the absence of notice explicitly naming the day, time, and place of meeting invalidates the meeting, unless the stockholders are all present and consent, and, if a single stockholder refuses to consent, the proceedings will be void.

Appeal from Appellate Court, Second District.

Information in nature of quo warranto. Mary Hegeler Carus, relator, and F. W.

Matthiessen, defendant. Judgment for defendant in Circuit Court, La Salle county: DAVIS, Judge. Judgment reversed by Appellate Court. Defendant appeals. The facts are stated in opinion. **AFFIRMED.**

*William J. Calhoun and M. F. Gallagher* for appellant.

*George Wiley, Montgomery, Hart, Smith & Steere, Charles S. Cutting, N. H. Pritchard and J. D. Dickerson* for appellee.

[500] COOKE, J.—The People, on the relation of Mary Hegeler Carus, individually and as trustee under the will of Edward C. Hegeler, deceased, appellee, filed an information in the nature of a *quo warranto* in the circuit court of LaSalle county against the appellant, F. W. Matthiessen, calling upon him to show by what authority he was exercising the office of director of the Matthiessen & Hegeler Zinc Company, an Illinois corporation. The plea of appellant set forth his election as a director on December 18, 1913, and averred title to the office by virtue of such election. The circuit court found that the appellant had been duly and regularly elected a director of the company at a stockholders' meeting held December 18, 1913, and a judgment of not guilty was entered. This judgment, on appeal, was reversed by the Appellate Court for the Second District and a judgment of ouster was entered. The cause is brought here by appeal on a certificate of importance.

The sole question involved is whether the meeting of December 18, 1913, was a legal meeting of the stockholders of the corporation. It is the claim of appellee that as the notice of the meeting required by law was not given, any action taken was invalid, while appellant contends that sufficient notice was given, and if not, that all the stockholders were present, and it was therefore immaterial whether notice was given.

The corporation was organized in 1871 under a general incorporation act passed in 1857. (Laws of 1857, p. 161.) The capital stock was divided into 426 shares, and these [501] shares were distributed among F. W. Matthiessen and Edward C. Hegeler and the members of their immediate families, the members of each family owning 213 shares. Section 6 of the act of 1857, under which the company was organized and which became a part of the charter of the corporation, provides that an annual election of directors shall be held at such time and place as the board may designate, and a written or printed notice of such election shall be given to each stockholder personally or sent to him through the mail at least fifteen days before the day of the election, and the election shall be made by such of the stockhold-

ers as shall attend for that purpose, either in person or by proxy. It is conceded that the notice required by this section of the statute was not given of the meeting of December 18, 1913. The by-laws of the company provide that the annual meeting of the stockholders for the election of a board of four directors shall be held at the office of the company, in the city of LaSalle, on December 18 of each year, excepting when that day shall fall on Sunday, in which case the meeting shall be held on the following day. The hour for holding the meeting is not fixed in the by-laws.

There was no material controversy as to the facts. It appears that the notice of the annual meeting required by the statute had never been given, but ever since the organization of the company the stockholders met by common consent some time during December 18 of each year, usually about the hour of ten o'clock A. M., for the annual election of the board of directors. If for any reason it did not suit the convenience of either appellant or Hegeler to meet at the office of the company, the meeting, by consent of all the stockholders, was held elsewhere. The stock was held by a very limited number of persons and the business was transacted harmoniously, two members of the Matthiessen family and two members of the Hegeler family being elected to the board of directors each year. After the death of Edward C. Hegeler 211 shares of the Hegeler stock was held by [502] Mrs. Carus as trustee under the will of her father, one share was held by Mrs. Carus in her own right, and one share by C. B. Lihme, a son-in-law of Edward C. Hegeler. Mrs. Carus was a director and president of the company, and Lihme was the other director representing the Hegeler interests. This was the situation on December 18, 1913. On December 17, 1913, appellant and others instituted *quo warranto* proceedings against Lihme to contest his right to hold the office of director in the company, and summons in that case was served on him either that evening or the next morning. Mrs. Carus and Lihme went to the office of the company in LaSalle about ten o'clock the morning of December 18, 1913. They found there present all the Matthiessen stockholders, either in person or by proxy. Lihme was much excited over the action which had been instituted against him, and he at once demanded of appellant that no election be held and no business be transacted at that time. Some of the witnesses testify that he demanded that the meeting adjourn until some time in the future, but all the testimony is to the effect that he demanded that no action be taken that day. While Lihme was engaged in making his demands a member of the Matthiessen family moved that appellant be

made the chairman of the meeting, and this motion was put and declared carried. Mrs. Carus was in the same way selected as secretary of the meeting. About the time the vote was being taken on Mrs. Carus as secretary she and Lihme withdrew from the room. Mrs. Carus said nothing whatever while she was in the room, and neither she nor Lihme voted on the two motions put while they were present. It is contended that as Lihme continued to demand that the meeting adjourn after appellant had been selected as chairman and had taken charge of the meeting, he thus participated to the extent that he is bound by the action of the meeting. Lihme did nothing but protest against the taking of any action or the transaction of any business at that time; but be the effect of his actions what it may, Mrs. Carus said nothing [503] and did nothing that could be construed as consenting to the holding of the meeting. Unless the provisions of the by-laws constituted sufficient notice of the annual meeting, or the physical presence, alone, of Mrs. Carus constituted a waiver of the statutory notice, the meeting was not a legal one and any election held thereat would be invalid. After Mrs. Carus and Lihme had departed the election was held and appellant was elected as one of the directors for the ensuing year.

While the trial court held as a proposition of law that a by-law of a corporation which names a day, but not the hour, for the holding of the annual meeting is insufficient notice to the stockholders of the time of holding the meeting, it took the view that no stockholder can urge the invalidity of such meeting for want of notice unless he has been injured or deprived of some substantial right by lack of notice; that where all the stockholders are present on the day and at the place fixed in the by-laws and at an hour at which for over twenty years it was customary to hold the annual meeting, and where each stockholder knew that the annual election for directors was then about to take place, in law each stockholder had the right and opportunity to participate in the meeting and was not injured by lack of notice or deprived of any substantial right and cannot urge the invalidity of the meeting on the ground of lack of notice. The court properly held that the by-laws did not constitute notice to the stockholders of the holding of the annual meeting for the election of directors. Section 6 of the act under which this company was incorporated provides that this meeting shall be held at such time and place as the board of directors may designate, and expressly requires written notice to be given the stockholders each year. Had the by-laws provided the hour at which the annual meeting should be held on each December 18 it would have amounted to no more than the

designation of the time and place of the meeting by the board and would not take the place of the [504] notice required by the statute. That notice is indispensable unless it is waived by all the stockholders, either expressly or by consenting to or participating in the meeting.

Did Lihme waive notice by demanding that no business be transacted, and by demanding a pledge of the chairman, after he had been selected, that the meeting do nothing but adjourn, or did Lihme and Mrs. Carus waive notice by their mere presence at the meeting? By nothing which he did or said did Lihme recognize the right of the meeting to organize or to transact business. His effort to secure a pledge from appellant, even after he had been selected by his faction as chairman, that the meeting do nothing but adjourn, amounted to no more than an offer to submit to the jurisdiction of the meeting provided no business whatever should be transacted. His offer was not accepted and he withdrew, protesting against the holding of the meeting.

This court has never been called upon to decide whether the mere presence of a stockholder at an annual meeting for the election of directors, with full opportunity to participate, is alone sufficient to constitute a waiver of notice and deprive him of the right to rely upon lack of notice. The text in 10 Cyc. 326, that where notice is required by statute the meeting cannot be legally held unless the notice be explicitly given in respect of the day, hour and place or the stockholders are all present and consenting, but if a single member having the right to be present and vote is not duly notified and is absent, or being present refuses to consent to the holding of the meeting, its proceedings will be void, states the correct rule and is supported by authority. This question arose in *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36, and the Appellate Court for the Second District, in an opinion written by a present member of this court, held that every stockholder had a right to be present at the annual meeting for the election of directors, and it could not be legally held until after notice of the time and place had been given in an authentic and legal mode, unless all stockholders [505] were present and consenting, in person or by proxy. That holding is correct, and, as applied to the facts in this case, neither Mrs. Carus nor Lihme having consented to the holding of the meeting or participated in it in any way, the meeting of December 18, 1913, was not legally held and appellant has no valid title to the office of director of the company by virtue of any action taken at that meeting.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

**NOTE.****Waiver of Notice of Stockholders' Meeting.**

Right to Waive Notice, 1038.  
 Defects Subject to Waiver, 1039.  
 What Constitutes Waiver, 1040.

**Right to Waive Notice.**

It is well established that the stockholders of a corporation may waive a by-law, charter or statutory requirement for the giving of notice of corporate meetings to them.

*England.*—Henderson v. Bank of Australasia, 40 Ch. D. 170, 37 W. R. 332, 59 L. T. N. S. 856, 58 L. J. Ch. 197; Briton Medical, etc. Assoc. v. Jones, 61 L. T. N. S. 384. See also In re British Sugar Refining Co. 3 Kay & J. 408; Rex v. May, 5 Burr. 2681. Compare Rex v. Theodorick, 8 East 543, 9 Rev. Rep. 494 (containing dictum to effect that notice specially required by charter cannot be waived).

*Canada.*—Compare Sherker v. Rudner, 39 Quebec Super. Ct. 44.

*United States.*—Kenton Furnace R. etc. Co. v. McAlpin, 5 Fed. 737; Stutz v. Handley, 41 Fed. 531, affirmed as to this point 139 U. S. 417, 11 S. Ct. 530, 35 U. S. (L. ed.) 227; Synnott v. Cumberland Bldg. Loan Assoc. 117 Fed. 379, 54 C. C. A. 553. See also Bridgeport Electric, etc. Co. v. Meader, 72 Fed. 115, 30 U. S. App. 580, 18 C. C. A. 451; In re Hammond, 139 Fed. 898.

*Alabama.*—Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L.R.A. 375.

*California.*—San Buenaventura Commercial Min. etc. Co. v. Vassault, 50 Cal. 534. See also Lowe v. Los Angeles Suburban Gas Co. 24 Cal. App. 367, 141 Pac. 399.

*Connecticut.*—Gold Bluff Min. etc. Corp. v. Whitlock, 75 Conn. 669, 55 Atl. 175.

*Georgia.*—Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S. E. 897.

*Illinois.*—Thomas v. Citizens' Horse R. Co. 104 Ill. 462; Gade v. Forest Glen Brick, etc. Co. 165 Ill. 367, 46 N. E. 286; Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230; Gray v. Bloomington, etc. Ry. 120 Ill. App. 159. See also Hiles v. Hiles, 120 Ill. App. 617, and the reported case.

*Indiana.*—Judah v. American Live Stock Ins. Co. 4 Ind. 333; Jones v. Milton, etc. Turnpike Co. 7 Ind. 547.

*Kentucky.*—Jones v. Hilldale Cemetery Soc. 65 S. W. 838, 23 Ky. L. Rep. 1486.

*Maine.*—Bucksport, etc. R. Co. v. Buck, 68 Me. 81. See also McClinch v. Sturgis, 72 Me. 288.

*Maryland.*—Thompkins v. Sperry, 96 Md. 560, 54 Atl. 254.

*Massachusetts.*—Bryant v. Goodnow, 5 Pick. 228; Stebbins v. Merritt, 10 Cush. 27. See also Braintree Water-Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420.

*Missouri.*—Riesterer v. Horton Land, etc. Co. 160 Mo. 141, 61 S. W. 238, overruling State v. McGrath, 86 Mo. 239; State v. Cook, 178 Mo. 189, 77 S. W. 559; Manhattan Brass Co. v. Webster Glass, etc. Co. 37 Mo. App. 145; In re Mathiason Mfg. Co. 122 Mo. App. 437, 99 S. W. 502.

*New Jersey.*—Babbitt v. East Jersey Iron Co. Stewart's Dig. p. 208, § 13; Weinburgh v. Union St.-Ry. Advertising Co. 55 N. J. Eq. 640, 37 Atl. 1026; In re Griffing Iron Co. 63 N. J. L. 168, 41 Atl. 931, affirmed 63 N. J. L. 357, 46 Atl. 1097, 57 L.R.A. 624.

*New York.*—People v. Twaddell, 18 Hun 427. See also People v. Peck, 11 Wend. 604, 27 Am. Dec. 104; Matter of Keller, 116 App. Div. 58, 101 N. Y. S. 133.

*North Carolina.*—Benbow v. Cook, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; Hill v. Atlantic, etc. R. Co. 143 N. C. 539, 55 S. E. 854, 9 L.R.A. (N.S.) 606.

*Ohio.*—Chamberlain v. Painesville, etc. R. Co. 15 Ohio St. 225.

*Pennsylvania.*—Vrooman v. R. P. Vansant Lumber Co. 215 Pa. St. 75, 64 Atl. 394.

*Vermont.*—Richardson v. Vermont, etc. R. Co. 44 Vt. 613.

*West Virginia.*—Germer v. Triple-State Natural Gas, etc. Co. 60 W. Va. 143, 54 S. E. 509.

*Wisconsin.*—Lutheran Trifoldighed Congregation v. St. Paul's English Evangelical Lutheran Congregation, 159 Wis. 56, 150 N. W. 190.

*Wyoming.*—Smith v. Stone, 21 Wyo. 62, 128 Pac. 612.

The reported case recognizes the general rule as heretofore stated, but holds that no waiver can be predicated on the facts appearing therein, for the stockholder although present neither assented to nor participated in the meeting.

The courts in reaching the conclusion that notice may be waived take the view that the provisions requiring notice are for the protection of the stockholders and not of the public, and if the stockholders desire they should be permitted to forego the benefits thereof. Kenton Furnace R. etc. Co. v. McAlpin, 5 Fed. 737; Synnott v. Cumberland Bldg. Loan Assoc. 117 Fed. 379, 54 C. C. A. 553; Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L.R.A. 375; Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S. E. 897; Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230; Riesterer v. Horton Land, etc. Co. 160 Mo. 141, 61 S. W. 238; Lutheran Trifoldighed Congregation v. St. Paul's English Evangelical Lutheran Congregation, 159 Wis. 56, 150 N. W. 190. Thus

in *Kenton Furnace R. etc. Co. v. McAlpin*, supra, the court said: "What is the purpose of the notice? What other purpose could there be, so far as they are interested in it, than that they should have an opportunity themselves of making a part and parcel of the meeting, taking part in its deliberations and actions; in other words, that they should have an opportunity of having a voice in whatever was done? That is the whole purpose of the notice. The public are not interested in this notice in any shape or form whatever. It is only stockholders who are interested, and to say that they may not estop that right by attending and participating in it, and may not estop themselves the right to deny its validity, would be to say that which I do not think in accordance with the theory and the rule of notice in cases of this character. And I think, while I am clear upon that proposition upon reason, that it is abundantly supported by authority." And in *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454, the court stated its views as follows: "There was no necessity for proving a compliance with the statute, when every person interested had express notice and participated in the meeting. . . . The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, 'the meeting and all proceedings are as valid as they would be had the full statutory notice been given.'" In *Riesterer v. Horton Land, etc. Co.* 160 Mo. 141, 61 S. W. 238, it was said: "It is clear that the constitutional and statutory provisions construed are for the benefit of the stockholders and not for that of the public, that no useful purposes would be subserved by construing them to be for the benefit of the public, and that being for the benefit of the stockholders they can waive that benefit, and if they do so, and all meet and unanimously, or by a legal majority, vote to increase the stock or bonded indebtedness, their act is binding on them, and neither they nor their creditors can be heard to deny the validity of the act."

From the principle on which the general rule is based it follows that where the stockholders make no objection to proceedings had on improper notice, thus waiving the irregularity, others cannot complain. *Campbell v. Argenta Gold, etc. Min. Co.* 51 Fed. 1; *Central Trust Co. v. Condon*, 67 Fed. 84, 31 U. S. App. 387, 14 C. C. A. 314; *Beecher v. Marquette, etc. Rolling Mill Co.* 45 Mich. 103, 7 N. W. 695; *State Nat. Bank v. Merchants' Bank*, 83 Miss. 610, 35 So. 569. Thus in, *Beecher v. Marquette, etc. Rolling Mill Co.* supra, wherein it appeared that the notice of stockholders' meeting stated that its object was to authorize the issuance of bonds to the extent of \$100,000, and at the meeting power

was granted for an issue to the extent of \$150,000 with an accompanying mortgage, it was held that inasmuch as the stockholders made no objection to the foreclosure of the mortgage a grantee of parties who had purchased the equity of redemption at execution sale could not be heard to complain that the notice of the meeting was defective. The court said: "The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong, direct or indirect, is done to any human being if conveyance is made or mortgage given without the exact notice required, unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive?"

#### *Defects Subject to Waiver.*

Waiver may be made of any defect arising from a failure to comply in any way with provisions requiring notice to be given. *Thompkins v. Sperry*, 56 Md. 560, 54 Atl. 254; *In re Mathiason Mfg. Co.* 122 Mo. App. 437, 99 S. W. 502. Thus in the case of *In re Mathiason Mfg. Co.* supra, where it was required that "at least two weeks' notice of the election shall be published in some newspaper printed at least once a week, in the city or county where the corporation is located," it was held that the failure to make any publication could be waived.

Waiver may be made where the notice given is defective, as for instance where it fails to meet a requirement that it must fully state the object of the meeting. *Henderson v. Bank of Australasia*, 40 Ch. D. (Eng.) 170, 37 W. R. 332, 59 L. T. N. S. 856, 58 L. J. Ch. 197; *Gold Bluff Min. etc. Corp. v. Whitlock*, 75 Conn. 669, 55 Atl. 175; *Richardson v. Vermont, etc. R. Co.* 44 Vt. 613; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612. Thus in *Smith v. Stone*, supra, it was held that the plaintiff, a stockholder, who was present at a meeting at which the sale of a corporation's property and assets was authorized, could not avoid the sale on the ground that under the notice of the meeting issued such business could not be transacted. The court said: "The plaintiff, . . . was present at the meeting and participated therein, and, while he objected to the adoption of the resolution complained of, it is not alleged that he made any objection to the form of the

notice, or to the authority of the stockholders at such meeting to consider the question and adopt a resolution for the sale of all the assets and property of the corporation, at least for an adequate price. It appears by the petition that he and another stockholder who was present objected to the resolution upon the sole ground that the price at which it was provided by the resolution that the sale should be made was not the reasonable, fair, and market value of the property, and that a price far in excess of that could be procured if any endeavor were made to do so. Under these circumstances, any objection to the form of the notice of the meeting is not available to the plaintiff." But in *Sherker v. Rudner*, 39 Quebec Super. Ct. 44, it was held that the stockholders could not disregard the statutory formalities regarding notice of a meeting for changing the number of directors as prescribed in the companies act (R. S. C. 1906, ch. 79 § 76). The statute provided that the company might increase or decrease the number of its directors, but that no by-law for that purpose should be valid or acted on, unless it was approved by a vote of at least two-thirds in value of the stock represented by the shareholders present at a special general meeting, called for considering the by-law; or until a copy of the by-law, certified under the seal of the company, had been published in the *Canada Gazette*. The court sustained the plaintiff's contention that a resolution reducing the number of directors passed at a meeting which all the stockholders attended and at which he was present and participated in was void because the meeting had been convened without special notice thereof. And in *Dolbear v. Wilkinson* (Cal.) 156 Pac. 488, it was held that mere physical presence without participation was not a waiver of a notice which was defective in that it did not state that the election of directors would be taken up at that time.

Also it has been held that one may waive the irregularity growing out of the giving of conflicting or misleading notices of the time and place of a meeting. *Jones v. Hilldale Cemetery Soc.* 65 S. W. 838, 23 Ky. L. Rep. 1486, wherein it appeared that two notices stating different dates for and places of meeting were given to the members of a cemetery society, and the court held that a meeting having been held in spite of the misleading notices, the election of trustees thereat was valid.

#### *What Constitutes Waiver.*

The requirements for notice of a stockholders' meeting have been held to be waived by a written waiver of notice. *Butler Paper Co v. Cleveland*, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230; *Gray v. Bloomington*,

etc. Ry. 120 Ill. App. 159; *Manhattan Brass Co. v. Webster Glass Co.* 37 Mo. App. 145. Thus in the case last cited, the court held written waivers to be valid when made under the terms of a statute (Rev. St. § 735) which provided that when all the members of a corporation shall be present at any meeting, however called or notified, and shall sign a written consent thereto on the record of the meeting, the acts of the meeting shall be as valid as if legally called and notified.

Waiver of irregular notice or lack of notice may result from the subsequent acts of stockholders. *Briton Medical, etc. Assoc. v. Jones*, 61 L. T. N. S. (Eng.) 384; *Vrooman v. R. P. Vansant Lumber Co.* 215 Pa. St. 75, 64 Atl. 394; *Richardson v. Vermont, etc. R. Co.* 44 Vt. 613. Thus in *Briton Medical, etc. Assoc. v. Jones*, supra, wherein it appeared that certain directors were appointed on thirteen days' notice while the requirement in the deed of settlement was fourteen days, it was held that the defect in appointment was remedied by the confirmation of their appointment at a subsequent annual general meeting. In *Bryant v. Goodnow*, 5 Pick. (Mass.) 228, it appeared that the defendant being desirous with others of establishing a line of stage coaches and "for that purpose to raise a capital of one thousand five hundred dollars, to be divided into shares of twenty-five dollars each" subscribed the sum of twenty-five dollars. When payment thereof was sought to be enforced against him he complained that he was not notified of the first meeting of the company at which certain expenditures were authorized. It was held that he had waived his objections on this account when he had subsequent to the first meeting tendered conditional payment of the amount of his subscription. In *Babbitt v. East Jersey Iron Co.* Stewart's Dig. p. 208, § 13, the court held that the subsequent assent of one incorporator who was absent from the first meeting to what was done thereat rendered the incorporation valid. In *Hill v. Atlantic, etc. R. Co.* 143 N. C. 539, 55 S. E. 854, 9 L.R.A.(N.S.) 606, it appeared that at a meeting of the stockholders of a corporation it was resolved to make a certain lease. The plaintiff was not present at this meeting and remained silent for approximately one year subsequent thereto. At a meeting then held a resolution was introduced at his instance, but tabled, instructing the proper officers to take the necessary steps to set aside the lease. The court held that even though no proper notice of the meeting at which the lease was authorized was given, the plaintiff had waived any irregularity both by virtue of his act at the later meeting and by his silence in the interim. Relative to the latter point the court said: "We think that the silence and inaction of the plain-



tiff . . . was a waiver of any right he originally had to object to irregularities of which he now complains. . . . When the act is done in good faith for the benefit of the company, although not done as it should have been, the stockholder must dissent within a reasonable time or his assent will be presumed and he will be estopped from gainsaying the validity of the transaction by his silence, when he ought to speak and act, it being such a neglect of duty that he is not entitled to the consideration of a court of justice; and especially is this principle enforced when the objectionable act may be followed by a large expenditure of money, in which case the stockholder should not only enter his protest seasonably, but follow up the same by active and preventive means, for it is obviously against good conscience that one who has the power to prevent the alleged injurious proceeding should stand by and see work prosecuted and money expended that may result to his benefit, and afterwards raise his objection thereto. He may not thus wait unreasonably and pocket the gain of the venture if successful, and then, if so minded, fall back upon his protest as a saving of his legal remedy. Such a course of conduct is the full equivalent of bad faith, and the doors of the court are shut against him because he cannot enter it, as he should, with clean hands and a clear conscience. His neglect to act, and not merely to speak, at the proper time, bars his right to remedial justice as effectually as his neglect to protest would have done."

The presence of a stockholder at a meeting coupled with his participation therein constitutes a waiver of any irregularity of notice. *Kenton Furnace R. etc. Co. v. McAlpin*, 5 Fed. 737; *Stutz v. Handley*, 41 Fed. 531, affirmed as to this point 139 U. S. 417, 11 S. Ct. 530, 35 U. S. (L. ed.) 227; *Synott v. Cumberland Bldg. Loan Assoc.* 117 Fed. 379, 54 C. C. A. 553; *Judah v. American Live Stock Ins. Co.* 4 Ind. 333; *Thompkins v. Sperry*, 96 Md. 560, 54 Atl. 254; *In re Griffing Iron Co.* 63 N. J. L. 168, 41 Atl. 931, affirmed 63 N. J. L. 357, 46 Atl. 1097, 57 L.R.A. 624; *Weinburgh v. Union St. Ry. Advertising Co.* 55 N. J. Eq. 640, 37 Atl. 1026; *Germer v. Triple-State Natural Gas etc. Co.* 60 W. Va. 143, 54 S. E. 509; *Lutheran Trifolded Congregation v. St. Paul's English Evangelical Lutheran Congregation*, 159 Wis. 56, 150 N. W. 190; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612. See also *In re British Sugar Refining Co.* 3 Kay & J. (Eng.) 408; *Matter of Keller*, 116 App. Div. 58, 101 N. Y. S. 133. Compare the reported case wherein it appears that a stockholder was present but did not participate. Thus in *Kenton Furnace R. etc. Co. v. McAlpin*, supra, the court said: "The act of incorporation pro-

vides that they may elect directors at certain times, and if they should fail to elect them at such times they can do so by giving thirty days' notice; and it is contended by learned counsel for the plaintiff in the case that that provision in the charter cannot be waived, and, inasmuch as it is not contended in this case that there was in fact a compliance with that requisite of the charter, that the meeting was void. On the other hand, it is contended that while the charter itself, or the by-laws, or both, may provide that a meeting may be called upon certain notice, that if all the parties who are interested in it, and all the parties who would have had a right to have received notice, without any such notice appeared at a meeting, and joined in its deliberations and discussions, that they are estopped from afterwards denying the legality of the meeting for the want of such notice. I think that that is the law. I think that where stockholders who, under the provisions of a charter or under the provisions of the by-laws, have the right to have the requisite notice prescribed by either or by both, that that is a right that they may waive, and if each one of them attends and participates in the action of the meeting, they are estopped from denying the legality of that meeting for the want of notice." And in *Matter of Keller*, 116 App. Div. 58, 101 N. Y. S. 133, it was said: "That this requirement of a thirty-day notice might have been waived by the respondent here is unquestionably true. If he had appeared and taken part in the election without objection as to the notice given he could not be heard thereafter to object that notice was insufficient."

This rule also applies where a stockholder participates in a meeting by proxy. *Jones v. Milton*, etc. *Turnpike Co.* 7 Ind. 547; *In re Mathiason Mfg. Co.* 122 Mo. App. 437, 90 S. W. 502. See also *Columbia Nat. Bank v. Mathews*, 85 Fed. 934, 56 U. S. App. 636, 20 C. C. A. 491.

*In Bucksport, etc. R. Co. v. Buck*, 68 Me. 81, it was held that the president of a board of directors by reason of his position, being largely responsible for a defective notice of a meeting of the subscribers to the capital stock of corporation, could not subsequently avail himself of that objection.

It has been held that a stockholder who is present in person or by proxy cannot complain that notice of the meeting has not been given to others. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473; *Schenectady, etc. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Hill v. Atlantic, etc. R. Co.* 143 N. C. 539, 55 S. E. 854, 9 L.R.A.(N.S.) 606. See also *Nickum v. Burckhardt*, 30 Ore. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822. But in *Jones v. Concord, etc. R. Co.* 67 N. H. 119, 38 Atl.

120, affirmed 67 N. H. 234, 30 Atl. 234, 68 Am. St. Rep. 650, it was held that although a stockholder was present at a meeting at which an increase of stock was voted he might still raise the question of defective notice as to other stockholders. The court took the view that he was entitled to such protection for the reason that if proper notice had been given, other stockholders might have attended the meeting and changed the result.

**PEOPLE EX REL. NEW YORK AND  
QUEENS GAS COMPANY**

v.

**McCALL ET AL.**

New York Court of Appeals—October 3, 1916.

219 N. Y. 34.

**Public Service Commission — Judicial Review.**

In reviewing on certiorari an order of a Public Service Commission for the extension of gas mains, the court has no power to pass on the wisdom or expediency of the order or of the weight of the evidence on which it is based but can annul it only if it is an unlawful, arbitrary or capricious exercise of power. [See note at end of this case.]

**Gas — Extension of Mains — Reasonableness of Order.**

The fact that the increased return from an extension of gas mains ordered by a Public Service Commission amounts to less than three per cent on the cost of making the extension does not show that the order is arbitrary or capricious.

**Appeal and Error — Orders Appealable.**

An order of the Appellate Division which annuls an order of the Public Service Commission without granting a rehearing is appealable to the Court of Appeals.

*People v. McCall*, 171 N. Y. App. Div. 580, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Certiorari. New York and Queens Gas Company, relator, and Edward E. McCall et al., constituting Public Service Commission of State of New York, defendants. From order of Appellate Division, defendants appeal. REVERSED.

[85] Certain residents and property owners of Douglaston and Douglas Manor in the third ward of the borough of Queens, New York city, applied to the public service commission of the first district for an order re-

quiring the relator in this proceeding, the New York and Queens Gas Company, to extend its gas mains and services in such manner as may be necessary reasonably to supply with gas the communities of Douglaston and Douglas Manor. On a review of the proceedings by the Supreme Court at the Appellate Division, the order of the public service commission was annulled. From that determination the commission has appealed to this court.

Douglaston and Douglas Manor are situated in the northeast corner of the borough of Queens near Little Neck Bay. To the southeast of Douglaston and also within the third ward of the borough is Little Neck, which extends to the borough line. To the west are the communities of Bayside and Flushing which are separated from Douglaston by a salt marsh about half a mile or more wide, and extending a mile inland. Through the middle of the marsh runs a creek navigable for small boats and along each side of the marsh is a high hill. The relator is at present supplying gas to Flushing and Bayside, but its mains and pipes are not sufficient to meet the additional requirements of Douglaston and Douglas Manor. The company's gas plant is located in Flushing about six miles from Douglaston, and it will be necessary to lay a main from the plant to Bayside and carry it from there down the hill, over the marsh and up the hill on the other side to reach Douglaston.

Douglaston and Douglas Manor are supplied with electricity for lighting purposes, and gas is desired mainly [86] for cooking during the summer months. The Appellate Division decided that upon the whole case it was unreasonable to require the relator to extend its services in compliance with the order of the public service commission. Further facts appear in the opinion.

*Arthur DuBois, George S. Coleman and Edward M. Deegan* for appellants.

*John A. Garver* for respondent.

[87] CUDEBACK, J.—The public service commissions are authorized by law "to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities." Pub. Serv. Comm. Law [Cons. Laws, ch. 48], § 66.

Under the authority of this statute the public service commission for the first district made the order requiring the relator to extend its gas mains and services to meet the reasonable requirements of Douglaston and Douglas Manor.

In applying the provisions of this statute the court at the Appellate Division said: "We have no doubt that under this law the

question remains for the court to determine upon the review of the determination of the Public Service Commission whether the extension ordered was a reasonable extension."

This statement of the law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law.

[88] The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed perhaps by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control.

The law governing the commissions is well expressed by the Minnesota Supreme Court in *State v. Great Northern R. Co.* 130 Minn. 57, 153 N. W. 247. It is there said: "The order may be vacated as unreasonable if it is contrary to some provision of the federal or state constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interests of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment." See also *People v. State Board of Tax Com'rs*, 214 N. Y. 594, 108 N. E. 913; *People v. Waldo*, 212 N. Y. 174, 105 N. E. 829.

In *Interstate Commerce Commission v. Illinois Cent. R. Co.* 215 U. S. 452, 470, 30 S. Ct. 155, 54 U. S. (L. ed.) 280, the chief judge, after stating the power of the court, continued: "It is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions [89] by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make

the order and not the mere expediency or wisdom of having made it, is the question."

The court at the Appellate Division did not, therefore, have the power to determine that the extension of the relator's gas mains and pipes ordered by the public service commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary or capricious exercise of power.

The relator argues in support of the power of the Appellate Division to review generally the reasonableness of the order of the public service commission that the necessary authority is given by the provision with regard to the writ of certiorari contained in section 2140 of the Code of Civil Procedure. That section reads as follows:

"Section 2140. The questions, involving the merits, to be determined by the court upon the hearing, are the following only:

"1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

"2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

"3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

"4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

"5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an [90] action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence."

I do not understand that this section of the Code extends the power of the court beyond the rules laid down in *State v. Great Northern R. Co.* and *Interstate Commerce Commission v. Illinois Cent. R. Co.* (supra).

It is urged that under the provisions of subdivision 5 of section 2140 the court may set aside the determination of the commission as against the weight of evidence, regarding it the same as the verdict of a jury.

The court had occasion to say in *People v. Hoffman*, 166 N. Y. 462, 476, 60 N. E. 187, 54 L.R.A. 597, in construing section 2140 of the Code of Civil Procedure, as applied to the determination of the board of examination under the Military Code: "The review authorized does not substitute the judgment of the civil court for that of the military court upon the evidence or the merits, but inquires

into jurisdiction of the subject-matter, the exercise of authority in relation to the subject-matter according to law, the violation of any rule of law to the prejudice of the relator and the like."

Of course, if the court at the Appellate Division had annulled the order of the public service commission and granted a rehearing in the exercise of discretion, its order would not be reviewable in this court, *Barrett v. Third Ave. R. Co.* 45 N. Y. 628, but that is not the case. The court sustained the writ of certiorari and finally annulled the order of the public service commission without granting a rehearing.

The question now is whether or not there was any evidence to show that the order of the public service commission was an unlawful and arbitrary exercise of power. *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, 109 N. E. 577, L.R.A. 1916A 1176; *People v. Barker*, 165 N. Y. 305, 59 N. E. 137, 151; *Otten v. Manhattan R. Co.* 150 N. Y. 395, 44 N. E. 1033.

There was no dispute as to the basic facts of the case. There was some variation in the estimates of the witnesses [91] as to the cost of iron pipe and the expense of engineering supervision and like matters, but there was no real disagreement as to the cost of the extension of the relator's system of gas distribution, and the increase in revenue that the relator would probably receive therefrom.

The court at the Appellate Division in its opinion summed up the proof on the subject. The court said that the cost of the extension would be between \$60,000 and \$70,000, and that the increased return to the relator from the consumption of gas would be about \$1,660 per year, which is only one-half of the interest at five per cent upon the extension.

This is very far from showing that the order of the public service commission was simply an arbitrary and capricious exercise of power. Indeed it was not asserted to be so by the court. The court in annulling the order claimed and exercised the right to review the action of the public service commission and pass generally upon its wisdom and expediency.

In Douglaston and the neighboring territory in the third ward of the borough of Queens covered by the relator's franchise, there are some 332 houses. The occupants of these houses can get no gas unless they are supplied by the relator. It is the duty of the relator to supply their needs if practicable. *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 S. Ct. 115, 45 U. S. (L. ed.) 194; *People v. Deehan*, 153 N. Y. 528, 47 N. E. 787. The cost of the extension is not the only matter for consideration. *Oregon, R. etc. Co. v. Fairchild*, 224 U. S. 510, 529, 32 S. Ct. 535, 56 U. S. (L. ed.) 863.

The court at the Appellate Division substituted its own judgment for that of the public service commission in determining that the latter's order was unreasonable. This decision if allowed to stand will seriously hamper the commissions in the discharge of their duties, and go far toward defeating the efforts of the legislature to establish agencies to regulate the great public service corporations.

[92] The order should, therefore, be reversed and the order of the public service commission reinstated, with costs in the Appellate Division and in this court.

Willard Bartlett, Ch. J., Chase, Hogan, Cardozo and Pound, JJ., concur; Hiscock, J., not voting.

Order reversed, etc.

#### NOTE.

The reported case holds that, on certiorari to review an order of a public service commission finding that an extension of gas mains is reasonably necessary, the court cannot substitute its own judgment for that of the commission. "It was not intended" says the court, "that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control."

The validity of a statute authorizing a public service corporation to pass on the necessity of an extension of a public utility is discussed in the note to *Idaho Power, etc. Co. v. Blomquist*, Ann. Cas. 1916E 282.

As to the review by mandamus or prohibition of the discretion of a public service commission, see the note to *State v. Stutsman*, Ann. Cas. 1914D 776.

#### HISCOCK

v.

#### PHINNEY.

Washington Supreme Court—August 11, 1914.

81 Wash. 117; 142 Pac. 461.

#### Automobiles — Municipal Regulation — Keeping to Right Side of Street.

Where a municipal ordinance provided that vehicles, except when passing other vehicles ahead, should be kept as near the right-hand curb as possible, an automobilist should keep his machine on the right-hand side of the

street, and, where he uses the left-hand side, his rights are inferior to those of travelers proceeding in the opposite direction.

[See note at end of this case.]

**Same.**

In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, which was either in the center or on the left-hand side of the street, the giving of an instruction that the rights of defendant and the son, who was riding a bicycle in the opposite direction, were the same is prejudicial, where an ordinance required travelers to keep as near the right-hand curb as possible, and the jury, after receiving the instructions, returned, requesting further instructions as to whether the defendant had the right to the center of the street.

[See note at end of this case.]

**Same.**

A municipal ordinance requiring travelers to keep as near the right-hand side of the curb of the street as possible is not in violation of Rem. & Bal. Code, § 5558 et seq., requiring travelers on the highways to turn to the right; the ordinance establishing the law of the road within the municipality.

[See note at end of this case.]

**Instructions — Necessity for Request.**

While Const. art. 4, § 16, requires the judges to declare the law, they need declare it only in a general sense, and a party desiring instructions on a particular phase of the case must request them.

**Streets and Highways — Collision with Automobiles — Negligence for Jury.**

In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, the question of the manner of the collision held, under the evidence, for the jury.

**Opinion Evidence — Speed of Automobile.**

In an action for the wrongful death of plaintiff's son, killed in a collision with defendant's automobile, a nonexpert witness who had observed the speed of automobiles, but had not owned or operated one, may testify as to his opinion of the speed of defendant's machine.

[See 19 Ann. Cas. 754.]

Appeal from Superior Court, King county: GILLIAM, Judge.

Action for death by wrongful act. Clara Hiscock, plaintiff, and A. A. Phinney, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

*C. J. Smith and Heber McHugh* for appellant.

*Brightman, Halverstadt & Tennant* for respondent.

[118] GOSE, J.—This is an action to recover damages for the death of a minor son

of the plaintiff. The plaintiff alleges that she was dependent upon the son for her support, and that he met his death in consequence of the negligence of the defendant, A. A. Phinney. Plaintiff has appealed from an adverse verdict and judgment.

The casualty happened at or near the southwest corner of 39th avenue and East John street, in the city of Seattle. Thirty-ninth avenue runs northerly and southerly, and East John street runs easterly and westerly and terminates at the avenue, both streets being twenty-four feet in width. The avenue is winding. The boy was engaged in carrying and delivering groceries and meat by means of a bicycle. The respondent was driving a Lozier car, five feet in width, weighing 4,400 pounds, north along the avenue. The boy was riding east on John street. Both were traveling down hill. The [119] boy either had turned, or was in the act of turning, south into the avenue. There is a high embankment covered with shrubbery at the southwest corner of the avenue and street where the accident happened. The respondent and other witnesses testified that one traveling north on the avenue cannot see into East John street because of the high embankment and shrubbery. The respondent testified that he was driving about the center of the street, at a speed of seven or eight miles an hour; that, when he first saw the boy, he was six or seven feet distant, "coming from behind the bank," about three feet up John street and "six or seven feet off the southwest curb;" that he, respondent, applied his brakes and stopped his car within six or seven feet; that the boy was riding at a speed of from fifteen to eighteen miles an hour; and that the boy struck the car, bending the brass knob on the west rear door and buckling the rear fender over the left wheel.

A witness for the appellant testified that he arrived at the scene of the accident about forty minutes after it occurred; that he observed skid marks which commenced at the intersection of the streets and extended northerly a distance of about ninety feet, and that the west skid mark was from four to six feet from the west curb. This witness said that the east skid mark was lighter and extended for a less distance than the west mark; that he examined the defendant's machine shortly after the accident, and that the left rear wheel had a smooth tire and the right wheel had a corrugated tire. He further said that, if the respondent's car had new tires and skidded ninety feet, it should have left a mark on the tires. Another witness said the nearest skid mark was three or four feet from the west curb. The boy's father testified that the skid marks were about five feet from the west curb, and that they commenced about ten feet south of the corner. Another witness

said that the skid marks commenced about ten or fifteen feet south of the corner; that they were three or four feet from the curb, and [120] continued about seventy-five feet, curving to the east or the right.

The respondent testified that he had new "Firestone non-skid" tires upon both rear wheels, and that the car did not skid. A witness for the respondent testified that he was engaged in the business of selling Firestone tires; that he examined the respondent's tires the morning after the accident; that they were new "Firestone non-skid tires;" that he saw no evidence that either tire had skidded; that "it would be pretty hard to skid;" and that if he had skidded ninety feet, the tire would be worn practically to the "fabric." Another witness testified in behalf of the respondent that he was an automobile man in the respondent's employ; that he put on "Firestone non-skid tires," two or three days before the accident; that there was no mark on the tires after the accident, and that it would not be possible for the car with such tires to skid ninety feet without leaving distinct marks or scars upon the wheels.

The respondent pleaded affirmatively, and the reply admitted, that an ordinance of the city of Seattle provides:

"Section. 1. A vehicle, except when passing a vehicle ahead, shall keep as near the right hand curb as possible."

"Sec. 6. A vehicle turning into another street at the right hand shall turn the corner as near the right-hand curb as practicable." Seattle Ordinance, No. 24,597.

The court instructed the jury:

"(10) The other ground of negligence charged in the complaint is that the defendant did run and drive his automobile to the left of the middle of the highway. It is for you to determine from all the evidence in the case whether or not the defendant did run his automobile to the left of the middle of the highway, and if so whether or not it was negligence for him to do so, under all the surrounding circumstances in the case, taking into consideration the locality and all surrounding circumstances.

"(11) I instruct you that, even though you should find from the evidence that the defendant, at the time and place [121] of the accident in question, was not driving on the right-hand side of 39th avenue north that fact would not, in itself, constitute negligence. A person is not always required to drive upon the right-hand side of the street or highway. The law in this state does not require the driver of an automobile to drive upon the right-hand side of the street at all times, but requires the driver or operator of an automobile to turn to the right in meeting vehicles, teams, or persons moving or headed in an opposite direction. A person may rightfully

use what is to him the left-hand side of the road, if there is no driver at that time on that side of the road, and if the circumstances are of such a character as not to make his conduct a source of danger reasonably to be apprehended."

The court also instructed:

"I instruct you that neither the deceased Fred Hiscock nor the automobile of the defendant at the time and place of the accident complained of in this case had a superior right to the use of the streets, but that their rights were equal."

The appellant assigns error upon the giving of these instructions. The instructions seem to have been based upon the statute rather than the city ordinance, and do not correctly state the law in the light of the ordinance. Under the first section of the ordinance, it was the duty of the respondent to keep "as near the right-hand curb as possible." This he did not do. Nor is it the law, in the light of the ordinance, that neither "had a superior right to the use of the streets, but that their rights were equal" at the "place" of the accident. Under the ordinance, the boy had a superior right to the use of the right-hand side of the street. *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050; *Reynolds v. Pacific Car Co.* 75 Wash. 1, 134 Pac. 512. In *Ballard v. Collins*, in speaking of an ordinance of the city of Seattle, we said:

"While the respondent's chauffeur was required to exercise reasonable care, he was not required to anticipate that a car was approaching on his side of the street. He had a right to presume that the law of the road would be observed."

[122] So in the case at bar, the boy had a right to assume that he would not meet a traveler upon his side of the street; and so long as he was upon his side of the street, he was traveling with a faith justified by law that he would encounter no object traveling in his direction. A traveler who is observing the ordinance has a superior right to the use of the street over one who is traveling in disregard of the ordinance.

A reference to the record shows that these instructions were prejudicial. After the jury had been instructed and had retired to deliberate, they returned to the court room for further instruction. Whereupon the court said: "I understand you want some further instructions?" to which one of the jurors replied, "Yes, sir. The jury seems to be in doubt as to part of the instructions as to whether the defendant had the right to the center of the road or street." Whereupon the court read instruction No. 11, and then said to the jury, "Does that cover the point?" to which the juror replied, "I think so, sir."

The question at issue is, what was the proximate cause of the death of the boy?

The jury should have been instructed that, if they found that the respondent was not driving "as near the right-hand curb as possible," in view of the width and course of the avenue and other surrounding conditions at the time of the accident, he was guilty of negligence.

The respondent relies upon *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876. It does not sustain his position. The instructions were evidently drawn in harmony with that case. There we were speaking of the statute and the law of the road arising from usage and custom. There was no ordinance involved.

Nor does the ordinance conflict with the statute, Rem. & Bal. Code, § 5558 et seq. (P. C. 33, § 13). It covers conditions which the statute does not reach. There being no conflict, the ordinance establishes the law of the road within [123] the boundaries of the city. In *re Ferguson*, 80 Wash. 102, 141 Pac. 322.

The appellant requested the court to instruct the jury that, if they believed from the evidence that the defendant was driving his automobile on the left-hand side of the street at the time the accident occurred, his negligence was presumed. This instruction should have been given.

The appellant also complains because of the failure of the court to instruct upon certain phases of the evidence in respect to negligent acts of the respondent, which are not charged in the complaint, and upon which she made no request for instructions. Counsel insists that this was error, relying upon § 16, art. 4, of the constitution, which provides that judges "shall declare the law." This we have construed to mean that the court shall declare the law applicable to the case in a general way. If a party desires to have the instructions adapted to a particular view of the case or to meet a situation which he conceives ought to be covered, it is his duty to specially request them, and in the absence of such a request, a mere omission upon the part of the court to instruct is not error. *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090.

The appellant further contends that the verdict of the jury cannot be harmonized with the physical facts. Other facts relied upon in addition to the skid marks are that pieces of a wooden box and its contents, which the boy was carrying upon his bicycle, were found along the west curb of the avenue some ten or fifteen feet south of the point where the avenue and the street intersect. From what has been said, it will appear that it was a disputed question of fact whether the skid marks were made by the respondent's automobile. There are no admitted physical facts which could control or overthrow the verdict of a jury. The point of actual contact, as well as

the question whether the respondent's car made the skid marks to which the witnesses [124] testify, was a question for the jury. *Mosso v. E. H. Stanton Co.* 75 Wash. 220, 134 Pac. 941, L.R.A. 1916A 943.

A witness for the respondent, Arthur Bond, testified that the respondent's car passed him in the block where the collision occurred; that the car appeared to be in the center of the street; that he observed the speed of the machine; that he has seen many automobiles in motion, and that in his opinion the car was not going more than nine miles an hour. On cross-examination, he testified that he had never owned or operated an automobile, and that he had never made tests of speed or distance traveled by an automobile in a given space of time. It is contended that the court erred in refusing to strike the testimony of the witness as to the rate of speed, upon the appellant's motion. It is argued that the testimony was inadmissible "unless the witness was thoroughly qualified as an expert and his observation was such as to justify him in forming an opinion." No authorities are cited in support of the contention. We think the testimony was competent. Its weight, of course, was for the jury.

Other alleged errors, such as that the court commented upon the facts, do not merit consideration.

The judgment is reversed, with directions to grant a new trial.

Crow, C. J., Ellis, and Main, JJ., concur.

#### NOTE.

#### Municipal Regulation of Automobiles with Respect to Equipment, Use of Streets, or the Like.

In General, 1047.

Registration and Number Plates, 1048.

Safety or Signaling Devices, 1049.

Use of Streets, 1050.

#### In General.

A municipal regulation of automobiles with respect to equipment, use of streets or the like, must of course avoid conflict with a statute dealing with the subject. See the cases cited throughout this note.

In *Chicago v. Walden W. Shaw Livery Co.* 258 Ill. 409, 101 N. E. 588, the court sustained an ordinance forbidding the operation on the streets of an automobile omitting noxious smoke, gas or odors, notwithstanding the following provision of the motor vehicle law: "Except as in this section provided, no city, town or village, or other municipality shall have power to make any ordinance, by-laws or resolution limiting or restricting the use

or speed of motor vehicles or motor bicycles, and no ordinance, by-law or resolution heretofore or hereafter made by any city, village or town, or other municipal corporation within the state, by whatever name known or designated, in respect to or limiting the use or speed of motor vehicles or motor bicycles, shall have any force, effect or validity, and they are hereby declared to be of no validity or effect: Provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor-driven commercial vehicles and motor vehicles which are used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof." The court held that in the provision that cities should have no power to pass any ordinance limiting or restricting the speed or use of motor vehicles, the word "use" was not to be taken in its broadest sense, but referred to the "general use or employment, which means the mere running of the machine; the use which permits the driver of the machine to go whenever and wherever he wishes;" and that under the proviso, municipalities had the power to make any regulation as to the use of motor vehicles not inconsistent with the provisions of the act, except as to rate of speed.

A municipality may regulate the equipment or use of automobiles only when the power so to do is granted to them expressly or by necessary implication. *Ex p. Epperson*, 61 Tex. Crim. 237, 134 S. W. 685, 37 L.R.A. (N.S.) 303, wherein it was held that an ordinance making it unlawful for any person under the age of sixteen to operate an automobile on the streets was invalid for want of charter power to enact it.

The constitutionality of statutes and ordinances regulating the speed of vehicles in streets and highways is discussed in the notes to *Christy v. Elliott*, 3 Ann. Cas. 487; *State v. Swagerty*, 11 Ann. Cas. 725, and *Kalich v. Knapp*, reported post, this volume, at page 1051. The statutory regulation of automobiles in matters other than speed, is considered in the notes to *People v. Schneider*, 5 Ann. Cas. 790, and *Mahoney v. Maxfield*, 12 Ann. Cas. 289. The validity and effect of an ordinance covering the same ground as a statute are considered in the notes to *Thrower v. Atlanta*, 4 Ann. Cas. 1; *Territory v. McCandless*, 13 Ann. Cas. 795, and *Chicago v. Union Ice Cream Mfg. Co.* Ann. Cas. 1912D 675. The rights and duties of persons driving automobiles in highways are discussed in the notes to *Tudor v. Bowen*, 21 Ann. Cas. 646, and *Deputy v. Kimmell*, reported ante, this volume, at page 656. The decisions passing on

the validity of a statute or an ordinance prohibiting the use of automobiles within certain territorial limits are collated in the notes to *In re Rogers*, 15 Ann. Cas. 1167, and *State v. Mayo*, 20 Ann. Cas. 512. In the note to *Applewold v. Dosch*, Ann. Cas. 1914D 481, are presented the cases passing on the subject of a state statute licensing automobiles as precluding the imposition of a municipal tax or license fee. The municipal regulation of garages is discussed in the note to *People v. Ericsson*, Ann. Cas. 1915C 183.

#### *Registration and Number Plates.*

It has been held that a municipality has the power to require automobiles used within its limits to be registered and to bear an identifying number plate. *Peo. v. Schneider*, 139 Mich. 673, 5 Ann. Cas. 790, 103 N. W. 172, 12 Detroit Leg. N. 32, 69 L.R.A. 345; *Brazier v. Philadelphia*, 215 Pa. St. 297, 7 Ann. Cas. 548, 64 Atl. 508. In the case last cited the court said: "It may be said that, if both statute and ordinance are to stand in full, then the operator of an automobile must take out two licenses before he can run the vehicle within the commonwealth. That may be, but we fail to regard that as a conclusive objection in the case. Under the terms of the ordinance in question, the license to be obtained from the city is one which is based upon other examinations and requirements than such as were imposed by the statute, although such examinations and infringements we do not regard as inconsistent with anything contained in the statute. No satisfactory argument has been presented to us against the right of the city to require such additional guaranties, and to require also that a license shall be obtained showing that the city's demands have been complied with. It has been argued that the Act of 1905 was intended to provide that only one license number or tag shall appear upon the front and back of the vehicle when operated on the highways, but we do not regard this to be the proper construction of the act. In its second section it is provided that only one 'state license' number shall be carried upon the vehicle. There is no prohibition against the carrying of a license which was not a state license, and the limitation of the prohibition to a single class of licenses implies that it was not intended to exclude a local municipal license from being carried upon the vehicle. And when in the same section it was enacted that a 'license number obtained in any other place or state shall be removed from said vehicle while the vehicle is being used within this commonwealth,' we understand that no reference was intended to be made to any such license as the city would issue under the ordinance in question. We do not think



that the word 'place' can properly be regarded as applying to a municipality within the commonwealth. It seems to us very plain that what was intended to be enacted by the clause just cited was that a foreign license number should be removed from any vehicle which comes from another territorial division outside of the state into the limits of the state, and only in such a case. The language 'while the vehicle is being used within this commonwealth' seems to indicate clearly that the vehicle in mind was one which comes from outside the commonwealth."

In other jurisdictions a similar ordinance has been held to be invalid. *Chicago v. Francis*, 262 Ill. 331, 104 N. E. 662; *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340; *St. Louis v. Woodward*, 235 Mo. 521, 139 S. W. 345.

In the case first cited the court said: "The question in this case is whether the city of Chicago can compel, by ordinance, the owner of a motor vehicle, other than a motor truck or motor-driven commercial vehicle, to display thereon any other number than the number of the registration seal issued by the secretary of state. The present statute expressly provides, 'nor shall such owner be required to display upon his motor vehicle or motor bicycle any other number than the number of the registration seal issued by the secretary of state.' The ordinance in question makes it unlawful for any person to use any vehicle upon the streets of the city of Chicago unless a metal plate is affixed bearing a number issued by the city clerk of the city of Chicago. The ordinance is squarely in conflict with the state law, and must therefore be held invalid and void unless within some of the provisos. It is apparent from this law that the general assembly by the revision of the law in 1911, and having in mind the court decisions of recent years which we have cited, intended to take certain matters in regard to the control of motor vehicles entirely out of the hands of municipal authorities. As said in *Ayres v. Chicago* [239 Ill. 237, 87 N. E. 1073]: 'It is a fact within the common knowledge of most persons that automobiles, other than those used in particular localities for hire, are extensively used in this state in making tours of considerable distance, in the course of which many cities, villages and towns would be visited. . . . Clearly, the purpose of the legislature was to pass a new and complete law designed to take the place of all municipal ordinances or rules regulating the equipment and operation of motor vehicles.' This condition is becoming more apparent each year with the extended use of motor vehicles and the long distances traveled by them in short periods of time, hence the urgent need of a general law which would apply to the whole

state, so that laws concerning motor vehicles being propelled about the state should not be left to the ordinances of each individual village or city in the state. The latter course would lead to confusion and in some cases to injustice. Almost any owner of a motor vehicle or motorcycle will frequently pass through several cities or villages in the course of a few hours. If the city of Chicago can compel the owner of an automobile to affix the tag of that municipality, every other city and village in the state can by ordinance do likewise. The legislature evidently had this in mind, as well as other matters which would lead to confusion unless corrected, when the law of 1911 was passed. The exception, from the law, of motor trucks and motor-driven commercial vehicles, which would necessarily be used locally, emphasizes the intent of the law in regard to motor vehicles like the one used by plaintiff in error in this case. It is undoubtedly necessary for municipalities to establish and enforce traffic regulations, and the reasonableness of municipal ordinances enforcing such regulations would depend upon the circumstances and conditions in such municipalities. Under the law a municipality may make and enforce reasonable traffic and other regulations, except as to rate of speed, not inconsistent with the provisions of the state law regulating the use of motor vehicles when conditions warrant them. It is urged by counsel for defendant in error that the ordinance in question merely required a number on the machine; that the number is but a token—an indication of something else which has been done; that the ordinance is designed to enable the enforcement of a revenue measure, and without it that revenue measure is rendered practically incapable of enforcement. It may be, judging from the language of section 2720, that the metal plate bearing a number is evidence of a receipt for a tax or license imposed under some other ordinance or section of an ordinance. If there is such an ordinance we are not advised of its terms and are not passing on the validity of such ordinance."

#### *Safety or Signaling Devices.*

An ordinance may validly require reasonable safety appliances, such as gongs and brakes, on automobiles. *Chicago v. Banker*, 112 Ill. App. 94. And see *Adler v. Martin*, 179 Ala. 97, 59 So. 597.

In *Harlan v. Kraschel*, 164 Ia. 667, 146 N. W. 463, the court construed the following: "Every motor vehicle operated or driven upon the streets or public highways of the city, shall be provided with adequate brakes, in good working order, and sufficient to control such motor vehicle at all times when the same is in use, and a suitable and adequate bell,

horn or other device for signaling, and shall during the period from one-half hour after sunset to one-half hour before sunrise, display two lighted lamps on the front and one on the rear of such motor vehicle, which rear lamp shall also display a red light visible from the rear (provided that each motorcycle and motor bicycle shall be required to display but one lighted lamp on the front of such motorcycle or motor bicycle), the rays of such rear lamp shall shine upon the number plate carried upon the rear of such vehicle in such a manner as to render the numerals thereon visible for at least fifty feet in the direction from which the motor vehicle is proceeding. The light or lights of the front lamps shall be visible at least five hundred feet in the direction in which the motor vehicle is proceeding." It was held that the ordinance did not apply to the case of an automobile temporarily left standing at one side of the street, and therefore it was not necessary for the court to pass on its validity. The court said: "It will be noted that the ordinance and statute in question by their terms purport to apply to motor vehicles when 'operated or driven upon the streets or public highways.' It is stipulated in this case that the defendant's car was temporarily 'left standing' at one side of the street. It was not in 'operation' nor being 'driven.' The contention of the plaintiff is that a standing car under the circumstances shown is being 'operated or driven' within the meaning of the statute and ordinance. It is clear that a standing car is not being operated or driven in a literal sense. There is nothing in the further context of the section that aids the contention of the plaintiff, or invites any other construction than that implied in the literal terms above quoted. The requirement alleged to have been breached is the requirement for lights. Under this section such lights must be exhibited in front and rear on every motor vehicle 'operated or driven' on the streets. These requirements also call for two front lamps 'visible at least five hundred feet in the direction in which the motor vehicle is proceeding,' and one rear lamp carried in such a manner as to render the number plate 'visible for at least fifty feet in the direction from which the motor vehicle is proceeding.' A standing car is not in the ordinary sense being 'operated or driven'; neither is it 'proceeding' in any 'direction.' The distinction made as between one rear light and two front lights is suggestive of a moving vehicle. Otherwise there would be no consistency in the difference of requirement as to front and rear. The expressions, 'in the direction from which the motor vehicle is proceeding,' and 'in the direction in which the motor vehicle is proceeding,' are also suggestive of movement, and are not consistent with the contrary view. It

is to be noted, also, that there is no more reason why a standing motor vehicle should display lights than that any other vehicle should do so. Granting that public safety would be to some extent promoted by the requirement that all standing vehicles in public streets should display lights at night, there is no apparent reason for any distinction between one vehicle and another of equal capacity for obstruction. Nor would there be in such a case any apparent reason for requiring stronger lights in front than in the rear. It is clear to us that the terms of the statute and of the ordinance will not bear the construction contended for by the appellant."

#### *Use of Streets.*

Municipal regulations forbidding the leaving of automobiles standing in the streets have been sustained. *Pugh v. Des Moines* (Ia.) 156 N. W. 892; *Com. v. Newhall*, 205 Mass. 344, 91 N. E. 206.

It has been held that a municipal ordinance requiring the driver of a vehicle in turning from a street into a cross street to the right to make the corner as near the right-hand curb as possible was not invalid by reason of a statute (Laws Wis. 1907, c. 516) regulating the use of highways by automobiles, where an examination thereof failed to disclose that they touched the subject covered by the ordinance, and also where it appeared that they expressly reserved to municipalities the usual powers of regulation not inconsistent therewith and required automobile drivers to observe the rules of the road. *Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316. Likewise, in the reported case, the court upholds a city ordinance providing that a vehicle, except when passing a vehicle ahead, shall keep as near the right-hand curb as possible, and that a vehicle turning into another street at the right hand shall turn the corner as near the right-hand curb as practicable. The court holds that the ordinance does not conflict with the statute (Rem. & Bal. Code, § 5558 et seq.) as it covers conditions which the statute does not reach, and therefore it establishes the law of the road within the boundaries of the city. See also *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050.

In *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456, there was involved an ordinance providing that "the driver or person having charge of any vehicle, before turning the corner of any street or turning out or starting from or stopping at the curb line of any street, shall first see that there is sufficient space free from other vehicles so that such turn, stop or start may be safely made, and shall then give a plainly visible or audible signal." The ordinance was held not to apply to a driver

who was not turning the corner of a street or turning out or starting from the curb line or stopping at that line. It was also held that there was nothing in the section which required that whenever one automobile passed another, the driver must blow the horn, nor did it require the driver to give an audible signal, but he might give "a plainly visible" one or an audible one.

A general ordinance, which by its terms applied to all vehicles of every nature on the streets of the city, and which operated merely to give to vehicles going in an easterly or westerly direction the right of way over vehicles proceeding in a northerly or southerly direction, has been held not to be in conflict with the state Motor Vehicles Law. *Freeman v. Green* (Mo.) 186 S. W. 1166.

An ordinance providing that no automobile shall be run on certain county highways between the hours of sunset of any day and of sunrise on the day following is not unreasonable. *In re Berry*, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160.

In *Domke v. Gunning*, 82 Wash. 629, 114 Pac. 436, there was involved a city ordinance which made it the duty of a person driving an automobile on the streets of the city "upon turning the corner of any street," to "leave a space of at least six feet between the curb and the . . . automobile." It appeared that on the lot fronting on the street where the accident happened, a building was being erected; that debris therefrom had been piled in the corner of the street, around which a fence or barricade had been constructed; and that pedestrians traveling along the street on reaching the corner would be obliged to leave the regular walk, step into the street, and walk around the outside of this fence or barricade. It was held that a charge by the court that this fence became the curb within the meaning of the ordinance was correct; that the purpose of the ordinance was to keep vehicles, in rounding corners, out of the path usually taken by foot passengers, and that the word curb was used as the most convenient term to mark one of the boundaries of the path, and not in a technical sense.

In *Royal Indemnity Co. v. Schwartz* (Tex.) 172 S. W. 581, there was involved a city ordinance providing as follows: "No person shall drive or conduct any vehicle required by law or ordinance to be licensed or numbered, when such person is under eighteen years of age. It shall be unlawful for any person under eighteen years of age to operate or run an automobile within the city limits." It was held that the ordinance was unreasonable because it was not limited to the regulation of the operation of automobiles in the city streets and alleys, but invaded the rights of the citizen by including in its territory property over which it had no control.

## KALICH

v.

## KNAPP.

Oregon Supreme Court—June 2, 1914.

73 Oregon 558; 142 Pac. 594;  
145 Pac. 22.

### Automobiles — Municipal Regulation of Speed — Effect of State Law.

L. O. L. § 3206 et seq., being a general law for the organization of cities and towns, establishing the procedure therefor and investing enumerated civil and criminal powers in such municipalities, and Laws 1913, p. 541, amendatory thereof, does not affect the applicability of the Motor Vehicle Law (Laws 1911, pp. 265-278) to the city of Portland, which at the enactment of the latter act was acting under a special charter.

[See note at end of this case.]

#### Same.

Portland City Charter (Sp. Laws 1903, pp. 3-172), §§ 72, 73, gives the council all legislative powers and authority of the city of Portland, and gives power to exercise within the limits of the city the powers commonly known as police powers to the same extent as the state could exercise that power, to regulate and control the use of the streets for vehicles of all descriptions, and to control and limit traffic on the streets, avenues, and elsewhere. Pursuant thereto, the city adopted ordinances in 1904 and 1906, regulating the speed of automobiles on streets of the city. The Motor Vehicle Law (Laws 1911, pp. 265-278) regulates the use of motor vehicles throughout the state. Const. art. 11, § 2, provides that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, and that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality. Held, that the Motor Vehicle Law is unconstitutional in so far as it attempts to regulate the speed of automobiles in Portland; such regulation being an amendment of the city charter.

[See note at end of this case.]

#### Same.

Const. art. 11, § 2, as amended, declaring that corporations may be formed under general laws, and that the legislature shall not enact, amend, or repeal any charter of any municipality, but that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the constitution and criminal laws of the state, and article 4, § 1a, reserving the initiative and referendum powers to the legal voters of every municipality as to all local, special, and municipal legislation, insure to each municipality a full measure of home rule, and place beyond the power of the legislature to make any change in local, special, and municipal legislation and the

legislature may not amend any municipal charter directly or indirectly where the amendment is the subject of municipal concern and regulation, and Motor Vehicle Law (Laws 1911, p. 365), regulating the use of motor vehicles throughout the state, is unconstitutional in so far as it attempts to regulate the speed of automobiles in municipalities, though the act contains a criminal provision, which is not a criminal law of the state within the constitution.

[See note at end of this case.]

**Constitutional Law — Legislative Power — Effect of Initiative and Referendum.**

The amendment of Const. art. 4, § 1, declaring that the legislative authority shall be vested in a legislative assembly, that the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same, and also reserve the power to approve or reject any acts of the legislative assembly, does not lessen the powers of the legislature in matters of legislation only, but the legislature is not the exclusive agent of legislation, and such power is conferred on the people by article 11, § 1, and article 4, § 1a, reserving to the people the initiative and referendum.

[See generally Ann. Cas. 1916B 819.]

**Same.**

All public matters concerning the people of the state at large, in common with people of any particular municipality, are matters of state jurisdiction within Const. art. 11, § 2, prohibiting the legislature from enacting, amending, or repealing any charter of any municipality, but empowering the legal voters of every city to enact and amend their municipal charter subject to the constitution and criminal laws of the state, and article 4, § 1a, reserving to the voters of every municipality the power over local, special, and municipal legislation, while all public affairs concerning the inhabitants of a locality as a municipality, apart from the people of the state at large, as supplying purely local needs, are matters of local concern, within the exclusive control of each municipality.

Appeal from Circuit Court, Multnomah county: MCGINN, Judge.

Action for damages. Peter Kalich, plaintiff, and F. C. Knapp, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

*King & Saxton* for appellant.

*Wilbur, Spencer & Dibble* for respondent.

[560] McNARY, J.—As the result of colliding with an automobile driven by defendant, plaintiff brings this action to recover \$35,000 damages for a personal injury. The accident occurred shortly after midnight on November 19, 1911, at the intersection of Williams Avenue and Russell Street, in Portland. During the trial of the case, plaintiff offered in evi-

dence certified copies of certain ordinances purposed to regulate the speed of motor vehicles within the limits of the municipality, but upon the objection of counsel for defendant, the court refused to allow the ordinances to be introduced into the case, upon the ground that the ordinances had been superseded by an act of the legislative assembly of the State of Oregon, known as the "Oregon Motor Vehicle Law," General Laws of 1911, pages 265-278. The result of the trial was a verdict in favor of defendant, whereupon plaintiff prosecutes this appeal.

[561] The ordinances, being three in number, were adopted by the city during the years 1904 and 1906, and, considered as one specie of legislation, forbid any person to drive or operate an automobile at any point on the streets of the city at a greater speed than 15 miles per hour, or at a speed of more than 10 miles per hour within the fire limits, or at a speed greater than a walk upon any street where street-cars turn. This local municipal legislation was enacted agreeably to the powers vested in the city by a charter granted by the state legislature in 1903: Laws 1903, pp. 3-172. The portion of the charter appropriate to the subject under consideration follows:

"Sec. 72. The council shall have and exercise exclusively all legislative powers and authority of the City of Portland, and no legislative powers or authority, either expressed or implied, shall be exercised by any other person or persons, board or boards, other than the council. The council shall have full power and authority, except as herein otherwise provided, to exercise all powers conferred upon the city by this charter and the Constitution and laws of the State of Oregon."

"Sec. 73. The council has power and authority, subject to the provisions, limitations and restrictions in this charter contained—

"(1) To exercise within the limits of the City of Portland all the powers, commonly known as the police powers, to the same extent as the State of Oregon has or could exercise said power within said limits; . . .

"(60) Except as otherwise provided in this charter, or in the Constitution or laws of the State of Oregon, to regulate and control, for any and every purpose, the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places, and parks of the city; to regulate the use of streets, roads, highways, and public places for foot passengers, animals, bicycles, automobiles and vehicles of all descriptions; . . .

[562] "(63) To control and limit traffic on the streets, avenues and elsewhere."

So far as is necessary to an understanding of the matter here involved, the Oregon motor vehicle law, provides:

"An act providing for regulating the use, registration, license, identification, conduct and operation of vehicles operated upon the public roads, streets and highways of the State of Oregon; to regulate and license the persons who drive the same; to prescribe penalties for violations hereof and to prohibit the unauthorized possession or use of a vehicle and to provide penalty therefor; to license and identify all motor vehicles; to limit the authority of cities and towns on like subjects concerned with said vehicles, and to repeal all acts and parts of acts either in conformity or in conflict herewith.

Sec. 2, subdivision 17: "The rate of speed on all streets, roads and highways of this state shall be a reasonable speed, up to and not exceeding twenty-five miles an hour, but any speed in excess of twenty-five miles an hour upon any road or highway of this state shall be an unreasonable speed and is prohibited by this act; provided, however, that no motor vehicle shall be driven at a rate faster than eight miles an hour upon the country roads or highways of this state when within one hundred yards of any vehicle drawn by horse or horses."

Sec. 25: "Local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation (1) requiring of any owner or operator of a vehicle any license fee or permit to use the public highways, or excluding or prohibiting any vehicle whose owner has complied with this act from the free use of streets, roads or highways of this state, except such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages, or except as herein provided; (2) affecting the registration or numbering of vehicles or [563] prescribing a slower rate of speed than herein specified at which such vehicle may be operated, or the use of the streets, roads and highways of this state, contrary or inconsistent with the provisions of this act; and all such ordinances, rules of regulations now in force are hereby declared to be of no validity or effect; provided, however, that the local authorities may limit by ordinance, rule or regulation hereafter adopted, the speed of vehicles on the streets within their respective corporate limits, on condition that such ordinance, rule or regulation shall also fix the same speed limitation for all vehicles, not to be in any case less than one mile in six minutes and on further condition that local authorities shall also have placed conspicuously on each main street, road and highway of this state where the boundary of such local authority crosses the same and on every main street where the rate of speed changes, signs of sufficient size to be easily readable by persons using the

same, bearing the words 'Slow down to — miles' (the rate being inserted) and with an arrow pointing in the direction where the speed is to be reduced or changed; and provided further, that said ordinance, rule or regulation shall fix the penalties for violation thereof similar to and no greater than those prescribed by this act for violation of speed limitation by any vehicles; and provided further, that nothing in this act contained shall be construed as limiting the power of local authorities to make, enforce and maintain further ordinances, rules or regulations affecting vehicles which are used to carry the public for hire."

Admitted by all, is the proposition, that but a single problem is here involved, namely, since the amendment of Article XI, Section 2, of the state Constitution, effective December 3, 1910, can the legislature enact a statute, general in its application, calculated to repeal certain ordinances of the City of Portland theretofore enacted pursuant to the powers granted to the city in its charter? A consideration of this question impels a brief review of the organic and [564] statutory laws applicable thereto. Article XI, Section 2, of the Constitution reads:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

1. The legislative assembly of 1893, Section 3206 et seq. L. O. L., passed a general law providing for the organization of cities and towns, establishing the procedure therefor, and investing enumerated civil and criminal powers in such municipalities. An amendment of this act was had at the session of the legislature for 1913, page 541. This course of general legislative enactment is impotent in its bearing so far as it affects the subject under consideration, for the City of Portland was, at the time of this particular legislation, clothed in a charter granted by the law-making body, and therefore cannot arrogate unto itself any supplementary power by virtue of the legislation in question. In *Riggs v. Grants Pass*, 66 Ore. 266, 134 Pac. 776, this court, speaking through Mr. Justice Eakin with reference to the general law pertaining to the formation of cities, said:

"It does not operate as an amendment of city charters; but charters may be amended to take advantage of powers granted."

2. To appreciate understandingly the real inspiration productive of Article XI, Section 2, of the Constitution, as well as its expected

corrective force, is but to recall the ills accompanying legislative creation of [565] and interference with municipal charters which naturally provoked a deep-seated resentment among the chartered communities. Tinkering with municipal charters became a most enjoyable pastime of the legislators and a favorite ground for the employment of their activities. To eradicate the abuses too often arising from legislative interference with matters wholly municipal in character, the people of the state by initiative action ingrafted this provision upon the organic law of the state. In the light of this condition, the Constitution must be considered and interpreted. Therefore, we believe the people of the state meant literally what they said when they used the expression that:

"The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town."

This language admits of no other interpretation than that the people purposed to curtail the power of the legislature in all matters of legislation pertaining to the creation of a municipal charter, its amendment or nullification. To yield to the thought that the constitutional enactment must be construed to inhibit the legislature from committing a direct assault upon the charter of a particular city, yet, permitting that very object to be obtained by making the law apply generally to all municipalities in the state, is to close the eyes to a full reading of the provision, and to license the legislature to do that by indirection which it is expressly forbidden to do directly. The argument that the constitutional provision means that the legislature may, by general enactment, regulate the internal affairs of the cities and towns of the state, but are prohibited from passing a similar law having reference [566] to a particular municipality, is giving life to the character of the act rather than to the substance of the Constitution, and is equivalent to saying that the legislature may do with the Constitution as it pleases so long as it selects a general conveyance rather than a particular vehicle.

In adding this constitutional mandate, there was no design to emancipate any city from general legislation by the legislative assembly affecting the body of the people of the state in those matters wholly involving state-wide policies and activities, or to prevent appropriate action by the lawmakers upon any of the topics regarding which the Constitution sanctions legislation, but only in respect to those phases of purely municipal government properly regulated by charters and embracing matters of internal municipal regulation. The wisdom of the body politic in conceiving and adopting this addition to the fundamental law of the state is

grounded on the proposition that each municipality is best suited to govern its own affairs. What might be the proper height of a building in one city, the distance the dwellings should be located from the street line in some populous district as a protection from the ravages of fire, and the speed automobiles should travel on the congested thoroughfares of a metropolis, are considerations properly of a municipal concern, differing as widely as the cities differ from the hamlets and wholly beyond the domain of legislative understanding.

Returning to the constitutional provision, this language will be observed:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws."

[567] The formation of incorporations by general laws alone is permitted. The next sentence contains this inhibition:

"The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town."

The formation of corporations by general laws, that is, providing through general legislation, the implements by which a community may initiate its existence and form and mold its shape is permitted, but from the legislature the people of the state have withdrawn its former prerogative to enact, amend or repeal any municipal charter by such a specie of legislation. Had the electors of the state desired municipal legislation by general laws, the first sentence of the Constitution would have read:

"Corporations may be formed and the charters of municipal corporations enacted, amended or repealed under general laws."

By the force of Article XI, Section 2, of the Constitution, the electors of municipalities are, subject to the Constitution and criminal laws and such general laws as may be enacted by the legislature affecting the relation of the state to the locality, made the legislative assembly to enact the laws germane to the general purpose and object of the municipality, free from legislative molestation, which autonomy in a sense constitutes a sovereign city, subject at all times, however, to the supreme will of the state, reserved by the people of the state through the initiative and referendum provision of the fundamental law.

Counsel for respondent finds much comfort in the case of *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777, and offers the conclusion of that opinion as decisive of the [568] case under consideration. The legislature in its biennial session in 1909 passed an act designed to provide a method for the incorporation, under general laws, of ports in communities bordering upon bays or rivers

navigable from the sea. Several cities of Southwestern Oregon found this act a suitable conveyance for their amalgamation as a port. Litigation resulted, and in consequence thereof, this court in a well-considered opinion written by Mr. Justice King, said, among other things:

"The act under consideration by permitting the incorporation of ports does not thereby directly attempt to amend the charter of any city or town within the boundaries thereof. Under any view, it may only affect the charters and ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized. This the Constitution clearly intended to permit; that is to say, a general law thereunder is provided whereby the people within the municipality created under it may take such steps in support thereof as may be necessary, even though its success may require, on the part of the included municipalities, a surrender of some of the rights or privileges previously granted to or acquired by them. Incorporated cities and towns may change or amend their charters at any time in the manner provided by the Constitution. The power to do so, however, is derived from the people of the state, and is necessarily limited to the exercise of such powers, rights and privileges as may not be inconsistent with the maintenance and perpetuity of the state, of which public corporations are but the mere instrumentalities of government. In other words, the powers thus acquired do not rise higher than their source."

The act of the law-making body receiving the thoughtful consideration of the court was one sanctioned by the constitutional provision in its first sentence, [569] which reads, "Corporations may be formed under general laws." This enactment had solely for its purpose a plan of procedure for the formation of ports, and therefor did not purport to amend or annul the charter of any city, and, further, such legislation was general in its application, and outside of the province of charter regulation. It is true that the court in that decision said, in substance, "that the state cannot surrender its sovereignty to the municipalities." This the state has not done by circumscribing the power of the legislature over municipal charters, as the sovereignty in this state resides in the people. They have retained unto themselves, under the initiative and referendum provision of the Constitution, power to create, amend, or annul a municipal charter, though denying that privilege to their representatives through which they commonly speak. While there may be certain statements contained in *Straw v. Harris* indicative of a different conclusion than here announced they fall in the category

of gratuitous observations unnecessary of consideration in a decision of the points involved. Nor do we think the decisions of this court subsequent, yet following in the wake of *Straw v. Harris*, conflict with the doctrine of this case.

From these principles we conclude the lower court erred in refusing to admit the ordinances in evidence, and that the Oregon motor vehicle law (Laws 1911, pp. 265-278) is unconstitutional so far as it attempts to regulate the speed of automobiles in the City of Portland.

Reversed.

Rehearing granted.

Moore and Ramsey, JJ., concur.

McBride, C. J., dissents.

[570] ON REHEARING.

(December 21, 1914.)

MCCARY, J.—In the original opinion of this case, reported in 142 Pac. 594, the majority of the court composing department No. 1 decided that Article XI, Section 2 of the Constitution withheld the legislature from amending or repealing the charter of any city, or the ordinances enacted pursuant thereto in respect to those matters peculiar to municipal regulation, though reserving that power to the sovereignty through the initiative and referendum provision of the fundamental law. At a rehearing of the case, counsel for defendant presented argument for a reversal, which is clearly embodied in the scholarly dissenting opinions of Mr. Chief Justice McBride and Mr. Justice Burnett, to which our attention will now be briefly given. Owing to the importance of the questions suggested and their grave bearing upon future legislation, we think it not amiss succinctly to state our position anew. Looking backward over the path of our state legislation, we observe that the organic law primarily contained the following clause:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights:" Article XI, Section 2, of the Constitution.

3. With pleasing fidelity to this provision of the Constitution, the recurring legislative assemblies [571] created municipal corporations, and lavishly bestowed their time upon the amendment of particular charters until a remedy was sought and obtained by the people in the adoption of the constitutional provision under consideration.

"Corporations may be formed under general laws, but shall not be created by the

legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon:" Article XI, Section 2, as amended.

A comparison of the two provisions of the fundamental law will at once reveal the intention of the voters and the evil they purposed to correct. The original section of the Constitution premittted the legislature to create municipal life by special law, and to clothe it with a charter which could be altered or repealed at any legislative session, when either the municipal welfare or political exigencies required.

Over the municipality the legislature had exclusive and unrestrained control, and, having the power to create, so it had the power to modify or destroy. In fact, the ultimate sovereign power of the state over its cities and towns was unquestioned. To remedy the many ills flowing from the absolute dependency of cities upon the autocratic will of the legislature and its oft-repeated interference in matters of local concern, the people conceived the idea of city sovereignty as a separate attribute of state sovereignty; consequently we have, by the adoption of the constitutional provision under consideration, vested our cities with more political power than they heretofore possessed since the formation of our state government. The electors [572] now are, subject to the Constitution and the criminal laws not affecting local regulation, made the legislative assembly to enact and amend the local laws which should regulate their municipal affairs. In the former opinion, this court said:

"By the force of Article XI, Section 2, of the Constitution, the electors of municipalities are, subject to the Constitution and criminal laws and such general laws as may be enacted by the legislature affecting the relation of the state to the locality, made the legislative assembly to enact the laws germane to the general purpose and object of the municipality, free from legislative molestation, which autonomy in a sense constitutes a sovereign city, subject at all times, however, to the supreme will of the state, reserved by the people of the state through the initiative and referendum provision of the fundamental law."

In the studiously considered case of *Branch v. Albee*, 71 Ore. 188, 142 Pac. 598, a majority of this court reaffirmed the same construction, saying through Mr. Justice Ramsey:

"Said section, as amended, first withdraws from the legislative assembly all power that it previously had to enact, amend and repeal

charters, and then confers upon the legal voters of every city and town power to enact and amend their charters, and this power, thus conferred upon cities and towns, is made subject to the Constitution and the criminal laws of the state. It is not made subject to the civil laws of the state. The conclusion seems to be irresistible that the people, by the adoption of said amendment, intended to withdraw from the legislative assembly all power that it previously possessed to enact, amend or repeal charters or acts incorporating cities or towns, and to confer upon the legal voters of cities and towns all of said power, *except* the power to *repeal* charters. If effect is given to the language of this amendment, no other conclusion appears to be tenable." *Branch v. Albee*, 71 Ore. 188, 142 Pac. 600.

[573] Referring to the same provision of the Constitution in the case of *Thurber v. McMinnville*, 63 Ore. 410, 128 Pac. 43, Mr. Chief Justice McBride said:

"We are of the opinion that the true intent of the amendment above quoted was to give to cities and towns the authority to enact and amend charters affecting property and other rights within the boundaries of such cities and towns, and that, so far as legislation outside of these boundaries is concerned, they must find it elsewhere than in this amendment. Inside their boundaries, and in relation to matters purely local, they are, as regards regulation by the state legislature, supreme; beyond these boundaries they are invested with no power except that which the legislature may see fit to grant them in common with all other cities, and under like circumstances."

At this juncture, we deem it prudent carefully to consider the case of *Portland v. Nottingham*, 58 Ore. 1, 113 Pac. 28, on account of its similitude to the one in hand. The point we desire to develop is that this case is an authority for the doctrine enunciated in the original opinion in *Kalich v. Knapp*, 73 Ore. 558, 142 Pac. 594, 145 Pac. 22, namely, that the legislature is inhibited by the Constitution from amending the charter of the municipality either by special or general legislation in those matters of local and municipal concern. In January, 1903, the charter of the City of Portland provided, among other things, that a property owner who was displeased at the assessment levied upon his property for a street improvement could appeal to the Circuit Court, but that the verdict of the jury should be a conclusive determination of the questions giving birth to his grievance. A dispute having arisen between the city and Mr. Nottingham regarding the reassessment of the property of the latter, the remedy provided by the charter provision [574] was invoked, resulting in a



verdict for the city, which was set aside by the court and a new trial granted. The city prosecuted an appeal to this court upon the assumption that the legislature did, at its biennial session in 1907 (Laws 1907, c. 162, p. 311), adopt an act whereby an appeal was allowable. Considering the vital question whether the legislature could, by general enactment, amend a charter provision, this court, in a forceful opinion written by Mr. Justice Burnett, said:

"This provision of the Constitution (Article XI, Section 2) was adopted by the people at the June election of 1906, and went into effect upon the proclamation of the Governor, June 25th of that year. Its effect is to take from the legislative assembly the right to amend the charter of the City of Portland, although enacted by the legislative assembly itself in January, 1903."

Further, Article IV, Section 1 (a) of the Constitution, provides that:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts." These constitutional provisions confer ample and *exclusive* power upon the people of every municipal corporation to regulate their own affairs respecting municipal legislation and procedure. The legislative assembly cannot pass laws to repeal or amend municipal charters, even by implication, respecting such matters."

After extracting from the Motor Act the criminal element therein contained, we cannot discern any appreciable difference in the principle propounded in these two cases, viz., that the Constitution as it is now built withholds the legislature from amending any [575] municipal charter by legislation, be it direct or indirect, general or special, which is properly and purely the subject of municipal concern and regulation.

As additional evidence of their political intention to preserve the ancient right of local self-government of municipalities, the people of the state in June, 1906, ingrafted on the Constitution Article IV, Section 1 (a) which provides:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts."

This provision of the Constitution like Article XI, Section 2, was designed to insure to each incorporated community a full measure of home rule and to place beyond the capacity of the legislature the power to make

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any change in the system of government of any municipality by legislation other than that authority reserved to the legislature in Article XI, Section 2. Since the adoption of these constitutional provisions this court has given thought to their intendments and limitations, and has, we think, generally arrived at the conclusions reached in this case: *Farrell v. Portland*, 52 Ore. 582, 98 Pac. 145; *Haines v. Forest Grove*, 54 Ore. 443, 103 Pac. 775; *McMinnville v. Howenstien*, 56 Ore. 451, Ann. Cas. 1912C 193, 109 Pac. 81; *Portland v. Nottingham*, 58 Ore. 1, 113 Pac. 28; *State v. Schluer*, 59 Ore. 18, 115 Pac. 1057; *State v. Hearn*, 59 Ore. 227, 115 Pac. 1066, 117 Pac. 412; *McKeon v. Portland*, 61 Ore. 385, 122 Pac. 291; *State v. Tillamook*, 62 Ore. 332, 124 Pac. 637, Ann. Cas. 1914C 483; *Thurber v. McMinnville*, 63 Ore. 410, 128 Pac. 43; *Riggs v. Grants Pass*, [576] 66 Ore. 266, 134 Pac. 776; *Kalich v. Knapp*, 73 Ore. 558, 142 Pac. 594, 145 Pac. 22; *Branch v. Albee*, 71 Ore. 188, 142 Pac. 598. True, in such cases as *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777, *Kiernan v. Portland*, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402, 37 L.R.A.(N.S.) 339, and *Churchill v. Grants Pass*, 70 Ore. 283, 141 Pac. 164, the court seems to have announced the rule that the amendments adverted to are competent to restrain the legislature in the enactment of special but not general laws affecting the municipalities.

With vigor the argument is pressed upon us that on account of the Motor Act (Laws 1911, p. 275) containing a clause providing a penalty for its violation, that the act is a criminal law, and therefore without the competency of municipal legislation, citing *Baxter v. State*, 49 Ore. 353, 88 Pac. 677, 89 Pac. 369, and *State v. Schluer*, 59 Ore. 18, 115 Pac. 1057. In these cases the question arose as to whether a city could amend its charter under Article XI, Section 2, of the Organic Act so as to be legal proof against the operation of the local option law: *Laws 1905*, p. 47. After a careful review of the provision of the Constitution, this court held that the local option law was general in its scope and criminal in its character, and therefore without the power of legislative expression. Without doubt these cases were correctly decided, for the subject matter of the local option law involves either the sale or prohibition of intoxicating liquors, and for that reason was the proper subject for legislative action. Treated as either a moral or an economic question, the state has, in the interest of better citizenship, abundant authority to regulate the sale of alcoholic liquors and to provide a punishment for disobedience to the law, whether we consider the prohibitory legislation from the standpoint of a criminal law or an enactment involving [577] the

state in its sovereign capacity. Problems of this kind lie too deep for municipal solution and far beyond the limits of purely municipal concern.

The concept that the Motor Act is a criminal law finds its mainspring in the last sentence of Article XI, Section 2, of the Constitution:

"The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

Recurring to Section 23 of the Motor Act, it will be observed that a punishment is provided for the infractors of the law which it is argued brings the act within the power of the legislature to adopt. Considered by itself, the constitutional provision last quoted might supply the legislature with sufficient excuse for this legislation, even though it had the legal effect of amending or superseding a city charter or ordinance. But this section cannot be construed alone, as at the same election an amendment to Article IV was adopted, but inserted after Section 1, designated as Section 1 (a), *supra*. Particularly do we desire to accentuate this sentence:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to *all* local, special, and municipal legislation, of every character, in and for their respective municipalities and districts."

These two amendments, referring as they do to the same subject matter, must be considered together, and be so interpreted as to carry out the intent of the framers and the people who have adopted them. In reading the excerpt from Article IV, Section 1 (a), it will be noticed that the powers created by Article XI, [578] Section 2, were enlarged and made applicable "to *all* local, special and municipal legislation of every character."

In considering the two sections of the Constitution for the purpose of welding an harmonious construction, we think it was the clear intention of the electors of the state to restrain the legislature from legislating in criminal matters affecting those subjects that are purely local and municipal in character. But in those public matters which concern the people of the state at large, in common with the inhabitants of the chartered communities, the legislature has undoubted power to define those acts which shall constitute a crime and provide a penalty for their infraction. This must be so, else we shall have dissipated the greatest power for the preservation of order, and without which the government of the state would be incomplete, and utterly fail to attain one of its great ends, the protection and security of person

and property in organized cities, as well as throughout its entire territory. Certainly the necessity of enlarging municipal powers in both civil and criminal matters, wholly local is thoroughly appreciated, even by the casual observer of the conditions in the crowded modern centers of population, yet, even so, the constitutional amendments only grant unto the cities the exclusive right to exercise such powers, civil or criminal, as legitimately belong to their local and internal affairs, and beyond this the legislative assembly and the people of the state, speaking through the initiative, occupy a field of action exclusively their own.

The City of Portland received its charter from the hands of the legislature at the session of 1903: Sp. Laws of 1903, pp. 3-172. By that franchise it was ordained that the common council should have full [579] power and authority to exercise all powers conferred by the charter and the Constitution and laws of the state. To the council was given, coextensive with the state, the right to exercise within the limits of the city, all the powers commonly known as the police power, and to regulate and control the use of its streets and the traffic thereon, except as otherwise provided in the Constitution and laws of the State of Oregon: Sections 72 and 73. By these provisions of the charter, the legislature vested the city with the same authority over its streets as the state itself possessed. As an expression of this potentiality, the ordinances were enacted in 1904 and 1906; hence at the time of their enactment the City of Portland had, within its corporate limits, concurrent power with the state to pass laws relative to the regulation and control of traffic over the streets of the city. The constitutional provisions forming the meat of this discussion were adopted by the people of the state in 1906, and had for their effect the removal of legislative authority over the subject of municipal traffic; consequently, at the time of the passage of the Motor Act through the legislature in 1911, that department of government was impotent to nullify or amend the charter or ordinances of the City of Portland in a matter of acknowledged local concern such as the regulation of traffic over the streets of the metropolis.

From what has been said it must follow "as night the day" that the Motor Act, if valid expressly amends every charter of every municipality in the state by divesting such cities of the power to pass or enforce ordinances in conflict with the statute. To assert that the adoption of the act is not an amendment but a suppression by paramount authority is but a hollow statement that must fall for the want of a distinguishing [580] prop. The desideratum is to discover the intended

effect of the legislation rather than the particular choice of words that may be used to express that effect. If the statute nullifies the charter or ordinances of the incorporated communities, it supersedes them either by suppression by paramount authority or by amendment. The resultant effect is the same. And from what has been said this cannot be done. In the title of the Motor Act we are confronted with this declaration: "To limit the authority of cities and towns on like subjects concerned with . . . vehicles." In Section 25 of the act, we find an express statement that local authorities shall have no power to prescribe a lower rate of speed than in the enactment provided. Without doubt, the legislative act embraces the same subject matter as the ordinances and is in direct conflict therewith, and if the statute is constitutional, then it expressly repeals the ordinances. In aid of our deductions that this language works an amendment of the charter, we adduce *State v. Wright*, 14 Ore. 365, 12 Pac. 708; *Warren v. Crosby*, 24 Ore. 558, 34 Pac. 661.

4. Associated with the other questions is this one: Does the supreme law of the state prohibit the people from diminishing the power of the legislature in the exercise of any of its original prerogatives of legislation? The primary draft of the Constitution, ratified by the electors of the territory in 1857 and approved later by the Congress of the United States, specified that:

"The legislative authority of the state shall be vested in the legislative assembly, which shall consist of a Senate and House of Representatives." Article IV, Section 1, Constitution.

Thus did the people of the state so hew and shape the body of their fundamental law as to constitute [581] the legislature the only instrument through which the people could express their choice on legislative matters. As a result of political expansion, the people amended this section of the Constitution by imposing an indirect limitation on the legislature compelling that institution to share its powers of legislation with that of the people publicly expressed through the initiative. For we read that:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Article IV, Section 1, as amended in June, 1902.

Here, it will be seen that the people did not shorten the powers of the legislature in

matters of legislation only, they did declare that the legislature was no longer to be their exclusive agency of expression. Experimentation of this character having proved popular, the electorate set about further to curtail the legislature as an organ of legislative expression. This they succeeded in accomplishing in the adoption of Article XI, Section 1, and Article IV, Section 1 (a) of the Constitution, when they forbade the legislature from voicing their sentiments in matters of purely municipal concern.

We are liable to confuse the discussion of the subject if we fail to discern between sovereignty itself and that force which stands as the representative of sovereign power. The source—the abiding place of sovereignty—is in the people. Government is merely an agency by which it is exercised. The legislative body is but a [582] component of that agency—a contrivance by which the people crystallize their ideas into the form of legislation. Therefore, in the enactment of organic legislation having for its function the abridgment of legislative power, the people of the state are not parting with any of their sovereignty, rather they are exercising their right to express this sovereign power directly. In time the people may strip the legislature of every power it once enjoyed, leaving it but a place in memory, and themselves exercise directly within the state all of the powers formerly committed to the legislature. No further need we seek to disclose the authority of this statement than to quote Article I, Section 1, of the Constitution:

"We declare that all men, when they form a social compact, are equal in right; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper."

Surely, then, in checking the legislature from further interference in municipal affairs does not constitute the surrender of any sovereignty. Nor does the city on that account become a miniature state, for at all times and under all forms of government sovereignty remains in the people of the state who, speaking through the initiative, may legislate on all matters unless restrained by the federal or the state Constitutions.

5. Finally, we cannot yield to the plaint that the conclusions reached are not justifiable, because judicial minds may differ with respect to the station where municipal power ends and state authority begins. The difficulty of locating the boundary between legislation [583] that is purely municipal, and therefore within the administrative competency of cities and legislation that lies without its fold and consequently within the

embrace of legislative enactment is more apparent than actual. Though it must be admitted that the differentiation is not and never can be totally free from perplexity, however, this unfortunate situation is the handmaid of many legal rules that either entwine or shade into each other without regard to the layman's dislike for complexity in legal jurisprudence. Discussing municipal affairs as distinguished from state functions, Mr. McQuillin, in his excellent treatise on *Municipal Corporations*, Volume 1, Section 173, says:

"All of those public matters which concern the people of the state at large in common with the people of the particular locality, as the administration of justice, and the authority of the state generally, through and by legislative enactments administered by state officers or by virtue of the power of the central government, in the preservation of the public peace and affairs of like general character, although some of which may be in the hands of the local or municipal authorities, are matters of state or central jurisdiction. On the other hand, all of those public affairs which concern the inhabitants of the locality as an organized community, apart from the people of the state at large, as supplying purely local needs, conveniences, and comforts like water, light, and gas, the establishment of sewers, fire protection, and the enforcement of by-laws or ordinances touching the interests of the local corporation alone are essential matters of local concern."

From the general principles of law herein discussed, we conclude that the judgment of the trial court is erroneous and therefore must be reversed.

Reversed.

Former opinion sustained on rehearing.

[584] Moore, Eakin, Bean and Ramsey, J.J., concur.

MCBRIDE, C. J. (*dissenting*).—It is an old saying that "hard cases make bad law," and in this case I think the enactment by the legislature of a foolish and unnecessary statute has created a hardship which has led the court into an erroneous construction of Article XI, Section 2, of our Constitution, as now amended. The section is as follows:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control,

or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon."

The intent of this section was to put an end to the theretofore prevalent practice of legislative intermeddling with particular city charters by acts special in their nature and not infrequently against the wish of a majority of the voters of the municipality. The language employed seems to me clearly to indicate a purpose to prohibit special and local legislation affecting city charters. It provides that the legislature shall "not enact, amend, or repeal any charter or act of incorporation of any municipality, city, or town"—using the singular number, whereas if it had been the intent to prohibit general legislation affecting all towns and [585] cities the plural would naturally have been employed. The act in question is a statute prohibiting a certain rate of speed by automobiles, and providing a penalty for its violation. This under the ruling in *Portland v. Erickson*, 39 Ore. 1, 62 Pac. 753, and *Baxter v. State*, 40 Ore. 353, 88 Pac. 677, 89 Pac. 369, makes the act in question a criminal statute, and therefore within the power of the legislature to enact in any event. Emergencies have arisen, and may arise again, in which it is desirable that general legislation to enable towns, cities, and ports to carry on the purposes of their organization should be speedily passed without the delay incident to the adoption of a measure by the initiative, and I hesitate to assent to a ruling by this court that in the end may result in much inconvenience to the various municipalities of the state. While deprecating legislative intermeddling with the local affairs of towns and cities in the manner the act in question has done, I consider it, not a question of power, but of public policy, which can and, no doubt will, be corrected at the next session of the legislature soon to meet.

The judgment should be affirmed.

BURNETT, J. (*dissenting*).—The plaintiff brought an action to recover damages for injuries sustained by him in a collision with an automobile driven by the defendant at the intersection of Williams Avenue and Russell Street, in Portland, contending that the defendant was driving at a reckless and unlawful rate of speed. For the purpose of proving negligence in that respect, the plaintiff offered some ordinances of the City of Portland limiting the speed of such vehicles in the city to a maximum rate of 15 miles per hour in general graded to 10 miles per [586] hour within the fire limits and to a rate no greater than a walk upon any street

where street-cars turn. The Circuit Court sustained an objection to the introduction of these ordinances on the ground that they had been superseded by an act of the legislative assembly of the state, known as the Oregon motor vehicle law (Laws 1911, c. 174). This ruling is assigned as the principal error on an appeal by the plaintiff from a judgment against him as a result of the jury trial there. In an opinion written by Mr. Justice McNary, filed June 2, 1914, the judgment was reversed on the ground that, in the respect involved, the vehicle law was an attempt to amend the charter of the City of Portland contrary to the injunction of Article XI, Section 2, of the state Constitution, that "the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city, or town." Involving as it does the issue of which shall be supreme the city or the state, the importance of the subject has brought about a rehearing *in banc*.

The direct question involved is the constitutionality of the vehicle law as applied to chartered cities and towns. At the outset we must remember that the legislative assembly is a co-ordinate branch of the government of equal dignity and importance with the judicial department, and if we assume to disregard or overturn its declarations of what the law shall be we must be prepared to demonstrate to a reasonable certainty that its utterances violate the Constitution, which is supreme in authority over the executive, the legislature, and the courts: *Cline v. Greenwood*, 10 Ore. 230; *Cook v. Portland*, 20 Ore. 580, 27 Pac. 263, 13 L.R.A. 533; *Umatilla Irr. Co. v. Barnhart*, 22 Ore. 389, 30 Pac. 37; *State v. Shaw*, 22 Ore. 287, 29 Pac. 1028; *Simon v. Northup*, 27 Ore. 487, 40 Pac. 560, 30 L.R.A. 171; [587] *Kadlerly v. Portland*, 44 Ore. 118, 143, 74 Pac. 710, 75 Pac. 222; *State v. Walton*, 53 Ore. 557, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173; *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777; *State v. Cochran*, 55 Ore. 157, 179, 104 Pac. 419, 105 Pac. 884; *Miller v. Henry*, 62 Ore. 4, 124 Pac. 197, 41 L.R.A. (N.S.) 97; *Libby v. Olcott*, 66 Ore. 124, 134 Pac. 13.

Another doctrine equally well settled is that of *stare decisis*, to the effect that when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides: *State v. Clark*, 9 Ore. 466; *Multnomah County v.*

*Sliker*, 10 Ore. 65; *Despain v. Crow*, 14 Ore. 404, 12 Pac. 806; *Corvallis v. Stock*, 12 Ore. 391, 7 Pac. 524; *Sheridan v. Salem*, 14 Ore. 328, 12 Pac. 925; *Paulson v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L.R.A. 673; *Everding v. McGinn*, 23 Ore. 15, 35 Pac. 178.

At all the times involved in this litigation the City of Portland was working under a charter granted by the legislative assembly in 1903 (Sp. Laws 1903, p. 3), and afterward adopted by the vote of the people of that city at an election therein. That enactment equipped the council with all the legislative power of the city and subject to the provisions, limitations and restrictions contained in the act authorized the council:

"(1) To exercise within the limits of the City of Portland, all the power, commonly known as the police power, to the same extent as the State of Oregon has or could exercise said power within said limits; . . . [588] (60) except as otherwise provided in this charter, or in the Constitution or laws of the State of Oregon, to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places, and parks of the city; to regulate the use of streets, roads, highways, and public places for foot passengers, animals, bicycles, automobiles, and vehicles of all descriptions; . . . (63) to control and limit traffic on the streets, avenues, and elsewhere."

The municipal legislation above referred to was enacted under the provisions of this charter. The motor vehicle law is a general act of the legislative assembly applicable by its terms to all public roads, streets, and highways in the State of Oregon. It permits a maximum speed of 25 miles per hour, declares that local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation inconsistent with the provisions of the act, and provides that cities may limit the speed of vehicles on their streets on condition that the minimum shall in no case be less than one mile in six minutes. Other conditions are annexed to the exercise of local authority on the subject, but these are sufficient for example.

At the threshold of the discussion it will be observed that under the very terms of the charter itself, in sub-paragraph 60 of Section 73 *supra*, the city is permitted to exercise the power in question "except as otherwise provided in this charter or in the Constitution or laws of the State of Oregon." The exception makes no distinction between the civil and criminal laws of the state as a limitation upon the powers of the council. Hence, for the time being, we need not concern ourselves about whether the motor vehicle law is a criminal statute or not, within the meaning of Article XI, Section 2, of the

state Constitution. The people of Portland in [589] adopting their fundamental law have thus expressly made the legislative power of their city council subject and subordinate to both the civil and criminal laws of the state as well as its Constitution. It follows that when the council adopts an ordinance conflicting with any state law, that body exceeds the legislative powers delegated to it by the people of the city and its legislation of that nature must yield and be set aside at all points of such conflict. In that charter the people of Portland themselves have asserted the supremacy of the laws of the state without distinction over the enactments of the city council. Laying aside for the moment all other questions, it is beyond dispute that the council cannot lawfully exceed its legislative authority defined and limited by the charter under which it acts. Viewing the matter from the standpoint of the city alone, its charter is paramount in authority over the council, and at least until the people of the municipality change that instrument by their initiative power the council must obey it. The legal voters of Portland have not yet amended their charter in the respect involved, and as the ordinance in question is plainly in conflict therewith because it exceeds the limiting words of the charter "except as otherwise provided in this charter or in the Constitution or laws of the State of Oregon," the ordinance is void so far as not in harmony with the motor vehicle law enacted by the state legislature. Based merely upon a construction of the fundamental law of the City of Portland, the disquisition might well end here, for the supremacy of the state law is reserved under the very instrument upon which the plaintiff depends.

Owing to the importance of the question, however, it is proper to consider anew the relative authority of the state and of cities and towns within its borders as [590] defined in Article XI, Section 2, of the state Constitution:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon."

The evil which gave rise to this expression of the will of the people as part of the fundamental law forbidding the legislative assembly to enact, amend, or repeal any municipal charter is well described by Mr. Justice McNary in the former opinion, to the effect that the legislative assembly had wasted much valuable time in dealing with particular charters of various cities and towns throughout the state which might have been more profitably devoted to general legislation. Ambitious villages were often burdened with charters sufficiently comprehensive for the metropolis, and each measure of the kind required as much attention as any other. The people, therefore, said in this amended section that corporations of whatever kind may be formed under general laws, but shall not be created by the legislative assembly by special laws. Going further into particulars, and by way of reiteration, it restrains its body of lawmakers from devoting any attention in any way to any single charter or act of incorporation. It left unrestricted and unchanged the general power of legislation [591] lodged by the Constitution with the legislative assembly.

The state is the paramount unit of government established by the people. This same people has ordained in Article I, Section 4, of its fundamental law that "the legislative authority of the state shall be vested in a legislative assembly consisting of a Senate and House of Representatives," reserving to the people, of course, the power to enact laws or to reject those promulgated by the legislature. Thus the general power of legislation remains in the legislative assembly as from the beginning of the state, and the reservation by the people was designed to be a corrective exception. As much as ever before, the rule applies as laid down in *Straw v. Harris*, 54 Ore. 424, 428, 103 Pac. 777, 779, as follows:

"That in the enactment of laws, the legislative department of a state, unlike that department of the national government, may enact any law not expressly or impliedly prohibited by the Constitution."

It is also there said by Mr. Justice King:

"There remains, however, as formerly, but one legislative department of the state. It operates, it is true, differently than before—one method by the enactment of laws directly through that source of all legislative power, the people; and the other, as formerly, by their representatives—but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. . . . The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same

time leaving it a co-ordinate legislative body with them."

Considering Article XI, Section 2, and Article IV, Section 1a, of the Constitution, conferring upon municipalities [592] and districts the initiative and referendum powers reserved to the people, Mr. Justice King in *Kiernan v. Portland*, 57 Ore. 454, 467, 111 Pac. 379, 112 Pac. 402, 403, 37 L.R.A. (N.S.) 339, writes thus:

"It will be observed from the first sentence in Section 2 that no restriction is placed upon the legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the legislature. Under all the rules of construction, this exception reserved to the legislative department the right, whether by the people directly through the initiative or indirectly through the legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws."

Further on in the same case the learned justice writing the opinion used this language:

"Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the legislature, could formerly have granted indirectly. All the prerogatives, attempted to be exercised by Portland in the construction of the Broadway Bridge, formerly could have been granted by the legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the law-making department of our state, provision for which may be made by the legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject."

In *State v. Tillamook*, 62 Ore. 332, 341, 124 Pac. 637, 640, Ann. Cas. 1914C 483, Mr. Justice Bean says:

[593] "Such municipal corporations are always subject to the control and regulation of the lawmakers of the state in the manner directed by the Constitution: *McMinnville v. Howenstien*, 56 Ore. 451, 456, 109 Pac. 81, Ann. Cas. 1912C 193. While these public corporations are capable of adopting and amending their charter, they still continue to be agencies of the state. A general control is left in the legislative assembly."

Again, in *Riggs v. Grants Pass*, 66 Ore. 266, 271, 134 Pac. 776, 778, Mr. Justice Eakin, after quoting with approval the language of Mr. Justice King in *Straw v. Harris*, 54 Ore. 424, 428, 103 Pac. 777, 779, to

the effect that "it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control of them," goes on to say:

"Article XI, Section 2, of the Constitution confers power and authority upon cities to form their own charters and make their own laws within their municipal needs, that is, in local and special municipal legislation. Authority beyond that must come from the sovereign, namely, the legislature, by general laws or by the people by general or special laws."

In brief, so long as the legislative assembly promulgates only general laws, it may proceed without let or hindrance based on anything contained in Article XI, Section 2, of the Constitution. The enactment of special laws on the subject of municipal charters is the only thing forbidden to that law-making body by that section, while the people at large may enact by the initiative either general or special laws affecting charters. The circumstances produced by that section are the same as if the people had added to Article IV, Section 23, another prohibition of local or special [594] laws, so that besides those now there specified that section would read:

"The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say . . . 15. Enacting, amending or repealing any charter or act of incorporation for any municipality, city or town."

Under such conditions the question to be determined would be whether the motor vehicle law is one affecting only a certain locality, and hence unconstitutional, or is it one of general application throughout the state, and consequently within the power of the legislative assembly to enact. The question is precisely the same in the present juncture.

In considering the relative authority of the state and of the city it comes to this, as stated by Mr. Justice Moore in *State v. Hearn*, 59 Ore. 227, 233, 115 Pac. 1066, 117 Pac. 412, 413:

"It is an axiom that no creature can ever become greater than its creator, and as a corollary deducible from this principle the rule is universal that the police power cannot be bargained away in such a manner as to place it beyond recall."

The principle of the supremacy of the state over any municipality within its borders, when manifested only by general legislation enacted by the legislative assembly or by either general or special laws initiated and adopted by the people, was first declared by this court in the elaborate and masterly opinion of Mr. Justice King in *Straw v. Harris*,

54 Ore. 424, 103 Pac. 777. That opinion has been cited many times since, with approval as shown by the following precedents, and has already become a classic in the legal literature of the state. *McMinnville v. Howenstien*, 56 Ore. 451, 109 Pac. 81, Ann. Cas. 1912C 193; *Kiernan v. Portland*, [595] 57 Ore. 454, 467, 111 Pac. 379, 112 Pac. 402, 403, 37 L.R.A. (N.S.) 339; *Portland v. Nottingham*, 58 Ore. 1, 113 Pac. 28; *Bennett Trust Co. v. Sengstacken*, 58 Ore. 333, 113 Pac. 863; *State v. Schluer*, 59 Ore. 18, 37, 40, 115 Pac. 1057; *State v. Hearn*, 59 Ore. 227, 233, 115 Pac. 1066, 117 Pac. 412, 413; *Schubel v. Olcott*, 60 Ore. 503, 510, 120 Pac. 375; *State v. Tillamook*, 62 Ore. 332, 341, 124 Pac. 637, 640, Ann. Cas. 1914C 483; *Riggs v. Grants Pass*, 66 Ore. 266, 271, 134 Pac. 776, 778; *Couch v. Marvin*, 67 Ore. 341, 136 Pac. 6.

For authority to reverse the judgment in this case much reliance seems to be placed upon the following precedents: *Farrell v. Portland*, 52 Ore. 582, 98 Pac. 145; *Haines v. Forest Grove*, 54 Ore. 443, 103 Pac. 775; *McMinnville v. Howenstien*, 56 Ore. 451, 109 Pac. 81, Ann. Cas. 1912C 193; *Portland v. Nottingham*, 58 Ore. 1, 113 Pac. 28; *State v. Schluer*, 59 Ore. 18, 115 Pac. 1057; *State v. Hearn*, 59 Ore. 227, 115 Pac. 1066, 117 Pac. 412; *McKeon v. Portland*, 61 Ore. 385, 122 Pac. 291; *State v. Tillamook*, 62 Ore. 332, 124 Pac. 637, Ann. Cas. 1914C 483; *Thurber v. McMinnville*, 63 Ore. 410, 128 Pac. 43; and *Riggs v. Grants Pass*, 66 Ore. 266, 134 Pac. 776. In not one of those decisions, however, is the paramount authority of the legislative assembly over the various cities, towns and other municipalities doubted or questioned when asserted by general laws. Which shall prevail in case of conflict, a general law of the state enacted by the legislative assembly or an ordinance or charter of a city, is not discussed in any of them. All the doctrine of *Farrell v. Portland*, 52 Ore. 582, 98 Pac. 145, is that the Enabling Act of 1907 was available to the port for the purpose of amending its fundamental law, the act of 1907 being a general law enacted by the legislature to provide a formula for the exercise [596] of the initiative by municipalities: *McMinnville v. Howenstien*, 56 Ore. 451, 109 Pac. 81, Ann. Cas. 1912C 193, decided that a city could exercise the right of eminent domain to supply its inhabitants with water from a source outside its boundaries. Mr. Justice Slater wrote to the effect that the right was conferred by the general law of February 21, 1891, now codified in Section 6874, L. O. L. Mr. Justice King was of the opinion that the power was incident to the general authority of the city to provide for the health and welfare of its people. However, after discussing the

causes leading up to the adoption of Article XI, Section 2, of the Constitution in its new form, he is careful to sum up the matter in these words:

"As a solution of this problem the people, through their sovereign power expressed at the polls, have, by amendment of the fundamental law, transferred those special powers from the legislative department to the particular localities directly affected, leaving only a general control thereof in the legislative assembly, at the same time retaining under the initiative and referendum, all power over them, differing only in the manner of the exercise of this supervision, which supervision lies with the people at large as a legislative branch of the state. In other words, the legislative assembly, as one of the state's law-making branches, may by general laws control and regulate all its municipalities, while the people, through the direct method provided, may enact either general or special laws for this purpose."

The other members of the court concurred in the result. *Haines v. Forest Grove*, 54 Ore. 443, 103 Pac. 775, only decides that in authorizing an issue of bonds in question by the initiative process the city had conformed substantially to the Enabling Act of 1907 thus recognizing the control of the legislative assembly [597] over municipalities when expressed by general laws. To sustain his position in the instant case Mr. Justice McNary lays great stress on what was written in *Portland v. Nottingham*, 58 Ore. 1, 112 Pac. 28, to the effect that "the legislative assembly cannot pass laws to repeal or amend municipal charters, even by implication." etc. In that case the city, acting under the charter of 1903, had improved a street, a purely local affair, and had assessed the expense upon the adjacent property benefited thereby. The charter provided an appeal to the Circuit Court of Multnomah County for the property owner aggrieved by the assessment, and declared that the verdict of the jury there should be a final and conclusive determination of the question. *Nottingham* appealed and the Circuit Court on his motion set aside the verdict, rendered at the hearing, on the ground that the jury had disregarded the instructions of the court. When the charter was promulgated there was no appeal from an order granting a new trial in an action at law. In 1907 (*Laws 1907*, p. 311), however, the legislative assembly amended what was originally Section 525 of the act of October 11, 1862, of the legislative assembly, entitled "An act to provide a code of civil procedure" so as to authorize an appeal from an order setting aside a judgment and granting a new trial. Here were two entirely distinct procedures, the one purely local embodied in the city charter



affecting only the property owner whose holdings in the locality were benefited by the improvement and the other incorporated in the statute regulating actions in the Circuit Courts. Although the two laws, the code and the charter, had no relation to each other, the city sought to appeal to this court from the order granting a new trial in the Circuit Court, and that, too, in the face of the charter [598] provision that the verdict of the jury should be a final and conclusive determination of the matter. In discussing the appeal it was decided here, in substance: (1) That to be effectual a verdict must be rendered in obedience to the law as declared by the trial court; and (2) that the amendment of the Code of Civil Procedure did not and could not affect the previously enacted charter of Portland. For that matter the legislative assembly did not pretend such a result in that instance. It would have been like contending that because 60 days are made the limit of time for taking appeals to this court, that would operate to enlarge to that period the 20-day limit for appealing from an assessment of damages in a county road proceeding (L. O. L. § 6292) or the 30 days allowed by Section 2457, L. O. L. for appeals from Justice's Courts. The Nottingham case does not affect the present question for three reasons: (1) There was a purely local matter controlled by a procedure *sui generis*, outlined by the charter and not controlled or attempted to be controlled by general legislation; (2) the right to travel on the highways, roads, and streets within the state is common to every person lawfully within the state and legislation on that subject operates upon the general public instead of any mere locality exclusively; and (3) the motor vehicle law is not an amendment of any particular charter, but is a legitimate assertion of the general legislative power of the state on a subject properly within the scope of that prerogative. State v. Schluer, 59 Ore. 18, 115 Pac. 1057, is devoted to the construction of what was known as the "Home Rule Amendment," and discusses the question of whether it authorized the local option law to be administered with incorporated towns or with general election precincts as the units upon which to operate. The excerpt [599] quoted above from the Hearn case shows that it recognizes the principal of state supremacy over municipalities. McKeon v. Portland, 61 Ore. 385, 122 Pac. 291, held in effect that one municipal corporation could not absorb another without some action on the part of the latter as a municipality, and that the one whose annexation was sought could not commit sovereign suicide. The opinions in State v. Tillamook, 62 Ore. 332, 124 Pac. 637, Ann. Cas. 1914C 483; Thurber v. Mc-

Minnville, 63 Ore. 410, 128 Pac. 43, and Riggs v. Grants Pass, 66 Ore. 266, 134 Pac. 776, all recognize the potency of a general law passed by the legislative assembly over city legislation.

The fallacy of the plaintiff's argument lies in assuming that the motor vehicle law operates as an amendment of the Portland charter. It is not a question of amendment. It is a question of supersession by paramount authority. It is analogous to the situation arising when state regulation of interstate railways must and does yield to national legislation promulgated under the interstate commerce clause of the Constitution of the United States. It may also be likened unto the supremacy of the National Bankrupt Law over the state enactments about assignments for the benefit of creditors. Amendment implies the corrective act of the author or other person having direct control at the time over the instrument or document to be amended. We do not speak of Jones amending the check or promissory note of Brown or his will or contract. The amendment of such papers is left to the author or someone having his consent. Of course in this instance the legislative assembly framed the original act constituting the Portland charter but the legal voters of the city adopted it and the constitutional amendment committed it to the city as much [600] as if the municipality was the original author of it. The word "amend" was doubtless put into the new constitutional section, so that the legislature might have no loophole by which to evade its injunction and tinker with individual charters on the plea that it would be only amending its own work. It was never the design, however, to divest the legislative assembly of any of its power to enact general laws of pre-eminent authority throughout the state.

The legislative assembly properly may have delegated some of its legislative power to the city, but the Constitution does not permit the law-making body of the state to abdicate that prerogative permanently. It may at any time reassert it, and is only forbidden to do so by special laws in such cases as the present. The power of the legislative assembly to pass general laws with supreme sanction has not been impaired by any amendment to the Constitution.

We further observe in our examination of Article XI, Section 2, that the power of its legal voters to enact, or amend the charter of any city or town is expressly subject to the Constitution and criminal laws of the state. The penal statutes there mentioned are not merely such enactments of the kind as were in existence at the time the amendment containing that language was adopted. The section evidently includes any criminal

law of general application which either branch of the legislative department of the government might afterward enact by virtue of its plenary power. To determine whether the motor vehicle law is a criminal law we have only to advert to the statutory definition of the term "crime" found in Section 1369, L. O. L. reading thus:

"A crime or public offense is an act or omission forbidden by law, and punishable upon conviction by either [601] of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; 5. Disqualification to hold and enjoy any office of honor, trust or profit under the Constitution or laws of this state."

It is the language of the Criminal Code enacted in 1864, and remains throughout the half century since then. It is so consonant with the signification imparted to the term by courts and law-writers from time immemorial that citation of precedents is superfluous. The motor vehicle law does forbid certain acts and omissions, and provides for their punishment by fine. It is unquestionably a criminal law, and we cannot extract that element from it without utterly disregarding as plain language as ever was written. Like the local option law, as construed in *Baxter v. State*, 49 Ore. 353, 88 Pac. 677, 89 Pac. 369, the motor vehicle law is a criminal law in that it forbids certain things and provides penalties by fines and imprisonment for violations of its precepts. If for no other reason, this criminal law of the state, by the very terms of the Constitution, must prevail over the city ordinance.

Under present conditions where the people from any part of the state may so easily journey into the metropolis and through the various cities, towns and villages of the state by private conveyances, the matter of travel upon the streets and highways of the commonwealth in every part of it is a legitimate subject for general legislation regulating the same. The streets of Portland do not belong to that city in the property sense of the word. They are dedicated to public use, and are alike open to all citizens of the state. Where not thus freely placed at the service of the public by the original owners of the land, they exist by virtue of the power of eminent domain, which is an original attribute of state sovereignty. As stated by [602] Mr. Chief Justice Wolverton in *Brand v. Multnomah County*, 38 Ore. 79, 91, 60 Pac. 390, 391, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L.R.A. 389:

"Primarily, the state has paramount control over all the highways within its borders, including public streets and highways within the confines of municipalities. Whatever authority a municipality may enjoy or possess, pertaining to its streets and highways, must

be derived from the legislative assembly through its franchises or charter; and such a corporation acts, if at all, through a delegated power emanating from the initial source. . . . Nor does the mere fact that the state has delegated certain powers to the municipality inhibit it from again assuming or exercising such powers."

It is true that this was written before the amendment of Article XI, Section 2, but it illustrates the principle that the state has original power over city streets and all other highways, and that authority granted to any city may be reassumed by the state to the exclusion of the municipality through exercise of the legislative prerogative. The only question is, How shall the resumption of the grant be accomplished by action of the legislative assembly? It is plain that the only restriction imposed upon the legislative assembly by the people in its fundamental law in such cases is that it shall not interfere with the municipality by any special law, and that the exercise of its legislative authority by means of general laws still exists in its unconfined and pristine vigor. We must remember, also, that the right of a city electorate to amend its charter is subject to the state Constitution, part of which is Article IV, Section 1, declaring that "the legislative authority of the state shall be vested in a legislative assembly," etc. We cannot leave this clause out of the case. It is not overcome by the following section [603] granting the initiative to municipalities. The latter section only allows cities to use the initiative formula within the scope of their authority, and was never designed to exempt them from their subordination to the Constitution and criminal laws of the state, nor to infringe upon the general law-making power vested in the legislative assembly by Article IV, Section 1. Discussing a similar situation in *Ewing v. Hoblitzelle*, 85 Mo. 64, 78, Mr. Justice Norton said:

"We do not hold that the legislature in exercising the power referred to in Section 25, Article 9, of the Constitution, can exercise it by the passage of a local or special law; but that it can do so by a general law we have no doubt, and when it is exercised, as we think it has been exercised in the act of 1883, by a general law, and such law is, in any of its provisions, in conflict with a charter provision, that the law prevails over the charter in obedience to the mandates of the constitution that 'such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state.'"

The travel of the citizens of the state at large upon its streets, roads and highways is greater in scope and importance than any local or municipal concern, and the legisla-

tive assembly, in the exercise of its power through general laws, may well consider it as a legitimate subject for its consideration despite the provisions of any local charter. If the legislative function, as vested in the legislative assembly by Article IV, Section 1, is of any validity whatever, we cannot act as censors upon that co-ordinate branch of the government and say, as we did in *Baxter v. State*, 49 Ore. 353, 88 Pac. 677, 89 Pac. 369, that the criminal local option law prevails over a city charter, yet, in our judgment, travel on public streets and highways in the state is not a fit subject for the legislature to regulate by means [604] of a penal statute general in its terms. To establish a contrary rule will cast upon the legislative assembly, as well as upon the judiciary, the burden of ascertaining, not whether the public laws conform to the Constitution of the state as a supreme standard of comparison, but whether they conflict with any of the multitudinous charters from that of the metropolis to that of every little hamlet in the state. To declare the ordinances of the city superior to the laws of the state will be to invite and encourage conflict between the two jurisdictions. An instance of this has already occurred where the council of the City of Portland undertook to prescribe rates of fare on street railways within the city. The United States District Court, speaking by Judge Robert S. Bean, in *Portland Ry. etc. Co. v. Portland*, 210 Fed. 667, held that, as the legislative assembly had committed the regulation of such matters to the railroad commission of the state in its capacity of supervising public utilities under the act of February 24, 1911 (Laws 1911, 483), the city law must yield to that of the state. Other instances of conflict will readily suggest themselves. Suppose any city adopts ordinances governing the sale of farm products, or nursery stock, or the punishment of crime contrary to the state laws on the same subjects, which of the inconsistent enactments must yield? It is plain that the state law will take precedence.

It is said, in substance, in *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777, that the state cannot lose control over its municipalities, as it would but lead to sovereigntial suicide; and it may be added that it was never the intention of the people to so hamper its legislative assembly on the one hand, and extend the powers of cities and towns on the other, as to lead to the slow death of the state by disintegration.

[605] The people have spoken through their representatives in the motor vehicle law. It is not for us to question the wisdom of the policy which it announces. We can only declare what the law is. We should have due respect for the co-ordinate branch

of the government and should not declare its utterances to be in violation of the fundamental law unless such a conclusion is supported by incontrovertible authority. Still further, the principle having been thoroughly settled by the precedents following *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777, the doctrine of *stare decisis* ought to control, preserving continuity of purpose in decision and certainty of the law. The motor vehicle law was clearly within the authority of the legislative assembly to enact as a general law with paramount authority over any local legislation whether of charter or ordinance. The learned judge at the Circuit Court was right in maintaining the supremacy of the state legislation.

The judgment should be affirmed.

#### NOTE.

#### Constitutionality of Statutes and Ordinances Regulating Speed of Vehicles in Streets and Highways.

Introductory, 1067.

Validity of Statute, 1067.

Validity of Ordinance, 1068.

#### Introductory.

The earlier decisions passing on the constitutionality of statutes or ordinances regulating the speed of vehicles in streets and highways are collated in the notes to *Christy v. Elliott*, as reported in 3 Ann. Cas. 487, and 108 Am. St. Rep. 196, and *State v. Swagerty*, 11 Ann. Cas. 725. This note presents the recent cases on the subject.

#### Validity of Statute.

It appears to be well settled that a statute regulating the speed of automobiles on public streets, roads and highways, is constitutional, as a valid and reasonable exercise of the police power of the state, and cannot be regarded as class legislation. *Helena v. Dunlap*, 102 Ark. 131, 143 S. W. 138; *State v. Waterman*, 112 Minn. 157, 127 N. W. 473; *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275; *Schultz v. State*, 89 Neb. 34, Ann. Cas. 1912C 495, 130 N. W. 972, 33 L.R.A. (N.S.) 403. So, in *Helena v. Dunlap*, supra, it was held that a statute (Acts 1911, p. 94) providing for the registration of and regulating the speed of motor vehicles was constitutional, as it could not be regarded as class legislation where it appeared that though it affected one class and not another, yet it affected all members of the same class alike and that the classification involved in the law was founded on a reasonable basis.

In *Schultz v. State*, 89 Neb. 34, Ann. Cas. 1912C 495, 130 N. W. 972, 33 L.R.A. (N.S.) 403, the court sustained a Nebraska statute (Comp. St. 1909, c. 48, sec. 147) providing as follows: "No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or in any event in the close built-up portions of a city, town or village, at a greater rate than one (1) mile in six (6) minutes, or elsewhere in a city, town or village, at a greater rate than one (1) mile in four (4) minutes, or elsewhere outside of the city, town or village, at a greater rate than twenty miles per hour; . . . and in no event greater than is reasonable and proper, having regard to the traffic then on such highways and the safety of the public." The court said: "It is argued that the act regulating the speed of motor vehicles is unconstitutional and void, because it is unreasonable. No authorities are cited in support of this argument, and we doubt if any authority can be found to sustain it. The act seems to be a proper exercise of the police power of the state. The legislature no doubt was aware of this new method of public travel, and recognizing the fact that the automobile furnishes a means of transportation by which a speed may be attained greater than by any other vehicle in common use, deemed it necessary to regulate its use in such manner as to prevent collisions and accidents like the one in the case at bar, and, having due regard to the safety of life and limb of all persons rightfully upon our public streets and highways passed the act in question defining the methods of operation and the rate of speed which would in their judgment best subserve the public interest. In such case the courts should not under ordinary circumstances substitute their opinions for the judgment of the legislative branch of the government as to the reasonableness of such regulation." In *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275, it was held that a statute prohibiting an automobile from passing a vehicle at a speed of more than four miles an hour was not unconstitutional as class legislation.

So much of a Georgia statute (Acts 1910, p. 92, sec. 5) as provides that no person shall operate a machine at a rate of speed "greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," has been held to be too uncertain and indefinite in its terms to be capable of enforcement. *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523; *Carter v. State*, 12 Ga. App. 430, 78 S. E. 205. In *Solan v. Pasche* (Tex.) 153

S. W. 672, it was objected that a Texas statute (Acts 30th Leg. c. 96, sec. 3) in similar terms could not be enforced as a penal statute because of its vagueness and indefiniteness. The court held that it was unnecessary to determine whether the statute was subject to that particular objection, as it was at least sufficient as a remedial statute imposing a civil duty, so as to render its violation negligence per se.

#### *Validity of Ordinance.*

In some jurisdictions, wherein a general state motor vehicle law has been enacted and put into operation, it has been held, nevertheless, that a city ordinance regulating the speed of automobiles within its limits is valid, if the ordinance is neither prohibited by nor in contravention of the statute, and that it is not unreasonable nor discriminatory. *Ex p. Snowden*, 12 Cal. App. 521, 107 Pac. 724; *Christensen v. Tate*, 87 Neb. 848, 128 N. W. 622. The case first cited involved a motor vehicle act (Stats. 1907, p. 915) which provided for the registration of motor vehicles and the issuance of license certificates to their owners and operators, and the regulation of the rates of speed at which such vehicles might be operated upon the public highways of the state, etc. For streets and highways within the boundaries of incorporated cities and towns it provided a maximum rate of speed of one mile in six minutes, where the contiguous territory was "closely built up," and one mile in four minutes elsewhere in such cities and towns. Graduated penalties for first and subsequent violations of the law were prescribed in the form of fines or imprisonment, or both. The act also limited the power of the local authorities to pass, enforce or maintain any ordinance, rule or regulation with reference to motor vehicles, except in accordance with certain express conditions stated in the act, and declared all ordinances, rules and regulations in force at the time of the passage of the act which did not conform to such limitations to be of no validity or effect. It was held that a city ordinance which divided the city into two districts and fixed a maximum rate of speed for one of them at twelve miles per hour, and for the other at twenty miles per hour, and provided penalties of fines or imprisonment, or both, graduated in severity for first and subsequent offenses, for all violations of its speed regulations where the speed attained did not exceed thirty miles per hour, was not in conflict with the state law. The court said: "The ordinance complies with the requirement of the act that the penalties for violation of the speed laws by motor vehicles shall be similar to and no greater than those fixed for other vehicles by

making the provisions of the ordinance in this respect applicable generally to all vehicles. Tested by the other limitations of the act, the ordinance does not attempt to exclude or prohibit any licensed owner or operator of a motor vehicle from making any use of the highway permitted by the act itself; it contains no provision affecting the registration or numbering of motor vehicles, prescribes no slower rate of speed for them, and does not regulate their use of the streets of the city in any manner contrary to or inconsistent with the provisions of the act."

In the reported case, which is followed in *Everart v. Fisher*, 75 Ore. 316, 321, 145 Pac. 33, 147 Pac. 189, it is held that an automobile speed ordinance passed by a municipality to which the police power of the state has been delegated by a special act is not superseded by a general motor vehicles law.

In *Pilgrim v. Brown*, 168 Ia. 177, 150 N. W. 1, the question was whether under a statute (Laws of 34th G. A. c. 72, sec. 21) giving to cities and towns the right to enact regulations governing the speed of automobiles within their limits and containing a provision by which an ordinance of this nature should be of no effect, unless the city should have first erected certain signposts on which there should have been placed a notice of the speed regulation, such an ordinance was void and the regulation of no force and effect where it appeared that one of the prescribed signs stood 503 feet or one block south of the north boundary of the city. The court said: "It is not altogether clear from the statute whether the legislature intended to make the validity of the ordinance depend upon the city's compliance with the requirement for signboards, or to relieve from the penalties of the ordinance such persons as might be misled or deceived by the absence of the prescribed warnings, or that the presumption of negligence attached to the driving of a motor car at a greater speed than the regulation allows should be applicable only in cases where the city has performed its duty in this respect. But if either of the several constructions be adopted the result of the case in hand must be the same. The evident purpose of the provision for the display of signs at the entrance to the cities is to give warning to car drivers that they may not unwittingly violate municipal regulations. They also, to some extent, tend to protect the general public in the use of the city streets against the perils caused by the reckless or thoughtless operation of such vehicles. It cannot be supposed there was any legislative intent to make the validity of a municipal regulation of this character depend on the question whether a nice or accurate survey shall find all the several signposts surrounding the city planted squarely

upon the boundary line. Conditions—topographical and otherwise—may be such that a sign displayed at a point on the highway a little inside the boundary will serve its intended purpose much more effectively than one standing on the extreme border. Again we may suppose a case where a road enters a city at a point, say for example, a few feet or rods south of the northwest corner of the municipal territory and another enters at a point a few feet or rods east of such corner, the two coming together at a short distance inside the city limits and continuing thence as one main highway. Will not a sign of the prescribed character placed at the junction of these ways be a fair and substantial compliance with the statutory direction? We think that in all reason this inquiry must be answered in the affirmative and that in general a substantial compliance is sufficient to make the regulation of speed effective. Still again there is nothing in the statute to prevent a city, if it shall so elect, from limiting its speed regulations to some defined part of its territory and leaving the rest open and unregulated by anything but the general laws of the state. Many of our cities and towns embrace within their limits very considerable margins of agricultural or other lands not yet thickly settled where there is little or no occasion for the application of city regulations governing the speed of cars. Should any given municipality under such conditions adopt speed regulations making them applicable only to that part of its territory occupied by the city proper, it would be most unreasonable to say that, to make them effective, signposts must be placed out upon the boundary line and within territory which is exempted therefrom. There is no claim or pretense in the present case that the appellant or any other person was or could be misled to his prejudice by the fact that a single one of the signboards surrounding the city was placed a short distance inside the boundary or that such sign was not so situated as to be open and visible to every person entering the city from that direction. The validity of the ordinance must therefore be upheld."

But where a municipal ordinance is in conflict with the state law regulating the speed of automobiles, or is too uncertain and indefinite to be capable of enforcement, it is invalid. In *re Smith*, 26 Cal. App. 116, 146 Pac. 82; *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523; *Carter v. State*, 12 Ga. App. 430, 78 S. E. 205. Thus, in *re Smith*, *supra*, it appeared that the Motor Vehicle Act of 1913 (Stats. 1913, p. 639) provides that no motor shall be operated at "such rate of speed as to endanger the life or limb of any person or the safety of any property." That provision is independent of the provi-

sion fixing certain maximum speeds. The act then fixes the maximum rate of speed generally, i. e., in sparsely settled portions of the country, at thirty miles an hour; next, where "the contiguous territory is closely built up," the rate of speed is limited to twenty miles an hour; next, in the business districts of any incorporated city and county, city or town, the limit is fifteen miles per hour; and finally, where "the operator's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway," the limit is ten miles per hour. It was held that a municipal ordinance which fixed the limit of speed in all parts of the city at twelve miles per hour, regardless of crossing or intersecting streets, or of obstructing to the view of the operator in approaching an intersecting way, was in unmistakable conflict with the state law, in that it fixed one uniform rate of speed of twelve miles an hour for all parts of the city, whereas the state law limited the speed to ten miles an hour under certain conditions, and allowed a speed of fifteen miles an hour under others. The court said: "In passing through the city of Merced with a motor vehicle the operator might, while endeavoring in good faith to obey the law, find himself driving within his rights under the state law and at the same time be violating the local ordinance, or he might be driving no faster than the ordinance allows and yet be in violation of the state law. It seems to us that the Merced ordinance in its present form is in irreconcilable conflict with the state law." Likewise, in *Carter v. State*, 12 Ga. App. 430, 78 S. E. 205, it was held that a municipal ordinance which allowed a speed of ten miles an hour at crossings in the city except within the fire limits was void as being in conflict with the state law (Act Ga. 1910, p. 92, sec. 5) which forbade a speed greater than six miles an hour on approaching a crossing.

In *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523, there was involved an ordinance which provided as follows: "It shall be unlawful for any driver or person in charge of an automobile to run or operate the same in a careless or reckless manner, whether said automobile is running under or over the speed limits herein provided. Said automobiles must be operated with due regard to the safety of persons and vehicles upon the street and public places, and in such a manner as to avoid collisions therewith." It was held that the ordinance was invalid as being too uncertain and indefinite to be capable of enforcement.

In *New York* the motor vehicles law (Highway Law, § 299, as amended by Laws 1910, c. 374, § 288) regulates the speed of motor vehicles and expressly prohibits municipal ordinances on the subject except as permitted by the following proviso: "Provided further that nothing in this article contained shall impair the validity or effect of any ordinances, regulating the speed of motor vehicles, or of any traffic regulations with regard to the operation of motor vehicles, heretofore or hereafter made, adopted or prescribed pursuant to law in any city of the first class; provided, further, that the local authorities of other cities and incorporated villages may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent, and on further condition that each city or village shall have placed conspicuously on each main public highway, where the city or village line crosses the same and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words, 'City of \_\_\_\_\_' or 'Incorporated village of \_\_\_\_\_,' 'Slow down to \_\_\_\_\_ miles' (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision two of section two hundred and ninety of this chapter but, except in cities of the first class, shall not exceed the same. Official copies of all local ordinances passed under the provisions of this subdivision shall be filed with the secretary of state at least thirty days before they shall respectively take effect and all such local ordinances shall be printed in pamphlet form and issued at regular intervals by the secretary of state." The purpose of the foregoing act was stated in *People v. Keeper*, 121 App. Div. 645, 106 N. Y. S. 314, as follows: "The various rules, regulations and ordinances in the many villages and cities of the state upon the various subjects of licenses, speed and penalties were so numerous, conflicting and confusing that the persons interested in the subject appealed to and succeeded in having passed by the legislature a general act under which an automobilist in any part of the state would know exactly what his restrictions and his liabilities were, and the act expressly repealed all

ordinances, rules or regulations theretofore in effect." In *People v. Ellis*, 88 App. Div. 471, 85 N. Y. S. 120, it was said, referring to the foregoing statute: "Nor does it confer upon the municipal authorities power to pass ordinances regulating the speed with reference thereto; on the contrary, it merely limits the right which the authorities now have under existing laws." In *People v. Dwyer*, 27 N. Y. Crim. 215, 140 N. Y. S. 148, it was held that the motor vehicles law did not affect the speed ordinances of a city of the first class and that it was not necessary that the streets of a city of that class should be posted. In *Chapman v. Selover*, 172 N. Y. App. Div. 858, 159 N. Y. S. 632, the court sustained a motor vehicle speed ordinance but held that a provision making a violation of the ordinance a misdemeanor was unauthorized. In *People v. Bell*, 148 N. Y. S. 753, it was held that since the proviso heretofore quoted authorizes municipal regulation of speed only "on the public highways" an ordinance which attempted to regulate the speed of automobiles "within the corporate limits of the village" was invalid. The ordinance was also condemned because of failure to post the notice required by the statute and to file a copy of the ordinance with the secretary of state.

## SORIERO

v.

## PENNSYLVANIA RAILROAD COMPANY.

### Two Cases.

New Jersey Court of Errors and Appeals—  
December 1, 1914.

86 N. J. Law 642; 92 Atl. 604.

### Negligence — Res Ipsa Loquitur — Fall of Wall.

Where an infant eight or nine years of age, while playing upon a pile of railroad ties, resting against a railroad wall, upon a public street, was injured by the falling of a stone from the wall, and there was testimony from which it was inferable that the stones in the wall were loose and the wall in need of repair, held, that the defendant was prima facie guilty of negligence in maintaining the wall in a dangerous condition to persons lawfully upon the street.

[See note at end of this case.]

### Negligence of Plaintiff — Causal Relation to Injury — Child Playing in Street.

The fact that the infant was playing upon the ties did not charge it with contributory negligence, since the ties were upon a public street, and the fall of the stone, and not the act of playing upon the ties, was the proximate cause of the injury and, under the testimony in no wise connected therewith as a causal factor in the accident.

### Degree of Care — Wall Abutting on Street.

In an action against a railroad company for injury to an infant from being struck, while playing in the street, by a stone which fell from a railroad wall, an instruction that defendant was required to use "that degree and amount of care which is within the range of human precaution and foresight to keep the wall in such condition as not to cause injury to a person upon the public highway" is erroneous; the defendant being required to exercise only that reasonable care required of the ordinary prudent man under similar circumstances.

[See 18 Ann. Cas. 5.]

### Appeal from Supreme Court.

Actions for damages. Dominick Soriero, by next friend, and Rafiele Soriero, plaintiffs, respectively, and Pennsylvania Railroad Company, defendant in each action. Judgments for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Vredenburg, Wall & Carey* for appellant.  
*Charles M. Egan* for respondent.

[642] MINTURN, J.—An infant son and his father are plaintiffs, respectively, in two suits against the defendant seeking damages for injury to the infant.

While playing upon some railroad ties, placed against defendant's wall abutting Railroad avenue, in Jersey City, Dominick Soriero, the infant plaintiff, eight or nine years old, was injured by the falling of a stone from the wall. There was testimony that the stones in the wall had been loose, and were loose at the time of the accident, but no actual [643] notice or knowledge of that fact was brought home to the defendant, and upon the existence of that fact defendant based its motion to nonsuit, as well its motion for a direction of a verdict at the close of the case. The trial resulted in a verdict for both plaintiffs.

The motions to nonsuit and to direct a verdict present the defence interposed by defendant, as a question of law, upon substantially undisputed facts, as to the manner and conditions in which the accident occurred. We think it indisputable that the ties upon which the infant plaintiff was playing were upon

the public street, and that the infant was not a trespasser upon the defendant's premises or property at the time of the accident as was the case in *Friedman v. Snare*, etc. Co. 71 N. J. L. 605, 2 Ann. Cas. 497, 61 Atl. 401, 108 Am. St. Rep. 764, 70 L.R.A. 147.

The falling of the stone was not caused by the fact that the ties were stored upon the street, or that the infant was playing upon them when the stone fell. Those were mere conditions incident to the situation, and were in nowise connected as primal or casual factors of the injury.

The gravamen of the allegation imposing liability is that the plaintiff was lawfully upon the public highway, when a stone, due to defendant's carelessness in maintenance, fell, causing the injury complained of. That situation brings the case within the familiar principle which attributes negligence to an abutting owner of property, who so negligently manages the same that a passerby lawfully upon the highway is injured.

Addison states the principle thus: "Every occupier of a house adjoining a highway is responsible for injuries to passersby, arising from things falling from the house into the streets, unless he can show that the fall arose from storm or tempest, or some inevitable accident." 1 Add. Torts 253, and cases cited.

In 29 Cyc. 593, it is stated that "the doctrine under consideration has been applied in cases of materials or articles falling from buildings or other structures on to passersby on a public street; and the unexplained falling of a building or other structure creates a presumption of negligence."

[644] So, Chief Baron Pollock, applying the principle to the case of a passerby injured on the highway, by the falling of a barrel of flour from the upper window of an abutting warehouse, said: "I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel would not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in the building or repairing a house or putting pots on the chimney, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence." *Byrne v. Boadle*, 2 Hurlst. & C. (Eng.) 722.

A case substantially similar in principle to that at bar was *Kearney v. London*, etc. R. Co. L. R. 5 Q. B. (Eng.) 411, where a railroad bridge had been built three years, and while the plaintiff was passing under it on a public highway, a brick fell and injured him. A motion to direct a nonsuit was made upon the ground that the mere falling of the brick

indicated no negligence with which the defendant could legally be charged. The Court of Queen's Bench held that the case was one for the application of the doctrine of *res ipsa loquitur*; or, in other words, the falling of the brick was *prima facie* evidence of negligence. Upon appeal to the Exchequer Chamber (L. R. 6 Q. B. (Eng.) 761) this doctrine was unanimously affirmed.

The case elucidating the application of this principle in the concrete are numerous, and a reference to a few of the most notable of them must suffice for the purposes of this case.

In *Church of Ascension v. Buckhart*, 3 Hill (N. Y.) 193, it was held that it is the duty of an owner of a ruinous building to prevent its walls from falling. In *Mullen v. St. John*, 57 N. Y. 569, 15 Am. Rep. 530, Commissioner Dwight reviews at length the authorities supporting the principle, and the conclusion there reached was that the owner of a building adjoining a street or highway is bound to take reasonable care that it be kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there; [645] and the happening of such an accident was held to be *prima facie* evidence of negligence. This adjudication has been followed by that court in *Seyboldt v. New York*, etc. R. Co. 95 N. Y. 562, 47 Am. Rep. 75, in *Edwards v. New York*, etc. R. Co. 98 N. Y. 261, 50 Am. Rep. 659, and in *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678, where an iron bolt fell from defendant's elevated structure upon a passerby, causing damage.

In Canada the same doctrine was applied in *Earl v. Reid*, 21 Ont. L. Rep. 545, cited with annotations in 18 Ann. Cas. 1.

The doctrine has also been applied in many cases where the contest has arisen over the respective liabilities of landlord and tenant for the damage resulting from the accident, but in every instance the principle of liability is conceded whether applied to one or the other, as the facts might warrant.

The fundamental requirement of duty upon the part of the defendant is similar whether applied to an adult passerby upon the street or to an infant playing there, who invokes the benefit of the legal status comprehended in the claim of *non sui juris*. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Hoberg v. Collins*, 80 N. J. L. 425, 78 Atl. 166, 31 L.R.A. (N.S.) 1064.

That requirement of legal duty has been determined by this court to be to exercise reasonable care and foresight for harm. *Kingsley v. Delaware*, etc. R. Co. 81 N. J. L. 536, 80 Atl. 327, 35 L.R.A. (N.S.) 338; *Munroe v. Pennsylvania R. Co.* 85 N. J. L. 688, Ann. Cas. 1916A 140, 90 Atl. 254.

There was evidence in the case at bar that the stones in the wall where the accident



happened were loose, and were about to fall, and that this particular stone fell and injured the infant plaintiff. Under the cases referred to, this proof presented a *prima facie* case, from which, in the absence of satisfactory exculpatory evidence upon the part of the defendant, the jury might properly infer negligence.

The charge of the learned trial court, however, is open to a criticism, which necessitates the reversal of this judgment. Speaking of the degree of care which the law imposed upon this defendant, under the circumstances, the court charged that the defendant was required to use "that degree and amount of care which is within the range of human precaution [646] and foresight, to keep the wall in such condition as not to cause injury to a person upon the public highway."

This language manifestly misconceives the limitations of the rule of legal duty applicable to a landowner in a situation such as is presented here. That rule is circumscribed by the limitation of reasonable care to protect the public against defective construction, or disrepair of property adjoining the public highway, and is co-equal only with the care required of the ordinary prudent man under similar circumstances. *Blyth v. Birmingham Water Works*, 11 Exch. (Eng.) 781; *Daniel v. Metropolitan R. Co.* L. R. 5 H. L. (Eng.) 45; *Hill v. Winsor*, 118 Mass. 251; *Com. v. Pearce*, 138 Mass. 176, 52 Am. Rep. 264; *Kingsley v. Delaware, etc. R. Co.* supra.

The judgment must therefore be reversed and a *venire de novo* is ordered.

For affirmance: None.

For reversal: The Chancellor, Chief Justice, Garrison, Swayze, Trenchard, Parker, Bergen, Minturn, Kalisch, Black, Bogert, Vredenburg, Heppenheimer, Williams, JJ.—14.

#### NOTE.

#### Application of Doctrine of Res Ipsa Loquitur to Injury to Person in Highway Caused by Fall of Wall or Portion Thereof.

##### General Rule.

The cases are nearly all in accord with the holding of the reported case that where a person lawfully in the street is injured by the fall of a wall or a portion thereof the doctrine of *res ipsa loquitur* will be applied. *Kearney v. London, etc. R. Co.* L. R. 5 Q. B. (Eng.) 411, affirmed in L. R. 6 Q. B. 759, 40 L. J. Q. B. 285, 24 L. T. N. S. 913, 20 W. R. 24, 19 Eng. Rul. Cas. 1; *Connolly v. Des Moines Inv. Co.* 130 Ia. 633, 105 N. W. 400; *Nicoll v. Sweet*, 163 Ia. 683, Ann. Cas. 1916C 661, 144 N. W. 615; *Howe v. New Orleans*, 12 La. Ann. 481; *De Mun Estate Corp. v. Frank-* Ann. Cas. 1916E.—68.

*fort Gen. Ins. Co. (Mo.)* 187 S. W. 1124; *Vincett v. Cook*, 4 Hun (N. Y.) 318, 6 Thomp. & C. 562; *Mentz v. Schieren*, 36 Misc. 813, 74 N. Y. S. 889; *Lubelsky v. Silverman*, 40 Misc. 133, 96 N. Y. S. 1058; *Papazian v. Baumgartner*, 49 Misc. 244, 97 N. Y. S. 399; *Scheller v. Silbermintz*, 50 Misc. 175, 98 N. Y. S. 230; *Reynolds v. Starin*, 50 App. Div. 535, 64 N. Y. S. 141; *Hughes v. Harbor, etc. Sav. Assoc.* 131 App. Div. 185, 115 N. Y. S. 320; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Kearner v. Charles S. Tanner Co.* 31 R. I. 203, 76 Atl. 833, 29 L.R.A. (N.S.) 537. See also *Campbell v. Cluff*, 9 Ont. W. Rep. 401; *Atchison v. Plunkett*, 8 Kan. App. 308, 55 Pac. 677, reversed 61 Kan. 297, 59 Pac. 646; *May v. Berlin Iron Bridge Co.* 43 App. Div. 569, 60 N. Y. S. 550; *Meaney v. Horowitz*, 115 App. Div. 572, 100 N. Y. S. 975; *Waterhouse v. Joseph Schlitz Brewing Co.* 12 S. D. 397, 81 N. W. 725, 48 L.R.A. 157. Compare *Joyce v. Black*, 226 Pa. St. 408, 75 Atl. 602, 27 L.R.A. (N.S.) 863; *Freeman v. Carter*, 28 Tex. Civ. App. 571, 67 S. W. 527. Thus in *Vincett v. Cook*, 4 Hun (N. Y.) 318, 6 Thomp. & C. 562, it was said: "A building adjoining a highway, which is in such a condition as to endanger the safety of persons passing along it, is a nuisance. The law casts upon the owners of buildings so situated the duty of preventing their being or becoming dangerous to persons lawfully passing along the highway. Failure in such duty, and resulting damage, furnish *prima facie* evidence of negligence by the maxim *res ipsa loquitur*. The burden was thus cast upon the defendant of proving that the building, at the time of the accident, was safe, so far as diligent examination would show." And in *Lubelsky v. Silverman*, 49 Misc. 133, 96 N. Y. S. 1056, the doctrine of *res ipsa loquitur* was applied where it appeared that the plaintiff was injured through the fall on him of a portion of a shed over the sidewalk erected in the course of the defendant's building operations. To the same effect see *Scheller v. Silbermintz*, 50 Misc. 175, 98 N. Y. S. 230. So the doctrine has been applied where it appeared that the plaintiff was injured by the falling of a cornice into the street. *Nicoll v. Sweet*, 163 Ia. 683, Ann. Cas. 1916C 661, 144 N. W. 615. *De Mun Estate Corp. v. Frankfort Gen. Ins. Co. (Mo.)* 187 S. W. 1124. Compare *Joyce v. Black*, 226 Pa. St. 408, 75 Atl. 602, 27 L.R.A. (N.S.) 863. Likewise in *Papazian v. Baumgartner*, 49 Misc. 244, 97 N. Y. S. 399, it appeared that the plaintiff, passing along the street in front of a house of which the defendant was the lessee was stricken and injured by a piece of stone which fell from the building. The stone was broken off from the under side of a window sill, about twenty feet above the sidewalk. It was held that the case was one for the application of

the rule of *res ipsa loquitur*. Similarly in *Mentz v. Schieren*, 36 Misc. 813, 74 N. Y. S. 889, it appeared that while walking on a street the plaintiff was struck and injured by an iron guard that fell from one of the windows of the premises occupied by the defendants. It was held that there was a presumption of negligence sufficient to call for an explanation. To the same effect see *Connolly v. Des Moines Inv. Co.* 130 Ia. 633, 105 N. W. 400. In *Hughes v. Harbor, etc. Sav. Assoc.* 131 App. Div. 185, 115 N. Y. S. 320, it appeared that while the plaintiff was passing along the street, he was struck and injured by a brick which fell from the top of a building, a distance of one hundred feet. A fire had occurred in the upper part of the building several weeks before the accident which had damaged the walls and a contractor had been employed to repair the roof. It was held that the case was one for the application of the doctrine of *res ipsa loquitur*. In *Kearner v. Charles S. Tanner Co.* 31 R. I. 203, 76 Atl. 833, 29 L.R.A. (N.S.) 537, it appeared that the plaintiff's intestate while passing along a street was killed by the fall of a wall of a building occupied as a starch manufactory caused by an explosion of starch dust. It was held that the doctrine of *res ipsa loquitur* applied. The court said: "As well-regulated starch manufactories do not ordinarily explode while the business therein is conducted with a reasonable degree of care, it would seem as though, after such an explosion has taken place and has caused the death of a person lawfully using the highway while ignorant of the danger to which he was exposed, it is not asking too much to require the proprietor to explain, for the benefit of the representatives of the deceased, the cause of such explosion. As the business is entirely within the control of the defendant and its methods of manufacturing starch may be good, bad, or indifferent, it is called upon to explain when a fatal explosion occurs within its premises. In our opinion, the case is included within the doctrine aforesaid."

The application of the doctrine of *res ipsa loquitur* where a person in the street has been injured by the fall of a wall or a portion thereof does not have the effect of shifting the burden of proof. *Connolly v. Des Moines Inv. Co.* 130 Ia. 633, 105 N. W. 400, wherein the court said: "The jury was . . . told that when a building or a part thereof falls without apparent cause, and an injury results therefrom, proof of the accident and injury raises a presumption of negligence on the part of the owners. There is no controversy between counsel as to the rule thus announced, but the appellant contends that it shifted the burden of proof and required the defendants to prove their freedom from negligence on the whole case. The position cannot be main-

tained, however. A presumption of this kind does no more than to relieve the plaintiff from going forward with his evidence of the defendants' negligence until the defendant has produced his evidence on the subject. It has the force and effect of a *prima facie* case, and nothing more. If there be no evidence rebutting the presumption it may be sufficient to sustain the party in whose favor it arises, but it does not shift the burden of proof."

As to the liability of the owner of a building for injuries to a person on the highway caused by its collapse, see the note to *Earl v. Reid*, 18 Ann. Cas. 1.

#### *Limitations of Rule.*

It is only in the absence of explanatory circumstances as to the cause of the fall of a wall that negligence on the part of the owner is presumed as to a person on the highway injured by its fall. *Ryder v. Kinsey*, 62 Minn. 85, 64 N. W. 04, 54 Am. St. Rep. 623, 34 L.R.A. 557. "The rule, *res ipsa loquitur*, aids the injured person who does not know why a certain catastrophe happened, or does not fully know and needs the aid of a presumption to complete his case. But if he knows, just how it came to happen and just what caused it, and proves it, there is neither room nor necessity for a presumption." *Mac Anany v. Shipley*, 189 Mo. App. 396, 176 S. W. 1079, wherein it appeared that a suit was brought against the tenant of a building to recover damages for injuries sustained by the plaintiff by reason of being struck by a board blown from the building while he was passing along a walk. The petition charged general negligence only, but the plaintiff proved that the building was old and that the board was loose for a long time and its condition plainly apparent. It was held to be error for the trial court to give an instruction giving the plaintiff the aid of the presumption arising under the rule of *res ipsa loquitur*.

It seems that the doctrine of *res ipsa loquitur* is not applicable as against one not in control or possession of the premises at the time of the injury. *Cross v. Koster*, 17 App. Div. 402, 45 N. Y. S. 215. See also *Uggle v. Brokaw*, 117 App. Div. 586, 102 N. Y. S. 857. Thus in the case first cited an action to recover damages for personal injuries sustained by the plaintiff through the falling of a piece of a *terra cotta* ornament from the front of a building, the defendant was one who had been employed by the owner to decorate the building. The defendant had completed the work and left the premises several days before the accident. The evidence tended to show that some of the decorations were "flopping all over the building," and that one of them flew up with the breeze and

caught and dislodged the piece of terra cotta which struck the plaintiff. After the decorations had been placed and before the accident an employee of another contractor employed about the building placed ropes and fastenings over portions of the building covered by the decorations, but it was not shown whether they interfered with the decorations. It was held that the doctrine of *res ipsa loquitur* was not applicable.

**LOVEJOY**

v.

**DENVER AND RIO GRANDE  
RAILROAD COMPANY.**

Colorado Supreme Court—March 1, 1915.

59 Colo. 222; 146 Pac. 263.

**Railroads — Action for Negligence — Pleading.**

A complaint, which alleges that a railroad engineer in charge of a switching train, placed a five year old boy upon his engine and then started it without taking proper precautions for the boy's safety, does not allege that the railroad had failed to employ a competent engineer.

**Negligence — Attractive Nuisance — Railroad Engine.**

The doctrine that one who leaves an attractive and dangerous machine on his premises thereby invites children to play with it, and must use due care to protect such children from injury, does not apply, where a railroad engineer placed a five year old boy on his engine and then put it in motion without taking proper precautions for the boy's safety.

[See Ann. Cas. 1913A 115.]

**Contributory Negligence — Child of Five.**

A boy five years of age is presumed to be unconscious of the danger of riding on a locomotive, and is not contributorily negligent in permitting the engineer to place him thereon for the purpose of giving him a ride.

[See Ann. Cas. 1913B 969.]

**Master and Servant — Liability to Third Persons — Scope of Employment.**

A master is liable for the negligent acts of his servant only when those acts are within the scope of his employment, but where the servant fails to perform a clear duty imposed on him by his employment, the master is liable for such failure.

[See 133 Am. St. Rep. 869.]

**Railroads — Person on Locomotive by Permission of Engineer — Liability for Injury.**

Where an engineer, in sole charge of an engine and cars, placed a five year old boy on the engine to give him a ride and then started the engine without taking proper precautions for the boy's safety, so that he was thrown off and injured, even if the act of placing the boy on the engine was outside the scope of the engineer's employment so as not to render the company liable therefor, it was liable for the engineer's failure to perform the duty imposed on him by his employment to keep children off the engine. [See note at end of this case.]

Error to District Court, City and County of Denver: RIDDLE, Judge.

Action for damages. Manley Lovejoy, plaintiff, and Denver and Rio Grande Railroad Company, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

*John A. Rush* for plaintiff in error.

*E. N. Clark and R. G. Lucas* for defendant in error.

[223] SCOTT, J.—The complaint in this case alleged in substance that the defendant operates a spur or branch railroad track running from its main line near the city of Leadville, to the Ibox mining property. That on the day of the accident complained of, the engineer of defendant company was in full charge of the conduct and operation of the defendant's engine and train operated on the said branch or spur of [224] its road. That there was no conductor for the train, but that the engineer was in full charge thereof. That the engine was coupled to, and engaged in pushing, a string of freight cars, had a tender attached behind, and was then so being operated by the said engineer in the line of his employment. That the latter stopped the engine and cars where the said branch line crossed the public highway, which likewise runs between the city and the Ibox mining property.

It is then alleged that the plaintiff, a boy of five years, with a little brother and sister, approached the engine, when the engineer got down from his cab and called to the plaintiff saying he had a present for him. That the said engineer had taken the plaintiff and his brother and sister on the engine and given them a ride a few days prior. That the engineer asked plaintiff if he wanted to ride on the engine and thereupon lifted him up and into the cab, and then started his engine forward in pursuance of his employment, leaving the plaintiff unguarded and uncared for, and that in some manner the plaintiff fell off the engine, and the wheels of the ten-

der ran over and crushed one of his legs so that it became necessary to have it amputated. The court sustained a demurrer to the complaint upon the ground that it did not state facts sufficient in law to constitute a cause of action.

The plaintiff elected to stand upon his complaint and brings the case here for review.

The acts of the engineer alleged to constitute negligence are: (a) that there was a duty resting upon the engineer in this case, to prevent the child from being placed on the engine; (b) that there was a duty resting on the engineer to safely remove the boy from the engine before starting to operate it; (c) that there was a duty resting on the engineer, after having placed the plaintiff on the engine and not having caused him to be removed therefrom, [225] to have safely guarded him while the engine was in motion. That the engineer by his neglect and failure to perform all or any one of these duties was guilty of such negligence as will make the defendant liable for the injury.

Other acts of negligence alleged are: (1) that there was a duty resting on the company to use great caution in the selection of an engineer who is careful and competent, and that the defendant did not exercise proper care in selecting the said engineer, and for such reason the defendant is guilty of negligence in this case; (2) that the said engine was a powerful and dangerous instrument, especially attractive to children, and therefore the failure to select a competent engineer was equivalent to negligently leaving such dangerous instrument without guard and in an unsafe condition.

Admitting the duty of the defendant to employ competent and skilled engineers, there is no sufficient allegation in the complaint of the non-observance of such duty, nor is there any allegation at all that the engineer here was not competent or skilled as such. That he may have been unduly kind-hearted and devoted to children, to the possible neglect of a duty as charged here, is not such a matter as may reasonably be foreseen in his employment, conceding his qualifications otherwise.

Neither are we able to see how the turntable doctrine is applicable to the facts in this case. This doctrine is well stated in the brief of defendant in error to be:

"The leaving or maintaining of a dangerous and attractive machine, or other instrument or agency upon one's premises, under circumstances which naturally tend to attract or allure young children of immature judgment, and to induce them to believe that they are at liberty to enter and handle or play with it, is tantamount to an implied invitation to enter. Hence, a corresponding duty is imposed upon the owner or occupant of the premises to

prevent the [226] intrusion, or to protect from personal injury such children as may be so attracted and thus induced to enter, and who are incapable of appreciating the attending dangers. The doctrine is founded upon the principle that when one sets a temptation before young children under circumstances which in law is equivalent to holding out of an inducement to enter, he must use ordinary care to protect them from harm. It is but applying the general rule that when one induces or invites another upon his premises, he must use ordinary care to avoid injuring him."

The leading, if not the first American case upon this subject, is that of *Sioux City, etc. R. Co. v. Stout*, 17 Wall. 657, 21 U. S. (L. ed.) 745, which involved an injury to a child by leaving a railroad turntable unlocked, and therefore in an unsafe condition for children who might naturally be attracted thereto. The reason for the rule was stated in that case to be:

"As it was in fact, on this occasion, so it was to be expected that the amusement of boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of a broken latch. This was a heavy catch, which, by dropping it into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus [227] reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention that it ought to have given, that it was negligent and that its negligence caused the injury to the plaintiff."

This cannot be well said to apply to the instant case of an engine being then operated and in direct charge and control of defendant's engineer. So that, if the defendant is to be held liable, it must be by reason of the acts and conduct of the engineer so alleged to constitute negligence.

It will be observed that under the allegations of the complaint, the engineer was in sole charge and control of the engine and train, and for such reason there can be in

this case none of those distinctions sometimes indulged in, arising in cases where the train was in charge of a conductor or other train-managing official, and where the injury occurred through the alleged negligence of the engineer alone.

The plaintiff was of that age when he must be presumed to be unconscious of the danger incurred in being placed on the engine, or to be possessed of a judgment to resist the temptation to his childish curiosity, and pleasure, offered by the invitation and act of the engineer. Hence, there can be no contributory negligence, and we have only to determine the question of negligence for which the defendant company may or may not be held.

That the injury occurred by reason of, and was due to the alleged acts of the engineer, is not disputed, but it is argued that in so doing he was not acting within the actual or apparent scope of his authority, and for such reason the defendant is not responsible.

The doctrine in this regard may be said to be as in substance stated by our text writers:

"In order to make a master liable in tort for an injury caused by the wrongful or negligent act of his servant, it must appear that the act was within the actual or apparent scope of the servant's authority; for if the servant was not [228] acting in the due course of his employment for his master, but in contravention of his duty to him and against his interest, the master is not liable. Addison on Torts, § 1809."

"The liability of the master for intentional acts, which constitute legal wrongs, can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort, which the master neither directed in fact, nor could have been supposed, from the nature of his employment, to have authorized or expected the servant to do." Cooley on Torts, 635.

"The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but for the wrongful acts he was suffered to do, that the master must respond." Cooley on Torts, 534.

But where there is a clear duty of the servant and where he fails or neglects to perform such duty, and such failure results in, and is the proximate cause of an injury, then the master is liable for the negligent acts of his servant.

In the case of *Euting v. Chicago, etc. R. Co.* 116 Wis. 13, 92 N. W. 358, 60 L.R.A. 158,

96 Am. St. Rep. 936, the principle that a master is not responsible for the torts of a servant when the servant has departed from his employment, as distinguished from the question as to whether he had departed from, or neglected his duty in the line of employment, is so clearly stated as to justify the insertion of that portion of the opinion here. In that case the court stated:

"So the situation to be considered upon the motion is: The defendant placed these dangerous explosives in the [229] custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the tracks as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty resulting from his employment, namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving [230] the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Pittsburgh, etc. St. L. R.*

Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 8 L.R.A. 464, 21 Am. St. Rep. 840, as follows:

"A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable, for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes the negligence of the master."

That a railroad engine being operated as was the one in question, was an unsafe and dangerous place for a child of tender years, is not only alleged in the complaint, but must be assumed as a matter of common knowledge.

Counsel contends that the act of the engineer in placing the child upon the engine alone was the proximate cause of the injury, and that such act was without the scope of his authority, therefore no liability attached.

Even if we concede for the moment that there was no liability upon the part of the defendant for the mere act of placing the child on the engine, yet even under the authority of cases so holding, the child was on the engine, in a concededly dangerous position, with the positive knowledge of the engineer, who then placed his engine in motion. Under such circumstances it was his duty to put the boy safely off the engine, which if he had done, the accident would in all human probability have been avoided.

[231] This is nothing more than the application of the doctrine of the duty to exercise reasonable care. The reason for the rule, and the distinction made in this class of cases is well stated in the case of *Chicago, etc. R. Co. v. West*, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380, as follows:

"Conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer, and had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would be liable. If that were all there is of this case, it is plain the judgment would be contrary to law, and should be set aside. The action is not based on any such ground. It is sought to recover for a very different reason. It is because when plaintiff was on the engine, no matter how he got there, it was the duty of the engineer to put him off, and in doing so he

was obliged to observe reasonable care. The rules of the company, in evidence, shows it was unlawful for any one, other than certain employees, to ride upon the engine. Should any stranger get upon the engine, it would clearly be the duty of the engineer to put him off, and in doing so he would be acting within the general scope of his employment, and if, in the discharge of that duty, he negligently or wantonly injured such person, the master would be liable. In this case it may be conceded plaintiff was wrongfully on the engine, whether he was there by the invitation of the engineer or by his own wrongful conduct, and it was the duty of the engineer to cause him to get off. At the time of the accident plaintiff was about seven years old, and, of course, was too young to observe much, if any, care for his personal safety. It was the duty of the engineer to observe care, even if plaintiff was in the wrong in getting upon the engine. It was admitted by counsel at the trial, 'the engineer has no right to throw a boy off or to kick him off.' That concession is in harmony with the law that makes it [232] his duty to observe reasonable care, under the circumstances, in putting a person off the engine, even when wrongfully there."

This is but to apply the same reasoning upon which is based the rule of last clear chance, though not to the same extent as in the uniform cases in this court, for the peril of the plaintiff here was within the actual knowledge and presence of the engineer, with the undisputed opportunity and power to have avoided the accident. The present case can be no different in principle than if the plaintiff had been between the rails in front of the engine, and plainly visible to the engineer when he put the engine in motion. There may be a difference in degree of danger, or in the certainty of injury, but there is obvious peril in either case.

The right to recovery will scarcely be questioned under the circumstances stated. *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555. 25 So. 251, 72 Am. St. Rep. 943; *Burg v. Chicago, etc. R. Co.* 90 Ia. 106, 57 N. W. 680, 48 Am. St. Rep. 419.

In *Missouri, etc. R. Co. v. Tonahill* (Tex.) 54 S. W. 419, a boy eleven or twelve years old and of immature judgment and discretion, in an attempt to board a train while moving out of a depot, fell and was injured. It was held to be the duty of the employees of the company to use ordinary care to prevent the attempt, and that the company was liable.

So, where a boy ten years old and of ordinary intelligence was injured while riding on the pilot of the engine of a work train, it was held that the employees had no right to permit any one to ride on the train, and

that they were guilty of negligence in failing to use care to prevent children from riding thereon. St. Louis S. W. R. Co. v. Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539.

In the case of an injury to a boy six or seven years of age, it was held in Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855, that:

[233] "It is negligence *per se* to permit a child of such tender years to climb on and ride upon a car loaded with loose earth, that is liable to slip and throw the child off at any time. In such case the statement of the facts makes out a case of negligence, and the opinion of witnesses is not needed to show that such an act is negligence. An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances."

In Harris v. Southern R. Co. (Ky.) 76 S. W. 151, in the case of a boy thirteen years of age, it was said:

"If appellant was directed or invited by the engineer and fireman, or either of them, to go upon the tender and shovel coal for their convenience, and they started the train to Louisville, and after it was moving they directed him to get off the train while it was in motion, and under such circumstances he attempted to alight from the train, and as a result thereof he received his injury, the appellee was responsible, unless at the time he attempted to alight, the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk."

In the case of a child four years of age being permitted to ride in an exposed and dangerous place upon a street car, East Saginaw City R. Co. v. Bohn, 27 Mich. 503, Judge Cooley writing the opinion, it was said of the duty of a railroad company:

"That the duty of the railway company not to permit persons to ride in unsafe places on their cars is the same, and rests upon the same reasons, with their duty not to make use of vehicles wholly unsafe, appears to me entirely clear."

It was further said in that case:

"If, however, it was dangerous for passengers to stand or sit on the front platform, where the driver himself would [234] be, it would not only be his right and duty to notify any who might occupy it of the danger, but if they were of an age not to be likely to understand the risk, or able to judge for themselves, or if he knew them to be insane or otherwise unable to exercise discretion, the duty would not be fully performed without an enforcement of proper regulations to compel their occupying positions less exposed."

And again, the court said:

"The action is for negligence in carrying him in an exposed and dangerous place on the car, and the negligence was the same whether he was compelled, or only permitted to ride there."

The principle upon which these cases rest has been fully upheld by this court in the case of Pueblo St. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116, wherein it was held to be negligence for the motorman of a street car to permit a boy thirteen years old, who is not a passenger, to ride upon the car for amusement, and to alight while the car is in motion, for the purpose of turning the trolley, and that the company is liable for such negligence. It was there said of the duty of the motorman in charge of the car to exercise reasonable care, regardless of instructions and regardless of the fact that, generally speaking, the acts of the motorman were not within the scope of his actual or apparent authority:

"The motorman was charged with the management and control of the car; it was his special duty, regardless of instructions, to exercise reasonable care and diligence in operating it so as to prevent injury to those with whom the relation of carrier and passenger did not exist. The evidence discloses that appellee was permitted to ride upon the car for a period of something over two hours; allowed to alight while the car was still in motion, for the purpose of turning the trolley; he was not upon the car as a passenger, but there because the permission granted to ride and turn [235] the trolley afforded him amusement, which would be naturally attractive to one of his years. To allow children to make a playground of a moving street car, or convert that vehicle when so moving into an article of amusement, is certainly exposing them to serious, if not fatal, injuries, and it is as much the duty of the employees of a street car company to exercise reasonable care and diligence in preventing those not capable of appreciating the danger to which they would be exposed on account of their childish proclivities to amuse themselves in the manner appellee did, as it is their duty to prevent injury to persons of like age exposed to injuries in other ways from the same source. Had the motorman not permitted appellee to ride upon the car merely for amusement, alight therefrom recklessly while in motion, but, on the contrary, had exercised a reasonable degree of care in preventing him from so doing, the injury might not have occurred."

Whatever may be said of the act of the engineer in the instant case, as it relates to the invitation to the plaintiff to come upon the engine, the fact remains that such engineer, under the allegations of the complaint, permitted him to remain in that dangerous

position, and proceeded to put his engine and train in motion without effort to protect him from danger, which it was his clear duty to do.

In the well considered case of *Whitehead v. St. Louis, etc. R. Co.* 99 Mo. 263, 11 S. W. 751, 6 L.R.A. 409, where a boy of fourteen years of age was injured, through the negligence of the trainmen, and while the boy was riding in the caboose of a freight train, forbidden to carry passengers, but with the acquiescence of the conductor, though the lad was not a passenger for pay, the court said:

"Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it, either with or without the payment [236] of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty toward his master, but that is a matter of no consequence here. To all outward appearance, as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority to permit the boy to ride on the train. It also follows from what has been said, as well as from the authorities cited, that the defendant did owe a duty to the boy. Owed a duty to him even on the theory that he was not in the full sense of the term a passenger."

As supporting the rule as to duty, and in holding the defendant company to the exercise of reasonable care, in similar cases, the following authorities may be cited: 23 Am. & Eng. Enc. of Law (2d ed.) 748; *Galveston, etc. R. Co. v. Zantlinger*, 93 Tex. 64, 53 S. W. 379, 47 L.R.A. 282, 77 Am. St. Rep. 829; *Pittsburg, etc. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Kansas City, etc. R. Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Brennan v. Fair Haven, etc. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Buck v. People's St. R. etc. Light, etc. Co.* 108 Mo. 179, 18 S. W. 1090; *Danbeck v. New Jersey Traction Co.* 57 N. J. L. 463, 31 Atl. 1038; *Metropolitan St. R. Co. v. Moore*, 83 Ga. 452, 10 S. E. 730; *Chicago, etc. R. Co. v. West*, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380; *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488; *Bucci v. Waterman*, 25 R. I. 125, 54 Atl. 1059; *Biddle v. Hestonville, etc. R. Co.* 112 Pa. St. 551, 4 Atl. 485; *Stone v. Chicago, etc. R. Co.* 88 Wis. 98, 59 N. W. 457.

It is urged by the defendant company that a railroad company has the right to carry passengers and freight on different trains, and when such provision is made, the conductor

[237] and brakemen have no implied authority to receive passengers upon freight trains.

The rule must be conceded, but it can have no application here. It is not claimed or pretended that the plaintiff was a passenger. The same duty is upon the engineer, whether of a passenger train, freight train, or where under any circumstances the engine is being operated, to keep persons without right off his engine, and to safely put them off if he in time discovers them there, and particularly so if such persons are children not of the age of discretion.

Counsel for defendant cite many cases where in railroad companies have been held not liable in cases of injury to boys by climbing on moving trains, without the permission or knowledge of the employees of the company. But the reason assigned for this rule, in substantially all these cases, is clearly stated in the case of *Wilson v. Atchison, etc. R. Co.* 66 Kan. 183, 71 Pac. 282, to be:

"They (trains) pass and repass through every community with such frequency, the peril of jumping upon and from moving trains is so well understood, and the task of keeping boys from stealing rides and hopping upon cars of trains slowly moving through towns or railroad yards, is so impracticable and burdensome as to make the rule invoked inapplicable. So to guard trains as to keep boys entirely away from them would require a host of employees, and fix a standard of responsibility which has never received countenance in this state. Such a standard of duty and responsibility cannot be invented and applied by the court without legislation."

No such reason exists in this case. No extra employee was required, but, on the contrary, the engineer, who was the master of the train and in personal charge of the engine, with his own hands placed the boy on the engine, and knowingly left him to shift for himself, while the engine was put in motion.

[238] It will be observed that in the Kansas cases, as in many such cases, the boy was found to be an intelligent boy, twelve years of age, who was familiar with the running of trains, and who knew and appreciated the danger of getting on and off a moving train, and that he was a conscious trespasser and responsible for his own negligence and injury.

It is true that cases are cited which apparently hold to a contrary doctrine from that here announced, but we must decline to follow them. They are not founded in either sound reason or justice. It is the universal rule that railroad corporations are held to the exercise of due care upon the part of their servants, and they should not be permitted to palpably violate this duty, and then hide behind the too often misconstrued and misapplied rule as to scope of authority.



The acts of the engineer as alleged in this case, constitute but one continuous transaction. He got down off his engine, induced the boy, unconscious of his danger, to permit him to place him on the engine, left him unguarded thereon and proceeded to put the engine in motion in the regular course of his employment, with the resulting accident. This was inexcusable negligence upon the part of the servant while engaged in the performance of his duties, however kindly may have been his purpose to please and amuse the child.

The judgment is reversed with instruction to overrule the demurrer, and to proceed with the trial of the case in accordance with the views herein expressed.

Gabbert, C. J. and Carrigues, J., concur.

#### NOTE.

The reported case holds that a railroad company is liable for injuries to a young child who is taken into the engine cab by an engineer, and who falls therefrom and is injured while the engine is being started. The decision proceeds on the theory that while the act of the engineer in taking the child into the cab is outside the scope of his duty, once the child is there he is in a dangerous place on the premises of the railroad and it is the duty of its employees to see that he is promptly and safely removed therefrom. The cases discussing the liability of a railroad company to a person wrongfully riding on a train by the permission or direction of a railroad employee are reviewed in the notes to *Vassor v. Atlantic Coast Line R. Co.* 9 Ann. Cas. 535; *Grimshaw v. Lake Shore, etc. R. Co.* Ann. Cas. 1913E 571, and *Illinois Cent. R. Co. v. O'Keefe*, 61 Am. St. Rep. 68.

#### CITY OF CINCINNATI

v.

#### PUBLIC UTILITIES COMMISSION.

Ohio Supreme Court—March 9, 1915.

91 Ohio St. 331; 110 N. E. 461.

#### Public Service Commission — Review of Municipal Regulation.

The requirements of a city ordinance, directing a street railway company to construct extensions of its lines, are subject to review by the public utilities commission, which is authorized, upon hearing, to determine

whether the requirements of such ordinance are just and reasonable.

[See note at end of this case.]

Same.

Under the provisions of section 614-51, General Code, the public utilities commission may determine the practicability of additions and extensions of street railway lines required by a city ordinance. In reaching such determination the commission may consider the physical conditions of the proposed route as well as the necessary plan of operation of cars thereover. If upon such hearing the commission finds that operation of cars over the proposed route would entail unusual and unwarranted dangers and jeopardize the lives of passengers, it is authorized to relieve the street railway company from the obligations sought to be imposed by the ordinance complained of. Such order of the commission will not be reversed upon review by this court when it does not appear from a consideration of the record that it is unlawful or unreasonable.

[See note at end of this case.]

(Syllabus by court.)

Error to Public Utilities Commission. AFFIRMED.

[331] On December 16, 1913, the council of the city of Cincinnati passed an ordinance, No. 701, 1913, which, in substance, directed The Cincinnati Street Railway Company and The Cincinnati Traction Company within seventy days after the passage of [332] the ordinance to construct a double-track extension over the so-called Warsaw avenue route from the intersection of Glenway avenue and Wilder avenue northwestwardly and westwardly over Glenway avenue to the intersection of Glenway and Seton avenues.

The companies named filed their complaint with the public utilities commission under Sections 614-44 and 614-46 of the General Code. They contend that such ordinance should not be enforced against them for the reason that the requirements of the ordinance are unjust and unreasonable; that thereby said companies are required to construct and maintain a street railway line over Glenway avenue, which is unstable and unsafe, due to the sliding character of the ground and extreme grade; that the construction of the Glenway avenue route as proposed involves unusual operating difficulties with respect to grades, curves and otherwise, and that operation thereon would jeopardize the lives of passengers.

To the complaint of said companies the city of Cincinnati filed its answer before the commission in which it insists that the ordinance in question is just and reasonable in its requirements, and denies that the portion of Glenway avenue over which the ordinance directs the construction and operation of said

street railway line is unstable or is of extreme grade, or that its operation would jeopardize the lives and limbs of passengers.

Upon the issues thus made the case was heard by the public utilities commission, at the conclusion [333] of which hearing the commission found that the additions and extensions required by said ordinance were not practicable and ordered that said The Cincinnati Street Railway Company and The Cincinnati Traction Company be relieved from any and all obligations imposed by said ordinance and that said ordinance be held for naught.

Thereupon the city of Cincinnati filed in this court its petition in error, seeking to have this court set aside and reverse the order made by the public utilities commission and order a dismissal of the appeal of The Cincinnati Street Railway Company and The Cincinnati Traction Company.

*Walter M. Schoenle* for plaintiff in error.

*Timothy S. Hogan and Joseph McGhee* for public utilities commission.

*Joseph Wilby and Ellis G. Kinkad* for defendant in error.

MATTHIAS, J.—The ordinance in question was passed under authority of Section 614-51, General Code. That section also provides that the requirements and orders of the city council, respecting additions and extensions by public utilities, shall be subject to review by the public utilities commission.

Upon the hearing of this matter considerable evidence was adduced before the commission, and it viewed the territory and inspected the proposed route and also observed the operation of cars over the Warsaw avenue route.

[334] This proceeding comes into this court by virtue of Section 544, General Code, which provides that "A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

Under Section 542 of the General Code such order of the commission must be regarded as *prima facie* reasonable. It is to be borne in mind then, at the threshold of our consideration of this case, that the presumption obtains of regularity of the proceedings of the public utilities commission, and that its conclusions were fully justified by the evidence before it. If, therefore, it does not appear from the record that the order made herein by the public utilities commission was an unlawful and an unreasonable one it is the duty of this court to affirm its action.

Apparently there is no contention before the commission as to the real necessity for

the provision of additional service to meet the demands of passenger traffic to and from Price Hill, a residence section of the city of Cincinnati. Efforts had been made, both by the city authorities and these companies, to provide some additional service over what is known as the Warsaw-Elberon avenue route, which would require an extension of the Elberon avenue line, now in operation, from Eighth street to Warsaw avenue; but it was impossible to procure the necessary consent of property owners [335] along that section of Elberon avenue. Hence the relief sought could not be obtained over that route.

In the hearing before the commission apparently all questions were eliminated save that of danger growing out of the operation of the proposed line from Wilder avenue to Seton avenue. Two elements of danger of operation were presented to and considered by the commission. The evidence shows that Glenway avenue for a distance of fifteen hundred feet above its intersection with Wilder avenue has a nine per cent grade, and that portions thereof have been built upon filled ground, by reason of which condition slides have become apparent. Skilled experts, who had examined and investigated the conditions with care, testified that if the proposed double-track line be constructed the added weight would inevitably make such sliding of the street more frequent and more pronounced, and would render the operation of cars thereon dangerous.

The other element of difficulty and danger arises from the necessary operation of the proposed line over the "balloon loop," an ingenious combination of tracks of balloon shape at the intersection of Glenway avenue and Wilder avenue where the Warsaw avenue line makes such a sharp turn that this arrangement of tracks is required.

The operation of the proposed Glenway avenue line would require that the outgoing cars cross the "balloon loop" at two intersections and, under the proposed method of operation, the inbound cars would take their course over what is now a part of [336] this "balloon loop" track. Then all cars over the proposed line, as well as those over the Warsaw avenue line, would pass either over or through the "balloon loop."

Under the present operation, during the best weather conditions, the number of cars passing through the "balloon loop" and which must use the same piece of track, is from sixty to seventy per hour, which the evidence shows is as many as may safely be operated under present conditions.

The proposed line would not afford any relief unless more cars be used than are now employed. If more cars cannot be safely used through the loop it seems clear that the danger would be augmented somewhat by

taking cars across the loop, and at the same time continue the required operation of cars over the Warsaw avenue line.

The record shows the proposed Glenway avenue line would strike the "balloon loop" at a grade of nine per cent and that such grade extends fifteen hundred feet above the loop. From the evidence before them, and actual inspection of the situation, the members of the commission found the conditions at that point to be such that an order that would cause further congestion would entail a hazard that should not be imposed.

It was contended by the city that the dangers of operation on account of the steep grade could be obviated, or at least minimized, by placing a derailing switch four hundred feet above the "balloon loop." If that be done there would still be a nine per cent grade extending to the "balloon loop." It [337] was found by the commission that in most of this distance of four hundred feet it would not be possible for the motorman to see far across the "balloon loop" and up the other side and observe Warsaw avenue cars coming down.

There was evidence that the sliding of Glenway avenue could be prevented by the erection of retaining walls, and it is contended that the commission should have entered a decree approving the ordinance upon the condition that the city construct the necessary retaining walls. The record does not disclose evidence from which the commission could have determined the character, size or location of retaining walls necessary to prevent sliding of the street. It was suggested during the hearing that such requirement be made of the city, but the statute authorizing a review of such ordinance by the public utilities commission does not confer upon the commission any power to legislate for the city or to require the municipal authorities to construct any improvement or exact the performance of any duty by them. Jurisdiction is conferred upon the commission to hear and determine, whether the requirements and orders of the council, as to additions and extensions by public utilities, are unjust and unreasonable. These requirements were embraced in the ordinance and were brought into question by the complaint of the street railway companies. Under its terms, plans of construction of these extensions are required to be submitted by the companies within seventy days and the work of construction to begin within forty days after the approval [338] of such plans. When the issue was made before the commission it was authorized to inquire into conditions affecting the matter of the proposed extension and pass upon the justness and reasonableness of the requirements of the ordinance. It had no other duty and can exercise no further

power in relation to such matter. It is authorized only to pass upon conditions presented by the evidence and to determine whether or not such ordinance is, in its requirements, just and reasonable, and whether it should be enforced against such public service companies.

It is urged too that the court may, and should, modify the order of the commission in the regard stated, but there is no evidence in the record upon which, if authorized, the commission or this court could base such conditional decree approving said ordinance. Furthermore, the erection of retaining walls would not meet the second serious element of danger found by the commission rendering the proposed extension impracticable—the increased operation of cars through the "balloon loop."

From a consideration of the record it cannot be concluded that the order of the commission is unjust or unreasonable. It is, therefore, affirmed.

Judgment affirmed.

Nichols, C. J., Johnson, Donahue, Wanamaker, Newman and Jones, JJ., concur.

#### NOTE.

#### Review by Public Service Commission of Municipal Regulation of Public Service Corporation.

The power of a municipality to regulate public utilities being a power delegated as an incident to the municipal existence, it seems to be the general opinion that the more specific delegation of the same power to a public service commission gives to the commission the power to overrule the action of a municipality unless that action has resulted in a contract which is within the protection of the constitution. *Tulsa St. R. Co. v. State*, 26 Okla. 559, 110 Pac. 373; *State v. Superior Court*, 67 Wash. 37, Ann. Cas. 1913D 78, 120 Pac. 861, L.R.A.1915C 287; *Manitowoc v. Manitowoc, etc. Traction Co.* 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056. And see the reported case. The reasons underlying that view were clearly stated in *Troy v. United Traction Co.* 202 N. Y. 333, 95 N. E. 759, which involved an attempt by a municipality to annul by ordinance an order of the Public Service Commission. The court said: "The public service commission was established, among other things, for the purpose of promoting uniformity and consistency in authoritative directions to be given to public service corporations and to constitute a tribunal trained to consider and determine controversies and problems relating to such corporations and to direct and supervise their relations to and dealings with the public as their patrons. A construction of the Public

Service Commissions Law that would permit any municipality to disregard and set at naught the orders of the public service commission in cases like the one now before us would not only cause confusion of authority but would make of no effect some of the work of the commission for the doing of which it was established." In *Dawson v. Dawson Telephone Co.* 137 Ga. 62, 72 S. E. 508, it was held that the granting of a franchise to a telephone company by an ordinance providing that the company "agrees and binds itself by this ordinance that the rates charged shall be" etc. and the acceptance of the franchise by the company does not prevent the company from increasing the charges by permission of the railroad commission. So in *Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295, it was objected to the validity of an order of a public service commission fixing water rates that the rates had been fixed previously by the ordinance chartering the company. The court said: "That the Public Service Commission may change any intrastate rate for service rendered to the public, when to do so will conflict with no paramount law or constitutional inhibition, we have no doubt. The very spirit and purpose of the act by which the commission is established and performs its functions, affirms that it may do so. The broad and general powers prescribed for it by the statute include that of general rate regulation. A reading of the act fully discloses that the Legislature meant to delegate to the Public Service Commission the administrative supervision and regulation of all service rendered to the public throughout the whole of the state. That it did this for the general welfare is most apparent. Modern conditions giving rise to such legislation in the interest of all, are so well known as to need no recounting here. . . . Though the grant and acceptance of the franchise wherein certain rates were fixed, created a contract between the water company and the city of Benwood, the rates thereby fixed are nevertheless cognizable for revision by the Public Service Commission under the broad powers delegated thereto, unless prior to the delegation of those powers the Legislature had expressly delegated power to the City of Benwood which authorized the city to contract inviolably for the rates mentioned in the franchise for the period stated therein. Rate-making is a legislative act. It is inherent in and belongs primarily to the Legislature. The rate-making power is a power of government—a police power of the state. The City of Benwood, at the time of the granting of the franchise, had no rate-making power that could bind the State, if the legislature of the sovereign State had not theretofore delegated the same to the city. And if such delegation or grant of rate-making power

was made to the city prior to the delegation of general and state-wide powers in the same particular by the Legislature to the Public Service Commission, the language relied upon as evidence of such delegation or grant to the city must be clear and express."

## LOUISVILLE AND NASHVILLE RAILROAD COMPANY

v.

O'BRIEN.

Kentucky Court of Appeals—March 16, 1915.

163 Ky. 538; 174 S. W. 31.

### Carriers of Passengers — Liability for Injury — Banana Peel on Car Step.

A carrier is not liable for injuries to a passenger slipping on a banana peel on a car step while alighting, unless the trainmen knew of its presence on the step, or it had been there such a length of time before the accident as would impute notice to them.

[See note at end of this case.]

### Duty to Inspect.

A carrier, though required to inspect its trains for the safety of its passengers, need not keep up a continuous inspection and is not chargeable with knowledge at each moment of the condition of every part of its train.

[See 4 R. C. L. tit. *Carriers*, p. 1194 et seq.]

### Duty to Anticipate Unusual Peril.

A carrier of passengers need not anticipate unusual and unexpected perils to its passengers.

Appeal from Circuit Court, Hart county.

Action for damages. Louis O'Brien, plaintiff, and Louisville and Nashville Railroad Company, defendant. Judgment for plaintiff Defendant appeals. The facts are stated in the opinion. REVERSED.

*Watkins & Carden, Sims & Rodes and Benjamin D. Warfield* for appellant.

*H. L. James and McCandless & Larimore* for appellee.

[539] MILLER, C. J.—This is an appeal from a judgment in favor of the appellee, Louis O'Brien, for \$1,500.00 against the appellant, who was the defendant below, for personal injuries received by O'Brien in stepping or falling from one of appellant's moving trains.

The accident came about in this way: On October 6th, 1913, O'Brien boarded appellant's local passenger train at Gaither's Station, south of Elizabethtown, and paid his fare to Dividing Ridge, a flag station about 25 miles further south. The train reached Dividing Ridge at 7:48 o'clock P. M.

O'Brien and his companion, Thomas, rode in the "smoker," which was immediately in front of the ladies' car. As the train approached Dividing Ridge, the porter and flagman called out the station in the "smoker" and in the ladies' car. The flagman then took his station at the steps of the ladies' car, which was next to the "smoker," for the purpose of assisting passengers to alight from the train. The conductor took his [540] station at the other end of the "smoker," next to the baggage car, for the purpose of seeing that the baggage was properly unloaded.

Immediately after the station Dividing Ridge had been called out O'Brien and Thomas got up and started to leave the "smoker" by the rear door and platform next to the ladies' car. The train was still moving, and was about 100 yards from the station. O'Brien testified that as he started down the steps of the "smoker," and when he had reached the third step from the top, he stepped on a banana peel, and slipped off the train, feet foremost. Thomas was immediately behind O'Brien when he fell from the train, and after the train had stopped, Thomas went back and found him at a point about a hundred yards from the station, and sitting upon the ground in an unconscious condition. He, however, soon regained consciousness.

A physician was called, and O'Brien, accompanied by the physician, one of the railroad employees, and Thomas, walked to Gardner's residence, in the neighborhood, where he remained all night. The doctor dressed his bruises, and the next morning O'Brien rode in a buggy to the house of a friend, a few miles distant, where he remained some three or four days, and then returned to his home near Gaither's Station.

Although O'Brien was 63 years old, no bones were broken, and his injuries do not seem to have been serious or permanent.

After the accident O'Brien did not immediately claim that he had slipped on a banana peel, and he did not say anything about it to Gardner or to Mrs. Gardner, or to any one present, except to Dr. Craddock, who dressed his wounds. Dr. Craddock testified that either before or while he was dressing O'Brien's wounds, "he said he slipped on something between the cars, and he thought it was a banana peel." With this exception, O'Brien made no claim that he had slipped upon a banana peel, for quite a while after the accident.

Thomas, who was immediately behind O'Brien when he fell, did not see a banana

peel, and says he could not tell whether O'Brien slipped off or fell off; and he further says he told the conductor or brakeman, he did not know which it was, that O'Brien had fallen off the train.

[541] Starks, the flagman, who came to the end of the ladies' car next to the "smoker," and was standing there while the train remained at the station, did not see O'Brien fall from the steps, and knew nothing about it until a passenger coming out of the "smoker," presumably Thomas, told him a man had fallen off the train some distance down the track. Starks reported that fact to Parsons, the conductor, who then went through the train for the purpose of ascertaining whether any of his passengers were missing, but missed none. The train left Dividing Ridge without any of the trainmen having learned that O'Brien had fallen from the train; but at the next station the conductor telegraphed to the proper officer of the road, giving him the information he had received about a man falling from the train, and asking that an investigation be made. As a result of that telegram, one of the railroad employees at Dividing Ridge found O'Brien shortly after Thomas had reached him, and assisted him to the Gardner residence.

There is no evidence that any one saw a banana peel on the car step at any time, except the testimony of O'Brien, that he saw it just as he stepped on it.

There is no evidence that any one on the train ate a banana on that trip, or that a banana was sold on the train, or that any one had a banana on the train on that trip. The only testimony even tending to show there was a newsboy or "butcher" on the train, or that there were any bananas on the train, is that of O'Brien, who testified upon that subject as follows:

"Q. Did you see any bananas on that train? A. I didn't see the bananas on the train; only saw a fellow selling them, I suppose; he had them there in his basket. Q. Tell what you saw? A. They were sitting right there at the left-hand side of the door as we came out, on some kind of a basket or box with a lid on it. He had them in his basket. Q. Do you know who had those bananas? A. No, sir. Q. Do you know what they called him? A. He goes by the name of 'butcher boy.' I don't know what his other name is. Q. Did you see him on the train that night? Yes, sir; I seen him going through the train. Q. With anything? A. No, sir; he didn't have anything selling it, unless it was cigars. He didn't have any in his hand."

Upon the issue as to whether there was a "butcher boy" on the train O'Brien is contradicted by the three [542] members of the train crew, all of whom testified there was no "butcher boy" on the train on that trip

It was a local train, and there was very little or no necessity for a "butcher boy;" and the news company who owned the business of selling newspapers and edibles upon the train, only put an agent on these local trains occasionally.

But, giving O'Brien's evidence its fullest force, it does not show that any bananas were sold on the train, or that any one had bananas on the train.

Moreover, there was no evidence whatever as to when, where or by whom the banana peel was thrown or placed on the car step, or that defendant had any notice thereof, either actual or imputed.

Dividing Ridge Station was on the east side of the tracks; and Sonora, 14 miles north of Dividing Ridge, was the last train stop at which the station was on the east side of the track. At the two intervening stations between Sonora and Dividing Ridge, the station was on the west side of the track, and, of course, the passengers alighted and boarded the train from that side.

Under this evidence appellant insists that its motion for a peremptory instruction to find for the defendant should have been sustained; and, in support of that ground, it relies principally upon the case of *Pittsburgh, etc. R. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094. That was also a case of a passenger falling from the car steps as a result of stepping upon a banana peel, and raised the precise questions here presented.

Rose was a passenger upon appellant's train from Louisville, Kentucky, to Jeffersonville, Indiana; and in making that trip he had to change cars at the "Junction," on the north side of the Ohio River, and take a different train to Jeffersonville. In leaving the train at the "Junction" he stepped on a banana peel, and was thereby caused to slip and fall from the train, to his injury. He recovered a judgment for \$3,000.00, which was reversed by the Appellate Court of Indiana, in a well-considered opinion, which discussed the general duties of the carrier to the passenger, in a case of this character.

After calling attention to the general rule running through the entire doctrine of negligence, that the vigilance and care required of all persons to be affected in each case must be proportionate to the dangers to be [543] apprehended, not only to the probability or possibility of accident, but to the gravity of the results of the accident, the court said:

"In all cases where an injury is sustained by a passenger while in transit, or through any defect in the appliances or operative mechanism of the means of transportation, or to any action of its servants, the carrier is held to the strictest account; but if the injury results through the carelessness of a third person in no way connected with the

carrier, or from the elements, for whose act the carrier can only be bound after notice, then a very different measure of duty prevails. (Cases cited.)

"The rule to be deduced from the cases applying where the injury has been caused by the elements, as snow or ice falling or freezing on the platform or the steps of the car, or from things which a passenger might lawfully bring into the car, or which some unauthorized person not connected with the carrier has deposited in the car or on the steps or platform of the car, or the approaches to the car, is that, before the carrier can be held liable he must have known of or have had reasonable time and opportunity to discover and remove the object causing the injury. Snow fallen or ice formed upon the platform and steps of the car, or mud deposited upon the steps by incoming passengers while the train is en route, are not such objects as render the carrier liable for injuries sustained by passengers caused thereby to slip and fall, though it would be within the bounds of human foresight and endeavor to sand the steps and platform at each stop before taking on or discharging passengers. The carrier is not held to such a strict responsibility in guarding against perils of this character. *Palmer v. Pennsylvania Co.* [111 N. Y. 488]; *Vancleve v. St. Louis, etc. R. Co.* [107 Mo. App. 96].

"In this case there is no room to doubt but that the plaintiff's injury was caused by the unauthorized act of some passenger on defendant's train, or by some stranger, and not by any servant of the company, and that, as a matter of fact, no servant of the company did know of the presence of the banana peel prior to the accident. And the company can be chargeable for the plaintiff's injury only on the theory that, in the exercise of proper diligence, it should have discovered the presence and dangerous character of the banana peel and removed [544] it from the step. The danger to be apprehended from this cause was certainly not a peril reasonably to be expected. It was very evidently dropped on the step of the car by some one immediately before the train left the station.

It would be unreasonable to hold that the carrier was bound to anticipate such an unusual and unexpected cause of peril. It was not a danger reasonably to be apprehended; not such a one as would require the unremitting vigilance of the carrier to guard his passengers against. To have successfully guarded against an accident of this kind the company would be compelled to keep a servant at the steps of every car during all the time they were receiving and discharging passengers. No such degree of vigilance is required of a carrier to guard against a peril of this character. *Palmer v. Pennsylvania Co.* su-

pra; Pittsburg, etc. R. Co. v. Aldridge [27 Ind. App. 498]; Stimson v. Milwaukee, etc. R. Co. [75 Wis. 381]; Vancleve v. St. Louis, etc. R. Co. [107 Mo. App. 96]; Young v. Missouri Pac. Co. 113 Mo. App. 636, 88 S. W. 767; Chicago, etc. R. Co. v. Murphy, 99 Ill. App. 126.

"We think, for the reason stated, that the evidence was not sufficient to sustain the verdict of the jury."

Conceding that it is the duty of a railroad company to inspect its trains, it is not bound to keep up a continuous inspection, or to know at each moment the condition of every part of the train.

Thus, in *Proud v. Philadelphia, etc. R. Co.* 64 N. J. L. 702, 46 Atl. 710, 50 L.R.A. 469, it was held that a failure of a railroad company to discover filth on the steps of a passenger in the nighttime, within half an hour after the car had been inspected and found to be in good condition, did not render the company liable to a passenger who was injured by slipping on the step, where the proof failed to show that due care would have prevented the accident.

A carrier is not bound to anticipate unusual and unexpected causes of peril.

In *Hotenbrink v. Boston Elevated R. Co.* 211 Mass. 77, 97 N. E. 624, 39 L.R.A. (N.S.) 419, a street car company was held not liable for injury to a passenger who fell from the step of a car, which was slippery because of tobacco juice which had been expectorated thereon, there being nothing to show that it had been there any length of time, and it was not shown that the conductor [545] had been negligent in failing to discover it before the accident happened.

That case was like the case at bar in many respects, as will be seen from the following excerpt from the opinion:

"There is no evidence that the conductor knew the saliva was there. No witness in the case, with the exception of the plaintiff and the child Clausina Bookhaut, testified that the alleged condition existed even at the time of the accident; and no witness testified to its existence before the plaintiff alighted. The momentary presence of such a substance on the step would not render the defendant liable. *Goddard v. Boston, etc. R. Co.* 179 Mass. 52, 60 N. E. 486; *Lyons v. Boston Elevated R. Co.* 204 Mass. 227, 90 N. E. 419. There was nothing in its appearance from which the inference could be drawn that it had been upon the step for a considerable period of time. *Anjou v. Boston Elevated R. Co.* 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143. The inference that it must have been there for two minutes, or since the preceding stop at H. or I Street, is merely conjectural, for it might have come from some passing teamster or pedestrian or otherwise."

Since it has not been shown that any of the appellant's servants knew of the presence of the banana peel upon the steps, or that it had been there such a length of time before the accident happened as would impute notice to them, we are of opinion the peremptory instruction asked by the appellant should have been given.

The cases of *Louisville, etc. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591; *Louisville, etc. R. Co. v. Cockerel*, 17 Ky. L. Rep. 1037, 33 S. W. 407; *Beiser v. Cincinnati, etc. R. Co.* 152 Ky. 522, 153 S. W. 742, 43 L.R.A. (N.S.) 1050, and *Louisville, etc. T. Co. v. Rommele*, 152 Ky. 719, Ann. Cas. 1915B 267, 154 S. W. 16, relied upon by the appellee to sustain the verdict of the circuit court, are not in point, and in no way contravene the rule of law herein announced.

For the error indicated, and without passing upon the other questions raised by the appellant, or the correctness of the instructions given, the judgment is reversed, with directions to peremptorily instruct the jury to find for the defendant upon another trial, if the evidence should be substantially the same as it was upon the first trial.

#### NOTE.

#### Liability of Carrier for Injury to Passenger Caused by Slipping on Banana Peel or the Like.

In accord with the rule laid down in *Anjou v. Boston Elevated R. Co.* 208 Mass. 273, 21 Ann. Cas. 1143, it has been held in several recent cases that a carrier is liable for injuries to a passenger caused by slipping on a banana peel or the like on a car step or platform where the servants of the carrier have been negligent in permitting it to remain there. *Prescott, etc. R. Co. v. Thomas*, 114 Ark. 56, 167 S. W. 486; *Galveston, etc. R. Co. v. Bibb (Tex.)* 172 S. W. 178. See also *Pittsburgh, etc. R. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094; *Ft. Worth, etc. R. Co. v. Yantis (Tex.)* 185 S. W. 969. Thus in *Prescott, etc. R. Co. v. Thomas*, supra, it appeared that the plaintiff was injured while getting off of one of the defendant's trains by slipping on a bunch of muskmelon seed on the steps of the car. A box step had been placed at the foot of the car steps by some of the trainmen immediately before the plaintiff embarked. There was no attempt to show that the seed had been on the steps for so short a time that the trainmen had no opportunity to discover its presence. It was held that the defendant was liable. In *Galveston, etc. R. Co. v. Bibb (Tex.)* 172 S. W. 178, the court in stating the facts and discussing the liability of the carrier said: "This is a suit against appellant instituted by appellee to

recover damages arising from injuries to his wife through the negligence of appellant in permitting the platform and steps to become wet and slippery and fruit to lie thereon, by reason of which she slipped and fell upon the steps and was seriously and permanently injured. It was admitted by appellant that appellee and his wife were passengers on the train that brought them from Sutherland Springs to San Antonio, and that she was hurt while alighting from the train at San Antonio, but denied that appellant was guilty of negligence as alleged. . . . Fruit and water were allowed to remain on the platform from which passengers would alight at their destination during the time, at least, that the train was running from Lavernia to San Antonio, a distance of 25 or 30 miles. The rule as to knowledge of a thing that causes an accident is that it must have been known to the defendant or must have been in existence for such length of time as to justify the inference that the failure to obtain knowledge was negligence. The least inspection of the platform would have revealed its condition to the conductor, brakeman, or porter, and would have suggested the danger of leaving it in such condition as it was shown to be."

But a carrier is not liable for an injury to a passenger caused by slipping on a banana peel or the like, unless its servants are aware of the presence of the substance, or it has been there such a length of time that in the exercise of the degree of care owed the passenger they should have discovered it. *Pittsburgh, etc. R. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094; *Hotenbrink v. Boston Elevated R. Co.* 211 Mass. 77, 97 N. E. 624, 39 L.R.A. (N.S.) 419; *Tevis v. United Rys. Co. (Mo.)* 185 S. W. 738; *Proud v. Philadelphia, etc. R. Co.* 64 N. J. L. 702, 46 Atl. 710, 50 L.R.A. 460. See also *Prescott, etc. R. Co. v. Thomas*, 114 Ark. 56, 167 S. W. 486. And see the reported case, wherein most of the foregoing cases are stated and discussed at length.

In *Tevis v. United Rys. Co.* supra, it appeared that the plaintiff while about to alight from one of the plaintiff's cars was injured by slipping on a banana peel in the doorway of the car. There was no showing as to how long the banana peel had been there, or any evidence that the employees of the defendant had a reasonable opportunity in which to discover and remove it; neither was there any evidence from which it could be inferred that the employees had seen it before the accident. It was held that the defendant was not liable.

The rule has been laid down that while it is not the duty of a person to inspect the door-sill or platform of a car for obstructions, he is required to exercise ordinary care for his own safety, and if in the exercise of that care,

he could discover a banana peel or other slippery substance, he cannot recover for injuries caused by slipping on it. *Ft. Worth, etc. R. Co. v. Yantis (Tex.)* 185 S. W. 969.

For a discussion of the liability of a carrier for failure to remove ice, snow or mud from the steps of its vehicles, see the notes to *Riley v. Rhode Island Co.* 17 Ann. Cas. 50, and *Dorrance v. Michigan United Rys. Co.* Ann. Cas. 1915A 763.

## RICHARDSON

v.

## FLOWER.

Pennsylvania Supreme Court—January 11, 1915.

248 Pa. St. 35; 93 Atl. 777.

### Appeal — Questions Reviewed — Necessity of Decision Below.

The Supreme Court reviews only questions considered and determined by the court below, and therefore will not review the correctness of the submission of a case, where it has been submitted from the standpoint in which both parties manifestly tried it.

### Master and Servant — Liability of Automobile Owner to Chauffeur.

Where, in a chauffeur's action for injuries sustained while replacing a punctured automobile tire, in consequence of a defect in the iron retaining ring, which blew out while the tire was being pumped, the evidence was conflicting as to whether the defendant owner had notice of the defect and promised to correct it, the question of assumption of risk is for the jury.

[See note at end of this case.]

### Trial — Issues — Effect of Agreement.

Where opposing counsel in such case agree that there is no question of assumption of risk in the case, and the trial judge agrees to disregard such question in his charge, and where, after verdict for plaintiff, the court, in considering defendant's motion for judgment non obstante veredicto, treats such question as controlling, the judgment should be vacated on appeal and a new trial awarded.

Appeal from Court of Common Pleas, Allegheny county: SHAFER, Judge.

Action for damages. John B. Richardson, plaintiff, and William S. Flower, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.



*W. S. Dalzell* for appellant.

*Don Rose* and *Obed K. Price* for appellee.

[36] MESTREZAT, J.—This is an action of trespass brought by a chauffeur to recover damages which he alleges he sustained while replacing a punctured tire on the wheel of his employer's automobile. The tire on the defendant's machine was held in place by a band or ring with a clutch at each end which was intended to pass into a hole in the rim of the wheel, and to be held there by a projection on the clutch or lug, when air was put in the tube by the expansion of the tube itself against the band. The chauffeur had difficulty in making the clutch stay in the hole provided for it. He alleges that he notified his employer there was something wrong with the wheel, and that it ought to be examined by an expert who knew something about a ring, and his employer replied that he did not wish to make any repairs to the wheel as he intended to get a new car. After putting the tire on and getting the ring in place, the chauffeur applied air from a charged vessel kept for that purpose, when the ring flew back and struck him in the face, injuring him severely. His action was brought to recover damages for the injuries he sustained.

The defendant denies that the wheel was defective, or that the chauffeur notified him that it was defective, and alleges that the injuries received by the chauffeur resulted from his own negligence. During the charge, after the court had submitted the other questions in the case to the jury, the learned judge asked counsel if [37] they thought there was any question of assumption of risk in the case, to which both counsel replied in the negative. The court agreed with counsel, and stated that as there was no such question in the case, he would say nothing about it in the charge. The defendant's counsel presented a point requesting binding instructions which was refused. There was a verdict for the plaintiff, and the defendant's counsel moved for judgment non obstante veredicto, which motion was also refused. Judgment was entered on the verdict, and the defendant has taken this appeal.

The defendant now raises the question of assumption of risk, and the greater part of his printed brief is devoted to sustaining that position. He contends that under the evidence in the case if the rim of the wheel was defective, the chauffeur knew the fact and by continuing his work with such knowledge he assumed the risk or hazard arising from the defect. He further claims that if it be conceded notice of the defect was given by the chauffeur to the defendant, that no assurance or promise was made by the latter that the defect would be remedied, and, there-

fore, the notice did not protect the chauffeur from the risks incident to the service. The plaintiff denies the right of the defendant to raise the question now because the case was not defended on that ground in the court below, and claims, as the record shows, that defendant's counsel concurred with the court in its conclusion that the doctrine of assumption of risk was not in the case.

It is familiar practice, recognized and enforced by this court that a party will not be heard to question the correctness of the submission of a case after the court has submitted it from the standpoint in which both parties to the issue manifestly tried it. This court reviews only questions considered and determined in the court below. We will not convict the trial court of error in not having ruled the case on a question which both parties concede was not in it. If that was the situation here [38] we would certainly decline to consider the question of assumption of risk by the defendant now argued so strenuously by his counsel.

The plaintiff testified that in a conversation he told the defendant he did not know whether the rim was dangerous or not, but there was something the matter with the rim, and that it ought to be looked at by an expert who knew something about rims. He also testified that at the time he had this conversation with the defendant, the latter assured him that the rim was all right, and said that he was not going to use the machine very long as he had ordered a new car, and would get rid of this one. This is substantially the evidence on which the plaintiff relies to relieve himself from the assumption of risk in replacing the punctured tire on the wheel at the time he received his injuries. In refusing the motion for judgment non obstante veredicto, the learned trial judge says in his opinion that whether the defendant's statement that he would not repair the machine but would get a new one to take its place is tantamount to a promise to repair the defect is one of the two serious questions in the case. The learned judge ruled the question against the defendant, holding that the defendant's declaration to the chauffeur that he was not going to use that machine very long and was going to get a new one was equivalent to a promise to repair the old one, provided the promise to supply the new one was a promise to supply it within a reasonable time or such time as under the circumstances would be a reasonable time for the owner to repair. He therefore, held that the chauffeur by continuing in the defendant's service did not, under the circumstances, assume the risks incident to the service with the defective machine. This undoubtedly is a controlling question in the case, but it is not a question of law for the court. The de-

defendant testified that he had no such conversation with the plaintiff, that his attention was never called to the alleged defect, and, what is natural [39] and quite reasonable, that he would not have endangered the lives of his family with a car that had a defective front wheel. The testimony clearly raised a question of fact which could only be decided by the jury under proper instructions by the court. It was for the jury to determine what conversation, if any, did take place between the parties, what was said, and the inferences to be drawn from what was said by them, and whether the chauffeur relied on his employer's statement that he did not intend to use the machine very long and was going to get a new one. These were facts and inferences to be drawn from them which were wholly for the jury and not for the court. If, therefore, the question of assumption of risk was, as the learned court now properly regards it, a controlling question in determining the liability of the defendant and hence in disposing of the motion for judgment notwithstanding the verdict, it was a question of fact to be dealt with by a jury, and the court could not rule the motion by determining the question as a matter of law. This court is likewise without authority to review the action of the trial court in determining the question of fact, and it is apparent therefore, that in the present condition of the record, we should not sustain the judgment entered by the court below.

If we should disagree with the learned court below and be of opinion that the defendant's language did not amount to a promise to repair the defect in the rim, or that the plaintiff did not continue the service because he relied on his employer's promise to make the repair, and reverse the judgment, we would likewise be determining a question of fact which clearly we have no right to do.

We regret to have to send this case back for a new trial, but it is apparent that the condition of the record requires it to be done. It would be unjust to sustain the defendant's contention and determine the question of assumption of risk as a matter of law after it had been [40] withdrawn from the jury by his agreement that it was not in the case. We cannot sustain the plaintiff's contention that assumption of risk is not in the case, when the court very properly regarded it as of controlling importance. We must, therefore, set aside and vacate the judgment, and remit the record for a new trial. The case is an important one, not only to the parties directly interested, but, in view of the great number of automobiles now in use, to the public generally. On the next trial the evidence should show the usual and ordinary duties of a chauffeur, what, as such, the plaintiff did while in the service of the de-

defendant, what knowledge a chauffeur should have of the mechanism of an automobile, and whether his duties require him to be sufficiently familiar with it to discover defects in the machine similar to the one alleged to have existed here, and the consequent danger, if any, to a competent chauffeur replacing a tire under the circumstances. If a servant's injuries result from his own incompetency, no liability attaches to the master. The jury should not be confused on the next trial by permitting the witnesses to use interchangeably the names of the different parts of the wheel. It is frequently very difficult in reading the testimony sent up with the record to determine what the witness refers to, whether the ring, the rim, the channel, etc. The facts bearing on the controlling questions in the case should be more fully developed, especially on the question of the plaintiff's contributory negligence. What position was the plaintiff in when he was struck by the ring, how far was he from the wheel, did he see the ring moving outward before he attempted to turn off the air, where was the air tank, etc.? If counsel desire specific rulings of the court on the law applicable to the facts, as disclosed by the testimony, on any question involved in the case they should present proper requests for instructions.

The judgment is vacated and a new trial awarded.

#### NOTE.

##### **Liability of Automobile Owner to Chauffeur for Personal Injuries.**

As a general rule, the owner of an automobile is liable for personal injuries to his chauffeur, when such injuries are caused by the negligence of the owner, and the chauffeur is free from negligence. *National Motor Vehicle Co. v. Kellum* (Ind.) 109 N. E. 196; *Cabanne v. St. Louis Car Co.* 178 Mo. App. 718, 161 S. W. 597; *Collins v. Terminal Transfer Co.* (Wash.) 157 Pac. 1092. And see the reported case. In *Collins v. Terminal Transfer Co.* supra, the court said: "It is a familiar rule of law that it is the duty of the master to use reasonable care to furnish a servant with reasonably safe instrumentalities with which he is to do his work. . . . Under this rule the respondent is entitled to prevail unless it can be said as a matter of law that one or more of the appellant's affirmative defenses defeat recovery."

Generally the foregoing rule is assumed, and the cases turn on whether the special facts show the actual existence of the relationship of master and servant, or on whether

negligence or contributory negligence is shown. Thus, in *Collins v. Terminal Transfer Co.* supra, it appeared that a helper who was employed to assist on an automobile truck, was instructed to obey the orders of the driver. The driver ordered his helper to drive the automobile. While acting under this order, the latter was injured because of a defect in the automobile. The owner was held to be liable to the helper, the court discussed the assumption of risk and the fellow servant doctrine. In *Anderson v. Van Riper*, 128 N. Y. S. 66, it appeared that an expert chauffeur on being employed was told that the automobile was in good repair. Before operating the machine, the chauffeur made his own examination of it. In endeavoring to start the automobile, the chauffeur was injured by a defective starter. The owner was held not to be liable. The court said: "There is no fact stated to show the defendant to have been negligent. Allegations of conclusions cannot supply this deficiency. There is no duty cast upon the owner of an automobile, by the statutes of this state, to have the same inspected. But if there were a duty, which the master owed to the servant, to make or cause to be made an inspection, it would be necessary to allege facts showing that the neglect to inspect the car was the proximate cause of the injury." In *Marks v. Stolts*, 165 App. Div. 462, 150 N. Y. S. 952, it appeared that the driver of an automobile truck told the owner that the machine was defective. Later he told the employer that he himself had repaired the truck. The driver being injured by the defect, the owner was held not to be liable because of the driver's estoppel and his assumption of the risk. In *Blick v. Olds Motor Works*, 175 Mich. 640, 141 N. W. 680, 49 L.R.A.(N.S.) 883, it appeared that the injured servant was foreman of the owner's erecting department. Among other duties, he had to test the machines on the factory's speedway. While testing a machine, he was killed because of alleged defects in the track. The track was held to be reasonably safe, and the servant to have assumed the risks of any defects. The court said: "Decedent is shown to have been an expert in the line of his duty having held the high position of foreman for several years prior to his death. He had, himself, driven cars many times around this track. The tendency of an object to fly off at a tangent when being propelled rapidly around a curve (centrifugal force) is a matter of common knowledge possessed by all intelligent adults. With the operation of this well-known law upon automobiles decedent was through experience peculiarly familiar, so it might well be said—though it is unnecessary in this case—that he assumed the risk of injury from driving

upon the curve at so high a rate of speed." In *National Motor Co. v. Kellum*, 109 N. E. 196, it appeared that the injured servant was a mechanic in an exhibition automobile race. His duties were to assist in operating the machine. Defects in the track resulted in the servant's death. The defects were known to the master but not to the servant. It was held that the master was liable. The court did not discuss the relationship of the parties, but the decision dealt with the doctrines of contributory negligence and assumption of risk. *Cabanne v. St. Louis Car Co.* 178 Mo. App. 718, 161 S. W. 597, the circumstances would seem to indicate that the relationship of the parties was that of principal and agent rather than that of master and servant. The court, however, did not touch on this phase of the controversy. The plaintiff was the defendant's demonstrating agent. The defendant furnished the plaintiff an overhauled automobile with which to work. The plaintiff was injured while driving the machine in the scope of his employment, and the defendant was held to be liable on the ground that he did not furnish safe implements with which to work.

Some of the cases pertinent to the present discussion have involved the application of a workmen's compensation act. Thus, in *Hendricks v. Seeman*, 170 App. Div. 133, 155 N. Y. S. 638, it appeared that the decedent was a helper on an automobile truck. He was killed in endeavoring to chase boys away from the truck. He was held to be operating the truck within the meaning of the workmen's compensation act. The court said: "It is conceded by the appellant that the operation of the vehicle in question comes within the language of group 41, but it is contended that the helper on such a truck is not one who operates the truck. If the word 'operation' is to be restricted to the actual process of driving the truck—that is, steering it and manipulating the brakes and levers—then, of course, the deceased was not engaged in the operation of this truck. But no such narrow construction should be placed upon the expression 'operation of trucks.' In order to operate this truck, used in the wholesale grocery business, the proprietors of the concern found it necessary to employ two men. There were other duties required of these men beyond the mere matter of driving the truck. Presumably goods were to be loaded and unloaded and delivered; and in driving through the streets of the city it was thought necessary by the employers, very likely, to have one person guard and look after the load, to prevent articles being lost or stolen, while the other person was driving the truck. All these various labors made up the duties of the men and constituted the operation of the truck. Therefore it must be held that

the deceased was engaged in the operation of the vehicle." In the case of *In re Sickles*, 156 N. Y. S. 864, it appeared that the plaintiff was a buyer and salesman for a storage company. In performing the duties of his employment, he drove his employer's automobile and suffered injury. He was held not to be engaged in the storage business within the workmen's compensation act of New York. In *Miller v. Taylor*, 159 N. Y. S. 999, it appeared that an automobile driver was engaged in delivering packages. When he alighted from his machine to make a delivery, he was struck by another automobile. In a proceeding under the workmen's compensation act, his injuries were held to have arisen out of his employment. In *Reimers v. Proctor Pub. Co.* 85 N. J. 441, 89 Atl. 931, wilful misconduct on the part of a driver in taking a car without permission was held to preclude an allowance of compensation. See to the same effect *Maryland Fidelity, etc. Co. v. Industrial Acc. Commission*, 171 Cal. 728, 154 Pac. 834, (illegal speed).

In *England*, the relation of master and servant does not exist between the owner of an automobile taxicab and the driver of the machine where the driver is paid a percentage of his receipts and the owner exercises no control over him. *Doggett v. Waterloo Taxicab Co.* 102 L. T. N. S. (Eng.) 874. But the driver of a motor omnibus, who must make minor repairs to his machine, can recover as a "workman" under the Employers' Liability Act of 1880. *Smith v. Associated Omnibus Co.* 96 L. T. N. S. (Eng.) 675, wherein the court said: "When the plaintiff says in evidence that he was a person who was furnished with spanners and wrenches, and was expected to put right anything that happened to the car, I think I may use my own knowledge as to what he might be called upon to do. He would have (in driving the car) to do a thing which would involve several rather complicated operations, and would require the use of a certain amount of strength. I do not think he could do these things without manual labor. I do not mean to say that if he did nothing but just turn a handle and start the car he would come within this definition clause. I do not put it upon that ground, but I put it upon the ground that it is shown by the evidence that this man would have to do a certain amount of what would be repairing. It has been said that there is an impression abroad, owing to something Lord Esher said in *Yarmouth v. France*, that manual labor must be hard labor, and that it must involve a very great exercise of the muscles. I do not think such a statement would apply to the manual labor referred to in this section, even if it were true generally."

## CROSS ET AL.

v.

## FISHER ET AL.

Tennessee Supreme Court—May 7, 1915.

132 Tenn. 31; 177 S. W. 43.

### Schools — Consolidation — Discretion of Board.

Under Acts 1913, c. 4, providing generally for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, the consolidation of schools is not required, but is merely permitted, and the question how the law shall be administered in such respect is left to the discretion of the county board of education.

### Transportation of Pupils — Validity of Statute.

Acts 1913, c. 4, § 2, providing for the transportation of children residing too far from a school to attend otherwise, if there are enough children so situated, though vesting a discretion in school boards to discriminate reasonably between pupils living in sufficient numbers at a distance from a school to need transportation, and those so living in insufficient numbers, is not violative of Const. art. 11, § 12, setting apart the interest on the common school fund for the equal benefit of all the people, since such section must be construed with section 8 of the same article, providing that the legislature shall not pass any law for the benefit of individuals inconsistent with the general law of the land, nor any law granting to any individual rights or exemptions other than such as may be extended by the same law to any member of the community who can bring himself within the law, for while, by necessity, children of some citizens resident at a distance from the schools may be deprived of the transportation extended to others, nevertheless such citizens can bring themselves within the law by changing residence.

[See note at end of this case.]

### Consolidation of Schools — Discretion of Board — Judicial Control.

If a county board of education, acting under Acts 1913, c. 4, providing for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, in consolidating certain schools into one had ignored all reasonable rules, acting in an arbitrary manner, so as to abuse its discretion, by disregarding the wishes, welfare, and interests of the taxpayers of the district, the action of the officials would have been proper subject for correction by injunction because of abuse of power.

[See 2 Ann. Cas. 543.]

### School Supervisors — Employment.

Acts 1913, c. 4, § 3, giving boards of education authority to employ supervisors of schools, whose duty shall be to assist county superintendents in the organization, graduation, and supervision of schools, etc., and to

pay them out of the respective school funds of counties, etc., does not violate Const. art. 11, § 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county courts, since the appointees contemplated by the act are not "county officers," but mere "employees."

Appeal from Chancery Court, Weakley county: McKINNEY, Chancellor.

Action by J. E. Cross et al., plaintiffs, against Syl Fisher et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

*Maiden & Maiden* for appellants.

*Lewis & Garrett* and *H. H. Barr* for appellees.

[33] FANCHER, J.—The bill in this cause was filed by certain citizens, taxpayers, and patrons of the schools in the nineteenth civil district of Weakley county. The defendant Syl Fisher is the county superintendent of public instruction, and the other defendants are members of the county board of education of said county. The bill attacks the validity of chapter 4 of the Acts of the [34] regular session of the Tennessee legislature of 1913, charging that it violates certain provisions of the State constitution. The act in question is as follows: "An act to be entitled 'An act to improve the public school system of the State by authorizing boards of education to consolidate schools, provide for the public transportation of pupils, and to employ supervisors.'

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that whenever it shall appear to the county board of education, or the county high school board of education, in any county of the State, that the efficiency of the public schools would be improved thereby, said boards of education shall have full power, and are hereby granted authority, to consolidate two or more schools.

"Sec. 2. Be it further enacted, that whenever, by reason of such consolidation, a sufficient number of children is situated too far away from such schools to attend without transportation, said boards of education are hereby authorized and empowered to make provisions for the transportation of said pupils that reside too far away from said schools to attend without transportation, and to pay for same out of the respective public school funds of the county in which such children reside.

"Sec. 3. Be it further enacted, that said boards of education are hereby given authority to employ supervisors of schools, whose duties shall be to assist county superintendents of public instruction in the organization,

[35] gradation, and supervision of public schools of the county, and the organization of industrial work, and to pay for same out of the respective public school funds of the county: Provided, that such supervisors shall be persons of known ability to supervise the work of other teachers, and shall have the equivalent of a high school education: Provided, further, that supervisors of elementary schools shall hold an elementary certificate of the first grade, and supervisors of high schools shall hold a high school certificate of the first grade.

"Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are, hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it."

The bill in substance charges that the defendants pursuant to said act had abolished the four public schools of said district, known as the Hopewell School, Parish School, Chestnut Grove School and the Galloway School, and had ordered a consolidation of said schools into one central school, to be located at or near the Hopewell School, where said board intended to construct a large school building at public expense; that the board was proposing to furnish transportation for the children belonging to said district schools who lived too far away from the central school to attend otherwise. It further charged that this consolidation was detrimental to the interests of the patrons and children of the schools because of the fact that a number would be removed a considerable distance [36] from the school, and that the action of the board was arbitrary and an abuse of power.

The act of 1913 was attacked as violative of the following sections and articles of the State constitution:

(a) Section 12, article 11, of the constitution, because it is alleged that said act authorizes the destruction of equal benefits guaranteed to all the people by said section of the constitution.

(b) Section 8, article 11 of the constitution, because it is alleged that benefits and privileges are conferred upon certain children and patrons which are or may be withheld from certain children and certain patrons; that it confers special rights, privileges, and immunities on some, and withholds such rights and privileges from others.

(c) Section 17, article 2, which ordains that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.

(d) That said act is void and unconstitutional for the reason that it undertakes to delegate legislative power to the county board of education.

(e) That said act is void for uncertainty and vagueness, in that it does not provide for the transportation of all children who reside too far away from the consolidated schools to attend, but only makes provision for transportation in case where the numbers so residing too far away to attend said schools are sufficient.

The decree of the chancellor holds that the said chapter 4 of the Acts of 1913, is a valid and constitutional statute.

[37] The decree recites that the complainants, by written agreement filed in the cause and by statement of their solicitors at the bar of the court, admitted that the facts did not warrant complainants' relief on the ground that the abolition and consolidation of said schools and providing of transportation was arbitrary, capricious, and an abuse of power; the court decreeing upon said agreement that the action of the said board was within its jurisdiction and power, and not arbitrary, capricious, and an abuse of power.

The decree orders the dismissal of the bill, taxing complainants with the costs, from which the complainants appealed to this court.

The decree itself provides that only certain parts of the record shall be copied in the transcript, "it being admitted that there was sufficient evidence to sustain the decree as to facts."

The first assignment of error is subdivided. Subdivision A thereof attacks the act of 1913 on the ground that it violates section 12, article 11, of the constitution. This is the portion of our constitution applying to our system of public schools and the fund called the common school fund, and provides that the interest from this school fund shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof.

Subdivision B under the first assignment attacks the act of 1913 on the ground that it violates section 8, article 11, of the constitution, which provides against [38] granting to any individual or individual rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law, and against the passage of any law for the benefit of individuals inconsistent with the general laws of the land.

The insistence in the present case is that the consolidation of these schools will work a hardship on some of the patrons so far removed that is not common to others, and that it will confer benefits upon some to the exclusion of others. It may be here stated

that any location of schools will necessarily bring about the benefit of close proximity to the schools of some patrons which it would be impossible in any practical sense to confer upon others in the same degree. There is no such thing as absolute uniformity of benefits in this regard.

The public school system of the State has been placed under the control of the legislature for the general benefit of all the people of the State, and not primarily, but incidentally, for the benefit of the pupils. In any practical operation of the school laws under the constitution, these equal benefits or opportunities cannot possibly be given to each individual. In some portions of the State that are sparsely populated, schools are necessarily placed farther away from some children than in some other portions, and in fact there are some out of the way places where the schools are a considerable distance away.

[39] It was held in *Leeper v. State*, 193 Tenn. 500, 53 S. W. 962, 48 L.R.A. 167, that public schools are owned and maintained by the State, and the State may prescribe the terms and conditions upon which pupils may enter them, except that it cannot disregard the constitutional injunction, "Tuition shall be without charge and equally open to all."

Necessarily, matters of this kind have to be placed in the hands of administrative officers and a discretion reposed in them as to the location of schools. The consolidation of schools is not required by this act. It is only permitted, and left to the sound discretion of the school officials of a given county as to how the law shall be administered in this respect. Undoubtedly in many instances benefits can be derived by the consolidation of schools. In fact, the consolidation of schools was permitted before this act, namely, under Acts 1873, ch. 25, Acts 1891, ch. 132, and also Acts 1907, ch. 236, section 10, subsection 4.

The transportation of pupils where they are removed some distance from the school is also authorized under the Acts 1909, ch. 264, section 3, as amended by chapter 23, section 2, Acts 1913.

But it is said that the act in question violates the constitution because it only provides for the transportation of children who reside too far away from the school to attend without transportation, in case there is a sufficient number of children so situated. This section of the act is as follows:

[40] "Be it further enacted, that whenever, by reason of such consolidation, a sufficient number of children is situated too far away from such schools to attend without transportation, said boards of education are hereby . . . empowered to make provisions for the transportation of said pupils that reside

too far away from said school to attend without transportation, and to pay for same out of the respective public school funds of the county in which such children reside."

The objection made to that part of this act which provides for transportation of children is to the effect that, in the process of consolidation of schools, some of the children may live too far away to attend such schools without transportation, and may be denied transportation because there is not a sufficient number in a given place or locality, and that this act on its face recognizes the right of a board to deny transportation to some.

It is further said that all people cannot live near schools nor transportation lines, and therefore it will not do to say that all citizens may or can bring themselves within a situation where they can enjoy the benefits of transportation under the act.

Counsel for the school board, upon the other hand, take the position that a proper construction of the said act of the legislature is that the legislators did not intend by such consolidation to deprive any children of transportation who live too far away to attend otherwise; that the law properly construed, means that the [41] board is given authority to provide transportation of pupils without discrimination.

We think a proper construction of the act is that it does give the board a discretion in the matter. Section 2 of the act provides that, where a sufficient number of children reside too far away from such consolidated schools to attend without transportation, the said boards are authorized and empowered to make provision for their transportation. The legislature evidently did not mean to provide transportation in cases where isolated families or children reside so far away from the schools that it would be impracticable to furnish transportation. The purpose of the act was to give the board of education power to discriminate in a reasonable manner, if necessary.

The question then arises: Will this discrimination, or authority in the act to discriminate, subject this section of the act in question to the constitutional objections pointed out?

Section 12 of article 11 of the constitution sets apart the interest on the common school fund to be used for the equal benefit of all the people of the State. But this does not mean that the schoolhouses shall be equally distant from every home, because that is impossible.

The inhibition against class legislation is clearly defined in section 8, article 11, of the constitution, and the provision in section 12 of said article must be read in connection with the provisions of section 8.

The latter section provides that the legislature shall have no power to suspend any general law for the benefit [42] of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. So it is that, if any citizen may be able to bring himself within the provisions of a law, there is no discrimination within the meaning of the constitution.

Under section 2 of the said act there is no provision inconsistent with this requirement of the constitution, because any member of a community may be able to bring himself within the provision of the law.

Statutes providing for schools and transportation of scholars have been construed in other States. In Vermont a statute was passed upon which provided that the school board might use a portion of the school money, not exceeding twenty-five per cent, for the purpose of conveying scholars to and from schools. The schools were to be located at such places and held at such times as in the judgment of the board of directors would best subserve the interests of education and give the scholars of the community as nearly equal advantages as might be practicable. It was said by the court in a mandamus suit filed against the school directors to compel them to furnish transportation for petitioners' children under this statute:

"The end sought here is equality of school privileges; but the statute clearly recognizes the fact that entire equality is impossible of attainment, and that [43] much must be left to the discretion of those in whose hands the administration of the law is placed. The differences in the number of scholars to be provided for, in the means available for the various demands of the work, in the proximity of schools and the condition of roads, and in the ages and strength of scholars, are such as to induce a belief that absolute rules would be more likely to work injustice than the exercise of official discretion. We think it was obviously the intention of the legislature to leave the question of transporting scholars to the discretion of the school directors." *Carey v. Thompson*, 66 Vt. 665, 30 Atl. 5.

In another case to compel conveyance for a school boy who lived four miles from school, under an act authorizing the district board to provide schools and transportation, it was held that the board had a discretion both as to the location of the schools and periods when they should be taught, and also as to furnishing transportation; that this was not a captious discretion, but such an one as

would best subserve the interests of education, and as would give to all the scholars of the district as nearly equal advantages as might be practicable; that the pupil's equality of privilege under the statute is limited or modified by its practicability which involves a consideration of its effect upon the success of the school system as a whole; that free schooling furnished by the State is not so much a right granted to pupils as a duty imposed upon them for the public good; that the fundamental purpose of a public school system is the protection and improvement [44] of the State as a political entity; that, while the boy had no absolute right under the statute to be carried, it was held that, with due consideration given the interests of education in general and to the equality of advantages to the individual, it was the duty of the board in that case to furnish transportation during a part of the school year. *Fogg v. Board of Education*, 76 N. H. 296, 82 Atl. 173, 37 L.R.A.(N.S.) 1110, Ann. Cas. 1912C 758.

Our Acts 1913, ch. 4, should be construed to mean that a discretion is given the county board of education to consolidate schools and to determine when, by reason of such consolidation, a sufficient number of children are so situated that they should be furnished transportation, and in doing so to consider, not only the right of individuals, but also the public good.

And, so construing the act in question, it is not unconstitutional in any respect.

The bill charges that the county board of education had acted in an arbitrary manner, and in a way that would work injustice to complainants and a large number of patrons, and deny them school privileges, because a large number live too far away from the central school ordered to be provided, and so situated as to render transportation impracticable.

It was charged that defendants were ignoring the rule of convenience and disregarding the wishes, welfare, and interest of the taxpayers and patrons of said district, and that the acts of the defendant complained of were arbitrary, and an abuse of power, if such power existed.

[45] It was also charged that no benefits would be derived by this consolidation, that the term would not be increased, and that no other or different curriculum could be taught in the consolidated school from that taught in the schools as at present constituted and located.

If these charges were sustained by the proof, the action of these officials might be enjoined because of an arbitrary and hurtful abuse of power. But the agreement is made of record that the facts do not warrant complainants' relief on these grounds, and the suit must fail upon the facts of the case.

It is insisted that the act in question provides for supervisors to aid the county superintendent, and that this is equivalent to providing an assistant to that officer, and that this provision confers upon the county board of education the authority to elect an assistant superintendent. This provision of the statute gives authority to employ supervisors of schools as an aid to the county superintendent in the work of organization, graduation, and supervision of the public schools, together with the organization of industrial work, and it is made their duty to supervise the work of teachers.

By section 17, article 11, the constitution provides that:

"No county office created by the legislature shall be filled otherwise than by the people or the county court."

But are these supervisors county officers? No fixed salary is provided for them, and they hold according [46] to no term of office. They are employed in the discretion of the board of education.

In *Prescott v. Duncan*, 126 Tenn. 106, 148 S. W. 229, this court was called upon to determine whether certain appointees of the board of county commissioners were officers within the meaning of said section of the constitution. An act of the legislature applying to Shelby county provided for the appointment by these commissioners of a jail physician, superintendent of county morgue, superintendent of emergency hospital, physician of insane asylum and workhouse, jail engineer, a janitor; an engineer, an electrician, a policeman for the courthouse, a night watchman, and such subordinate help as may be necessary in order to properly conduct the affairs of the county, and these were to receive salaries not to exceed certain amounts.

It was held that the positions provided for were not county officers within the meaning of this section of the constitution, but were employees merely.

The supervisors provided for under the act now in question are only employees to act as aids or assistants in the public school work. There are many subordinate positions and deputies in the conduct of public affairs. It was evidently not intended by the makers of the constitution that all the subordinates and assistants should be elected by the people or the county court.

Other questions were disposed of orally. The court was of opinion that these other questions did not involve any new principle or new application of an old principle of law.

The decree of the chancellor is affirmed.

#### NOTE.

The court sustains, in the reported case, a statute authorizing the transportation of



pupils to and from school whenever "a sufficient number of children is situated too far away from such schools to attend without transportation." The discretion given to the school board to pass on the existence of a "sufficient number" of pupils to warrant transportation is said to be a proper and reasonable delegation of administrative power. The cases discussing the validity and construction of a statute or ordinance providing for the transportation of pupils to and from school are reviewed in the note to *Fogg v. Board of Education*, Ann. Cas. 1912C 758.

**WORTHINGTON**

v.

**DISTRICT COURT ET AL.**

Nevada Supreme Court—July 3, 1914.

37 Nev. 212; 142 Pac. 230.

**Statutes — Subjects and Titles.**

The title of an act entitled "An act relating to marriage and divorce" is sufficient, within Const. art. 4, § 17, providing that each law shall embrace but one subject and matters properly connected therewith, to justify provisions in the body of the act prescribing the length of residence required before parties may apply for a divorce.

[See Ann. Cas. 1915A 79; 79 Am. St. Rep. 456.]

**Same.**

Notwithstanding Const. art. 4, § 17, providing that each law shall embrace but one subject and matters properly connected therewith, a statute may contain several provisions, provided they relate to the subject expressed in the title, or are properly connected therewith.

**Constitutional Law — Statute Long Acquiesced In.**

That a statute has for years been enforced by the courts, without its constitutionality being challenged, may be considered as a recognition of its constitutionality, and courts will seldom entertain questions of the constitutionality of a statute recognized as valid in the adjudication of rights, and when the invalidity of the statute would lead to serious consequences.

[See Ann. Cas. 1912A 505.]

**Statutes — Amendment — Effect as Repeal.**

Act Feb. 15, 1875 (Laws 1875, c. 22), entitled "An act to amend an act entitled 'An act relating to marriage and divorce approved November 28, 1861,'" and containing only three sections, purports, by section 1, to amend section 22 of the original act by re-

enacting the section as changed. Sections 2 and 3 are the ordinary repeal of inconsistent laws, and a provision as to when it shall take effect. Act Feb. 20, 1913 (Laws 1913, c. 10), entitled "An act to amend an act entitled 'An act to amend an act relating to marriage and divorce approved Nov. 28, 1861,'" purports to amend "section 22" by re-enacting it with the changes affected by the amendment and repealing conflicting acts. It is held that, in view of Const. art. 4, § 19, providing that no law shall be revised or amended by reference, but the act or section as amended shall be re-enacted and published, the act of 1875 did not repeal section 22 of the original act, and the act of 1913 was not void as attempting to amend section 22 after such repeal, but the unchanged part of the section as originally enacted continued in force, notwithstanding the amendments, so that the title of the act of 1913 is sufficient.

[See generally 5 Ann. Cas. 202.]

**Construction of Amendment — Legislative Intent.**

The intention of the legislature to amend a specified section of the statute must govern, and a clerical mistake as to the section amended must be disregarded.

**Special Laws — Law Relating to Divorce.**

The Constitution, prohibiting any special laws granting divorce, renders void any special act granting divorce, as divorces were granted by Parliament and state legislatures prior to the constitutional provision.

**Divorce — Requirement as to Residence — Validity.**

The provision in Act Feb. 20, 1913 (Laws 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time of the accrual of a cause for divorce, the parties shall not both be bona fide residents of the state, no court shall grant divorce, unless either party shall have been a bona fide resident for not less than one year next preceding the commencement of the action, is of general uniform operation throughout the state, and applies the same in every part of the state, and to all persons under similar circumstances, and is not a local or special law within Const. art. 4, § 20, prohibiting any local or special law granting a divorce.

[See note at end of this case.]

**Same.**

Acts Feb. 20, 1913. (Laws 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time a cause for divorce accrues, the parties shall not have been bona fide residents, the court shall not grant a divorce, unless either party shall have been a bona fide resident for not less than a year, provides for a classification of non-residents at the time of the accrual of a cause of action for divorce, and the classification is reasonable, and does not conflict with the fourteenth amendment to the federal Con-

stitution guaranteeing the equal protection of the laws.

[See note at end of this case.]

#### **Special or Local Laws — Classification.**

Reasonable classifications in a legislative act are not prohibited by the Constitution prohibiting the passage of local or special laws.

[See 21 Am. St. Rep. 782.]

#### **Divorce — Power of Court.**

The courts have no inherent power to grant a divorce; but such power must be conferred by statute.

#### **Residence Essential to Jurisdiction.**

The courts of a state have no jurisdiction to grant a divorce, unless at least one of the parties has a domicile in the state, and the appearance of a nonresident defendant will not invest the court with jurisdiction of a suit brought by a person who has no bona fide domicile in the state.

[See 9 R. C. L. tit. *Divorce*, p. 399.]

#### **Statute Requiring Residence — Validity.**

A statute of a state which provides that where, at the time of the accrual of a cause for divorce, the parties shall not be both bona fide residents, no court shall grant a divorce, unless either party shall have been a bona fide resident for not less than one year next preceding the bringing of the action, does not violate Const. U. S. art. 4, § 2, guaranteeing to citizens of each state all privileges and immunities of citizens in the several states; there being a distinction between the citizenship and residence and the rights of citizens and residents, and the Constitution guaranteeing no rights to citizens as to divorce.

[See note at end of this case.]

#### **Statutes — Retrospective Operation — Regulation of Procedure.**

The provision of Act Feb. 20, 1913 (Laws 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended by Act Feb. 15, 1875 (Laws 1875, c. 22), by declaring that the court shall not grant a divorce, unless either party shall have been a resident for not less than one year, relates merely to procedure, and not to the cause of action, and applies to cases where the cause of action accrued before the act took effect.

#### **Divorce — Statute Requiring Residence — Validity.**

The constitutional prohibition against the impairment of obligation of contracts does not apply to divorces, which are under the control of the legislature, and the provision of Act Feb. 20, 1913 (Laws 1913, c. 10), amending section 22 of the marriage and divorce act of 1861 (Laws 1861, c. 33), as amended in 1875 (Laws 1875, c. 22), by declaring that when, at the time a cause for divorce accrues, the parties are not both residents, the court cannot have jurisdiction, unless either party has been a bona fide resident for not less than one year, does not impair the obligation of contracts, though it be construed as relating to a cause for divorce.

[See note at end of this case.]

#### **Right to Divorce Statutory.**

The right to a divorce is not a guaranteed privilege of the citizens, and the right to divorce is limited to the causes and subject to the requirements prescribed by state statute.

#### **Constitutional Law — Policy of Statute.**

The court, in determining the validity of a statute, will not consider its policy, wisdom, or expediency, but will enforce it in accordance with the intention of the legislature, unless clearly in conflict with the Constitution.

[See 6 R. C. L. tit. *Constitutional Law*, p. 107.]

#### **Rights Protected by Constitution.**

The provisions of the Constitution, state or federal, do not cover rights, privileges, and obligations not specified and not existing or understood at the time of its adoption, or not in force by long acquiescence, or by continued official or public approval.

Original action for mandamus. Alfred Worthington, relator, and District Court of Second Judicial District in and for Washoe County et al., respondents. The facts are stated in the opinion. WRIT DENIED.

*Sweeney & Morehouse, W. D. Jones and N. J. Barry* for relator.

*A. A. Heer, S. Summersfield, R. G. Withers, Prince A. Hawkins, George S. Brown, John S. Orr and L. A. Gibbons* for respondents.

*H. D. Danforth, amicus curiae.*

[215] TALBOT, C. J.—Petitioner applies for a writ of mandate commanding the Honorable T. F. Moran, judge of the Second judicial district court, to issue an order for the publication of summons in the action of Alfred Worthington, Plaintiff, v. Cecelia Worthington, Defendant, for divorce, which was brought in that court on the 11th day of February, 1914.

It is alleged that the petitioner filed his verified complaint in that case, stating two causes of action, in conformity with the laws of this state relating to marriage and divorce; that the summons and certified copy of complaint could not be served personally upon the defendant because she resides, and for a long time has resided, in the city of Daly, San Mateo County, State of California, and is not now, and never has been, a resident of the State of Nevada. Petitioner made and presented to the district judge an affidavit setting forth these facts, and stating that on the 20th day of July, 1913, he became, [216] and ever since has been, a resident of Washoe County, State of Nevada; that he needed an order in conformity with the laws of this state authorizing the publication of the summons and the deposit of a certified copy of the complaint and summons in the postoffice at Reno, addressed to the defendant at her place of residence, with the

postage thereon prepaid, so that she might be notified of the action.

The district judge refused to make the order for publication and service of summons, upon the ground that the petitioner had not been a resident of the county of Washoe, State of Nevada, for the full period of one year before the commencement of the action, and based his refusal upon section 22 of the act relating to marriage and divorce, as amended at the last session of the legislature by an act approved February 20, 1913, under the title: "An act to amend an act entitled 'An act to amend an act entitled "An act relating to marriage and divorce," approved November 28, 1861,' as approved February 15, 1875."

This act provides:

"Section 1. Section twenty-two of said act is amended so as to read as follows:

"Sec. 22. Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes: First—Impotency at the time of the marriage continuing to the time of the divorce. Second—Adultery since the marriage, remaining unforgiven. Third—Wilful desertion, at any time, of either party by the other, for the period of one year. Fourth—Conviction of felony or infamous crime. Fifth—Habitual gross drunkenness, contracted since marriage, of either party, which shall incapacitate [217] such party from contributing his or her share to the support of the family. Sixth—Extreme cruelty in either party. Seventh—Neglect of the husband, for a period of one year, to provide the common necessities of life, when such neglect is not the result of poverty on the part of the husband which he could not avoid by ordinary industry. *Provided*, that when at the time the cause of divorce accrues, the parties shall not both be *bona fide* residents of the state, no court shall have jurisdiction to grant a divorce, unless either the plaintiff or the defendant shall have been a *bona fide* resident of the state for a period of not less than one year next preceding the commencement of the action.

"Sec. 2. All acts or parts of acts in conflict with this act are hereby repealed.

"Sec. 3. This act shall be in effect from and after the first day of January, 1914."

(Stats. 1913, c. 10.)

The only change made by this amendment is the addition of the last sentence quoted in section 22, which begins with the word

"*Provided*." Otherwise the section is the same as the amendment of 1875, which was the same as section 22 of the act as originally passed by the first territorial session of the legislature in 1861 (Stats. 1861, c. 33), excepting that the amendment of 1875 (Stats. 1875, c. 22) shortened from two years to one year the time required for desertion and failure to provide.

Petitioner makes no objection to the act of 1875, but directs his batteries against the last amendment. It is said that there was no section 22 to amend in 1913, and that the legislature cannot inject into the statutes by the last amendment the jurisdiction of the court, not germane to the title.

Also, it is claimed that this act is in violation of the following provisions of the state constitution:

"All men are, by nature free and equal and have certain inalienable rights among which are those of enjoying [218] and defending life and liberty; acquiring, possessing, and protecting property and pursuing and embracing safety and happiness." (Section 1, art. 1.)

"Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised, or section as amended, shall be re-enacted and published at length." (Section 17, art. 4.)

"The legislature shall not pass local or special laws . . . granting divorce." (Section 20, art. 4.)

"In all cases enumerated in the preceding section, and in all other cases, where a general law can be made applicable, all laws shall be made general and of uniform operation throughout the state." (Section 21, art. 4.)

It is further contended that the statute is in conflict with section 2, article 4, of the constitution of the United States, which provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—and of the fourteenth amendment, which specified that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The objection that the amendment requiring one year's residence in certain cases to give the court jurisdiction in an action for divorce is not germane to the title is unten-

able. To sustain such a contention would be in effect saying that the provision of the act originally passed requiring six months' residence under certain circumstances was unconstitutional because under a similar title, and that divorces granted since the organization of the territory and state are void, resulting in [219] many cases of bigamy, illegitimacy, and failure of inheritance.

We had occasion to examine similar objections to the sufficiency of titles to legislative acts in the cases of *State v. State Bank*, etc. Co. 31 Nev. 456, 103 Pac. 407, 105 Pac. 567, and *Ex p. Ah Pah*, 34 Nev. 283, 119 Pac. 770. In the former cases we said:

"The main principles controlling these questions have been well-nigh settled by this and other courts. That section 17, article 4, of the constitution, providing that 'each law enacted by the legislature shall embrace but one subject and matters properly connected therewith,' is mandatory must be conceded. In regard to this objection, we need only determine whether this action and the decree of the district court relate to matters germane to the subject expressed in the title of the act, or to what is properly connected therewith."

In that case we held that "An act creating a board of bank commissioners, defining their duties, providing for the appointment of a bank examiner, prescribing his duties, fixing his compensation, providing penalties for the violation of the provisions of this act, and other matters relating thereto" (Stats. 1907, c. 119), although providing by section 10 for an action by the attorney-general against a banking corporation on the decision by the bank examiner and commissioners that it is unsafe for it to continue business, and that, if the court shall find it unsafe, it shall appoint a receiver, does not contravene the above constitutional provision.

The title of the original and the two amendatory acts relate to marriage and divorce. Divorce, being the dissolution of the marriage relation, necessarily relates to marriage. The length of residence required before parties apply for a divorce, whether it be six months, or one year, or a longer or shorter period, necessarily pertains to divorce, and is a matter connected with the title of the act. The amendment is as free from constitutional objection as if it had been entitled an act relating to divorce, or an act relating to the jurisdiction of the [220] district court. Many acts, such as the ones relating to crimes, punishments, civil practice, and criminal practice relate to numerous matters. It is sufficient if they relate to the subject briefly expressed in the title and anything properly connected therewith.

The constitution of the state, adopted in 1864, provided that all territorial laws not

repugnant to its provisions shall remain in force until altered or repealed. (Rev. Laws, sec. 386.) For nearly half a century the marriage and divorce act has been recognized by all the courts of this state as a valid existing law, and the marital rights of numerous parties have been settled according to its provisions. Where an act of the legislature has for a long period of years been enforced by the courts of a state, without its constitutionality being challenged, that fact may be considered a virtual recognition of its constitutionality. Courts seldom entertain questions of the constitutionality of an act so long and repeatedly recognized as valid in the adjudication of the most important relations and rights, and when the interpretation of the statute would lead to consequences most serious.

In the *Tiedemann* case, 36 Nev. 494, 500, 137 Pac. 824, this court treated the amendment of 1875 of section 22 of the marriage and divorce act as a part of the act of 1861, and not as a separate act, and referred to the act of 1913 as amendatory of section 22 of the original act. While the question was not specifically presented for consideration in that case, this view of considering amendatory statutes is well supported by the authorities.

Under the title and language of the act of 1875, before mentioned, considered with the provision in section 19, article 4, of the constitution, that "no law shall be revised or amended by reference to its title only, but, in such case, the act as revised, or section as amended, shall be re-enacted and published at length," it is apparent that the legislature intended to amend section 22 of the original act relating to marriage and divorce. It is contended that the act of 1875 repealed section 22 of the original act, and that the act of 1913 is void, because it [221] attempts to amend that section after it has been repealed. The unchanged part of a section amended is deemed to continue in force. From the title stating so and the language used, it is apparent that by the act of 1913 the legislature intended to amend the act of 1875. No language could have more definitely indicated this purpose. The "act as revised and section as amended" was "re-enacted and published at length." Each of the later acts is entitled "An act to amend," and not "An act to repeal." The statement in section 2 of the act of 1913 that "all acts and parts of acts in conflict with this act are hereby repealed" is a stereotyped form, often unnecessarily used in bills. It has no effect, and may be regarded as surplusage. We think the act of 1875 should be considered as an amendment, as defined by lexicographers and scholars, and as it was intended, the same as such acts have been considered by legislatures and compilers of laws in this

state, instead of a repeal, as ordinarily understood, of section 22 as originally passed. Sections 2 and 4 of our act relating to marriage and divorce were amended by an act approved March 5, 1867 (Stats. Sp. Sess. 1867, c. 51, p. 88), and in the subsequent amendment of these sections by the acts approved February 5, 1891 (Stats. 1891, c. 5), and March 6, 1899 (Stats. 1899, c. 35), the legislature, similarly as in other second amendatory acts, treated them as numbered sections of the original act, without reference to them as sections of the first amendatory act.

As the act of 1913 re-enacts at length, in compliance with section 17, article 4, the language designated as section 22 in the act of 1875, it must have been the intention to amend that section, and no other. But if it be conceded for the argument that the act of 1875 was a new act which repealed section 22, and that the act of 1913 ought to have specified that section 1, instead of section 22, was amended, it would still be clearly apparent that there was only a mistake in this reference to the section, and that the one re-enacted at length, and none other, was intended to be amended. As often held, the [222] intention of the legislature should govern, and clerical mistakes should be disregarded.

In New York, an act of 1883 (Laws 1883, c. 414) purported to amend section 16 of the act of 1856 (Laws 1856, c. 179), which, it was claimed, had been repealed by an act of 1864 (Laws 1864, c. 555). The court in *People v. Board of County Canvassers*, 143 N. Y. 84, 37 N. E. 649, held a different opinion as to the repeal, but concluded that, even if the act of 1856 was repealed as claimed, the amendatory act of 1883 was nevertheless valid. The court said:

"The enactment of this law is put into the form of an amendment of a law, which was standing upon the statute books, and whether that earlier law, by force of subsequent legislation, had become inoperative is wholly immaterial. The only question is: Has the legislature, in the enactment complained of, expressed its purpose intelligently and provided fully upon the subject? If it has, then its act is valid and must be upheld. That is the case here. The act of 1883 contains all that is provided for in the particular section of the act of 1856, and gives full power to the boards of supervisors with respect to the formation of school commissioners' districts. A law thus explicit and complete may not be disregarded or invalidated because of a possible mistake of the legislature with respect to the existence of the statute in amendment of which the act is passed. It is an enactment of a law, in any view."

The Supreme Court of Massachusetts, in *Com. v. Kenneson*, 143 Mass. 419, 9 N. E. 763, said:

"The defendant contends that Stats. 1886, c. 318, sec. 2, is inoperative, because it purports to be an amendment of the Pub. Stats. c. 57, secs. 5, 9, and he says that said section 9 was repealed by Stats. 1885, c. 352, sec. 6. The argument is that an amendment of a repealed statute is a nullity. . . . The intention of the legislature is plain that, after Stats. 1885, c. 352, took effect, instead of Pub. Stats. c. 57, sec. 9, the sixth section of Stats. 1885, c. 352, should be in force, and that after Stats. 1886, c. [223] 318, took effect, section 2 of this statute should be in force, instead of section 6 of Stats. 1885, c. 352. The sections in each statute are complete in themselves, and, being substitutes for each other, stand like independent enactments. The only defect in the statute is that Stats. 1886, c. 318, sec. 2, refers to Pub. Stats. c. 57, sec. 9, and not to this section as amended; but the intention is evident."

In *Fletcher v. Prather*, 102 Cal. 414, 36 Pac. 658, under a constitutional provision similar to ours, it was held that the amended section of an act takes the place of the original section by its appropriate number in the original act, and that portions not altered are to be considered as having been the law from the time they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment.

"The slight variance in reciting the title of the act amended will be immaterial if the act intended is clearly identified."

"An act entitled 'An act to amend section 1733 of chapter 11 of title 11 of the original code of Oregon' was held good, although there was no such chapter or title; there being but one section with the number given."

"The intent of the legislature was held to be plain, and effect was given to the act, so that, while the title and act purported to amend section 202 of article 8 of a specified statute, they were given effect as an amendment of section 1 of article 8."

(*Lewis's Sutherland, Statutory Construction*, 2d ed. sec. 138; *Otis v. People*, 196 Ill. 542, 63 N. E. 1053; *Northern Pac. Exp. Co. v. Metschan*, 90 Fed. 80, 61 U. S. App. 161, 32 C. C. A. 530.)

Mr. Sutherland also says that where the title of the amendatory act recites the title of the act amended, and there is only one act with that title, error in referring to the date of the approval of the act amended will not vitiate the title. (*American Surety Co. v. Great White Spirit Co.* 58 N. J. Eq. 526, 43 Atl. 579; *Citizens' St. R. Co. v. Haugh*, 142 Ind. 254, 41 N. E. 533; *Alberson v. Hamilton*, 82 Ga. 30, 8 S. E. 869.)

[224] At sections 231, 135, 137, and 233 of that work, and over the citation of many cases, it is said:

"In the amendment or revision of a statute two things are required: First, the title of the act amended or revised should be referred to, and, secondly, the act as revised, or section as amended, should be set forth and published at full length. . . . It is not required that the amendatory act state that certain words of a specific section are stricken out and others inserted, and then set out in full the section as amended; it is sufficient if the section as amended be set out in full. . . . If the references to the act to be amended in the title and body of the amendatory act is sufficient for identification, it is all that is required, and slight errors will be disregarded."

"By force of our constitutional provision, requiring the object of every law to be expressed in its title, the title limits the sphere within which the enacting clause can operate."

"The constitutional requirement under discussion as applied to the acts of this character when they contain matter which might appropriately have been incorporated in the original act under its title is satisfied generally if the amendatory or supplemental act identifies the original act by its title, and declares the purpose to amend or supplement it. Under such a title, alterations by excision, addition, or substitution may be made, and any provisions may be enacted which might have been incorporated in the original act. A title which expresses a purpose to amend an earlier enactment, referring to the earlier enactment by its title, in which the subject of the proposed legislation is clearly expressed, is no more or less than the expression of a purpose to deal with the subject so expressed in the title of the earlier enactment."

"There is a conflict of authority as to whether a section which has been repealed can be amended. The question usually arises where a section of an act is amended 'to read as follows,' and is then again amended in the same [225] manner and by the same description, ignoring the first amendment. Most of the older and some of the more recent cases hold that such an amendatory act, or the amendment of a repealed section, is a nullity. A repeal by implication is said to stand upon the same footing in this respect as a direct or express repeal. 'While there is some conflict of opinion on the subject,' says the United States Court of Appeals, 'the decided weight of authority and the better opinion is that an amendatory statute is not invalid, though it purport to amend a statute which had previously been amended, or for any reason had been held invalid.' This view, we believe, is sustained by the decisions."

(*Wilkinson v. Ketler*, 59 Ala. 306; *State v. Warford*, 84 Ala. 15, 3 So. 911; *Ex p.*

*Pierce*, 87 Ala. 110, 6 So. 392; *Harper v. State*, 109 Ala. 28, 19 So. 857; *Harper v. State*, 109 Ala. 66, 19 So. 901; *O'Rear v. Jackson*, 124 Ala. 298, 26 So. 944; *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274; *Lewis v. Brandenburg*, 105 Ky. 14, 47 S. W. 862, 48 S. W. 978; *Lang v. Calloway*, 68 Mo. App. 303; *Parlin Orendorf Co. v. Hord*, 78 Mo. App. 279; *Fenton v. Yule*, 27 Neb. 758, 43 N. W. 1140; *State v. Babcock*, 23 Neb. 128, 36 N. W. 348; *Baird v. Todd*, 27 Neb. 782, 43 N. W. 1143; *State v. Partidge*, 29 Neb. 158, 45 N. W. 290; *State v. Bemis*, 45 Neb. 724, 64 N. W. 348; *State v. Kearney*, 49 Neb. 325, 68 N. W. 533; *State v. Kearney*, 49 Neb. 337, 70 N. W. 255; *State v. Wahoo*, 62 Neb. 40, 86 N. W. 923; *Van Clief v. Van Vechten*, 55 Hun 467, 8 N. Y. S. 760; *White v. Boody*, 74 Hun 39, 28 N. Y. S. 294; *People v. Jefferson County Board of Canvassers*, 77 Hun 372, 28 N. Y. S. 871; *People v. Upson*, 79 Hun 87, 29 N. Y. S. 615; *Columbia Wire Co. v. Boyce*, 104 Fed. 172, 44 C. C. A. 588; *Heinze v. Butte, etc. Consol. Min. Co.* 107 Fed. 165, 46 C. C. A. 219; *Minnesota, etc. Land, etc. Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70.)

The section in our organic act providing that the legislature shall not pass special laws granting divorces would render void any special act attempting to grant [226] a divorce, as divorces were granted by parliament and state legislatures prior to the adoption of such constitutional provisions in this and other states.

The provisions in the last amendatory statute that when, at the time the cause of divorce accrues, the parties shall not both be *bona fide* residents of the state, no court shall have jurisdiction, unless one of the parties shall have been a *bona fide* resident of the state for a period of not less than one year next preceding the commencement of the action, is of general and uniform operation throughout the state, and not in conflict with the requirements that all such laws must be of uniform and general operation. It applies the same in every part of the state, and the same to all persons under similar circumstances.

As seen, our law in its present form, except that six months' instead of one year's residence and two instead of one year's desertion or failure to provide are required, was passed at the first session of the territorial legislature for the people here before there was any railroad in this state or modern means of transportation, when the laws of some other states did not require as long a residence, and when there was no anticipation that people would come to this state for the purpose of obtaining divorces. Long after the enactment of our law requiring six months' residence Indiana allowed divorce actions to be instituted in the county in which the

plaintiff was a *bona fide* resident, without requiring any specified period.

Under the amendment of 1913 there is a distinction or classification regarding a longer residence when both of the parties are not *bona fide* residents of the state. Ever since the passage of the act relating to marriage and divorce at the first session of the territorial legislature there have been the same classifications relating to residence which appear in the forepart of section 22, and these never have been and are not now questioned. In addition to the classifications regarding residence and venue which have always existed in that act, it is provided that females not under 18 may marry without [227] parental consent, while males are not allowed to marry without obtaining consent until after they are 21 years of age, and failure of the husband to provide for the wife is made a ground for divorce, while no such cause is specified in favor of the husband.

It could be contended with as much force that the six months' requirement in the original act is void as that the classification requiring one year under certain circumstances is unconstitutional. Classifications similar in principle are common in other states. Under certain circumstances one year's residence is required before filing suit for divorce in Arizona, Arkansas, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, unless personal service is made, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and Nevada—33 states—and Porto Rico. Two years is required in Florida, Indiana, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, and Vermont—8 states—and in Hawaii. Three years' residence is required in Alabama, Connecticut, and the District of Columbia. In Massachusetts a residence of five years is required, unless the parties were inhabitants at the time of marriage, and libelant has lived in the state three years. A residence of six months is required in Idaho. Louisiana has a provision in relation to marriages having been solemnized in the state. In Delaware *bona fide* residence is required, and divorces are not granted if the cause accrued in another state, and petitioner was a nonresident at the time, unless for limited causes recognized by the laws of the state.

The constitution of South Carolina of 1868 provides that: "Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law." (Article 14, sec. 5.)

In 1895 the constitution of that state was amended so as to provide that: "Divorces

from the bonds of matrimony [228] shall not be allowed in this state." (Article 17, sec. 3.)

In Texas formerly only six months' residence was required; but an amendment approved April 1, 1913, provides that no suit for divorce shall be maintained in the courts of that state, unless the petitioner shall: "Be an actual, *bona fide* inhabitant of the state for a period of twelve months, and shall reside in the county where the suit is filed six months; *provided*, that such suit shall not be heard or divorce granted before the expiration of thirty days after the same is filed; . . . *provided further*, that in addition to the grounds for divorce now provided by statute, that where any husband and wife have lived without cohabitation for as long as ten years, the same shall be sufficient grounds for divorce."

In South Carolina, where divorce is not allowed for any cause, and in New York, where it may be obtained only for adultery, if the husband is about to kill his wife, and does kill another person who intercedes to defend her, and is sent to prison for life, she can obtain no relief from the bonds of matrimony.

A few of the states have passed eugenic laws prohibiting the marriage of persons afflicted with certain incurable, contagious, or transmissible diseases.

Similarly to ours, many of the states have classifications based on alternative conditions which in certain instances make the one year's residence unnecessary. For instance, a residence of one year is required in Colorado, unless the act was committed in the state, or one of the parties resided in the state at the time; three years in Connecticut, unless the cause arose after removal to the state; in Illinois one year, unless the offense was committed in the state; in Kentucky one year, unless the act was committed while the plaintiff was a resident of the state; in Maine one year, unless the plaintiff resided in the state when the cause accrued, or the parties were married in the state; in Michigan there must be a residence of two years, if the cause arose out of the state; in Minnesota one year, except where adultery was committed in the [229] state; in Mississippi one year unless both parties are domiciled in the state, or service has been made on the defendant in the state; in Missouri one year, unless the act was committed in the state, or while one of the parties resided in the state; and in Porto Rico one year, unless the act was committed while one of the parties resided there; in Nebraska two years' residence is required if the cause arose out of the state.

In most of the states causes for divorce are substantially the same as in Nevada. The draft of an act to make uniform the law regulating divorce and the annulment of mar-

riage, prepared by the committee of the American Bar Association, and recommended to the commissioners on uniform state laws, designates causes for the dissolution of marriage substantially the same as the ones contained in our statute, excepting that our clause relating to the neglect of the husband to provide for the wife is omitted, and two years' desertion, instead of one, and habitual drunkenness for two years, instead of drunkenness which incapacitates from contributing the proper share to the support of the family, are required. In the proposed uniform act it is provided that two years' residence is necessary in order to give jurisdiction, except when the cause is adultery or bigamy, or there are certain other classified circumstances. That the various states may make such classifications and require this or any desired length of residence does not appear to have been questioned by the eminent lawyers and jurists constituting the committee preparing and recommending the act and composing the American Bar Association.

In the enactment and administration of the laws many classifications necessarily exist. The defendant in a civil action must answer in ten days if served in the county, within twenty days if served out of the county and in the district, and within forty days if served out of the district. The statutes provide that nonresident defendants are required to give security for costs. Classifications in regard to cities, counties, officials, public service, mining, and other corporations, business and professional [230] vocations, and in many other ways have been made and sustained when reasonable. The residential classification made by the amendment of 1913, being similar to the classifications made in various states, which have been enforced without exception, and to the ones made in our own statute relating to marriage and divorce, and acted upon and accepted without question for fifty years, we are unable to say that it is unreasonable or unconstitutional. It is well settled that reasonable classifications in a legislative act are not inimical to constitutional provisions against the passage of special laws. (*Singleton v. Eureka County*, 22 Nev. 97, 35 Pac. 833; *Ex p. Spinney*, 10 Nev. 323; *Russell v. Esmeralda County*, 32 Nev. 304, 107 Pac. 890; *Central Loan, etc. Co. v. Campbell Commission Co.* 173 U. S. 84, 19 S. Ct. 346, 43 U. S. (L. ed.) 623; *Harwood v. Wentworth*, 162 U. S. 547, 16 S. Ct. 890, 40 U. S. (L. ed.) 1069; *Waite v. Santa Cruz*, 184 U. S. 302, 22 S. Ct. 327, 46 U. S. (L. ed.) 552; 36 Cyc. 992; *Atchison, etc. R. Co. v. Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 U. S. (L. ed.) 909; *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73.)

In determining constitutional questions presented, the law of divorce as it existed at

and prior to the time of the adoption of the constitution should be considered. There has been divorce in some form since the dawn of history. Under the Mosaic law the husband could write the wife a bill of divorce and send her away, and she could go and become another man's wife. (*Deuteronomy*, c. 24.) About the beginning of the Christian era there arose two famed schools of the law at Jerusalem. One, under Shammai, taught that divorce was unlawful except for adultery; the more popular one, under Hillel, authorized divorce for any cause. With the early Romans divorce was at the will of the husband, and later upon the agreement of the parties. In more modern times, in all civilized countries, divorce has been subject to the limitations or consent of the state or church in control. In England at the time of the secession of the colonies, and for a long time previously, divorce from bed and board had been allowed by ecclesiastical courts, and absolute [231] divorces to a favored few by special acts of parliament. Otherwise divorces were not granted under the common law, and there was no general act of parliament authorizing them, and no jurisdiction in the chancery or common-law courts to grant divorces until eighty-one years after the declaration of independence.

As there were no ecclesiastical courts in this country, divorces were granted by special act of the legislature, and later in most states under general statutory provisions. As Congress has only such powers as are specifically granted or implied under the provisions of the constitution of the United States, and as these do not embrace divorce, and all legislative powers not granted to Congress are reserved to the legislatures of the various states, except as inhibited by some provision of the state constitution, and as there is no inherent or inherited power in the courts of this country to grant divorces, it follows that our tribunals have no jurisdiction or authority in regard to divorces, except such as may be conferred upon them by the legislature, which has power to pass general and special laws, except as prohibited by some constitutional provisions. The law favors marriage as the most important of the domestic relations, but allows its dissolution only under such restrictions as the legislature may deem best for the public welfare.

The authorities hold that the courts of the state have no jurisdiction to grant a divorce, unless at least one of the parties has a domicile in the state. (*People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260, opinion by Judge Cooley; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Hare v. Hare*, 10 Tex. 355; *Strait v. Strait*, 3 MacArthur (D. C.) 415; *Greenlaw v. Greenlaw*, 12 N. H. 200; *House v. House*, 25 Ga. 473; *Sewall v. Sewall*, 122



Mass. 156, 23 Am. Rep. 299; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; State v. Armington, 25 Minn. 29; Reel v. Elder, 62 Pa. St. 308, 1 Am. Rep. 414.)

In Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, it was held that a decree of divorce rendered in a state where neither of the parties lived at the time of rendition is [232] void for want of jurisdiction. Referring to this case, the Supreme Court of Kansas, in Litowich v. Litowich, 19 Kan. 451, 27 Am. Rep. 148, said:

"And this decision of the Supreme Court of Indiana is in accordance with the unbroken current of authority. (2 Bishop's Marriage & Divorce, sec. 144.) And where the judgment granting the divorce does not appear to be void upon its face, it may be shown to be void by evidence *aliunde*. (Hoffman v. Hoffman, 46 N. Y. 30, 33, 7 Am. Rep. 299; Kerr v. Kerr, 41 N. Y. 272; Borden v. Fitch, 15 Johns. (N. Y.) 121, 141, 8 Am. Dec. 225; Leith v. Leith, 39 N. H. 20; Pollard v. Wegener, 13 Wis. 569, 576.) And indeed any judgment from a sister state, void for want of jurisdiction, may be shown to be void in any proceeding, direct or collateral, and by evidence *dehors* the record, provided that the record itself does not show the invalidity of the judgment upon its face. (Thompson v. Whitman, 18 Wall. 457, 21 U. S. (L. ed.) 897; Knowles v. Gaslight, etc. Co. 19 Wall. 58, 22 U. S. (L. ed.) 70; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Ward v. Price, 25 N. J. L. 225; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 156, 21 Am. Dec. 172; Shumway v. Stillman, 6 Wend. (N. Y.) 447, 452; Hall v. Williams, 6 Pick. (Mass.) 232, 237, 17 Am. Dec. 356; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Pollard v. Baldwin, 22 Ia. 328; Norwood v. Cobb, 15 Tex. 500, 24 Tex. 551.)"

In Howell v. Howell, 87 Kan. 389, 124 Pac. 168, Ann. Cas. 1913E 429, the court said: "Under these sections a party asking a divorce must, in any event, have been an actual resident, in good faith, of the state one year preceding the filing of his petition. The Howells, it seems, had not resided in Kansas the required time, and hence the court had no jurisdiction of the divorce proceeding."

In Nicholas v. Maddox, 52 La. Ann. 1493, 27 So. 966, cases are cited supporting the statement of the court that it has always been held in Louisiana that a husband or wife who acquires a domicile in that state [233] cannot maintain an action there against the absent spouse, who never acquired a domicile in that state.

In McConnell v. McConnell, 167 Mo. App. 680, 151 S. W. 175, it was held that under an act providing that an action for divorce

should be had in the county where the plaintiff resides, and declaring that no person shall be entitled to a divorce who has not resided in the state for a year next before the filing of the petition, unless the offense complained of is committed within the state, the court had no jurisdiction of a suit for divorce by a nonresident husband for an act committed by the wife in the state while residing there.

In Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883, 12 L.R.A.(N.S.) 1100, it was held that actual residence is necessary to give jurisdiction; and the note reviews numerous cases so holding.

In Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L.R.A.(N.S.) 1197, 12 Ann. Cas. 1090, it was held that residence must be shown to give the court jurisdiction.

In Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 U. S. (L. ed.) 366, it was held that the state has exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, that the appearance of a nonresident defendant does not invest the court with jurisdiction of a suit for divorce instituted by a person who has no *bona fide* domicile within the state, and that the state may forbid the enforcement within its borders of a decree of divorce procured by its own citizens in another state while retaining their domicile in the prohibiting state. (Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 U. S. (L. ed.) 867, 5 Ann. Cas. 1; Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551, and note under this case in 45 U. S. (L. ed.) 804.)

In Barber v. Barber, 21 How. 582, 16 U. S. (L. ed.) 226, the United States Supreme Court disclaimed any jurisdiction in the courts of the United States upon the subject of divorce, but held that the parties to a decree of divorce are bound by the state court having jurisdiction over the parties.

[234] In 14 Cyc. 584, over the citation of authorities, it is said: "The courts of the state have no jurisdiction to decree a divorce between parties who do not reside therein."

In Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954, it was held that an act requiring the plaintiff in a divorce case to have been an actual resident of the state for one year and the county within which the action was commenced for three months next preceding the commencement of the action is within the powers reserved by the state, and not in conflict with any provision of the constitution of the United States or of the state. The law was held not in conflict with the provision in the constitution of the State of South Dakota that: "No law shall be passed granting to any citizen, class of citizens, or corporation, privileges or immunities which upon the same terms shall

not equally apply to all citizens or corporations."

In Tiffany's *Persons and Domestic Relations* (2d ed.) sec. 98, it is said: "Our courts have jurisdiction to entertain and grant suits for divorce only where such jurisdiction has been expressly conferred upon them by statute. It is a general rule that the jurisdiction of proceedings for a divorce depends on the domicile of the parties, irrespective of the place of marriage, and without reference to the place where the offense for which the divorce is sought was committed. To give the court jurisdiction, at least one of the parties must be domiciled in the state or territory where the action is brought, and, if neither party is domiciled in the state, the court has in fact no jurisdiction."

In an article on control of marriage and divorce in a law publication for June, 1914, it is said: "Jurisdiction and power to dissolve the marriage relation by divorce is purely statutory, throughout all portions of the United States, and the statutory power to enact statutes specifying causes or ground, procedure, and length of domicile required to confer jurisdiction, rests with the legislative bodies of each state."

[235] Among the cases cited by the respondent, holding that divorce is statutory, are: *Franklin v. Franklin*, 40 Mont. 348, 106 Pac. 353, 26 L.R.A.(N.S.) 490, 20 Ann. Cas. 339; *Irwin v. Irwin*, 3 Okla. 186, 41 Pac. 369; *Dennis v. Dennis*, 68 Conn. 186, 36 Atl. 34, 34 L.R.A. 449, 57 Am. St. Rep. 95; *Dutcher v. Dutcher*, 39 Wis. 651; *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495; *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; *Noel v. Ewing*, 9 Ind. 37; *Williams v. Williams*, 136 Ky. 71, 123 S. W. 337; *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *State v. Templeton*, 18 N. D. 525, 123 N. W. 283, 25 L.R.A.(N.S.) 234; *Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192; *Martin v. Martin*, 173 Ala. 106, 55 So. 632; *Jones v. Jones*, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645; *Carson v. Carson*, 40 Miss. 349; 1 *Pomeroy*, Eq. sec. 96; sec. 112, subd. 10; *Maalen v. Anderson*, 163 Mich. 477, 128 N. W. 723-725.

The case of *Maynard v. Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 U. S. (L. ed.) 654, on appeal from a judgment of the Supreme Court of the Territory of Washington, determined in 1888 by the Supreme Court of the United States, which is the final arbiter of questions relating to the federal constitution, is conclusive against the contention that a special legislative divorce act infringes rights guaranteed by that instrument. The question involved was the validity of an act of the territorial legislature which simply provided: "That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A.

Maynard be, and the same are hereby, dissolved."

It was alleged in the complaint that no cause existed for the divorce; and that no notice was given to the wife of any application by the husband for a divorce or pendency of the bill in the legislature; that she had no knowledge of the passage of the act until July, 1853; that at the time she was not within, and that she never became a resident of, the territory, and never acquiesced in or consented to the act; that the legislative assembly was without authority to pass the act; and that the same was void, and did not divorce the parties. Although such a [236] special act granting a divorce would be void under the provision of our constitution, the decision reached indicates that our statute does not conflict with any provision of the federal constitution, and would not even if it were a special instead of a classified divorce act and that the claim that it is void because special or infringing the rights guaranteed to the citizen is untenable. Speaking for the Supreme Court of the United States in that case, Justice Feld said:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

"... Says Bishop, in his *Treatise on Marriage and Divorce*: 'The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power.' (Section 664.) Says Cooley, in his *Treatise on Constitutional Limitations*: 'The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases.' (Page 110.) Says Kent, in his *Commentaries*: 'During the period of our colonial government, for more than one hundred years preceding the Revolution, no divorce took place in colony of New York, and for many years after New York became an independent state there

was not any lawful [237] mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature.' (Volume 2, 97.) The same fact is stated in numerous decisions of the highest courts of the states. Thus in *Cronise v. Cronise*, 54 Pa. St. 260, the Supreme Court of Pennsylvania said: 'Special divorce laws are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the state, under the constitutions of 1776 and 1790. The continued exercise of the power, after the adoption of the constitution of 1790, cannot be accounted for, except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it; but it stands upon the higher ground of contemporaneous and continued construction of the people of their own instrument.'

"In *Crane v. Meginnis*, 1 Gill & J. (Md.) 474, 19 Am. Dec. 237, the Supreme Court of Maryland said: 'Divorces in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of the legislative power.'

"In *Starr v. Pease*, 8 Conn. 541, decided in 1831, the question arose before the Supreme Court of Connecticut as to the validity of a legislative divorce under the constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that state on the subject of divorces, passed one hundred and thirty years before, which provided for divorces on four grounds, said, speaking by Mr. Justice Daggett: 'The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii*; and at almost every session since the constitution of the United States went into operation, now forty-two years, [238] and for thirteen years of the existence of the constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our state. We are not at liberty to inquire into the wisdom of our existing law on this subject, nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the constitution of the United States or by that of the state.' . . .

"The same doctrine is declared in numerous other cases, and positions similar to those

taken against the validity of the act of the legislative assembly of the territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of the government into three departments and the implied inhibition through that cause upon the legislative department to exercise judicial functions was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. . . . We are therefore justified in holding—more, we are compelled to hold—that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature.

" . . . As was said by Chief Justice Marshall in the Dartmouth College case, 4 Wheat. 519, 4 U. S. (L. ed.) 629, not by way of judgment, but in answer to objections urged by positions taken: 'The provision of the constitution never has been understood to embrace other [239] contracts than those which respect property or some object of value, and confers rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces.'

" . . . When the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family, and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams v. Palmer*, 51 Me. 481, 483. Said that court, speaking by Chief Justice Appleton: 'When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those

rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established; but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are much as the law determines from time to time, and none other.' And again: 'It is not, then, a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, [240] the obligations of which arise, not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals; the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.' . . . And the chief justice cites, in support of this view, the case of *Maguire v. Maguire*, 7 Dana (Ky.) 181, 183, and *Ditson v. Ditson*, 4 R. I. 101. In the first of these the Supreme Court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts."

If, as petitioner contends, under the provisions of the United States constitution and the fourteenth amendment guaranteeing to the citizens of the various states equal protection of the laws, our statutes cannot discriminate against nonresidents desiring divorce, and our legislature cannot require persons coming to this state and seeking divorce to reside here one year, they cannot be required to reside here six months, nor for any length of time, but would be entitled to maintain an action for divorce for the causes specified under our laws, without taking up their residence here.

If, contrary to the doctrine universally recognized in other states and in foreign civilized countries, citizens of other states, without obtaining a domicile here, were entitled

to apply for divorce in our courts under the provisions of the federal constitution granting citizens of other states equal protection of the laws, the same condition would exist in all the other states, for the federal [241] constitution applies equally to all, and every citizen of the United States would be free to go into any adjoining or other state where a divorce might be most easily obtained and start an action, without having any residence or domicile in that state. If residence may be required, necessarily the legislature must have the power to determine the period.

There is a distinction between citizenship and residence, and the rights of citizens and residents are often different. Citizens of the United States are native-born and foreigners who have been naturalized according to the laws of the United States after five years' residence. Even the rights of the citizens are not always the same. Under the constitution, male persons over 21 years of age, who are citizens of the United States, and who have resided in this state six months, are entitled to vote and hold office and females who have resided in the state one year are eligible to the offices of superintendent of schools and school trustee. In this and many other states females, although citizens and residents for the period required for males, are not allowed to vote, and in other states foreigners who were residents have been allowed the elective franchise. The qualifications prescribed by the state and federal constitutions relating to citizens and electors have no reference to divorce, a status pertaining to the internal affairs of the state and under the control of the lawmaking power, except as restricted or provided by the constitution. Under the rights assured to the citizen by the constitution, none in relation to divorce is guaranteed or specified.

No rights by implication follow from that document, except such as existed or were understood when it was adopted. For illustration, the constitution provides that "the right of trial by jury shall be secured to all, and remain inviolate forever." This insures only the right of trial by jury in ordinary civil and criminal actions as it existed at the time the constitution was adopted, but does not guarantee the right of trial by jury in an equity case (*Barton v. Barbour*, 104 U. S. 126, 26 U. S. (L. ed.) [242] 672), or in a proceeding for the collection of taxes because there was no right to a jury in such cases at the time the constitution was adopted (*Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 S. Ct. 57, 29 U. S. (L. ed.) 414; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 10 S. Ct. 533, 33 U. S. (L. ed.) 892).

In the brief filed by counsel acting as a friend of the court, it is said that the amendment of 1913, which went into effect on the

1st of January, 1914, is prospective legislation, and not retrospective, and consequently that, as the complaint filed in the district court alleges that the cause of action accrued prior to the time when the act went into effect, the case does not come within the amendment, but is controlled by the statute previously in force, which required a residence of only six months.

As the amendment does not relate to the cause for divorce, but to the residence required before institution of suit, it may be considered as a matter of practice. Statutes extending or shortening the periods within which actions may be brought have often been held to apply to contracts existing or executed prior to the passage of the statute, and not to be unconstitutional when they shorten the time if they allow a reasonable period for the commencement of suit.

If the amendment could be considered as relating to the cause for divorce, it would not be inimical to the constitutional provision prohibiting laws impairing the obligation of contracts, for, as we have seen, constitutional provisions of this nature do not apply to divorces, which are under the control of the legislature. (Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 U. S. (L. ed.) 654; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260.)

Many religious people regard marriage as a sacrament. Our statute provides: "That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential." (Rev. Laws, sec. 2338.)

In his work on Marriage and Divorce (6th ed.), Mr. Bishop says: "An executed marriage contract, which is that whereon any divorce operates, is not a contract. It is [243] a status. Consequently the provision of the constitution now in contemplation has no relation whatever to divorce, whether legislative or judicial." (Section 667.)

"Marriage, being much more than a contract, and depending essentially on the sovereign will, is, not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties. That it is not within this constitutional provision may be deemed now to be settled doctrine." (Section 8.)

In his work on Marriage, Divorce, and Separation, he states:

"Competent parties have always the law's approbation in marrying; but for divorce it requires a cause which itself has approved. If, therefore, a statute authorizes divorce for a dereliction specified, it should in reason be applied equally to past as to future transactions; and so the courts will apply it, if nothing appears in the terms to forbid. For

the same reason it is applicable to past marriages the same as to future ones; consequently, also, it is not an infringement of constitutional guaranties. In other words, the status of marriage, though it deeply affects the individual parties, is treated by the law as a public interest, to be molded, modified, or destroyed by the public demand." (Section 1492.)

In Connor v. Elliott, 18 How. 591, 15 U. S. (L. ed.) 497, the Supreme Court of the United States held that no privileges are secured to citizens in the several states by section 2, art. 4, of the federal constitution, except those which belong to citizenship, and that marital rights attached to the contract of marriage are not included in such privileges.

As divorce is not among the inalienable rights of man or the ones granted by Magna Charta, the federal or state constitution, or the common law, and, except at the will and subject to any restrictions imposed by the legislature, has never been recognized as one of the guaranteed privileges of the citizen, and as marriage is the most important of the domestic relations, and of [244] highest concern to the state, it follows that the right to have the bonds of matrimony dissolved is limited to the causes and subject to the requirement prescribed by the statute, and that the amendment, advisedly passed by the legislature, and recommended and approved by the governor, requiring a *bona fide* residence of one year, the period required in most of the states to give the court jurisdiction in an action for divorce, controls, instead of the earlier statute, designating six months, which served our people for half a century. Questions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine. It is the duty of the courts to interpret and enforce the statute in accordance with the intention of the lawmaking body, unless it is clearly in conflict with some provision of the organic law. (Ex p. Boyce, 27 Nev. 299, 75 Pac. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Gibson v. Mason, 5 Nev. 233.)

Although the common law is progressive, and within its proper limitations, by judicial decision, advances to meet the new conditions which arise in the affairs of men, and new statutes are enacted as necessity may appear, the provisions of the constitution are adamant until changed by the people, and do not cover rights, privileges, and obligations not specified and not existing or understood at the time of its adoption, or not in force by long acquiescence, or by continued official or public approval.

As the parties were not residents of the state at the time the cause for divorce accrued, and neither was a *bona fide* resident of

the state for one full year next preceding the commencement of the action, as required by the statute, the court was without jurisdiction, and the learned district judge properly refused to make an order for publication of summons.

The application for the writ is denied.

ON PETITION FOR REHEARING.

Per Curiam:  
Rehearing denied.

**NOTE.**

**Validity of Statute Requiring Certain Period of Residence within State as Prerequisite to Divorce.**

Divorce jurisdiction is, in the United States, wholly statutory and subject to legislative control. 9 R. C. L. tit. *Divorce*, pp. 245, 396. It would seem to follow that the legislature has the power to require a certain period of residence within the state as prerequisite to a divorce. *Franklin v. Franklin*, 40 Mont. 348, 20 Ann. Cas. 339, 106 Pac. 353, 26 L.R.A.(N.S.) 490, wherein the court said obiter: "It rests exclusively with the legislature to prescribe the grounds upon which divorces may be granted, and also to prescribe such conditions as to residence of the parties within the jurisdiction, and such limitations as to the time within which actions may be brought, to secure them, as it deems public policy requires." So in *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, it was said: "It has long been the law of this state that a divorce shall not be granted upon the default of the defendant, or upon the uncorroborated evidence of the parties (Civ. Code, sec. 130), and that a divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought for three months next preceding the commencement of the action. (Civ. Code, sec. 128.) In discussing this provision of our divorce law, this court said in *Warner v. Warner*, 100 Cal. 11: 'The state has an interest in the result of such cases. The public welfare demands that the bonds of matrimony should not be lightly set aside, and there is less probability of successful collusion or unfair advantage where the parties have both resided and are known than there is in a county where neither has resided, and which the plaintiff may select solely for the purpose of procuring a divorce.' The provisions above referred to and others contained in our Civil Code, applicable only to divorce cases, can, as already stated, be sustained only on the theory of the interest of the state in the maintenance of the marriage relation. We presume that no one

would question their validity, even though some of them do regulate the practice of courts of justice in divorce cases."

In the reported case it is held that a statute is valid which requires a longer period of residence where but one of the parties is a resident of the state than if both parties are residents. In *Pugh v. Pugh*, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954, which appears to be the only other case involving the question, the statute under consideration required a residence of one year in the state as prerequisite to a suit for divorce except in cases where the marriage took place in the state or the cause of action arose therein. The court held that the general requirement of a residence of one year was valid and refused to pass on the validity of the exceptions, on the ground that a person not within their terms had no interest sufficient to raise the question. The court said: "The first section of the act fixing the time within which actions may be commenced for a divorce is clearly within the powers reserved to the state, and is not in conflict with any constitutional provision of this state or the United States, and is therefore clearly constitutional. The right of the state to thus limit the time for the commencement of an action for divorce cannot be questioned, and assuming for the purposes of this decision only that the exceptions provided in sections 2 and 4 are unconstitutional, as before stated, the rights of the plaintiff are in no manner affected by these exceptions."

**ROSENBERG**

v.

**DAHL.**

Kentucky Court of Appeals—January 12, 1915.

162 Ky. 92; 172 S. W. 113.

**Agency — Sufficiency of Evidence to Show Relation.**

Agency and consequent liability for negligence may be found from the evidence as a whole and facts and circumstances, notwithstanding the categorical answers to the contrary of the alleged principal and agent, the only witnesses on the issue.

**Streets and Highways — Injury from Runaway Horse.**

One injured by a horse running away on a street may rest on a prima facie inference of negligence from it having been left unhitched and unattended, though, whether or not the

owner introduces evidence, the question of negligence is for the jury.

[See note at end of this case.]

**Damages — Excessiveness — General Rule.**

The Supreme Court cannot grant a new trial merely for excessive damages for personal injury, unless they appear to have been given under the influence of passion or prejudice; that is, are so excessive as to be entirely out of proportion to the injury.

[See Ann. Cas. 1913A 1361.]

**Parties — Failure to Serve Coparty — Waiver of Objection.**

The benefit of Civ. Code Prac. § 102, providing that in an action not on contract, where part only of defendants have been served, plaintiff can only demand a trial at any term, as to those served, on discontinuing on the first day of such term as to the others, is waived by a defendant going to trial without seasonable objection.

**Judgments — Against Defendant Not Served — Who May Object.**

The judgment in a negligence case is not invalidated, as against the only defendant who was summoned or appeared and defended, because also in form against others.

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Fourth Division.

Action for damages. George Dahl, plaintiff, and S. Rosenberg, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*M. A. Sachs, D. A. Sachs, J. G. Sachs, Benj. H. Sachs and D. A. Sachs, Jr., for appellant.*  
*J. L. Richardson and Lieber & Heidenberg for appellee.*

[93] CARROLL, J.—The appellee, Dahl, brought this suit against the appellant, "S. Rosenberg and others, partners doing business under the firm name and style of Royal Milling Company, and George Romiser," to recover damages for personal injuries sustained, as he alleged, when a vehicle in which he was riding in the city of Louisville was collided with by a runaway horse and buggy owned, as he alleged, by "S. Rosenberg and others unknown to this plaintiff, doing business under the firm name and style of Royal Milling Company," and which at the time of the collision was being used by Romiser, their servant and agent.

It appears that the summons issued on the petition was executed on Rosenberg individually and also as president [94] and chief officer of the Royal Milling Co., neither Romiser nor any other defendants being served with process.

Rosenberg individually filed his answer, in which, after traversing the averments of the

petition, he specifically denied that at the time of the accident "Romiser was a servant, agent or employee of the defendant Rosenberg or of said Rosenberg and others doing business under the firm name or style of Royal Milling Company, or that he ever was an agent, servant or employee of defendant Rosenberg."

In a separate paragraph he set up as a defense the contributory negligence of Dahl.

On a trial of the case before a jury there was a verdict reading: "We, the jury, find for the plaintiff in the sum of \$2,500.00," and on this verdict the following judgment was entered: "It is considered and adjudged by the court that the plaintiff, George Dahl, recover of the defendants, S. Rosenberg, and others, partners, doing business under the firm name and style of Royal Milling Co., and George Romiser, the sum of \$2,500.00, with 6% interest per annum from September 18, 1913, and his costs."

A reversal of this judgment is asked because the evidence failed to show that Romiser, who was in charge of the horse at the time it ran off, was an agent, servant or employee of Rosenberg, and also for other reasons that will be noticed in the progress of the opinion.

The circumstances of the accident are about these: Romiser was driving the horse that ran off to a buggy while he was out soliciting customers for flour. When he went into the store of a man named Ott on Storey avenue, in the city of Louisville, for the purpose of talking to him about the flour he was selling, he left the horse attached to the buggy standing on the street, unhitched and unattended, in front of the store. A little while after Romiser went into the store the horse, for some cause not explained in the evidence, ran away and the front wheel of the buggy collided with the rear wheel of the surrey in which appellee was riding. In the collision, and as a result of it, appellee was thrown out, or partly out, of the surrey, receiving the injuries for which he sought to recover damages.

As the alleged negligence on which the action was founded grew out of the conduct of Romiser, who was in [95] charge of the horse, it was essential to a recovery against Rosenberg that the appellee should have introduced evidence sufficient to show that Romiser was using the horse in connection with the business of Rosenberg, and while acting as his agent or employee, and it is earnestly contended by counsel for the appellant that the evidence on behalf of appellee did not establish the employment or agency.

Of course, if Romiser, in using the horse and buggy at the time, was acting as the agent of Rosenberg, or in his employment,

and his negligence caused the injury to appellee, Rosenberg could be made liable in damages for the negligence of his agent or employee; but if Romiser was not using the horse and buggy as an agent or employee of Rosenberg, then Rosenberg could not be subjected to damages on account of the negligence of Romiser in leaving the horse standing on the street unhitched.

We have read and considered very carefully the evidence of Romiser and Rosenberg, the only witnesses who testify on this subject, and both of them say, in answer to direct questions, that Romiser, on the day the accident happened, was not soliciting orders for or acting as agent or employee either for Rosenberg or the Royal Milling Co., which it appears was the name assumed by Rosenberg in the conduct of his business as a dealer in flour. But when the whole of their evidence is read, it leaves the unmistakable impression that Romiser was in fact using the horse and buggy in soliciting orders for Rosenberg and the Royal Milling Co. The evidence of these witnesses is full of evasion and effort to exonerate Rosenberg from liability for the accident, and the jury having the right to weigh and consider the whole of the evidence and the fair and reasonable inferences that might be drawn therefrom, came to the conclusion that Romiser was an agent of Rosenberg and the Royal Milling Co., and we are not prepared to say that their finding upon this disputed issue of fact is not sustained by sufficient evidence, direct and circumstantial, to support the verdict.

When a witness is examined concerning a transaction the jury are not bound to accept as true his direct answers to one or more questions, but may, upon the whole of his evidence, be entirely justified in disregarding his "yes or no" answers and in reaching the conclusion that [96] his evidence as a whole is so contradictory to the categorical answers as to furnish reasonable ground for the belief that the real truth of the transaction is to be found in the facts and circumstances that destroy the probative value of his direct and unequivocal answers.

The court told the jury in the instructions that they could not find for appellee unless they believed that at the time of the accident Romiser was acting as the servant, agent or employee of Rosenberg and the Royal Milling Company, and the jury could not have found a verdict for appellee unless they so believed, and our reading of the evidence upon this feature of the case convinces us that the jury did not make any mistake in so finding.

The next question is, did the negligence of Romiser cause the accident? The testimony of Romiser in relating how the accident happened is as follows: "Q. How did you happen

to let the horse get away that day? A. He just ran away. I did not let him. Q. You were at Ott's grocery store? A. Yes, sir. Q. You left him unhitched out in front? A. Yes, sir. Q. Left him standing loose in the street? A. Yes, sir. Q. And when you went out to get him he bolted? A. When I went out to get him? Q. Yes. A. No, sir. He bolted before I went out to get him or he would not have knocked me unconscious. Q. How did he happen to hit you? A. The horse was headed out Storey avenue. I was in Mr. Ott's grocery and he says, 'There goes your horse.' The minute I seen the horse running I started out, and I made a break at the lines, and as I grabbed at the lines I missed them and he knocked me unconscious, and that is all I know about him. Q. Did you have a hitching rein on your buggy? A. Yes, sir. Q. Why didn't you hitch him? A. No place there convenient to hitch."

Mr. Ott was asked: "Q. I will ask you where you were standing in your store at the time of this accident? A. Right inside the door. Q. Was Mr. Romiser standing near you? R. Right close by me. Q. Did you see this accident? A. Yes, I seen the horse running away. Q. Tell the jury just what you saw. A. The horse ran away, and Mr. Romiser ran after it, and when he got close to the buggy he must have got caught and thrown Mr. Romiser on the ground. That is all I seen."

This being all the evidence of the subject of the horse running away except that relating to the immediate collision, it is insisted by counsel for appellant that it is [97] not sufficient to show that Romiser was guilty of any actionable negligence. The evidence we have quoted merely shows that Romiser left the horse unhitched and unattended when he went into the store of Ott, and that the horse, for some unaccountable cause, ran off. There is no evidence as to the nature or habits of the horse or as to whether he was gentle or wild, docile or vicious; so that, unless it will be presumed that Romiser was negligent, or negligence may be inferred from the mere fact that the horse he left unattended and unhitched in the street ran off, there is no evidence of negligence in the record. If, however, this presumption or inference of negligence arises from the facts stated, then it was incumbent upon appellant, if he desired to show that Romiser was not negligent, to overcome this inference by evidence that the horse was gentle and his habits good, and that in the exercise of ordinary care it could not have been anticipated that he would become frightened or run off.

In *Palmer Transfer Co. v. Long*, 140 Ky. 111, 130 S. W. 961, we had a case in many respects like this. The driver of a carriage for hire left his horses standing unattended in



the street while he went into a house for the purpose of getting a passenger, and they became frightened and ran away, injuring Mrs. Long, an occupant of the carriage, who brought suit for damages. What caused the horses to run away did not appear, but we said:

"We think the jury was authorized to find that the driver was negligent in not keeping hold of the reins, or hitching his horses. Unless he knew that the horses were gentle and would stand without being held, it was his duty to have his hands on the reins so that he could control them, or to have hitched them. There is no evidence that the horses were gentle or safe, and the presumption from their conduct is that they were not."

In *Robert Dennery v. Great Atlantic etc. Tea Co.* 82 N. J. L. 517, 81 Atl. 861, 39 L.R.A.(N.S.) 574, the court said: "If, therefore, a horse and wagon are found passing along a street with no one in charge, the absence of a driver gives rise to prima facie evidence of negligence on the part of the owner. The fact that the horse is running does not negative this presumption. That a horse, under such circumstances, finding itself without any one's guidance or control, should soon commence running is the result both of its nature and of its training. . . .

[98] We think, therefore, that the unexplained presence upon a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raises a prima facie presumption of negligence on the part of the owner." To the same effect are: *Corona Coal, etc. Co. v. White*, 158 Ala. 627, 48 So. 362, 20 L.R.A.(N.S.) 958; *Southworth v. Old Colony, etc. R. Co.* 105 Mass. 342, 7 Am. Rep. 528; *Wasmer v. Delaware, etc. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Moulton v. Lewiston, etc. Ry.* 102 Me. 186, 66 Atl. 388, 10 L.R.A.(N.S.) 845; *Ryan v. McIntosh*, 20 Ont. L. Rep. 31, 17 Ann. Cas. 806.

Many other authorities sustaining the proposition that it is prima facie evidence of negligence to leave a horse that runs away unhitched and unattended in a public street of a city might be referred to, but there is really no substantial difference of opinion in the cases upon this subject.

The general rule, and the one that we adopt as correct, is that when a horse, that has been left unhitched and unattended on the street of a city, runs away, thereby causing injury, the complaining party may rest his case on the prima facie inference of negligence arising from evidence that the horse was left unhitched and unattended, without offering any evidence as to the habits or qualities of the horse, or the cause that made him run away. We do not mean, however, to say that the mere fact that an un-

hitched or unattended horse runs away creates a conclusive presumption of negligence, or that the court should so instruct the jury as a matter of law. For, whether or not the owner introduces evidence tending to show the gentle and quiet habits of the horse, or such other pertinent facts, as illustrate the exercise of care on his part in leaving him unattended and unhitched—although of course he may do this—or the case is closed without any evidence of the character or habits of the horse or evidence of care on the part of the owner, it is a question for the jury to say whether the owner was negligent in leaving the horse unattended and unhitched.

There are many horses of good habits and gentle disposition that may safely be left on the street unhitched and unattended, but whenever a horse so left runs off, then the owner takes the burden of showing the disposition and qualities of the horse and that in leaving him unhitched he acted with reasonable prudence, and it is [99] for the jury to say whether he was or was not guilty of negligence. *Dolfinger v. Fishback*, 12 Bush (Ky.) 474.

This view of the law was presented in an instruction telling the jury that if they believed from the evidence that Romiser carelessly and negligently so managed and controlled or handled the horse attached to the vehicle as to suffer the horse to run away unattended by any one in charge, through the streets of Louisville, whereby he came in contact with the vehicle in which the plaintiff was riding, the law is for the plaintiff and that unless they so believed they should find for the defendant.

Another ground for reversal is that the damages awarded are excessive. The appellee, at the time he was injured, was a delicate man, under the treatment of Dr. Pope, and the evidence of Dr. Pope and the other witnesses tends to show that his condition was much aggravated by the accident, and that he sustained on account of this some permanent injury.

The assessment of damages is, we think, larger than it should be, and yet it cannot be said that it is so excessive as to appear to have been given under the influence of passion or prejudice. In many personal injury cases that are brought before us, the damages assessed are larger than we think should be awarded, but under the Code we have no authority to grant a new trial merely on the ground of excessive damages unless the damages appear to have been given under the influence of passion or prejudice; or, in other words, are so excessive as to be entirely out of proportion to the injury sustained. The question of the amount of damages that shall be recovered in this class of cases is primarily for the jury. They are as well, if

not better, qualified than we are to arrive at a fair and just conclusion as to what amount of damage should be allowed, and, although we may not agree with their assessment, our uniform practice has been not to interfere with it unless for the causes stated; and hence we do not see our way clear to order a new trial on this ground.

Section 363 of the Civil Code of Practice provides that: "An action upon contract, wherein the summons has been served in due time, as provided in Section 102, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other ordinary actions the plaintiff can only demand a trial at any term as to part of the defendants upon his [100] discontinuing his action on the first day of such term as to the others."

And as it appears that Rosenberg was the only defendant served with process or before the court, it is contended that the appellee was not entitled to a trial until all of the defendants were summoned or until he had discontinued his action as to those not summoned.

Under this section of the Code it would be error to force the defendant into trial in an ordinary action like this unless all of the defendants were before the court or the plaintiff discontinued his action as to those not before the court. *Hedger v. Downs*, 2 Metc. (Ky.) 160; *Baumeister v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 72 Am. St. Rep. 397; *Adkins v. Kendrick*, 131 Ky. 779, 115 S. W. 814.

But this provision of the Code is intended for the protection and benefit of the defendant. He may, if he chooses to do so, object to a trial unless all the defendants are summoned or the plaintiff discontinues his action as to those not summoned, or he may waive his right to claim the benefit of this statute by failing to object to the trial in seasonable time, and if he does so fail to object, he cannot thereafter avail himself of this code provision either in the trial court or in this court. In this case the record shows that no motion for a continuance, or objection to the trial before the other defendants had been brought before the court, or the action as to them was discontinued, was made, and we may well assume that the capable and experienced counsel for appellant were not averse to going into trial at the time the case was called without either asking for a continuance or moving that the plaintiff discontinue his action as to the defendant not summoned.

Another objection is to the form of the judgment. Of course, the judgment is void as to Romiser and he is not complaining of it; nor do we perceive how the rights of

Rosenberg are prejudicially affected by the fact that the judgment, in addition to going against him, went against "others, partners doing business under the firm name and style of Royal Milling Co." Rosenberg was the only party before the court, the only person who filed an answer or made defense, and it would be the merest trifling to say that the surplus matter in this judgment should render it void as to Rosenberg.

Upon the whole case, we perceive no substantial error to the prejudice of the appellant, and the judgment is affirmed.

#### NOTE.

##### **Liability of Owner for Injuries Caused by Runaway Horse.**

Scope of Note, 1114.

Basis of Liability, 1114.

Horse Unattended, 1115.

Horse in Charge of Driver, 1116.

Servant Injured by Master's Horse, 1117.

Contributory Negligence, 1117.

#### *Scope of Note.*

The purpose of this note is to discuss the recent cases passing on the liability of the owner of a runaway horse for injuries caused by it. The earlier cases on that subject are collected and discussed in the notes to *Koonz v. New York Mail Co.* 5 Ann. Cas. 874; *Damonte v. Patton*, 10 Ann. Cas. 862; *Ryan v. McIntosh*, 17 Ann. Cas. 806, and *Riepe v. Elting*, 48 Am. St. Rep. 356.

#### *Basis of Liability.*

The liability of the owner of a horse to respond in damages for injuries done by the animal in running away ordinarily depends on whether he, or another acting for him, has been guilty of any negligence in the care, management, etc., of the horse, to which its escaping from control is attributable. Thus it has been generally held in the recent cases that the owner is not liable for injuries caused by purely accidental runaways where there is no evidence of negligence on the part of the owner or of his servants. *Orr v. Boockholdt*, 10 Ala. App. 331, 65 So. 430; *Stuch v. Town*, 178 Mich. 477, 144 N. W. 833; *Brooks v. Kauffman*, 93 Neb. 682, 141 N. W. 831; *Gropp v. Great Atlantic, etc. Tea Co.* 157 App. Div. 346, 142 N. Y. S. 140; *Reardon v. New York*, 132 N. Y. S. 332; *Goldschneider v. J. Rheinfrank Co.* 132 N. Y. S. 401; *Kimble v. Stackpole*, 60 Wash. 35, 110 Pac. 677, 35 L.R.A.(N.S.) 148; *Metropolitan Casualty Ins. Co. v. Clark*, 145 Wis. 181, 129 N. W. 1065; *Birmingham v. Gallery*, 36 Quebec

Super. Ct. 481. See also *Ferryall v. Youlden*, 76 N. H. 548, 85 Atl. 786; *Aldrich v. Borden's Condensed Milk Co.* 201 N. Y. 564, 94 N. E. 608, *reversing judgment* 136 App. Div. 893, 119 N. Y. S. 1112. And see the cases cited throughout this note.

#### *Horse Unattended.*

The recent cases generally hold that when it is shown that an unattended horse ran away in the streets of a city, and in its course injured a person who was without fault, a *prima facie* case of negligence on the part of the owner is made out and the owner is put to his proof to negative the negligence. It is a case for the application of the doctrine of *res ipsa loquitur*. *Breidenbach v. M. McCormick Co.* 20 Cal. App. 184, 128 Pac. 423, *affirmed* 21 Cal. App. 709, 132 Pac. 771; *Willis v. Semmes* (Miss.) 71 So. 865; *Dennery v. Great Atlantic, etc. Tea Co.* 82 N. J. L. 517, 81 Atl. 861, 39 L.R.A. (N.S.) 574; *Tietje v. Catalona*, 88 N. J. L. 63, 95 Atl. 733; *Furlong v. Winne, etc. Co.* 166 App. Div. 882, 152 N. Y. S. 245; *Hollaran v. New York*, 168 App. Div. 469, 153 N. Y. S. 447. In *Willis v. Semmes*, *supra*, it was held that a runaway team is unaccompanied, within the foregoing rule, where its driver is running along behind the team, shouting and trying to overtake it, and that to come within the rule of an accompanied horse the driver must actually be in the vehicle or have the reins at the time.

But any presumption of negligence which may arise from the fact of a horse's running away unattended, is met by proof that the runaway was caused by a collision between the defendant's buggy and the automobile of a third person, which collision threw the defendant out of his buggy, thus leaving his horse to run on alone. *James v. Morten*, 79 Misc. 255, 139 N. Y. S. 941. See also *Tooker v. Fowler, etc. Co.* 147 App. Div. 164, 132 N. Y. S. 213. In *Crone v. St. Louis Oil Co.* 176 Mo. App. 344, 158 S. W. 417, the court refused to entertain the presumption of negligence arising from the mere fact of a horse running away, unaccompanied, because of the doctrine that where specific acts of negligence are alleged in a petition, the plaintiff can recover only on proof of the specific negligence charged.

In cases of injuries caused by an unattended horse running away, proof of the ownership of the horse at the time of the injury, establishes *prima facie* that it was in the possession of the owner, and that whoever was driving it was doing so for the owner. *Knust v. Bullock*, 59 Wash. 141, 100 Pac. 329.

The owner is liable only where he is negligent in leaving unattended a horse which

runs away and causes injury. There is no negligence in leaving a horse unattended if due care is used in tying it securely, so if a horse which is securely tied breaks away and causes injury, the injury is accidental, not negligent. *Bull v. Hotel Grunewald Co.* 135 La. 802, 66 So. 227; *Miller v. United Rys. Co.* 155 Mo. App. 528, 134 S. W. 1045; *Mumm v. Dance*, 155 App. Div. 6, 139 N. Y. S. 566. See also *Kahaley v. Frye*, 62 Wash. 43, 113 Pac. 247. In *Miller v. United Rys. Co.* *supra*, wherein it appeared that a team of horses hitched to a large moving van was left unattended and unfastened, except that the lines were fastened to the van, it was held to be proper to leave to the jury the question whether the owner of the team was negligent in leaving it in that condition, within easy access to the public street. In *Mumm v. Dance*, *supra*, a verdict for the plaintiff was set aside as against the weight of the evidence, where the evidence showed that horses left by the defendant's servant were securely tied, though they actually broke the strap and ran away, injuring the plaintiff. In *Bull v. Hotel Grunewald Co.* *supra*, it was held that there was no evidence of negligence on the part of the owner of a horse and wagon, where the horse, which was tied with a regulation hitching strap to a weight, became frightened, ran away, and knocked down and severely injured the plaintiff.

But ordinarily it is negligence to leave a horse standing unattended and untied or insecurely tied in the public streets, and *a fortiori* is this so where there is an ordinance requiring horses left unattended in the street to be tied securely. A violation of an ordinance of that kind is such a violation of duty as will sustain an action for negligence against the owner, where injury to another results from the violation. *Parkin v. Grayson-Owen Co.* (Cal.) 143 Pac. 257; *Fisher v. Charles Levy Circulating Co.* 182 Ill. App. 393. In the case first cited, it was said that such an ordinance is simply declaratory of a common-law principle. And it was held that the fact that the immediate cause of the fright and running away of the horses was the firing of a toy pistol by a boy, was no defense, because the owner's negligence in leaving the horses improperly tied was continuing, and the firing of the pistol was, therefore, not an independent, intervening cause.

The common-law rule that the owner of cattle keeps them at his peril and must keep them within his own close, has no application to horses harnessed and hitched. Therefore where a horse hitched to a wagon, and left standing unfastened in the yard of the owner, runs away and injures a person on the public street it cannot be said as a matter of law

that the horse is wrongfully on the public street, and in the absence of proof of negligence on the part of the owner, the latter will not be liable for an injury resulting from the runaway. *Briggs v. Lake Auburn Crystal Ice Co.* 112 Me. 344, 92 Atl. 185. But the fact that a team was left unhitched and unguarded in the yard of a manufacturing company, opening into a street, has been held to make out a *prima facie* case of negligence on the part of the servants of the owner of the team, where the team ran away and killed the plaintiff's intestate. *Migliaccio v. Smith Fuel Co.* 151 Ia. 705, 130 N. W. 720. In *Fuerboeter v. Rittenhouse, etc. Co.* 182 Ill. App. 321, wherein it appeared that the plaintiff, while driving along a street, was thrown from his seat and injured because a horse belonging to a lumber company ran out of the lumber company's yard and into the plaintiff's team, frightening his horses, it was held that the lumber company was not negligent in the management of the horse, it appearing that the horse had never run away before and had never manifested any disposition to run away, but was a quiet and gentle horse and was in the custody of a careful employee who tried to prevent the runaway, which was due to the horse being frightened by a switch engine which backed into the lumber yard. In *Jones v. Lee*, 106 L. T. N. S. (Eng.) 123, it was held that it was not negligence for the owner of a young horse to place him in a field with defective fences, through which the horse escaped and got on the public road, and that the owner was not liable for injuries caused by the horse's running into a bicycle, there being no evidence that the horse was vicious or in the habit of trespassing or attacking persons or bicycles on the public road.

#### *Horse in Charge of Driver.*

Where the owner of a horse places the animal in charge of a driver, he is liable as a general rule for damage caused by the horse running away, if the driver is negligent in his management of the animal and is acting within the scope of his authority at the time. *Cooper v. Layson*, 14 Ga. App. 134, 80 S. E. 666; *Harper v. Owen H. Fay Livery Co.* 264 Ill. 459, 106 N. E. 273, *affirming* 177 Ill. App. 138; *Bergman v. Empire Tea Co.* 190 Ill. App. 181; *Howell v. Mandelbaum*, 160 Ia. 119, Ann. Cas. 1915D 349, 140 N. W. 397; *Palmer Transfer Co. v. Long*, 140 Ky. 111, 130 S. W. 961; *Abbott v. Dingus*, 44 Okla. 567, 145 Pac. 365. See also *Gropp v. Great Atlantic, etc. Tea Co.* wherein it was held that in an action predicated on the negligence of the defendant's servant in driving a horse, it was reversible error to admit evidence of knowledge of the defendant of the vicious nature of the horse, the evidence not

being material to the question of the driver's negligence.

It is held, however, contrary to the rule in cases of unaccompanied horses, that where a horse is accompanied by a driver, the negligence of the driver must be proved, and no presumption of negligence arises from the mere fact that the horse runs away. *Cooper v. Layson, supra*; *Willis v. Semmes* (Miss.) 71 So. 865.

The owner of a horse known by him to be vicious, dangerous, and unmanageable, is negligent in putting him on the streets and thus endangering persons traveling on the streets, or in hiring him out and thus endangering the bailee, and he is liable for injuries resulting from that negligence. *White v. Steadman* [1913] 3 K. B. 340, 82 L. J. K. B. 846, 109 L. T. N. S. 249 [1913] W. N. 172, 29 Times L. Rep. 563; *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143; *Gropp v. Great Atlantic, etc. Tea Co.* 141 App. Div. 372, 126 N. Y. S. 211; *American Express Co. v. Parcarello* (Tex.) 162 S. W. 926. In *Corliss v. Keown, supra*, it was held that where the owner of a horse, knowing it to be dangerous, loaned it, with his driver, to his mother, who, also knowing of the dangerous proclivities of the animal, used it in her own business, a person injured by the running away of the horse had an action both against the owner of the horse for his negligence in allowing such a horse to be used, and against the person to whom it had been loaned, for her negligence in using it.

A liveryman is not held to the extraordinary care of a common carrier. He is a bailor, and, as such, owes to one hiring a horse from him ordinary care in furnishing a safe and proper horse and equipment, and is liable to the bailee for a failure to exercise such ordinary care, if he furnishes defective and unsafe harness, which breaks, causing a runaway, from which injury results. *Logan v. Hope*, 139 Ga. 589, 77 S. E. 809; *Parker v. Loving*, 13 Ga. App. 234, 79 S. E. 77, wherein damages were recovered against a liveryman for injuries to the sister of the bailee, who was riding with him. The court said: "A livery-stable keeper who lets horses and vehicles for hire is not a common carrier of passengers and, as such, bound to exercise extraordinary diligence for the safety of his passengers. The relation between the person to whom the vehicle is hired and the owner is that of bailee and bailor; and the liability of the owner is governed by the rules applicable to such a contract of bailment. He is but a private carrier for hire and required to exercise due care and diligence in performance of the duty imposed upon him by the contract; that is to say, such care and skill as prudent and cautious men experienced in the business are accustomed to use under similar circumstances."

The bailee of a horse has a qualified ownership in the animal which imposes on him the duty of using due care in its management, a breach of which duty will render him liable in damages to one injured as the result thereof. *San Francisco Breweries v. Brainard*, 233 Fed. 45; *John H. Radel Co. v. Borches*, 147 Ky. 506, 145 S. W. 155, 39 L.R.A. (N.S.) 227. In *San Francisco Breweries v. Brainard*, supra, it was held that where the team was one hired by the defendant, the question whether it was in charge of the defendant at the time of the injury was a question of fact for the jury. It was held, in *John H. Radel Co. v. Borches*, supra, that where an undertaking concern contracted to furnish carriages for a funeral, it was the master, *pro tempore*, of drivers of teams which it hired for the purpose from a livery company, and was liable for injuries to one of the family of the deceased, returning from the funeral, caused by the negligence of the driver in leaving his team momentarily, from which negligence a runaway resulted.

#### *Servant Injured by Master's Horse.*

Several recent cases hold that a master owes to his servant the same care in furnishing him with a horse, as in furnishing him with any other kind of tools or appliances, and that if he negligently furnishes a vicious or unsafe horse, he is liable to the servant for injuries caused by the running away of the horse, if the use of the horse is within the scope of the servant's employment. *Sloss-Sheffield Steel, etc. Co. v. Long*, 169 Ala. 337, Ann. Cas. 1912B 564, 53 So. 910; *Berenson v. Butcher*, 209 Mass. 209, 95 N. E. 220; *Scanlon v. Cavanaugh*, 210 Mass. 291, 96 N. E. 526; *Marks v. Columbia County Lumber Co.* 77 Ore. 22, 149 Pac. 1041.

But the mere relation of master and servant adds nothing to the general liability of the owner of a horse for injuries caused by its running away, and a servant can recover nothing in the absence of negligence on the part of the master. *Green River Coal, etc. Co. v. Phaup*, 137 Ky. 34, 121 S. W. 651; *McFadden v. Standard Oil Co.* 164 App. Div. 890, 148 N. Y. S. 957; *Armington v. Providence Ice Co.* 33 R. I. 484, 82 Atl. 263. In *McFadden v. Standard Oil Co.* supra, it was held that a servant had no cause of action against his master who put him to driving horses, which, though green, were not known to the master to be vicious, fractious or untrained, or ever to have run away before. See also *Miller v. Blood*, 217 N. Y. 517, 112 N. E. 383. In *Green River Coal, etc. Co. v. Phaup*, supra, it was held that for a mining company to leave piles of cinders along a track over which its employee had to drive a mule did not constitute negligence, so that when the mule took fright at the cinders and

ran, injuring the driver, he was not entitled to recover. The court said that "when a person undertakes to drive a mule, he assumes all the risks and dangers ordinarily incident to that particular occupation."

#### *Contributory Negligence.*

Most of the recent cases in which the question of contributory negligence has arisen have been concerned with the question whether it is contributory negligence for one voluntarily to undertake to stop a runaway, thus exposing himself to danger, and the weight of authority is that for one thus to undertake to stop a runaway in order to prevent damage to the team or to persons in the highway, is not *per se* such contributory negligence as will bar a recovery for injuries sustained, but that the question of contributory negligence is for the jury to decide, considering all the circumstances. *Furlong v. Winne, etc. Co.* 166 App. Div. 882, 152 N. Y. S. 245; *Hollaran v. New York*, 168 App. Div. 469, 153 N. Y. S. 447. In *Lortie v. Adelstein*, 46 Quebec Super Ct. 543, it appeared that the plaintiff saw two runaway horses drawing a heavy, loaded carriage, coming down the street, greatly endangering pedestrians. He threw himself on the neck of one of the horses and succeeded in stopping the team, but in so doing sustained a severe fracture of the bones of his hand. The court, without discussing the question of contributory negligence held that since the plaintiff was acting as *negotiorum gestor*—one who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs—he was entitled to indemnity from the one for whom he was so acting, the owner of the team.

In *Palmer Transfer Co. v. Long*, 140 Ky. 111, 130 S. W. 961, it was held that the fact that a passenger in a hired vehicle jumps out when the horses run away, and is injured thereby, is not such contributory negligence as will bar the passenger from recovery against the owner.

#### RIGGINS

v.

#### STATE.

Maryland Court of Appeals—January 26, 1915.

125 Md. 165; 93 Atl. 437.

#### Witnesses — Examination — Question Calling for Matter Partly Irrelevant.

It is not error to sustain objections to questions asked a prosecuting witness on

cross-examination as to a conversation between her and the state's attorney, which questions are not limited to the relevant parts of that conversation.

**Same.**

It is also proper to sustain an objection to a question as to what the state's attorney had asked the witness on that occasion.

**Criminal Law — Evidence — Statement of Prosecuting Attorney.**

In a criminal prosecution, evidence that the state's attorney, after first hearing the prosecuting witness' story, stated that there was no ground upon which to arrest the defendant, is irrelevant, and should not be permitted to go to the jury.

**Witnesses — Impeachment — Inconsistent Statement by Prosecuting Witness.**

A prosecuting witness who has testified to intercourse with the defendant, and who has stated that on her first visit to the state's attorney's office she refused to tell him anything, can be asked on cross-examination whether she did not on that occasion tell him that the defendant did not have intercourse with her.

**Privilege — Statements by Prosecuting Witness to Prosecuting Attorney.**

Where the disclosure of a communication by a prosecuting witness to the state's attorney would not interfere with the proper administration of justice, and is not against public policy, there is no confidential relationship between the parties which prevents the witness from being cross-examined concerning such communication, or the attorney from being called to impeach her if she denies making it.

[See note at end of this case.]

**Argument of Counsel — Prosecuting Attorney — Expression of Belief in Guilt.**

It is not improper for the state's attorney in his argument to state that he believes defendant to be responsible for the condition of prosecuting witness prior to the time she testified to intercourse with him, and that he bases his belief upon a card sent by defendant to the prosecuting witness, and which has been introduced in evidence.

[See Ann. Cas. 1916A 431.]

Appeal from Criminal Court of Baltimore City: ELLIOTT, Judge.

Criminal action. Walter W. Riggins convicted of illegal carnal knowledge of female and appeals. The facts are stated in the opinion. **REVERSED.**

*Wm. Purnell Hall* and *George J. Kessler* for appellant.

*Edgar Allan Poe*, *Wm. F. Broening* and *Horton S. Smith* for appellee.

[166] **PATTISON, J.**—The appellant was convicted in the Criminal Court of Baltimore City of carnally knowing one Ella Weitzel, a

female, not his wife, who, at the time of the alleged offense, was alleged to have been between the age of fourteen and sixteen years.

[167] During the progress of the trial five exceptions were taken to the rulings of the Court upon the evidence. The prosecuting witness, Ella Weitzel, testified upon examination-in-chief, that the first time she had sexual intercourse with the appellant was in May, 1913, after she had left the hospital in April of that year, and this she says was the first time she ever had sexual intercourse with any one. She further testified that the defendant had such intercourse with her on a number of occasions thereafter, before her arrest in the latter part of October, 1913. When arrested she with her father, went to the office of the State's Attorney and, as she states in her examination-in-chief, "they asked me questions and all and I would not tell them anything." When upon cross-examination she was asked: "Didn't you go to the State's Attorney's office?" Answer: "Yes, sir, the day they got me." She was then asked the five following questions, to which objections were interposed, and the objections being sustained, and exception was noted to each of them:

1st:—What did you tell the State's Attorney?

2nd:—Did the State's Attorney ask you if you had had intercourse with Riggins prior to coming to his office?

3rd:—Tell us your conversation with the State's Attorney?

4th:—Didn't you tell the State's Attorney that you never had intercourse with Walter Riggins?

5th:—Didn't the State's Attorney tell your father (who was at that time in the office of the State's Attorney) that there was absolutely no ground upon which to have you arrested, or Mr. Riggins?

The occasion she speaks of when at the State's Attorney's office was in October, after she had been arrested, and after the occasions upon which she testified the defendant had sexual intercourse with her. The Court's rulings on the first and third questions were undoubtedly correct. In answer to the first of these questions she was at liberty, in fact she was expected, to state all that she told the State's Attorney, [168] and in answer to the third question she was to give the entire conversation between them, without regard to its relevancy; and we find no error in the ruling of the Court upon the second question. The Court's ruling, in not permitting the witness to answer the fifth question was also correct, for had the State's Attorney said to the father that there was no ground upon which either the witness or defendant could have been arrested this should not have gone to the jury. But as to the fourth ques-

tion, we think the witness should have been permitted to answer it. If at the time mentioned the witness told the State's Attorney that the defendant had never had sexual intercourse with her, such statement is contradictory of her testimony given at the trial, and it must have been largely upon her testimony that the jury found its verdict, therefore, such statement if made, was, we think, admissible and should have gone to the jury.

It is contended, however, by the State, that the statement made by her as a witness to the State's Attorney, was a confidential communication and is privileged.

In support of its contention, the State has referred us to 40 Cyc. 2369, in which it is stated: "A confidential communication to a prosecuting attorney of a State, County or District, by a prosecuting witness is privileged." The author in a note thereto cites a number of cases in support of this statement: *State v. Houseworth*, 91 Ia. 740, 60 N. W. 221; *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *State v. Phelps, Kirby* (Conn.) 282; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L.R.A. 1915D 1; *Oliver v. Pate*, 43 Ind. 132; *Vogel v. Gruaz*, 110 U. S. 311, 4 S. Ct. 12, 28 U. S. (L. ed.) 158; *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 463. In addition to the above cases the State has cited *Bowers v. State*, 29 Ohio St. 543, and *Worthington v. Scribner*, 109 Mass. 488, 12 Am. Rep. 736.

The cases of *Worthington v. Scribner*, *Gabriel v. McMullin* and *Vogel v. Gruaz* were suits for slander, while the cases of *Michael v. Matson* and *Oliver v. Pate* were suits for malicious prosecution. In each of these cases the communication forming the basis of the civil suit was made to the prosecuting [169] attorney, as such, in a proceeding criminal prosecution or investigation, and in all of such cases the Court refused to permit such prosecuting attorney to go upon the stand and disclose the communication so made to him.

In the case of *Bowers v. State*, the defendant was on trial upon an indictment for seduction under a statute of the State. The prosecuting witness having been examined by the State as a witness, and having denied, on her cross examination, that she had ever admitted that the defendant's intercourse with her was had without any promise of marriage, the defendant in an attempt to prove such admission offered in evidence the admission of the prosecutrix made in *consultation with her attorney* in a bastardy proceedings instituted by her against the defendant. The Court there held that the case came clearly within the rule in regard to privileged communications between attorney and client and refused the admission of such evidence.

In the case of *State v. Houseworth*, the Court was construing a statute. The Court in the case of *State v. Phelps* would not permit the prosecuting attorney to put in evidence the disclosures made to him as such prosecuting attorney to the prejudice of the party making them. In disposing of the question the Court said "Disclosures under such circumstances to the attorney ought to be considered as confidential and it would tend to defeat the benefit the public may derive from them, should they be made use of to the prejudice of those from whom they come."

In the case of *State v. Brown* upon which the State greatly relies the defendant was on trial for murder. Thomas Oakes, the prosecuting witness, was permitted to testify as to what he had stated to the Attorney General when the latter was engaged with said witness in preparing the case for prosecution. To contradict the witness the private stenographer of the Attorney General, who was present at the time when the said statement of the witness was made was placed upon the stand, but the Court would not permit him to testify as to [170] said statement, holding that such communications were secrets of the State or matters the disclosure of which would be prejudicial to the public interest, but in the latter case of *State v. Rash*, 2 Boyce 77, 78 Atl. 405, it was held by the same Court that where a statement has been made by a witness to a prosecuting attorney bearing on the guilt of a person under investigation for bribery and where on the trial of a person for bribery the witness denied making such statement and has been indicted for perjury on such denial, the statement to the prosecuting attorney is not privileged and may be admitted in evidence against the witness under an indictment for perjury. The effect of this decision is that statements made to the prosecuting attorney are not under all circumstances to be regarded as privileged communications.

In other jurisdictions, in cases of malicious prosecutions and false arrests, the prosecuting attorney has been permitted, under objection, to state in evidence what had been communicated to him by the defendant, as prosecuting witness, in the investigation or prosecution of a preceding criminal charge, where such communication formed the basis of the civil suit. *Granger v. Warrington*, 3 Gilman (Ill.) 299; *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962; *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; *Meysenberg v. Engelke*, 18 Mo. App. 346.

A case similar in many respects to the one now before us is the case of *People v. Davis*, 52 Mich. 569, 18 N. W. 362. In that case the defendant was charged with having committed adultery with the wife of one, Thomas O'Rourke, the prosecuting witness. The

prosecutor gave his evidence in the case at length, and when the defense entered upon their proofs Mr. Lowell, who was prosecuting attorney of the county when the prosecution was begun, was called to the stand and was asked, with a view to impeaching the prosecutor, whether in the statement O'Rourke made to him he did not say that on the occasion when he saw his wife and respondent together on April 30th, 1882, he saw nothing wrong between them. Objection was made to this question by both Mr. Lowell and the present prosecuting attorney, on the ground that communications [171] made by the prosecutor to the prosecuting attorney were privileged; and the Court sustained the objection. The Court in that case, speaking through Chief Judge Cooley, said: "It does not appear to have been claimed that Mr. O'Rourke had any privilege in the case, nor could it be; for he was not as to this prosecution the client of the prosecuting attorney, nor was that officer in any sense his counsel. He was, on the other hand, a sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected. *Wellar v. People*, 30 Mich. 17, 24; *Meister v. People*, 31 Mich. 99. Communications made to him for the purpose of invoking official action are supposed to be made for the purposes of public justice, and the party making them can assume no control as to the use that shall be made of them subsequently.

"If, then, there is any privilege in the case, it must be the privilege of the State in whose interest O'Rourke assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the State, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the State should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts.

"In this case the prosecutor testified that on a particular day and at a place specified he witnessed the commission of the crime charged. The defense then offered to show that in laying the case before the prosecuting officer the prosecutor stated that on the day and at the place specified he witnessed nothing wrong between the parties. If he did so state at that time, when he was laying before the public authorities the very case they were to prosecute, and if he now swears to a case altogether different, it may well be argued that he is unworthy of belief; and the State has no interest in interposing [172] any ob-

stacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the State has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called."

It will thus be seen that the authorities are conflicting as to the character of such communications.

The case before us differs from the cases we have mentioned in that the evidence here offered is that of the prosecuting witness and not the prosecuting attorney as in those cases.

The question here presented is whether the prosecuting witness should have been required to answer the question and not whether the State's Attorney may be called to the stand to contradict her. If she had been permitted to answer the question and had answered it in the affirmative the State's Attorney would not have been called upon to disclose the statement made by her to him.

There may be, and doubtless are, cases where the administration of justice would be greatly impaired or interfered with if witnesses therein were required to testify as to information imparted by them to the prosecuting attorney in the investigation or prosecution of such criminal charges. In all such cases the witness should not be required to disclose such information, but in this case we cannot see how the answering of the question asked could in any way prejudice the rights of the witness or interfere with the proper administration of justice or could in any way be regarded as against public policy.

The witness had testified on behalf of the State that the defendant had sexual intercourse with her long prior to said conversation with the State's Attorney and had also testified [173] upon cross-examination that in such conversation she "would not tell the State's Attorney anything" as to the offense charged against the defendant, when she was asked, "didn't you tell the State's Attorney that you never had intercourse with Walter Riggins?" This question as we have said should have been answered, for had she made such statement to the State's Attorney, this fact should have gone to the jury as affecting her credibility to the extent of the weight the jury may have given it under the facts and circumstances of the case. But as we will remand this case for new trial and as the witness, at such trial, may again be asked this question and may answer it in the nega-



tive, we will here state that in our opinion the State's Attorney may, if she denies making such statement, be called to the stand for the purpose of contradicting her. In so holding, however, we wish it understood that we are not laying down any general rule to be applied in all cases of this character, but what we here say applies only to this case or to cases of like facts and circumstances where there is no impairment of or interference with the fair and proper administration of justice by permitting such disclosures to be made.

The remaining exception is to the action of the Court in its refusal to instruct the jury to disregard an expression or statement of the State's Attorney made by him in his argument to the jury. It was disclosed by the evidence offered by the defendant that at the time the prosecuting witness was at the hospital in April, 1913, before the occasion upon which she said the defendant first had sexual intercourse with her, she had what is called a marital outlet.

The State's Attorney in his argument to the jury in referring to this evidence said: "I believe if she had a marital outlet before she went to the Johns Hopkins Hospital, Riggins was the cause of it, and this is the reason I believe Riggins was the cause." He at that time, showing to the jury a postal card written by the defendant to the prosecuting witness which had been put in evidence.

[174] "It is of course improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the undisputable right to urge that the evidence convinces his mind of the accused's guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds although it did not convince his. A prosecuting officer therefore has the right to state his views as to what the evidence shows."

In *People v. Weber*, 149 Cal. 325, 86 Pac. 671, the opinion expressed by the State's Attorney was based upon the contents of a postal card which is not in the record, it seems, but which was part of the evidence in the case, and, therefore, in our opinion the Court committed no error in its ruling upon this exception.

The judgment, however, will be reversed for the error hereinbefore stated and a new trial awarded.

Judgment reversed and new trial awarded.

**NOTE.**

**Statement by Prosecuting Witness to Prosecuting Attorney as Privileged.**

Introductory, 1121.

View that Statements Are Privileged, 1121.

View that Statement Are Not Privileged, 1124.

Rule in Iowa, 1125.

**Introductory.**

The authorities are in seemingly irreconcilable conflict as to whether statements made by a prosecuting witness to a prosecuting attorney are privileged. The chief distinction between the two lines of authority is that those courts holding such communications to be privileged give regard to a consideration of public policy, while the majority of those adhering to the contrary opinion, do not consider the question of public policy, but base their decisions on the absence of the technical relationship of attorney and client between a prosecuting witness and a prosecuting attorney.

**View that Statements Are Privileged.**

In several jurisdictions it has been held that statements made by a prosecuting witness, or a witness for the prosecution, to a prosecuting attorney or solicitor are privileged, and that this is so without regard to whether the relation of attorney and client is deemed to exist between these persons, the ruling being based on the theory of public policy that persons having knowledge of the commission of an offense should be encouraged freely to impart that information to the officers of the state, without being subjected to the restraint which would be inspired by a fear that their statements might be used against them. *Wyatt v. Gore*, Holt Nisi Prius, 299, 3 E. C. L. 124; *Vogel v. Gruaz*, 110 U. S. 311, 4 S. Ct. 12, 28 U. S. (L. ed.) 158; *Oliver v. Pate*, 43 Ind. 132; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L.R.A. 1915D 1; *Schultz v. Strauss*, 127 Wis. 325, 7 Ann. Cas. 528, 106 N. W. 1066. In *Wyatt v. Gore*, supra, which was an action against the lieutenant-governor of Upper Canada for maliciously removing the plaintiff from his position as surveyor-general without cause, and for false representations to the government injurious to the plaintiff, the attorney-general of the province was called and interrogated as to statements made to him by the defendant concerning the plaintiff. The court held that the statements were privileged and sustained the witness' objection to answering the question, saying: "The witness is not bound to answer; and, in delicacy, he will not

answer such questions. Whether the conversations, in which reference was made to Mr. Wyatt's conduct as surveyor-general, were on public or private business, they ought not to be disclosed. The governor consults with a high legal officer on the state of his colony; what passes between them is confidential; no office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed." In *Vogel v. Gruaz*, supra, the court said: "We are of opinion that what was said by Bircher to Mr. Cook, was an absolutely privileged communication. It was said to Mr. Cook while he was State's attorney, or prosecutor of crimes, for the county, and while he was acting in that capacity. Bircher inquired for the state's attorney, and was introduced to him, and stated to him that he wanted to talk with him about a matter he wanted to bring before the grand jury in regard to Gruaz. He laid the matter before Mr. Cook, and charged Gruaz with having stolen his money, and was asked how, and stated how, and inquired of Mr. Cook if there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had a good case, and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly, the communication would have been privileged, and not to be disclosed against the objection of Bircher. Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him, on a statement of his case, to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for information or advice, did not destroy the relation which the law established between them. It made that relation more sacred, on the ground of public policy." In *Oliver v. Pate*, 43 Ind. 132, the question arose whether communications by a prosecuting witness, made to a prosecuting attorney, were privileged and incompetent in a subsequent action for malicious prosecution against the prosecuting witness. The court said: "The state furnishes an attorney to prosecute all persons charged with crime. It is essential that he should be furnished with facts to enable him to successfully prosecute. Every good citizen, it is presumed, will aid in the conviction of offenders and communicate to the prosecuting attorney all the facts within his knowledge, tending to establish the guilt of such offender; and all

such communications and statements made to him must be considered and held to be privileged, and must not be divulged without the consent of the party making them. The fact that the state furnishes the attorney can make no difference. The statement is made to one, who for the time being and for that purpose occupies the position of legal adviser. And that must determine the question, and not who selects or employs him. The prosecutor acts as attorney and receives the communication in that capacity. Public policy requires that a person in making communications to a prosecuting attorney, relative to criminals or persons suspected of being guilty of crime, should be at liberty to make a full statement to him without fear of disclosure." In *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, the court said: "The county attorney was called as a witness by the plaintiff and was permitted to relate a conversation between Matson and himself relating to the liquor prosecution, before it was dismissed. The defendant objected to this on the ground that his statements to the county attorney under the circumstances were privileged. We think the objection should have been sustained, not on the theory that the relation of attorney and client existed, thus rendering the communication incompetent under the statute, . . . but for the reason that the evidence was inadmissible on grounds of public policy. The rule forbidding an attorney to disclose his client's secrets exists independent of the statute. Its basis is not the mere fact that the communication was confidentially made. *Barnes v. Harris*, 7 Cush. (Mass.) 576, 578. The reason for its existence is that 'the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.' . . . The interest of the public in protecting the privacy of a communication seems indeed greater when it is made to a prosecuting officer in that capacity than when it is made by a client to his attorney. Persons having knowledge regarding the commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely and unreservedly the source and extent of their information. The possibility that what they say under such circumstances will be used against them tends to impose a natural restraint upon their conduct and to deprive the officer of the benefit of their services. It is said that the privilege based upon this principle applies only to the identity of the informant (4 Wig. Ev. sec. 2374), and such appears to be the English rule. But in this country it has been treated as covering the communication itself."

The Indiana court held, however, in *State v. Van Buskirk*, 59 Ind. 384, that the rule that communications made by a prosecuting wit-

ness to a prosecuting attorney are privileged did not extend to a case where the statements were made, not directly to the prosecuting attorney, but to the grand jury in his presence. Holding that there was no privilege in such a case, the court said: "A single question is presented for our consideration and decision, by the record of this cause, and the error assigned thereon, and that question may be thus stated: Can it be correctly said, that the relationship of attorney and client exists, either in law or in fact, between a witness who may be required to testify before a grand jury, and the prosecuting attorney of the court, who may chance to be present, officially or otherwise, during the examination of such witness before such grand jury? If such relationship can be said to exist, of course the prosecuting attorney cannot be compelled, and ought not to be permitted, to disclose any of the testimony of such witness before such grand jury. But if, on the other hand, such relationship does not exist, either in law or in fact, we know of no sufficient reason why the prosecuting attorney may not be compelled to disclose any of the testimony of such witness within the personal knowledge of such prosecuting attorney. In section 771 of the practice act, it is made the duty of an attorney 'to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.' 2 R. S. 1876, p. 304. In section 2 of 'An act defining who shall be competent witnesses,' etc., approved March 11th, 1867, it is provided and declared, *inter alia*, that 'attorneys at law, as to confidential communications from a client, or advice given to such clients; . . . shall not in any case be competent witnesses, unless with the consent of party making such confidential communication.' 2 R. S. 1876, pp. 133 and 134. But it seems very clear to us, that it cannot be correctly said, as matter either of law or of fact, that prosecuting attorney is, by virtue of his office, the attorney of any witness who may be examined by or before the grand jury, in the presence and hearing of such prosecuting attorney. Nor can it be correctly said, that the evidence of the witness before the grand jury is, in any sense, a confidential communication to the prosecuting attorney, although it may have been given in his presence and hearing."

The general rule which obtains in the law of attorney and client that the privilege accorded to confidential communications made within this relationship is only qualified, and will not attach where the communications are made with a view to the perpetration of a crime, has been held to apply equally to the case of communications made to a prosecuting attorney. *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982, wherein it appeared that the

communications objected to as privileged were made to a county attorney in furtherance of a plan to commit a criminal libel and to fabricate evidence to support it. Holding that the *mala fides* of this illegal scheme removed the privilege, the court said: "Manifestly the general rule has no room for application to a case like the present, where the communications were made to a prosecuting officer in furtherance of a conspiracy to commit an indictable offense. It can hardly be seriously contended that there were not sufficient facts and circumstances shown by the state to warrant the submission to the jury of the question of qualified privilege. In fact, the defendants utterly failed to bring themselves within the general rule as it is thus stated by Newall, in his work on Slander and Libel, 2d ed. p. 500, sec. 98: 'Upon grounds of public policy communications which would otherwise be slanderous are protected as privileged if they are made in good faith in the prosecution of an inquiry, regarding a crime which has been committed and for the purpose of detecting and bringing to punishment the criminal.'"

Where private counsel has been retained to assist in the prosecution of an indictment, the fact that he is acting as a prosecuting attorney does not, of course, remove the privilege which exists as to communications made to him by his client, a prosecuting witness. *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621. But the mere fact that counsel has voluntarily assisted in the prosecution of a case, does not make him a prosecuting attorney, nor does it make him the attorney of a witness for the prosecution, by whom his services have not been engaged. Statements, therefore, made by a prosecuting witness to such counsel are not within the rule of privilege. *Meysenberg v. Engelke*, 18 Mo. App. 346. *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458, was a prosecution for murder. To contradict one of the state's witnesses, counsel for the prisoner called the court stenographer and asked him if the witness had not made certain statements to the attorney general during the preparation of the case for the state. The attorney general objected to the question on the ground that the court stenographer was acting as his private stenographer at the time, assisting in preparing the case for trial. The court sustained the objection and excluded the testimony, saying: "The law will not permit this. The attorney general could not be required to disclose facts coming to his knowledge for the use of the state in its prosecution of the accused; nor can his private amanuensis or clerk, as Mr. Hardesty then was. To do so would be prejudicial to the public interest and would in many cases defeat the ends of public justice." In *State v. Rash*, 2 Boyce (Del.) 77, 78 Atl.

405, however, it was held that a prosecuting attorney could give testimony contradicting a defendant who denied statements made by him to the prosecuting attorney. Rash, the defendant in an indictment for perjury was alleged to have made certain statements, under oath, to the deputy attorney general, charging one Whaley with having attempted to influence his vote by bribery. When called as a witness in the bribery prosecution, he denied having made the statements. These denials were made the basis of an indictment of Rash for perjury. Objection was made to the prosecution's offer of testimony as to the communications alleged to have been made by Rash to the deputy attorney general, on the ground that the communications were absolutely privileged, *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458, being cited as sustaining this view. The trial judge overruled the objection and admitted the testimony. The case was not appealed.

***View that Statements Are Not Privileged.***

It has been held in other jurisdictions, however, that communications made by a prosecuting witness to a prosecuting attorney are not privileged because there is no relation of attorney and client. *Fite v. Bennett*, 142 Ga. 660, 83 S. E. 515; *Granger v. Warrington*, 3 Gilman (Ill.) 299; *People v. Davis*, 52 Mich. 569, 18 N. W. 362; *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962. See also *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193 (wherein the communications were made to the prosecuting attorney not in his official capacity but in his capacity as a member of a committee). *People v. Roach*, 215 N. Y. 592, 109 N. E. 618 (wherein the court held that testimony by a prosecuting attorney was competent in rebuttal, no question of privilege being raised). And see the reported case. In *Fite v. Bennett*, supra, which was an action for fraud, the defendant, to prove that the fraudulent representations had not been made by him, introduced evidence to show that the plaintiff had formerly been the prosecuting witness in an indictment of another person for the same representations. The defendant called a person who at the time of the indictment had been an assistant in the office of the solicitor-general who prepared the case, and offered to prove by him certain information which the present plaintiff had given the witness and another assistant to the solicitor-general, in his then capacity as prosecuting witness. Objection was made to the competency of the witness, on the ground that it was against public policy to allow him to disclose state secrets. The court held that, if the witness should be treated as an official, there was no relation of attorney and client between him and the

plaintiff in the case at bar, and therefore he was not incompetent on the ground of the existence of such confidential relation. *Granger v. Warrington*, supra, was an action for malicious prosecution. To show want of probable cause, the plaintiff called Curtiss the prosecuting attorney of the county, who testified that Granger, the defendant, had consulted him with reference to a complaint that he contemplated making before the grand jury against the defendant, during which consultation the witness had told the defendant that in his opinion an indictment could not be sustained. The court held that the evidence was properly admitted and was not privileged, saying: "It is apparent from the principles laid down in the case of *Hutton v. Robinson* [14 Pick. (Mass.) 420] that to entitle communications between individuals to be considered as confidential and privileged, the relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his statements to him with a view to enable the attorney correctly to understand his cause, so that he may manage it with greater skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights. Did, then, Granger employ Curtiss as an attorney, either to investigate a question of law, in which his private interests were concerned, or to commence or to defend a suit in which he was a party? He clearly had no such object. He had no personal interest in the result at which Curtiss should arrive, and he did not expect to compensate him for his advice. Consequently the relation of client and attorney did not arise; and consequently the conversation was not privileged from being disclosed by Curtiss as a witness. Granger can be considered in no other light than a witness on the part of the people, communicating to the law officer of the government, his knowledge in relation to the commission of a supposed crime, and inquiring of that officer whether the facts thus communicated amounted to an offense. We think that no considerations of public policy require that the conversations between Granger and the state's attorney should be regarded as confidential and privileged. It would be an unnecessary extension of the rule in relation to confidential communications, and ought not, therefore, to be allowed. The evidence of Curtiss was, consequently, properly received." In *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962, the court said: "The confidential relation of attorney and client did not exist between the defendant and the county attorney. The former consulted the latter in his official capacity as public prosecutor, for the purpose of having instituted a prosecution for a public offense, or to ascertain

whether the facts made a case for such a prosecution. The defendant, in making these communications, was acting merely as a citizen, in theory at least, in the interests of public justice, and in receiving these communications, and giving advice upon them, the county attorney must be deemed to have been acting solely in his official capacity. This did not constitute the relation of attorney and client, within the meaning of the statute. Counsel cites one case (Oliver v. Pate, 43 Ind. 132) to the contrary, but we are unable to agree with the reasoning of the court in that case." In *People v. Davis*, 52 Mich. 569, 18 N. W. 362, although denying the privilege to a witness who made a communication to the prosecuting attorney, on the ground that no relation of attorney and client existed, the court expressly refused to rule that there might not be a privilege on the part of the state, on the grounds of public policy. It was said: "If, then, there is any privilege in the case, it must be the privilege of the state in whose interest O'Rourke assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the state, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the state should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts."

It has been held that, even if a privilege exists as to communications made by a prosecuting witness to a prosecuting attorney, the privilege is waived if the prosecuting witness opens up the matter and himself testifies as to such communications. The opposing party may then introduce testimony in this regard. *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962.

#### *Rule in Iowa.*

In Iowa it has been held that the privilege given by the statute of that state (Code § 4608) is broad enough to cover all cases of communications made to any attorney, including a prosecuting attorney, whether the relation of attorney and client exists or not. This ruling, however, is placed squarely on the statute and specifically eliminates the consideration of general public policy. *State v. Houseworth*, 91 Ia. 740, 60 N. W. 221; *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355. See also *State v. Swafford*, 98 Ia. 362, 67 N. W. 284. In *State v. Houseworth*, supra, the court said: "The statute under which the exemption is claimed is as follows: 'No

practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waived the rights conferred.' We do not understand it to be questioned but that the statements by the prosecuting witness to the county attorney were confidential, intrusted to him in his professional capacity, and were necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. This being true, it becomes a question whether or not statements of a prosecuting witness in a criminal case can come within the purview of the statute. Because of remarks by the district court while the question was pending before it, we are led to understand that much, if not controlling, importance was given to the fact of whether or not the relation of attorney and client existed between the prosecuting witness and the county attorney; the court thinking that it did not exist, for it said: 'So far as the relation of attorney and client is concerned, none existed in the world.' While it is true that, as to attorneys, such communications are oftener made by clients than by others, we do not think there is any such limitation upon the operation of the statute, but that it matters not from whom the communication is received, if it be to a practicing attorney in his professional capacity, and necessary for him to discharge the functions of his office. Mr. Ranck was attorney for the state. What transpired at the time of the alleged offense was necessary and proper to enable him to discharge the duties of his office. His client could not communicate with him, and all communications must be from third parties. But the statute nowhere fixes the communication to be privileged as between attorney and client, nor is it there by legal inference. The design of the law is to better enable attorneys, ministers, physicians, and others to discharge the duties of their respective offices; and it matters not from whom the communication comes, the question being, at all times, was it properly intrusted, and necessary for that purpose? We do not think it necessary to consider the question from the standpoint of public policy, which has received some attention in argument, as we think, under the provisions of the statute, the objection should have been sustained."

In *State v. Hector*, 158 Ia. 666, 138 N. W. 930, however, the court said: "It is true

that in *Gabriel v. McMullin*, 127 Ia. 426, and *State v. Houseworth*, 91 Ia. 740, we held that communications made by a prosecutor to the county attorney not in the grand jury room were privileged under section 4608 of the Code, or by reason of public policy; but this holding does not dispose of the question now before us. Here the proceedings were before the grand jury and in the presence of the county attorney, who also acted as the clerk of that grand jury, and prosecutrix had already opened up the subject by attempting to explain why she did not testify before the grand jury as she did upon the trial of the case. Assuming that the matter was within the discretion of the court, we think it was so vital to the case that the county attorney should have been allowed to testify."

**AMERICAN SURETY COMPANY OF  
NEW YORK**

v.

**PANGBURN.**

Indiana Supreme Court—June 26, 1914.

182 Ind. 116; 105 N. E. 769.

**Bonds — Action — Pleading Delivery.**

Allegations of the execution of a surety bond sued on implied a delivery thereof.

**Suretyship — Waiver of Failure of Principal to Execute.**

A surety assenting to the delivery of a surety bond, which shows on its face a failure to execute by the principal, may be bound by the incomplete instrument; and hence a complaint alleging that the bond sued on was executed by the surety is not insufficient, though the bond filed therewith as an exhibit was not signed by the principal, and though it contained a provision that it should not be construed as entered into or delivered by the surety until executed in due form by the principal, since the allegation that the bond as executed necessarily implied a waiver of such condition precedent.

[See Ann. Cas. 1912A 1014.]

**Construction of Contract — Suretyship for Hire.**

A surety for hire cannot invoke the rule of strictissimi juris, and its rights are measured by the law applicable to insurance contracts.

[See note at end of this case.]

**Insurance — Construction of Contract.**

Insurance contracts, if doubtful or equivocal, are construed against the insurer.

**Suretyship — Failure of Principal to Sign Bond — Waiver.**

In an action on a surety bond, not signed by the principal, and containing a provision

that it should not be construed as entered into or delivered by the surety until executed in due form by the principal, where the surety answered by a verified plea of non est factum, the burden is on plaintiff to prove that the bond was signed and delivered by the surety in its incomplete condition, with the purpose on the part of the surety of being bound thereby.

[See Ann. Cas. 1912A 1014.]

**Same.**

Where a surety company executed a bond indemnifying a county treasurer against loss by reason of the acts of a deputy treasurer and mailed it to the treasurer, without it having been signed by the deputy, thereafter renewed it for an additional term in consideration of a further premium, and subsequently, upon application of the deputy, made a new bond which it authorized a third person to deliver to the treasurer without it having been signed by the deputy, and retained the premiums received for each bond, the facts warrant a finding that it delivered the second bond to the treasurer, with intention to be thereby bound, and it is liable thereon, notwithstanding a provision in both bonds that they should not be construed as entered into or delivered by the surety until executed in due form by the principal.

**Same.**

That a surety bond, signed by the surety alone and not by the principal, was joint in form does not prevent a recovery thereon, where it was delivered to the obligee by the surety with intent to be thereby bound.

**Same.**

In an action on a surety bond given by the surety to a third person, without it having been signed by the principal, with instructions to deliver it to the obligee, the court properly charged that, in determining whether the bond was delivered, the jury may consider, as tending to show the surety's intention at the time of giving possession of the bond to the third person, evidence tending to show that it delivered to the obligee a similar bond covering a previous period unexecuted by the principal.

Appeal from Circuit Court, Clark county: WEST, Judge.

Action on bond. Marion E. Pangburn, plaintiff, and American Surety Company of New York, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Roscoe O. Hawkins, Gaylord R. Hawkins, Joseph H. Warder, Charles L. Jewett and Henry E. Jewett* for appellant.

*Edwin C. Hughes, Harry W. Phipps, Frank S. Roby, Ward H. Watson, Sol H. Esarey and Elias D. Salisbury* for appellee.

[118] MORRIS, J.—Appellee sued appellant and Lewis L. Chapman, on a surety bond. The complaint alleges that at the general election of 1898, appellee was elected treas-

urer of Clark County, for a term of two years, commencing in January, 1899; that he appointed Chapman as his "General Statutory Deputy;" that the bond in suit was executed by Chapman as principal, and appellant as surety, to indemnify appellee against loss by embezzlement or theft, by Chapman, of county funds; that in the year 1899, Chapman embezzled \$9,822 that came into his possession by virtue of his official position. The action was commenced in September, 1900, but the cause was pending in lower courts for more than twelve years before the rendition of the judgment from which this appeal is prosecuted.

The bond, filed as an exhibit to the complaint, recites that

"We, Lewis L. Chapman as principal, . . . and the American Surety Company of New York, . . . as surety (in consideration . . . of an agreed premium . . .) bind ourselves, subject to the conditions hereinafter contained, to indemnify Marion E. Pangburn, treasurer of Clark County, Indiana, hereinafter called the 'employer' . . . against such direct pecuniary loss not exceeding \$10,000, as the employer shall have sustained of the employer's money, funds, . . . stolen or embezzled by said employee . . . in the course of the performance of the duties of his employment as deputy treasurer of said employer."

This is followed by numerous conditions, in number 13 of which appears the following:

"That this instrument shall not be construed as entered into or delivered by the surety until executed in due form by the employee as principal; that the liability of the surety hereunder is, and shall be construed as, one of suretyship only. . . . And said employee . . . binds himself . . . to save said surety harmless from, and on demand to pay it any and all claims, demands, loss . . . judgments and adjudications whatsoever which said surety shall at any time sustain."

[119] The instrument exhibited, shows the name of Chapman in the body of the bond, but not as signed at the conclusion thereof, though there appears a blank for such signature, and the attestation thereof. It appears as signed by appellant alone.

Chapman's demurrer to the complaint, for insufficient facts was sustained, and thereafter he ceased to be a party to the action. Appellant's demurrer was overruled, and such ruling is assailed here as erroneous. The complaint alleges that the bond was "executed" by appellant. The averment of the execution of an instrument implies a delivery thereof. Whatever may be the rule in other jurisdictions, this court is committed to the doctrine that a surety assenting to delivery may be bound by an incomplete instrument

which shows on its face a failure to execute by the principal. In *Wild Cat Branch v. Ball* (1873) 45 Ind. 213, the action, as here, was on a bond, joint in form, with the name of the principal appearing in the body thereof, but not the signature thereto, and with a signature of the sureties only. In its opinion the court on page 218 said: "The sureties might have agreed to become liable, and assented to the delivery of the bond without the name of the principle being signed thereto, and for this reason, and as it is alleged in the complaint that they did execute the bond, which includes its delivery, we hold that the complaint as to them is sufficient. If the circumstances were such as that they are not liable on the bond, we think they must disclose their defense by way of answer." This doctrine is approved in *Husak v. Clifford* (1913) 179 Ind. 173, 100 N. E. 466. It is true that in the case of *Wild Cat Branch v. Ball*, supra, there was no express condition, as here, that the bond should not be deemed as executed, unless signed by the principal, but we perceive no good reason why, under the facts here appearing on the face of the complaint, the surety may not have waived such express condition. An ordinary accommodation surety is entitled [120] to stand on the strict letter of his contract, but appellant is a surety for hire. The overwhelming weight of recent American authority, does not accord such surety the right to invoke the rule of *strictissimi juris*, but places such contract in the insurance class and measures the right of such surety by the law applicable to insurance contracts. *U. S. Fidelity, etc. Co. v. Poetker* (1913) 180 Ind. 255, 102 N. E. 372 and authorities cited; monographic note to *Hormel & Co. v. American Bonding Co.* (1910) 33 L.R.A. (N.S.) 513. Treating the contract as one of insurance, the averment of the complaint that the bond was executed by appellant necessarily implies the waiver of the condition precedent set out in the body of the obligation. *Penn Mut. L. Ins. Co. v. Norcross* (1904) 164 Ind. 379, 72 N. E. 132, and authorities cited. In the course of that opinion it was said on page 387: "It is obvious that, no matter how resolutely a party declares beforehand that he will not be bound except by a contract of a specified character, yet, if he afterwards makes a contract in disregard of his declaration, his prior provision will avail him nothing." Insurance contracts, if doubtful or equivocal, are construed against the insurer. *Federal L. Ins. Co. v. Kerr* (1910) 173 Ind. 613, 618, 89 N. E. 398, 91 N. E. 230, and authorities cited. There was no error in overruling appellant's demurrer to the complaint.

Appellant answered the complaint in several paragraphs, among which was a verified

plea of *non est factum*. This cast on appellee the burden of proving that the bond in suit was signed and delivered by appellant, in its incomplete condition, with the purpose, on appellant's part, of being bound thereby. There was a trial by jury, resulting in a verdict and judgment for appellee. Appellant's motion for a new trial assigning, among other things, the insufficiency of the evidence, in law and fact, to [121] support the verdict, was overruled and this action is assailed as erroneous.

There was little conflict in the direct evidence relating to the delivery of the bond. Appellee was first elected as treasurer of Clark County in November, 1896, for the term of two years commencing the first Monday in January, 1897. When his term commenced, appellee appointed Chapman as his general statutory deputy, on condition that he furnish a bond. Chapman applied to appellant at its home office in New York, for a bond for the term of one year, and appellant signed a bond in all respects like the one in suit, except as to dates, and forwarded the same to its branch office at Indianapolis, in charge of one Clark a resident assistant secretary who was authorized to deliver to obligees, bonds that had been signed at the home office. Later, on March 14, 1897, the bond was mailed to appellee, at Jeffersonville, Indiana, from appellant's branch office at Indianapolis by appellant's resident assistant secretary with a letter, reading in part, as follows:

"Mr. Marion E. Pangburn, Treasurer,  
"Jeffersonville, Ind.

"Dear Sir: We beg to enclose herewith suretyship bond No. 202,438, covering your deputy, Mr. Lewis L. Chapman, in the sum of \$10,000, for the period of January 2, 1897, to January 2, 1898. Delay in the execution of your bond has been due to," etc.

That bond was never signed by Chapman. Appellant received \$50 as a premium. The bond was renewed for the year 1898, in consideration of a premium of \$50. On January 2, 1899, appellee reappointed Chapman as his statutory deputy, with the understanding that he should give bond as he had done before. Chapman made application to appellant for a new bond, on a printed form, and sent it to appellant's home office, at the city of New York. Thereupon appellant forwarded to appellee a printed form of statement for him to fill out and sign. The same was filled out and [122] signed by appellee and returned to the home office of appellant on January 26, 1899. Some days later at the home office in New York, the bond in suit was signed for appellant by its vice president and assistant secretary and forwarded to appellant's branch office at Indianapolis. The

latter office was then in charge of Albert W. Wishard, agent and assistant resident secretary, who was authorized by appellant to deliver to obligees, bonds that had been signed by appellant at its home office. Ward H. Watson, then a resident of Charleston, Indiana, was in appellant's Indianapolis office, in February, 1899, and Wishard handed him the bond in suit, and requested him to deliver it to appellee. Watson took the bond and delivered it to appellee, at the courthouse of Clark County. In delivering the bond, Watson followed Wishard's instructions. Appellant's officers who signed the bond for it, did not know, until after suit was brought, that Chapman never signed the bond. Before the bond was delivered appellant received \$50.00 as the premium for the execution thereof, and still retains the same. There was never any offer to return this, or any former premium. After forwarding the bond to the branch office at Indianapolis, no investigation was made by appellant's officers, to ascertain whether Chapman signed the bond. After the bond in suit was handed to appellee by Watson, Chapman was continued as deputy treasurer until December 13, 1899, when he was discharged, because of the discovery of irregularities.

Of course appellant was under no obligation to return the premium received as a condition precedent to pleading a *non est factum*. Evidence in regard to the premium was admitted by the trial court for the purpose of enabling the jury to determine the intent of appellant's officers in sending the bond, in its incomplete condition, to appellee. We are of the opinion that the evidence is sufficient to warrant the finding that appellant delivered the instrument in suit to appellee, with the intention of being thereby bound, and [123] that the bond, in its incomplete condition was sufficient to warrant a recovery against appellant, for a breach thereof.

Counsel for appellant cite many authorities in support of the proposition that a contract containing the express condition found here must be held invalid in the absence of its execution by the principal. *Markland Min. etc. Co. v. Kimmell* (1882) 87 Ind. 560; *Allen v. Marney* (1879) 65 Ind. 398, 32 Am. Rep. 73; and *Deering Harvester Co. v. Peugh* (1897) 17 Ind. App. 400, 45 N. E. 805, cited by appellant, are to be distinguished from the case at bar by reason of the fact that here the instrument was delivered by the surety, instead of the principal, or some one acting in his behalf. Many cases from other jurisdictions are cited which do not involve the question of waiver by a surety for hire. However, it must be conceded that there is a lack of harmony in the cases of other jurisdictions. See monographic notes



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to following cases: School Dist. No. 80 v. Lapping (1907) 12 L.R.A.(N.S.) 1105; Deering v. Moore (1893) 41 Am. St. Rep. 534; Novak v. Pitlick (1903) 98 Am. St. Rep. 360; Ramsey v. People (1902) 90 Am. St. Rep. 188; People v. Carroll (1908) 151 Mich. 233, 115 N. W. 42, Ann. Cas. 1912A 1014. The facts in General R. Signal Co. v. Title Guaranty, etc. Co. (1911) 203 N. Y. 407, 96 N. E. 734, were similar to the facts here. The bond, there, was signed by the surety company, and delivered to the obligee, a private corporation, to indemnify the latter against loss by larceny or embezzlement of its employee. The bond was not signed by the employee, and contained a provision that it should not be effective unless executed by the principal. The application of the employee for the bond, in that case, contained a promise by him to indemnify the surety company against any loss occasioned by the breach of the bond, while in the employee's application here there was no such promise. However, the difference is immaterial, as the law made Chapman liable to appellee for funds stolen or embezzled, and appellant would be subrogated to appellee's rights whenever it pays indemnity [124] against such loss. In its opinion the court of appeals said: "Either they (officers of the surety Co.) were dealing honestly with the plaintiff, intending to waive the condition of Ellis' signature, under the circumstances, or they were scheming to deceive and defraud. The law will presume the former intention. . . . While the defendant required the employee's signature to the bond as a condition of its validity as an obligation, as it had a right to do, in holding it estopped from now insisting upon the condition, it loses nothing but a technical defense, which, if suffered to prevail in the face of the facts . . . would mean the lending of the aid of the court to the perpetration of a fraud."

Under the liberal provisions of our code of civil procedure the appellant might have made Chapman a party to the action and filed a counterclaim and obtained an adjudication of its rights against him to the same extent as if he had executed the bond, for the provisions of the latter created no liability of Chapman to it that did not already exist, by operation of law, from him to appellee. It thus appears that Chapman's failure to execute the bond "was a mere technicality, which ought not to affect the rights of any of the parties concerned." School Trustees v. Scheik (1886) 119 Ill. 579, 59 Am. Rep. 830, 8 N. E. 189. See also U. S. Fidelity, etc. Co. v. Haggart (1908) 163 Fed. 801, 91 C. C. A. 289; Deering v. Moore, *supra*; Empire State Surety Co. v. Carroll County (1912) 194 Fed. 593, 114 C. C. A. 435; Woodman v. Calkins (1893) 13 Mont. 363, 40 Am. St. Rep. 449, 34 Pac. 187; State v. Bowman

(1841) 10 Ohio 445; Rule v. Anderson (1911) 160 Mo. App. 347, 142 S. W. 358; People v. Carroll, *supra*. While the form of the instrument has been deemed of such importance, by some courts, as to render invalid an obligation, joint in form, but signed by the surety alone, we perceive in the form of the bond no insurmountable barrier against giving effect to the contract in [125] accordance with the intent of the obligee and the obligor that signed it. To hold otherwise, would, in many instances, as suggested by the Court of Appeals of New York, lend the aid of the courts to the perpetration of frauds, and we are convinced that sound reasons abound for holding valid a bond signed and delivered under the circumstances here disclosed.

The bond contained various provisions relative to notice of loss, etc. By appropriate paragraphs of answer appellant averred a failure on appellee's part to comply with these provisions. It is contended by appellant that the evidence is insufficient, on these issues, to support the verdict; it is also claimed that the evidence fails to show that Chapman's defalcations occurred during the life of the bond in suit. We do not deem it necessary to set out the evidence relating to these matters, but content ourselves with the general statement that the verdict is sustained by sufficient evidence on the issues in question.

Complaint is made of instruction No. 8, which informed the jury that in determining whether the bond in suit was delivered by appellant to appellee, they might take into consideration, as tending to show appellant's intention, at the time of giving possession of the bond to Watson, the evidence given which tended to show that appellant delivered to appellee, at the beginning of his first term, a like bond, unexecuted by the principal. There was no error. The intent of appellant in delivering possession of the bond in its incomplete form, to Watson, with instructions to give it to appellee, was a material fact, in the determination of which, evidence of similar transactions on recent occasions was proper for the jury's consideration.

Counsel for appellant contend that the court erred in giving certain other instructions, and in refusing certain ones it requested. For the most part, these contentions involve the same legal questions already determined in this [126] opinion. In other respects the action of the court forms no basis for the claim of harmful error. Indeed, considered as a whole, and viewed from the legal standpoint sanctioned by this opinion, the instructions are not subject to serious criticism. There is no reversible error in the record.

Judgment affirmed.

**NOTE.**

The contract of a surety for hire is, it is held in the reported case, to be construed as a contract of insurance, and the rule of *strictissimi juris* does not apply thereto. It is accordingly held in that case that the execution and delivery by a surety company of a bond waives the failure of the principal to sign, despite a provision in the bond that it shall not be construed as entered into by the surety until it is executed in due form by the principal. The cases discussing the distinction between the liability of a surety company and that of an individual surety are reviewed in the note to *Philadelphia v. Fidelity, etc. Co.* Ann. Cas. 1912B 1085. For a discussion of the failure of the principal to sign an obligation as affecting the liability of the surety, see the note to *Deer Lodge County v. United States Fidelity, etc. Co.* Ann. Cas. 1912A 1010.

**LINDELL ET AL.**

v.

**PETERS ET AL.**

Minnesota Supreme Court—May 7, 1915.

129 Minn. 288; 152 N. W. 648.

**Homestead — Creation of Easement against Homestead — Signature of Wife.**

A deed granting a perpetual right of way over a homestead is invalid unless signed by both husband and wife.

**Reformation of Instruments — Conveyance of Homestead.**

A conveyance of the homestead, or a portion thereof, executed by both husband and wife, as required by statute, may be reformed by correcting a misdescription of the property intended to be conveyed thereby.

[See note at end of this case.]

**Evidence of Mistake Sufficient.**

Evidence examined and held sufficient to sustain a finding that both husband and wife agreed to grant the right of way in controversy, and that it was omitted from the deed by mutual mistake.

(Syllabus by court.)

Appeal from District Court, Ramsey county: DICKSON, Judge.

Action to reform deed and for injunction. H. G. Lindell et al., plaintiffs, and Auguste Peters et al., defendants. Judgment for plain-

tiffs. Defendant named appeals. The facts are stated in the opinion. **AFFIRMED.**

*R. A. Walsh* for appellant.

*J. T. Avery* for respondent.

[289] TAYLOR, C.—Block 36 of West St. Paul is bounded on the east by South Robert street and on the south by Isabel street. Lots 6 and 7 of this block front upon South Robert street and are each 50 feet in width north and south, and 150 feet in length east and west. Lot 6 is the corner lot at the junction of these streets and lot 7 adjoins it on the north. The entire front of both lots is covered by a three story brick block which extends back from Robert street about 70 feet. Defendants are husband and wife. At the time of the transactions in controversy, defendant Henry owned lot 7 and the west 50 feet of lot 6. The east 100 feet of lot 6 belonged to parties not concerned in this suit. A driveway, usually referred to as an alley, 10 feet in width, and the east line of which was 100 feet west of Robert street, extended from Isabel street across lot 6 and across so much of lot 7 as lay south of an ash house which extended along the north line of that lot. This was not a public alley, but a private driveway which had been used for many years for ingress and egress to the rear of the building located on lot 7, and it was located wholly upon the property of defendant Henry. Defendants sold and conveyed the east 100 feet of lot 7, being all that part thereof lying east of this driveway, to plaintiffs, and in the deed of conveyance granted an "easement for right of way over" this driveway across lot six "for alley purposes." Plaintiffs subsequently discovered that the deed did not give the right to use that part of the driveway upon lot 7, and brought this action to reform the deed by incorporating therein a provision granting a right of way over that portion of it upon lot 7, upon the ground [290] that such was the original contract, and that such provision had been omitted from the deed by mutual mistake. The trial court found that plaintiffs' contention was true and reformed the deed as requested. Defendant Henry took no further action in the matter, but defendant Auguste made a motion for amended findings, or for a new trial, and appealed from the order denying it.

At the time of the sale to plaintiffs and during the negotiations therefore, defendants occupied apartments in the brick block upon lot 7, and that lot was their homestead. Our statute provides that "no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation therefor, shall be valid without the signatures of both husband and wife." Section 6961 G. S. 1913.

Appellant contends that reforming the deed in controversy so as to grant a right of way over that portion of the driveway located upon the homestead violates this statute; also that the finding that she agreed to convey such right of way is not supported by the evidence.

It must be conceded that the grant of a perpetual right of way over a homestead is an alienation within the meaning of the statute. *Delisha v. Minneapolis, Electric Traction Co.* 110 Minn. 518, 126 N. W. 276, 27 L.R.A.(N.S.) 963. Consequently the question is presented whether the above statute bars the courts from reforming a properly executing deed of the homestead by correcting a misdescription therein of the property intended to be conveyed thereby. *Borgstrom v. Haverty*, 112 Minn. 500, 128 N. W. 824, has already determined this question adversely to appellant. Similar questions, under statutes as restrictive as our own, have been considered by several courts, and the weight of authority is to the effect that such deed may be so reformed. See *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454; *Witherington v. Mason*, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41; *Cox v. Holcomb*, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79; *Parker v. Parker*, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52; *Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; *Silliman v. Taylor*, 35 Tex. Civ. App. 490, 80 S. W. 651; *Ford v. Daniells*, 71 Mich. 77, 38 N. W. 708. It is held that, if any of the statutory [291] requirements were omitted in executing the instrument, such defects cannot be cured by the courts; but, if both husband and wife executed the instrument as required by the statute, it is held that, by so executing it, both clearly intended that it should become effective, and that the courts will correct mistakes in describing the property intended to be conveyed, whenever necessary in order to give effect to the true intention of the parties. The Wisconsin court reaches a different conclusion, but bases such conclusion largely upon the ground that the common law disability of a married woman to make contracts had not been removed, as to such contracts, in that state. *Petesch v. Hambach*, 48 Wis. 443, 4 N. W. 565; *O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702. But that court held in *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 305, however, that, if the premises ceased to be a homestead, the deed could be reformed as against the husband; and the doctrine of the *Petesch* and *O'Malley* cases is weakened by the later case of *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838.

Defendant Henry had placed the property in the hands of a real estate agent for sale.

This agent interested plaintiffs therein, and, by appointment, they met at the home of defendants, for the purpose of examining the property, and of agreeing upon the terms of its purchase. Both defendants met them, and defendant Henry showed them the entire property, including the alleyway in controversy, and finally agreed with them upon the terms of sale. Appellant did not accompany them while examining the premises, and was not present when the terms of sale were discussed and agreed upon; but she knew that negotiations were in progress, and subsequently knew that an agreement had been reached. She took no active part in the transaction, and what she knew concerning the provisions of the agreement appears only by inference, as she did not testify as a witness, and no other witness gave testimony upon that question. She apparently permitted her husband to act for her as well as for himself, and must have known that plaintiffs were relying upon his action as the action of both. No suggestion is made that she was deceived, misled, or overreached in any manner, or did not intend that her [292] husband should speak for her as well as for himself. The deed, which she joined with him in executing, gave plaintiffs the perpetual use of that part of the driveway located upon lot 6. This portion of it touched the property sold to plaintiffs only at one corner, and they could not enter it from their property without also using at least a portion of the driveway upon lot 7. Appellant knew that the driveway upon both lots had always been used in connection with the property sold plaintiffs, and that the use of that portion of it upon lot 7 was necessary, in order to make that portion of it upon lot 6 available or usable. The trial court has found that both defendants agreed to grant plaintiffs the right to use the driveway across both lots. The evidence abundantly sustains this finding as to the husband; and we think the facts and circumstances, together with the permissible inferences which the court was justified in drawing therefrom, are sufficient to sustain it as to appellant also.

Order affirmed.

#### NOTE.

#### Right to Reformation of Conveyance of Homestead.

##### General Rule.

The holding of the reported case that a court of equity has the power to reform a conveyance of a homestead, executed and acknowledged by both husband and wife in strict conformity to statutory requirements, by correcting mistakes as to the descrip-

tion of the property intended to be conveyed, is supported by a large majority of the decisions in which the question has arisen. *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454; *Witherington v. Mason*, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41; *Parker v. Parker*, 88 Ala. 365, 6 So. 741; *Tillis v. Smith*, 108 Ala. 264, 19 So. 374; *Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216 (*overruling Leonis v. Lazzarovich*, 55 Cal. 52); *Holt v. Holt*, 120 Cal. 67, 52 Pac. 119; *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; *Denison v. Gambill*, 81 Ill. App. 170. See also *Casler v. Byers*, 129 Ill. 657, 22 N. E. 507; *Beyschlag v. Van Wagoner*, 46 Mich. 91, 8 N. W. 693; *Ford v. Daniels*, 71 Mich. 77, 38 N. W. 708; *Borgstrom v. Haverty*, 112 Minn. 500, 128 N. W. 824; *Silliman v. Taylor*, 35 Tex. Civ. App. 490, 80 S. W. 651; *Durham v. Luce* (Tex.) 140 S. W. 850.

That the inclusion of the homestead in a conveyance does not alter the rules of construction of the instrument was clearly stated in *Beyschlag v. Van Wagoner*, 46 Mich. 91, 8 N. W. 693, as follows: "We do not understand that the constitutional provision requiring a mortgage of a homestead to be signed by the wife of the owner, requires such a mortgage to be construed on principles different from those which govern other conveyances similarly signed. If the parties have executed a mortgage which was meant to cover their homestead, they have bound the homestead if the description is not so defective as to make it beyond the power of the courts to identify and apply it."

In answer to the contention that to reform a mortgage of the homestead would amount to the creation of a new contract, the court in *Durham v. Luce* (Tex.) 140 S. W. 850 said: "When a married woman executes a deed with all the formalities required by the law, by which she intends to convey her homestead or her separate property, the correction of a mistake in the description of the property intended by all the parties to the instrument to be conveyed thereby is not the creation of a new contract for the married woman, but only makes the contract properly executed and acknowledged by her express her true intention. Such correction in no way impairs the effect of our statute, which requires the conveyance of a married woman to be by deed, duly executed and acknowledged by her in the manner prescribed by the statute." To the same effect it was said in *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454: "We need not hold that equity will undertake to reform a conveyance by a feme covert, where the ratification sought requires an order at the hands of the court for re-execution, or such reformation operates strictly as the creation of a new

conveyance. It may be admitted that, if this were a case of the latter kind, the chancery court could not act upon the will of a married woman by compelling her assent. It would be absurd to say that this was a voluntary assent. . . . Hence, it has been properly held that where the wife joins her husband in a deed, but her name is omitted from the granting clause, chancery will not correct the mistake in the instrument of conveyance by compelling the execution of a perfect deed. . . . The purpose here sought to be effected is simply to judicially determine what the parties have in truth and fact done, at least in equity—to insure, in other words, a more perfect identification of the premises, and not to change the subject-matter of the contract."

Nor will the existence of a collateral agreement, that the deed sought to be reformed should operate as a mortgage and thus defeat the rights of third parties, justify a refusal to reform. *Tillis v. Smith*, 108 Ala. 264, 19 So. 374.

In *Lear v. Prather*, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699, a mortgage in which the homestead rights of the mortgagor were expressly reserved was reformed so as to include the homestead, on the ground that the intention of the parties was to mortgage the entire tract, except only that exempt as a homestead, and it appeared that the reservation as to the homestead was inserted under a mistaken belief that it was not subject to mortgage, when in fact the mortgagor had no homestead rights.

In a case wherein it appeared that a widow was induced by fraudulent representations to give a deed of trust on her homestead to secure a debt due from her brother and son-in-law, it was held that in an action against her to try title she was entitled to relief as to her mistake concerning the effect of the deed induced by the fraudulent representations of the attorney for the creditors. *Ramey v. Allison*, 64 Tex. 697.

In *Frederick v. Henderson*, 94 Mo. 98, 7 S. W. 186, the court refused to reform a widow's conveyance of her homestead on the ground that the evidence of the mistake was insufficient to justify reformation, though it was implied that the deed would have been reformed if the evidence had been sufficient.

But it has been held that an absolute deed, properly executed under the statute, providing for sales of the property to secure loans and other debts will not be reformed for the purpose of protecting the wife's homestead, by declaring it to be a mortgage on the allegation that it was so intended. *Barnett v. People's Bank*, 65 Ga. 51. And in *Adams v. Baker*, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799, it was held that a defective mortgage on community property executed by the

husband without the knowledge of the wife, would not be reformed so as to include the homestead as was intended, because of lack of notice of the mortgage on the part of the wife.

In each of the following cases the principle that equity will reform a conveyance of the homestead by correcting errors in the description of the property was recognized, but reformation was refused because the conveyances were not executed in strict conformity with the statutes providing for the alienation of a homestead. *Cox v. Holcomb*, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79; *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534; *Grapengether v. Fejervary*, 9 Ia. 163, 74 Am. Dec. 336. In *Cox v. Holcomb*, supra, wherein it appeared that the acknowledgment of the wife to a conveyance of the homestead was defective, the rule was stated as follows: "The power of the wife to consent to the alienation is derived from the statute. There can be no question, that if no sufficient examination and acknowledgment have been made, a court of equity will not compel the wife to correct the defective execution. When an order for re-execution is necessary, and the reformation only operates as a reconveyance, the court will not undertake to reform it. The wife's signature and assent must be voluntary, under the constitution and statute. The omission of the statutory requirement, essential to a valid execution of the deed of a married woman, cannot be supplied by the compulsory power of the court." And in *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534, wherein it was sought to reform a mortgage by inserting a waiver and release of the homestead, which had been omitted by the scrivener through mistake, it was said: "A court of chancery cannot give life to an instrument which has no vitality in itself. A married woman can convey her land only in the manner prescribed by the statute in existence at the time she makes the deed; to make the deed effectual, all the forms and solemnities required by the statute should be observed. So, here, the written instrument was without validity in respect of the estate of homestead of defendants in this property, and the court was without power to vitalize it. As such estate can only be released in writing subscribed and acknowledged as prescribed by the statute, the attempt of the court to reform the contract in writing, upon the proof of the verbal agreement, was in effect to make a new and independent contract affecting a release and waiver of the estate. This cannot be done."

*Rule in Wisconsin.*

In Wisconsin, a rule contrary to that stated supra has been adopted, the court hold-

ing that equity has no power to reform a conveyance of the homestead by correcting the description so as to conform to the intention of the parties, even though the instrument is executed in strict conformity with the statute. *Petesich v. Hambach*, 48 Wis. 443, 4 N. W. 565; *O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702; *Gotfredson Bros. Co. v. Dusing*, 145 Wis. 659, 129 N. W. 647. See also *Cumps v. Kiyo*, 104 Wis. 656, 80 N. W. 937; *Scheuer v. Chloupek*, 130 Wis. 72, 109 N. W. 1035. In *Petesich v. Hambach*, supra, it appeared that a mortgage had been executed by the husband and wife on lands supposed to be the homestead, but through a mistake in the description other lands only were covered. The court refusing to reform the mortgage so as to make it include the homestead, stated the Wisconsin doctrine as follows: "The homestead in controversy belonged to the husband. The wife had no estate in it by virtue of the homestead right. She had only an absolute veto upon the power of her husband to alienate it, which the statute executes for her until she sees fit to affix her signature to her husband's conveyance of it. . . . Our statute only removes the disability if coverture in respect to the separate estate of the wife. This homestead not being the separate estate of the wife, it is clear that she was under the common-law disabilities of coverture when she signed the defective mortgage. Being so, she could validate her husband's mortgage of the homestead only by signing it. She has signed no such mortgage, and could not make a valid executory agreement to do so. Hence, there is no ground upon which a judgment to reform the mortgage can legally be rendered." And it was held in *O'Malley v. Ruddy*, supra, that the consent of the wife, given in her answer, to the reformation so as to include the homestead did not amount to her signing a mortgage and was therefore ineffectual.

It has been held, however, that equity would reform a conveyance, which failed through a misdescription to convey the homestead as intended, where the homestead rights ceased to exist against the husband or his heirs if he died intestate, though not against the widow. *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. 395. See also *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, 30 Am. St. Rep. 838. In *Conrad v. Schwamb*, supra, it appeared that a deed was intended to convey the homestead, but through a mistake in the description failed to do so. The purchaser entered into possession and the grantors left the state to reside, and the husband later died. The court granted the prayer for reformation as against the heirs on the ground that the homestead right had ceased to exist. The court in the later case of

*O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702, pointed out that *Conrad v. Schwamb*, supra, was not in conflict, with the rule laid down in *Petesich v. Hambach*, supra, and distinguished the cases as follows: "The controlling difference between these two cases is that in one of them the homestead intended to be mortgaged remained a homestead from the execution of the mortgage until the trial, while in the other the premises permanently ceased to be a homestead on the execution of the deed. Because the homestead character continued in the one case, as it does in this case, reformation of the mortgage was denied, and because it had terminated in the other case the deed was reformed as to the heirs."

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**MYERS**

v.

**SALTRY.**

Kentucky Court of Appeals—March 11, 1915.

163 Ky. 481; 173 S. W. 1138.

**Appeal — Scope of Review — Evidence Not in Record.**

Where the record is without a transcript of the evidence, the only question on appeal is whether the pleadings support the judgment.

**Same.**

Where the record is without a transcript of the evidence, the court on appeal will presume that the omitted parts of the record will support the judgment.

**Statute of Frauds — Contract Not to Be Performed within Year — Contract Depending on Contingency.**

An oral contract binding one to rear and maintain another's child until the child's maturity is not within the statute of frauds requiring contracts to be in writing which are not to be performed in a year, for the child may die within the year and thereby terminate the contract.

[See note at end of this case.]

**Limitation of Actions — Continuing Contract.**

A contract binding one to rear and maintain another's child until the child's maturity is a continuing one, and the compensation under it becomes due and payable at the termination of the child's minority within the statute of limitations.

**Appeal — Presumptions to Support Judgment.**

Where the petition in an action on a contract did not allege whether the contract was in writing or oral, the court on appeal from a judgment granting relief under the contract

will presume, in the absence of the evidence, that the contract was written if a writing is necessary to support the judgment.

**Same.**

In the absence of a transcript, the court on appeal may presume that proof of a written contract sued on was introduced without objection and that plaintiff without objection proved an express promise to pay the debt demanded, such as would take it out of the statute of limitations.

**Pleadings — Construction.**

Pleadings are liberally construed after verdict and judgment to sustain the judgment, and any formal defect is deemed cured.

**Same.**

Pleadings are, when attacked on demurrer, strictly construed against the pleader.

**Infants — Expenditures for Nurture — Recovery — Pleading.**

A petition, in an action on a contract binding plaintiff to rear and maintain defendant's child during the minority of the child, which alleges that plaintiff provided the child with a home, maintained, clothed, and educated him, nursed and cared for him in sickness, and in that way expended the amount demanded, states a cause of action as against the objection that it does not allege that the expenses incurred were necessities.

**Appeal — Amendment of Record — After Decision.**

After the case has been submitted and an opinion filed, the appellant, who has lost on an imperfect appeal, will not be permitted to file a record which was not a part of the record when the case was disposed of; though a different rule prevails when a motion is made by appellee to file an additional record after an opinion has been handed down, and before the petition for rehearing has been disposed of.

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Third Division.

Action on contract. Helen M. Saltry, plaintiff, and W. G. Myers, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*R. A. McDowell* and *Matt O'Doherty* for appellant.

*R. C. Kinkead* for appellee.

[482] *NUNN, J.*—This record comes to us without a transcript of the evidence. In such cases, the only question to be determined is whether the pleadings support the judgment. *Bradford v. Jones*, 150 Ky. 355, 150 S. W. 387; *Duker v. Kaelin*, 90 S. W. 959, 28 Ky. L. Rep. 900; *Annheuser-Busch Brewing Co. v. Seelbach*, 40 S. W. 671, 19 Ky. L. Rep. 375; *Louisville Bridge Co. v. Neafus*, 110 Ky. 571, 62 S. W. 2, 63 S. W. 600, 23 Ky. L. Rep. 185.

This court will presume that the omitted portions of the record will support the judgment. *Jones v. Jackson*, 13 Ky. L. Rep. 253, 16 S. W. 458; *Hackney v. Hoover*, 23 Ky. L. Rep. 2061, 67 S. W. 48; *Sanson v. Connolly*, 141 Ky. 120, 132 S. W. 159; *McKee v. Stein*, 91 Ky. 240, 13 Ky. L. Rep. 49, 16 S. W. 583.

We gather from the briefs that the plaintiff, the appellee here, is a sister-in-law of the appellant, Myers. In 1901 the parties were living in Scranton, Pennsylvania. Domestic troubles arose between Myers and his wife, and they separated. Their infant son, Floyd Myers, then about five years old, came into the hands of Mrs. Saltry, the appellee. Her husband was a miner, and shortly afterwards they moved to Butte, Montana, where he worked in the mines. The appellant moved to Louisville and married again, and has continued to reside there.

The pleadings disclose this state of case: Mrs. Saltry filed a suit in the Jefferson Circuit Court against Myers, in which she alleged that in August, 1901, he placed his infant son, Floyd Myers, in her care and custody—

"And requested this plaintiff to rear, maintain and educate said child, and to expend such amounts as might be necessary for such purposes, agreeing and promising to reimburse this plaintiff to the extent of any and all such expenditures. This plaintiff further states that she took said child at said time and has retained the custody of him from said time until December, 1912; that she, [483] from her own means, provided said child with a home; maintained, clothed and educated him; nursed and cared for him in sickness with the faithfulness and affection of a mother; that said boy is now past the age of 16 years, and that on the 27th day of December, 1912, she brought said boy from her home in Butte, Montana, for such purpose, surrendered and returned him to his father, the said defendant, William C. Myers, who received him; and that the said Floyd Myers is now living with his father, the defendant. She states that she has during said time expended in the care, maintenance and education of said child, the sum of \$4,974, and that defendant is indebted to her in said sum. That since the delivery of said boy to the defendant she has rendered to the defendant a full statement of said expenditures and demanded payment thereof, but the defendant has refused and still refuses to pay the same."

A statement of the expenditures is filed with the petition as an exhibit, and she concludes with a prayer for the recovery of the amount above mentioned. The court overruled motion to make the petition and the statement of account more specific, and also overruled demurrer. The defendant answered in three paragraphs. The first was a trav-

erse; the second was a plea of limitation; and the third relied upon the statute of frauds. Verdict and judgment was rendered in appellee's favor for the amount sued for.

The statement of account filed with the petition, we believe, was sufficiently specific to notify the defendant of the character of claim made, and to enable him to intelligently defend. The court did not err in overruling the demurrer. While the petition does not allege that the expenditures were made for necessities, it shows the expenditures were necessarily made in fulfillment of the contract.

If, in fact, the contract was oral, it would not be within the statute of frauds requiring contracts to be in writing which are not to be performed in a year. While this contract for rearing and maintaining the child might continue for years—that is, until the child's maturity—yet it might be terminated within a year. The child might die within a year, and in such event, the contract would be terminated.

"If the performance of a contract depends upon a contingency which may happen within a year, then it is [484] not within the statute, although that contingency may not, in fact, happen until after the expiration of the year, and although the parties may not have expected that it would occur within that period. It is sufficient if a possibility of performance exists." *Stowers v. Hollis*, 83 Ky. 544; *Standard Oil Co. v. Denton*, 70 S. W. 282, 24 Ky. L. Rep. 906; *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384; *Whitley v. Whitley*, 80 S. W. 825, 26 Ky. L. Rep. 134.

While the child could not receive a complete education within a year, still, had it died during the year, the plaintiff certainly would have been permitted to recover, *pro tanto*, the expense incurred during that year for education. Of course, it was not contemplated by the parties that the contract would be completed within a year, nor did they expect anything to happen within a year that would terminate it, but it is the possibility of such a contingency that takes the case out of the statute of frauds. Nor do we believe the statute of limitations can be invoked. The contract was a continuing one, and it contemplated the period of the boy's minority and became due and payable at the expiration of that period, or when his education was completed.

For purposes of this case, it might be conceded that appellant's position with reference to the statutes of limitation and frauds is correct on oral contracts, but in the absence of the transcript of evidence we cannot say that the contract was oral. As the petition does not say whether it was written or oral, on demurrer the court would take it to be an oral contract. But the allegation

was sufficient to justify the introduction in evidence of a written contract. In the absence of the evidence, and after verdict and judgment, the presumption is that the contract was written if a writing was necessary to support the judgment. In the absence of a transcript we may presume that proof of a written contract was introduced without objection, and also that without objection plaintiff proved an express promise to pay the debt, such as would take it out of the statute of limitation. The rule is that pleadings are liberally construed after verdict and judgment to sustain the judgment, whereas, on demurrer and before judgment they are strictly construed against the pleader. Any formal defect in pleadings is deemed cured by a verdict and judgment. *Winstead v. Hicks*, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446; *Hill v. Ragland*, 114 Ky. 209, 70 S. W. [485] 634, 24 Ky. L. Rep. 1053; *Dunekake v. Beyer*, 79 S. W. 209, 25 Ky. L. Rep. 2002; *Ashland, etc. St. R. Co. v. Lee*, 82 S. W. 368, 26 Ky. L. Rep. 700; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569, 27 Ky. L. Rep. 186.

Appellant insists that the petition was defective for another reason. He calls attention to the averment of Myers' request of her "to expend such amounts as might be necessary for such purposes," and his promise to repay her for such necessary expenditures, and the failure to allege that the expenditures she claimed to have made were necessary. But this is a suit upon a contract, and not one to recover upon the liability imposed by law upon a parent for necessities furnished an infant. The petition alleges that she provided the child with a home; maintained, clothed and educated him; nursed and cared for him in sickness, and in that way expended the amount claimed in the petition. While she does not expressly allege that they were necessities, yet they were just such things as Myers agreed to pay for, and when one alleges that the expense was incurred in order to furnish a home, maintain, clothe and educate the child, and nurse and care for him in sickness, it would be surplusage to say that these things were necessary. The case of *Ashland, etc. R. Co. v. Lee*, 82 S. W. 368, 26 Ky. L. Rep. 699, was like this, in that there was no bill of evidence in the record. It was a suit to recover damages for personal injuries received by Lee in attempting to board a car to be transported as a passenger. The petition was defective in failing to allege facts showing a knowledge by the servants of his presence, or negligence on their part in not ascertaining his presence at the time he was attempting to ascend the steps of the car.

In that case the court said: "In this case we have not the proof before us and we must presume that proof was introduced showing

that appellant's servants had knowledge of the presence of appellee at the time he was attempting to get on the car, or that the car had stopped for passengers at that place and by the exercise of ordinary care on their part they could have ascertained his presence. Without proof of this character the court could not have submitted the case to the jury, nor could the jury have rendered a verdict for appellee. The appellant did not bring the evidence here, and it must be presumed that the lower court [486] did its duty in this regard and would not have submitted the case to the jury unless such evidence has been introduced."

For the reasons stated, the judgment must be affirmed, and it is so ordered.

#### ON REHEARING.

(April 27, 1915.)

164 Ky. 350; 175 S. W. 626.

[351] *CARROLL, J.*—The opinion in this case was handed down March 11, 1915, and may be found in 163 Ky. 481, 173 S. W. 481. We are asked, in a petition for a rehearing, accompanied by motion and affidavits, to set aside the submission of the case, withdraw the opinion, and permit a record to be filed that was not a part of the record when the case was disposed of.

The exceptional circumstances attending this motion strongly persuade us to grant it, but in view of the uniform ruling of this court in refusing similar requests, it must be denied. *Christopher v. Searcy*, 12 Bush (Ky.) 171; *Yeager v. Groves*, 78 Ky. 278; *Martin v. Royse*, 54 S. W. 177, 21 Ky. L. Rep. 1353; *McGerty v. McGerty*, 55 S. W. 201, 21 Ky. L. Rep. 1360; *Leonard v. Cowling*, 121 Ky. 631, 87 S. W. 812, 89 S. W. 131; *Louisville Bridge Co. v. Neafus*, 110 Ky. 571, 62 S. W. 2, 63 S. W. 600.

A different rule prevails when a motion is made by appellee to file an additional record after an opinion has been handed down and before the petition for a rehearing has been disposed of. *Chesapeake, etc. R. Co. v. Kelly*, 161 Ky. 660, 171 S. W. 182; *Miller Creek R. Co. v. Barnett*, 160 Ky. 845, 170 S. W. 202.

Motion denied.

#### NOTE.

**Whether Contract Which Depends upon Contingency for Performance within Year Is within Statute of Frauds.**

Introductory, 1137.

General Rule, 1137.

Application of Rule:

Marriage or Marriage Brokerage Contract, 1138.



Duration of Contract Contingent on Future Event, 1138.  
 Payment of Money under Contract Contingent on Future Event, 1140.  
 Contract of Insurance, 1140.  
 Contract Which May Be Performed or Terminated at Will, 1140.  
 Contract to Continue during Life or Terminate by Death of Certain Person, 1141.  
 Contract to Be Performed on Death of Certain Person, 1143.  
 Contract Not to Engage in Certain Business, 1143.

**Introductory.**

The earlier decisions passing on the question whether a contract which depends on a contingency for its performance within a year is within the statute of frauds, are reviewed in the notes to *Nonamaker v. Amos*, 4 Ann. Cas. 170, and *Okin v. Selidor*, 138 Am. St. Rep. 588. This note presents the recent cases on the subject.

**General Rule.**

It is well settled that where the performance of a contract depends on a contingency, the happening of which within one year will amount to a complete performance, but which may or may not happen within a year, the section of the statute of frauds which requires that contracts which are not to be performed within one year shall be in writing, does not apply.

*United States.*—*Nester v. Diamond Match Co.* 143 Fed. 72, 74 C. C. A. 266.

*Alabama.*—*Philip Carey Mfg. Co. v. Southern Constr. Co.* 2 Ala. App. 292, 56 So. 746.

*Arkansas.*—*Sullivan v. Winters*, 91 Ark. 149, 18 Ann. Cas. 597, 120 S. W. 843; *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S. W. 768, 26 L.R.A.(N.S.) 403; *Hampton v. Caldwell*, 95 Ark. 387, 129 S. W. 816; *Graham v. Jonesboro*, etc. R. Co. 11 Ark. 598, 164 S. W. 729.

*Connecticut.*—*Russell v. Slade*, 12 Conn. 455.

*Georgia.*—*Young Men's Christian Assoc. v. Estill*, 140 Ga. 291, Ann. Cas. 1914D 136, 78 S. E. 1075, 48 L.R.A.(N.S.) 783.

*Idaho.*—*Darknell v. Coeur d'Alene*, etc. Transp. Co. 18 Idaho 61, 108 Pac. 536, 39 L.R.A.(N.S.) 938.

*Illinois.*—*Hulse v. Hulse*, 155 Ill. App. 343; *Dickinson v. McKay*, 177 Ill. App. 412; *Mead v. Chicago*, etc. R. Co. 189 Ill. App. 323. And see *Julin v. Bauer*, 82 Ill. App. 157.

*Kentucky.*—*Bullock v. Falmouth*, etc. Turnpike Co. 85 Ky. 184, 3 S. W. 129; *Fain v. Turner*, 96 Ky. 634, 29 S. W. 623; *Ford Lumber*, etc. Co. v. Cobb, 138 Ky. 174, Ann. Cas. 1916E.—72.

127 S. W. 763; *Fidler v. Dils*, 8 Ky. L. Rep. (Abstract) 266; *Myers v. Korb*, 50 S. W. 1108, 21 Ky. L. Rep. 163. See also *Klein v. Liverpool*, etc. Ins. Co. 57 S. W. 250, 22 Ky. L. Rep. 301; *East Tennessee Telephone Co. v. Paris Electric Co.* 156 Ky. 762, Ann. Cas. 1915C 543, 162 S. W. 530. And see the reported case.

*Maryland.*—*Cole v. Singerly*, 60 Md. 348.

*Massachusetts.*—*Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142; *Blake v. Cole*, 22 Pick. 97.

*Missouri.*—See *Hammack v. Friend*, 180 Mo. App. 472, 166 S. W. 647.

*Nebraska.*—*Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019; *Reynolds v. Wymore First Nat. Bank*, 62 Neb. 747, 87 N. W. 912.

*New Jersey.*—*Okin v. Selidor*, 78 N. J. L. 54, 78 Atl. 770, 138 Am. St. Rep. 538, 34 L.R.A.(N.S.) 503.

*New York.*—*Lockwood v. Barnes*, 3 Hill 128, 38 Am. Dec. 620.

*Oklahoma.*—*Uncle Sam Oil Co. v. Richards*, 158 Pac. 1187.

*Texas.*—*Adair v. Stallings*, 165 S. W. 140.

*West Virginia.*—*Reckley v. Zenn*, 74 W. Va. 43, 81 S. E. 565; *McClanahan v. Otto-Marmet Coal*, etc. Co. 74 W. Va. 543, 82 S. E. 752; *Coffman v. Viquesney*, 84 S. E. 1069.

Thus in *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019, it was said: "A contract, in order to be within the purview of said section, must be such that, by its terms, cannot be performed within one year from the making thereof. The statute does not include a verbal agreement which may possibly or probably not be performed within a year, nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period. When a contract, not in writing, by its terms, or by any fair and reasonable construction of its provisions, is capable of being performed within a year, it is not within the statute." So the court said in *Okin v. Illidor*, 78 N. J. L. 54, 78 Atl. 770: "The second ground cannot avail the appellant for the reason that although his agreement covers five years it was not one that was not to be performed within one year and within such period its performance was required. The section of the statute of frauds is cast in this negative form, hence it applies wherever by no contingency covered by the contract the promisor can within one year from the making of his agreement be required to perform it." And in *Uncle Sam Oil Co. v. Richards* (Okla.) 158 Pac. 1187, it was said: "Contracts, to fall within this section of the statute of frauds, must be those which by their terms are not to be performed within one year. A

contract which may or may not be performed within a year does not fall within this section of the statute of frauds. It is only where by the terms of the contract it is apparent that the performance was not to be completed within a year that this section becomes applicable."

#### *Application of Rule.*

##### MARRIAGE OR MARRIAGE BROKERAGE CONTRACT.

An agreement to marry, the performance of which is made to depend on the restoration to health of one of the parties is not within the statute of frauds. *McConahey v. Griffey*, 82 Ia. 564, 48 N. W. 983. So a promise by a man to marry as soon as he could have a suitable home erected and wind up his business affairs so that he could quit labor, take a vacation, wedding trip, etc., has been held not to be within the statute, as it did not appear that this could not have been done within the year. *Huggins v. Carey* (Tex.) 149 S. W. 390.

##### DURATION OF CONTRACT CONTINGENT ON FUTURE EVENT.

The recent cases furnish numerous illustrations of the rule that a contract which is to continue until the happening of a contingency, which may or may not arise within one year, is not within the statute, and therefore is not void though not made in writing. Thus, in *Reckley v. Zenn*, 74 W. Va. 43, 81 S. E. 565, it appeared that a verbal contract provided that the plaintiff for his services as manager of a timber operation conducted by the defendants was to be paid by them the sum of \$125 per month, and in addition, if the plaintiff remained with them until they were through with the operation, two per cent on the net proceeds of all sales made of lumber during the plaintiff's management and the same per cent on the proceeds of a sale of the equipment and remaining stumpage. The court said, in holding that the statute of frauds did not apply: "Directly applicable to the facts of the case at hand is the language of Mr. Justice Gray, in *Warner v. Texas*, etc. R. Co. 164 U. S. 418 [17 S. Ct. 147, 41 U. S. (L. ed.) 495]: 'The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was; but whether the contracts, according to the reasonable interpretation of its terms, required that it should not be per-

formed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.'"

Verbal contracts have been held to be valid, as not being within the statute, which, by their terms, were to continue: "So long as the defendant controlled, managed and operated said river as aforesaid." *Nester v. Diamond Match Co.* 143 Fed. 72, 74 C. C. A. 266; or as long as a cotton gin was operated at a certain place, *Graham v. Jonesboro*, etc. R. Co. 111 Ark. 598, 164 S. W. 729; or until a lessor should pay the lessee a certain sum of money, *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; or so long as an employee continued to hold certain stock of the employing corporation, *Darknell v. Coeur d'Alene*, etc. Transp. Co. 18 Idaho 61, 108 Pac. 536, 39 L.R.A. (N.S.) 938; or so long as an employee should "live and prove a competent and worthy man," *Cox v. Baltimore*, etc. R. Co. 180 Ind. 495, 103 N. E. 337, 50 L.R.A. (N.S.) 453; or so long as an employee lived, *Piereson v. Kingman Milling Co.* 91 Kan. 775, 139 Pac. 394, *rehearing denied*, 92 Kan. 468, 140 Pac. 1033; or so long as a company was engaged in the sawmill business on the Ohio River, *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685, 20 Ky. L. Rep. 2006; or as long as the owner of a coal elevator remained in the coal business and handled the coal in the manner contemplated by a written agreement (of which the foregoing was a verbal renewal), *Frankfort*, etc. R. Co. v. *Jackson*, 153 Ky. 534, 156 S. W. 103; or during the continuance of logging operations, *Niagara F. Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090; or provided the business should be continued during the term of the contract, *H. J. McGrath Co. v. Marchant*, 117 Md. 472, 83 Atl. 912; or until a certain indebtedness was paid, and thereafter indefinitely, *Campbell v. Burnett*, 120 Md. 214, 87 Atl. 984; or as long as the plaintiff abstained from the sale of a certain newspaper, *Rague v. New York Evening Journal Pub. Co.* 164 App. Div. 126, 149 N. Y. S. 688; or until the lumber company "cut out" the timber at a certain place, *Texarkana Lumber Co. v. Lennard*, 47 Tex. Civ. App. 116, 104 S. W. 506, *affirming* 94 S. W. 383; or as soon as the plaintiff received the money due on certain notes, *Hedges v. Strong*, 3 Ore. 18, or so long as a third party continued to manufacture certain articles for the defendants, *Glenn v. Rudd*, 3 Ont. L. Rep. 422.

In *Philip Carey Mfg. Co. v. Southern Constr. Co.* 2 Ala. App. 292, 56 So. 746, it

was held that a contract to guarantee for a term of five years a roof furnished for and put on a building, was not an "agreement, which, by its terms is not to be performed within one year from the making thereof," within the meaning of those words as used in the statute of frauds (Code, § 4289) as the contingency on which the liability was to accrue might happen within the year. In *Young Men's Christian Assoc. v. Estill*, 140 Ga. 291, Ann. Cas. 1914D 136, 78 S. E. 1075, 48 L.R.A. (N.S.) 783, it was held that a verbal promise to pay \$500 to a charitable corporation on the beginning of the contemplated work of constructing a building in furtherance of the general corporate design, was a contract dependent on a contingency which could occur within the year, and therefore was not within the statute of frauds. In *Robinson v. Western Union Tel. Co.* 169 Mich. 503, 135 N. W. 292, it appeared that although there had been talk of a year's employment, it was not agreed to, and an unconditional contract for six months' employment had been made, with a conditional clause for employment after the expiration of the six months' period, if the employee had made good. The court held that the contract was not within the statute of frauds. In *Hall v. Cook* (Tex.) 117 S. W. 449, it was held that a verbal contract whereby the plaintiffs were to bore a well 500 feet, and if a sufficient flow of water was not obtained at that depth, they were to continue to bore to 800 feet, unless they were caused to stop by the defendant before reaching that depth, was not within the statute of frauds.

A contract for the employment of the plaintiff by the defendant "If I buy the mill," has been held not to be within the statute. *Cole v. Singerly*, 60 Md. 348. And a like ruling has been made as to an oral contract for the division of the proceeds of a sale of land to be made thereafter, wherein no definite time was agreed on within which the contract should be performed, *Sullivan v. Winters*, 91 Ark. 149, 18 Ann. Cas. 579, 120 S. W. 843; and as to an oral agreement to cancel a trade if the defendant became dissatisfied, *Coffman v. Viquesney* (W. Va.) 84 S. E. 1069. It has been held that an agreement to pay the plaintiff from week to week, what he needed, the balance to be retained and paid him when he had learned his trade, was not within the statute, *Myers v. Korb*, 50 S. W. 1108, 21 Ky. L. Rep. 163.

A parol contract between a street railway company and a railroad company for the erection of gates and the maintenance of a watchman at a crossing of their respective tracks, the expenses of which were to be borne equally by the companies, in which contract no time fixed for its performance, has been held not to be within the statute

of frauds. *Richmond Union Pass. R. Co. v. Richmond, etc. R. Co.* 96 Va. 670, 32 S. E. 787, wherein the court said: "'Clause 7, sec. 2840, Code 1887, contemplates such contracts as on their face have performance postponed beyond one year, and not such as may or may not chance to be performed within that period.' . . . 'Agreements to continue to do something for an indefinite period, which may be terminated at any time by either party; or which may be terminated by such a change in the circumstances of the parties as will make it unreasonable or unnecessary that they should be farther bound, the contingency of such change of circumstances being implied in the nature of the contract, are not within the statute.' *Browne on Statute of Frauds* (5th ed.) 276a; 1 *Reed on State of Frauds*, sec. 197. In *Talmadge v. Rensselaer, etc. R. Co.* 13 Barb. (N. Y.) 493, this principle is strikingly illustrated. In that case the defence to an action for injury to the plaintiff's cattle by running over them with railway cars, was that the plaintiff had verbally agreed to build and maintain a fence along the railroad opposite his land, whence his cattle escaped on to the track at the time of the injury. This agreement was held not to require a writing under the statute of frauds, but, says *Browne* (sec. 273a) upon doubtful ground. 'It would have been properly so held upon the ground,' says that author, 'that the duration of the plaintiff's promise to maintain the fence was obviously limited (though no words said to that effect) by the duration of the circumstances of the parties which led to the making of it. If the road should cease to be used by the promisee or its assigns for railway purposes, it is unreasonable to suppose that the fence was still to be maintained, the reason for maintaining it no longer existing; and this might well happen within the space of a year, consistently with the understanding and rights of the parties.' The case cited seems to be quite as strong for the application of the statute as that under consideration. A change of circumstances surrounding the parties would at any time have determined the contract, and it may be observed that such a change has in fact taken place, and the gate is no longer maintained where it was placed in the first instance." An oral contract of employment to superintend the making and gathering of a crop of cotton, in which no definite term was specified, has been held not to be within the statute of frauds. *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S. W. 708, 26 L.R.A. (N.S.) 403, wherein the court said: "The contract in question did not fall within the operation of the statute of frauds, for it cannot be said that it was, according to its terms, 'not to be performed within a year.'

It may or may not, according to the agreement, have been performed within a year. This depended upon the course of the seasons, weather conditions during the planting and crop-gathering seasons, particularly the latter; and also the scarcity or plentifulness of farm labor and appellee's ability to secure labor during those seasons. We are asked to say, by way of judicial cognizance, that a crop of cotton cannot be made and gathered within a year; or at least, that such a feat is so unusual in this state that it could not have been within the understanding and contemplation of the parties to the present contract; but we are unwilling to make such a declaration. On the contrary, if we should resort to matters of common knowledge among residents of the cottongrowing localities as to the course of the seasons and as to the culture and production of cotton, we should say that a crop of cotton can be, under favorable conditions, planted, harvested, ginned and marketed within a year. That depends mainly upon weather conditions during the gathering season and the amount of farm labor available; and if these conditions are favorable, there appears to be no reason why the crop cannot be made and gathered within a year from the time in which the contract in question was made, which was early in December, 1907. We are not unmindful of the adage among Southern farmers that it requires 'thirteen months in each year' to make and gather a crop of cotton, which is perhaps due to the proneness of mankind to magnify the difficulties of one's own task and to regard those of others as less arduous and exacting. But this cannot be accepted as a truism so as to control, in law, the binding force of the contract. According to the terms of the contract in the present case, as established by the evidence accredited by the jury, appellee agreed to perform certain work for a gross stipulated price. Self-interest was a natural incentive to conclude the engagement by getting the crop gathered as speedily as possible, and he impliedly agreed to do this, his employer having the right to expect and demand as much of him. That being true, we cannot say that it was the understanding and contemplation of the parties, when the contract was entered into, that it was not to be performed within a year."

But in *Williams v. Apothecaries Hall Co.* 80 Conn. 503, 69 Atl. 12, wherein it appeared that it was orally agreed that the tenant of a corporation, under a lease from year to year, should continue in possession under the lease until the question as to the sale or division of certain capital stock of the corporation should be determined and the stock disposed of, and in the meantime the tenant should pay his agreed rent either

monthly or quarterly, it was held that the agreement was within the statute of frauds and therefore void.

#### PAYMENT OF MONEY UNDER CONTRACT CONTINGENT ON FUTURE EVENT.

An agreement to pay a certain sum of money on a contingency which may possibly happen within one year, is not within the statute of frauds and hence is valid although verbal. *Hulse v. Hulse*, 155 Ill. App. 343; *Dickinson v. McKay*, 177 Ill. App. 412; *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Blake v. Cole*, 22 Pick. (Mass.) 97. So, agreements have been held to be within that rule which consisted of promises to reimburse the surety on a bond, if the principal within one year failed to make certain payments, or to observe certain rules, or if he engaged in business on his own account, *Dickinson v. McKay*, 177 Ill. App. 412; or to pay a sum dependent on the amount realized on a sale of certain premises, *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602.

In *Blake v. Cole*, 22 Pick. (Mass.) 97, wherein it appeared that the defendant became surety on a bond at the request of the plaintiff's intestate and on his verbal engagement to indemnify him, it was held that as the bond might be forfeited for breaches within the year, or the estate settled within that time, the contract was not within the statute.

#### CONTRACT OF INSURANCE.

Insurance contracts are, of course, to be performed on a contingency which may happen within a year, and therefore are not within the statute of frauds. *American Cent. Ins. Co. v. Leake*, 104 S. W. 373, 31 Ky. L. Rep. 1016; *Carter v. Bankers' L. Ins. Co.* 83 Neb. 810, 120 N. W. 455; *International Ferry Co. v. American Fidelity Co.* 207 N. Y. 350, 101 N. E. 160, *reversing judgment* 145 App. Div. 906, 129 N. Y. S. 1129; *Croft v. Hanover F. Ins. Co.* 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

#### CONTRACT WHICH MAY BE PERFORMED OR TERMINATED AT WILL.

It has been held that a contract which may be performed and thus terminated, at will, on less than a year's notice, is not within the statute of frauds. *Prout v. Webb*, 87 Ala. 593, 6 So. 190; *Kutz v. Fleisher*, 67 Cal. 93, 7 Pac. 195; *Mead v. Chicago*, etc. R. Co. 189 Ill. App. 323; *Durgin v. Smith*, 115 Mich. 239, 73 N. W. 361; *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824; *Girton v. Daniels*, 35 Nev. 438, 129 Pac. 555; *Jagau v. Goetz*, 11 Misc. 380, 32 N. Y. S. 144; *Seddon v. Rosenbaum*, 85 Va.

928, 9 S. E. 320, 3 L.R.A. 337. So, where a contract, from its very nature, depends for its continued existence on the continuation of the business engaged in at the time by the parties thereto respectively, and either party may continue to engage in the same business for any number of years, or, on the other hand, either party may desist from the business within a year from the date of the contract, and such a discontinuance by either party will terminate the contract, it is not within the statute of frauds. *Prout v. Webb*, 87 Ala. 593, 6 So. 190.

In *Smith v. Conlin*, 19 Hun (N. Y.) 234, it was held that a contract whereby the plaintiff was employed from October of one year to October first of the next year, and for a further year to commence on the last mentioned day, if no notice should be given by either party, at least two weeks prior to that date, was not within the statute. To the same effect, see *General Electric Inspection Co. v. Ebling Brewing Co.* 52 Misc. 145, 101 N. Y. S. 648. It has been held that the statute of frauds did not apply to a contract for the sale of lumber which provided that the agreement was to remain in force for one year, and that the purchaser should have the right to renew the same for five years more, and therefore, in the exercise of that option, it was not necessary for the parties to enter into a new writing. *Byrne Mill Co. v. Robertson*, 149 Ala. 273, 42 So. 1008. In *Biddle v. Whitmore* (Minn.) 158 N. W. 808, it was held that a verbal agreement extending a lease for another year, under the same terms and subject to the provisions of the former written lease, and made before the expiration of the first lease, was within the statute of frauds and unenforceable.

The cases holding that a contract which is not to be performed within one year, but which is terminable at the option of the parties, is within the statute of frauds, are collated in the notes to *Wagniere v. Dunnell*, 17 Ann. Cas. 205, and *Hanau v. Ehrlich*, Ann. Cas. 1912B 730.

#### CONTRACT TO CONTINUE DURING LIFE OR TERMINATE BY DEATH OF CERTAIN PERSON.

A contract which, by its provisions, is to continue during the lifetime of a certain person, or which by reason of its personal nature will be deemed to be terminated on the death of a party thereto, is not within the statute of frauds.

*Illinois*.—*Osgood v. Skinner*, 111 Ill. App. 606, judgment affirmed 211 Ill. 229, 71 N. E. 869; *Mead v. Chicago*, etc. R. Co. 189 Ill. App. 323. And see *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100.

*Indiana*.—*Wiggins v. Keizer*, 6 Ind. 252; *Harper v. Harper*, 57 Ind. 547; *American*

*Quarries Co. v. Lay*, 37 Ind. App. 386, 73 N. E. 608. Compare *Goodrich v. Johnson*, 66 Ind. 258.

*Kentucky*.—*McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384; *Waggener v. Howaley*, 164 Ky. 113, 175 S. W. 4; *Whitley v. Whitley*, 80 S. W. 825, 26 Ky. L. Rep. 134. See also *Jones v. Comer*, 76 S. W. 392, 25 Ky. L. Rep. 773. And see the reported case.

*Maryland*.—*Wilhelm v. Hardman*, 13 Md. 140.

*Massachusetts*.—*Peters v. Westborough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142.

*Missouri*.—*Wynn v. Followill*, 98 Mo. App. 463, 72 S. W. 140.

*New Jersey*.—*Burgesser v. Wendel*, 73 N. J. L. 286, 62 Atl. 994.

*New York*.—*Tolley v. Greene*, 2 Sandf. Ch. 91; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *McLees v. Hale*, 10 Wend. 426; *McKinney v. McCloskey*, 8 Daly 368, affirmed 76 N. Y. 594.

*Ohio*.—*Westropp v. Westropp*, 7 Ohio Cir. Dec. 14.

*Tennessee*.—Compare *Deaton v. Tennessee Coal, etc. Co.* 12 Heisk. 650.

*Texas*.—*Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448; *Tipton v. Tipton*, 55 Tex. Civ. App. 192, 118 S. W. 842.

*Utah*.—*Johnson v. Johnson*, 31 Utah 408, 88 Pac. 230.

*Canada*.—*Spencer v. Spencer*, 23 Manitoba 461, 24 West. L. Rep. 420, 4 West. W. Rep. 785, 11 Dominion L. Rep. 801.

Illustrations of the foregoing rule are as follows: A promise by the father of an illegitimate child to pay for the past and future raising of the child, *Wiggins v. Keizer*, 6 Ind. 252; a contract to furnish "hired help" to the plaintiff for the purpose of keeping, supporting and caring for the defendant's child for two years and eight months, *Wynn v. Followill*, 98 Mo. App. 463, 72 S. E. 140; a contract to rear and maintain the child of another, see the reported case, and *Jones v. Comer*, 76 S. W. 392, 25 Ky. L. Rep. 773; a contract to support and school an infant for seven years and pay him for work and labor performed, *Wilhelm v. Hardman*, 13 Md. 140; an agreement between the overseers of the poor and an individual for the support of a bastard child for five or six years, *McLees v. Hale*, 10 Wend. (N. Y.) 426; a contract to take charge of an orphan and to provide him with all necessities until he became of age; *McKinney v. McCloskey*, 8 Daly 368, affirmed 76 N. Y. 594; an agreement to support another for a number of years, *Peters v. Westborough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142; a promise to pay a certain sum weekly to the defendant as long as she lived in a certain house, *Burgesser v. Wendel*, 73 N. J. L. 286, 62 Atl. 994; an oral agreement between an individual conducting an advertising agency

and a railroad company whereby the latter was to place, when so requested, its advertisements in papers and magazines, for which payment was to be made at regular advertising rates in passenger transportation over its lines, *Mead v. Chicago, etc. R. Co.* 189 Ill. App. 323; an agreement to furnish the plaintiff a home during the defendant's life and to give him the home place at the latter's death, *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384; a contract to pay as rent of land one-third of the grain and one-fourth of the cotton raised each year on the land during the lifetime of the grantor, *Tipton v. Tipton*, 55 Tex. Civ. App. 192, 118 S. W. 842; an agreement to give the grantor, during his life, one-half of all the crops produced each year on the land, *Johnson v. Johnson*, 31 Utah 408, 88 Pac. 230; an oral partnership agreement for five years to deal in cattle, *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448; a contract to support another for life, *Harper v. Harper*, 57 Ind. 547; *Whitley v. Whitley*, 80 S. W. 825, 26 Ky. L. Rep. 134; *Waggener v. Howsley*, 164 Ky. 113, 175 S. W. 4; *Westropp v. Westropp*, 7 Ohio Cir. Dec. 14; *Spencer v. Spencer*, 23 Manitoba 461, 24 West. L. Rep. 420, 4 West. W. Rep. 785, 11 Dominion L. Rep. 801. Compare *Goodrich v. Johnson*, 66 Ind. 258, wherein it was held that the oral agreement or promise of the putative father of a bastard child to support it until it became of age, by its express terms, was not to be, and could not be, performed within one year from the making thereof, as it was a continuing promise, extending through the period of twenty-one years from the making thereof, and was not to be fully performed until after the lapse of all those years.

In *American Quarries Co. v. Lay*, 37 Ind. App. 386, 73 N. E. 608, it was held that a contract whereby the plaintiff in consideration of his wages, necessary nurse hire and all doctor's bills resulting from his then present disability, and employment when recovered, released the defendant from any claim arising out of an accident sustained by the plaintiff on a certain date, was personal in character and might have been terminated within a year by death, and was not, therefore, within the statute of frauds. In *Martin v. Batchelder*, 69 N. H. 360, 41 Atl. 83, it was held that an agreement to keep a horse a year for the use of it, was not within the statute, as, if the horse had died within the year, the agreement would have been fully performed.

But in *Deaton v. Tennessee Coal, etc. Co.* 12 Heisk. (Tenn.) 650, a parol contract whereby the defendant agreed to support a widow and her three children until the youngest became of age, and if she died before that time, to support the children until

the youngest child became of age, was held to be within the statute of frauds. The reason assigned by the court was that the contract, by its terms, could not be performed within the year, except on the death of the widow and all three of the children within that period, and while the happening of such an extraordinary contingency might defeat the performance of the contract, . . . it would not take the case out of the statute; that the contract was for the payment of a specific amount monthly until a definite period, namely, when the youngest child should become of age, and though the performance of the contract might be defeated by the death of all the parties for whose benefit it was made within the year, that would not operate as a performance of the contract. And in *Hagan v. McNary*, 170 Cal. 141, 148 Pac. 937, L.R.A.1915E 562, it was held that a verbal agreement that the defendant's intestate would pay a certain sum to the plaintiff if she would furnish him with a home for his natural life, was invalid as being within the statute of frauds, though the plaintiff had performed her part thereof. The court held that as the agreement stated no time for the payment of the money and the services were not and could not be completed until the intestate's death, the agreement did not become completely executed, nor did the obligation to pay become matured until the services had been completely performed, which did not take place until the moment of death, and no obligation arose, therefore, until the moment after. In *Chase v. Hinkley*, 126 Wis. 75, 5 Ann. Cas. 328, 105 N. W. 230, 110 Am. St. Rep. 896, 2 L.R.A.(N.S.) 738, the court said: "There are authorities holding that contracts for personal services are not within the statute, since only those are which cannot be performed within a year, not those which may be contingently terminated. It is reasoned that since the death of a servant ends his term of service without breaking his contract, though in form not to be performed within a year it may be so performed. . . . Though the death of the servant has the effect stated, leaving the employer liable upon the contract for the time service was actually rendered, it is held generally that contracting parties are not presumed to have in mind the termination of the agreement in that way, and that the mere legal effect, as to excusing full performance, will no more take the case out of the statute than would any other act having like effect. Such a case differs from that where one contracts to render continuous service terminable upon a stipulated contingency, as to support another for the remainder of his natural life. Such a contract is not within the statute because by its terms it ceases with the death contemplated. . . . Ordi-

nary contracts for personal services are not affected by that rule according to the great weight of authority. . . . So it will be found that in cases involving such services the statute is applied regardless of the fact that the legal effect of the servant's death is to terminate the agreement."

CONTRACT TO BE PERFORMED ON DEATH OF CERTAIN PERSON.

It has been held that a contract which is to be performed at the death of a certain person, is not within the statute of frauds. *Adams v. Adams*, 26 Ala. 272; *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667; *Alderman v. Chester*, 34 Ga. 152; *Thomas v. Feese*, 51 S. W. 150, 21 Ky. L. Rep. 206. And see *Edwards v. Farve* (Miss.) 71 So. 12. Thus it has been held that an agreement to make a testamentary disposition of "all the property of which the testator might die seised or possessed" to her children, was not within the statute. *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667. An agreement to pay for services by a testamentary provision is not within the statute. *Heery v. Reed*, 80 Kan. 380, 10 Pac. 846; *Clark v. Cordry*, 69 Mo. App. 6. And see *Kenyon v. Youlen*, 53 Hun 591, 6 N. Y. S. 784, 25 N. Y. St. Rep. 299.

CONTRACT NOT TO ENGAGE IN CERTAIN BUSINESS.

Inasmuch as a contract not to engage in a certain business may be ended within a year by the death of the promisor, that class of contracts is not required to be in writing by the statute of frauds. *Hampton v. Caldwell*, 95 Ark. 387, 129 S. W. 816; *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; *Osgood v. Skinner*, 111 Ill. App. 606, affirmed 211 Ill. 229, 71 N. E. 869; *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747; *Wolverton v. Bruce*, 6 Indian Ter. 135, 89 S. W. 1018; *Sausser v. Kearney*, 147 Ia. 335, 126 N. W. 322; *Nickell v. Johnson*, 162 Ky. 520, 172 S. W. 938; *Doty v. Martin*, 32 Mich. 462; *Erwin v. Hayden* (Tex.) 43 S. W. 610; *Tomlin v. Clay* (Tex.) 167 S. W. 204. See also *Dickinson v. McKay*, 177 Ill. App. 413; *Smalley v. Greene*, 52 Ia. 241, 3 N. W. 78, 35 Am. Rep. 267; *Whittaker v. Welch*, 15 N. Bruns. 436. Compare *McGirr v. Campbell*, 71 App. Div. 83, 75 N. Y. S. 571; *Gottschalk v. Witter*, 25 Ohio St. 76.

McPHAIL

v.

CITY AND COUNTY OF DENVER.

Colorado Supreme Court—March 2, 1914.

59 Colo. 248; 149 Pac. 257.

Animals — Licensing of Dogs — Power of Municipality.

Municipal Code of City and County of Denver, c. 16, art. 2, § 747 et seq. prescribing license fees for the keeping of dogs and penalties for failure to pay, are constitutional, since the regulation of the keeping of dogs is within the police power of the state, and may be delegated to cities and towns.

[See 1 R. C. L. tit. *Animals*, p. 1127.]

Same.

The regulation of dogs, a branch of its police power which the state may delegate to a city, is not limited to dogs running at large, but extends to the keeping of dogs.

Notice — Necessity of Writing.

The general rule is that notice required by law to be given is notice in writing, and whenever by statute or ordinance a duty is imposed on an individual, for the neglect of which he is subject to a penalty, notice is required before liability arises, unless the contrary is expressly provided.

[See note at end of this case.]

Error to County Court, City and County of Denver: CLASS, Judge.

Prosecution against Duncan McPhail for violation of municipal ordinance. Defendant convicted and brings error. The facts are stated in the opinion. REVERSED.

*Duncan McPhail* for plaintiff in error.

*I. N. Stevens, W. H. Bryant, H. J. O'Bryan, J. A. Marsh, William R. Kennedy and Paul Knowles* for defendant in error.

[248] TELLER, J.—The plaintiff in error was convicted of violating section 750 of article 2, chapter 16 of the Municipal Code of [249] the City and County of Denver, which requires owners of dogs to pay to the city treasurer, annually, a prescribed sum for each dog so owned or kept in said city. He alleges error in the proceedings and seeks to reverse the judgment imposing a fine upon him.

Section 747 of the said Municipal Code reads in part as follows: "It shall be the duty of said dog license inspector to ascertain whether or not proper license has been paid for any dog, as provided by ordinance. In the event said license has not been paid, and the same evidenced by proper license receipt, tag or stamped collar, it shall be the duty

of said inspector to serve every person owning, keeping or harboring any dog so unlicensed, with notice, warning such person to pay said license as the law provides, within twenty-four hours from the serving of such notice. If any person so served with notice shall fail to pay to the treasurer at his office within the time allowed by said notice, it shall be the duty of said inspector to summon into court said person as provided by ordinance."

A further section provides a penalty for the violation of the ordinance, and under this section a fine was assessed against the plaintiff in error.

It was admitted on the trial that plaintiff in error owned a dog, and had paid no license fee.

The principal error presented by plaintiff in error in the briefs is the refusal of the trial court to hold the ordinance to be in violation of the city charter, and of the Constitution of the State. In other words, it is contended that the city charter gives no authority to the city to enact the ordinance in question, and that such authority cannot be granted without violating the Constitution.

As to the latter claim it is sufficient to say that no question is more firmly settled than that the regulation of the keeping of dogs is within the police power of the State, and that it may grant to cities and towns the right to exercise such parts of the police power as it may deem proper. [250] 28 Cyc. 740; *Cole v. Hall*, 103 Ill. 30; *State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529; *Sentell v. New Orleans*, etc. R. Co. 166 U. S. 698, 17 S. Ct. 693, 41 U. S. (L. ed.) 1169; *Jenkins v. Ballantyne*, 8 Utah 245, 30 Pac. 760, 16 L.R.A. 689.

Speaking on this subject Judge Dillon says:

"A license fee or tax is usually charged, and such license fee or tax is regarded as a proper exercise of the police power, and not as a tax upon property. The authority of a municipal corporation to pass ordinances on the subject is sometimes conferred in express terms, but it has also been sustained under such general grants of authority as power to declare what shall be deemed to constitute a nuisance and to abate the same, or to enact ordinances for the protection of health, life and property, or to make by-laws for the comfort and security of citizens." 2 Dillon on Mun. Corp. 5th ed. sec. 724.

Section 17 of the city charter contains the following provisions:

"The council shall have power to enact and provide for the enforcement of all ordinances necessary to protect life, health and property, to declare, prevent and summarily abate and remove nuisances; to preserve and en-

force the good government, general welfare, order and security of the city and county and the inhabitants thereof; to enforce ordinances and regulations by ordaining fines not exceeding three hundred dollars, or imprisonment not exceeding ninety days, or both fine and imprisonment, for each and every offense."

This, under the authorities, is sufficient to authorize the ordinances in question, and they must be held valid. The power to regulate is not limited, as plaintiff in error contends, to dogs running at large. It extends, as many cases hold, to the keeping of dogs, and that for obvious reasons.

If, therefore, the proceedings under review were otherwise [251] regular and valid, the fine was lawfully imposed.

It appears from the record that a notice in writing was left at the house where plaintiff in error boarded, which notice, addressed merely to "occupant," was found by the tenant of the premises who kept a dog, and acting on the notice she went to the city hall and paid a tax on her dog.

No written notice was served upon plaintiff in error, and he never saw the notice left at the house. The city, to prove notice, put in evidence several conversations which the dog license inspector had with plaintiff in error in which the provisions of the ordinance requiring the license fee were discussed.

One of the grounds of the motion for a new trial was that the court erred "in holding that the verbal notice given by the plaintiff to the defendant was sufficient in law," and the overruling of that motion is now assigned as error.

The ordinance above quoted authorizes the inspector to summon a delinquent dog owner into court only after service upon him of notice to pay a license fee within twenty-four hours.

The proceeding thus to be begun, though a civil action in form, is penal in character, and may result in punishment by imprisonment.

There are cases too numerous to mention which hold that a proceeding which may result in the taking or encumbering of property, must be preceded by notice to the property owner, giving him the right to object, or to perform some act before it may be done by the public at his expense, as the case may be. It would seem, therefore, that before a person supposed to own a dog be subject to arrest, as in this case, and trial, he should have some official notice, and an opportunity to pay the tax, or at least to make the attempt to show that he does not own or keep a dog, if such be the fact. The propriety of such notice is recognized by the terms of the ordinance.



In *Brewster v. Newark*, 11 N. J. Eq. 114, it is [252] said: "Notice is certainly required, wherever a duty is imposed upon an individual, and a penalty fixed for non-compliance, unless by the law it is expressly provided that no notice need be given."

From these considerations, and from the language of the ordinance, it must be held that a notice was necessary before the action could be begun.

Was there in this case such notice given as the law requires?

The court, over defendant's objections, admitted testimony of oral notice to plaintiff in error, and that is the only notice claimed to have been given him. This also is assigned as error.

The general rule is that notice required by law to be given, is notice in writing. 29 Cyc. 1117.

In *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407, it is said: "The rule is well settled that where a notice is required or authorized by statute, in any legal proceedings, it means written notice." See also *Norton v. New York*, 16 Misc. 303, 38 N. Y. S. 90; and *State v. Elba*, 34 Wis. 169.

In such cases notice does not mean knowledge; it means the statutory instrumentality of knowledge. *Minard v. Douglas County*, 9 Ore. 206.

An English statute authorized a sale of goods after distress for rent, and notice thereof. Held that a written notice was required to render a sale valid. *Wilson v. Nightingale*, 8 Q. B. 1034, 55 E. C. L. 1034.

The language of the ordinance clearly indicates that a written notice was intended. It does not direct the inspector to *notify* owners of dogs to pay the tax, but requires that he *serve* them with notice, a term which would hardly be used of oral notice.

It is said, however, that plaintiff in error waived the notice, by refusing payment on the ground that the ordinance was invalid.

But since the serving of a written notice, and not mere [253] knowledge on the part of the plaintiff in error, was the basis of the right to begin the prosecution, the service of notice was necessary as a jurisdictional fact, and there was and could be no waiver of such notice.

We conclude, then, that, written notice being necessary before proceedings can be begun by summons or arrest to enforce the ordinance, for want of such notice, the judgment is erroneous.

The former opinion is withdrawn, and the judgment vacated.

The judgment of the county court is reversed with directions to dismiss the proceeding.

WHITE, J. (*concurring*).—It will be observed that section 750 of the Municipal Code

does not designate the specific date upon which payment of the license fee thereby exacted shall be made. It is by section 747 that the time of payment is definitely fixed, to wit, "within twenty-four hours from the serving" of the notice upon the dog owner by the dog license inspector to pay the license fee. The failure to serve notice in no sense relieved the owner of the dog from the duty to pay the prescribed license fee, but he could not be liable to the penalty prescribed for non-payment, until the end of the annual period for which the license fee was exacted, or until the lapse of twenty-four hours after the service upon him of a notice, by the dog license inspector, to pay the same. In other words, no penalty could be recovered until default in payment of the license fee. As no written notice was served, and the annual period for which the license was sought to be collected had not expired, no default had occurred when the suit was brought. The fact that the owner of the dog persisted in asserting that he would not pay, in no sense invested the municipality with the right to [254] a forfeiture of the penalty, until the time of payment arrived, and default therein occurred. The question of waiver of notice is in no sense involved. The action to recover the fine was premature and I concur in reversing the judgment.

SCOTT, J. (*dissenting*).—I agree with the conclusion reached in the majority opinion that the ordinance under which McPhail was charged, is constitutional, but I wholly disagree with the conclusion that the defendant did not have sufficient notice and that for such reason the case should be reversed.

Upon the question of notice the ordinance provides:

Sec. 747. "There is hereby created the office of dog license inspector, who shall be appointed by the mayor, and who shall serve until removed. It shall be the duty of said dog license inspector to ascertain whether or not proper license has been paid for any dog as provided by ordinance. In the event said license has not been paid and the same evidenced by proper license, receipt, tag or stamped collar, it shall be the duty of said inspector to serve every person owning, keeping or harboring any dog so unlicensed, with notice warning such person to pay said license as the law provides within twenty-four hours from the serving of such notice. If any person so served with notice shall fail to pay to the treasurer at his office within the time allowed by said notice, it shall be the duty of said inspector to summon into court said person as provided by ordinance."

It appears from the testimony that the city license inspector on the 18th day of September, 1911, discovered a female dog tied up at the premises where the plaintiff in

error, McPhail, resided, and without any tag showing it to be licensed. The inspector called at the door of the house, and finding no person present, prepared the usual notice in such case, and pushed it under the door. This notice was not addressed to McPhail but to the "Occupant." There was at [255] the time a lady named Switzer residing at the premises, who found the notice and who also owned a dog. Mrs. Switzer took the notice to the proper authority and procured a license for her dog. McPhail did not see this notice. The inspector afterward learned that the dog licensed from the house number, was a male, and called again at the house on October 10th, and later had two conversations with McPhail. The first of these was at the City Hall, where McPhail said: "You sent a letter to Mrs. Switzer to pay her dog license. This female dog belongs to me. I ain't going to pay a cent; this ordinance is unconstitutional; I will fight it, if I have to go to the Supreme Court." Later, and on the 11th day of October, the officer called at the office of McPhail and again asked him to take out the license, where substantially the same conversation occurred. The complaint was filed on the 18th day of October.

Neither the ordinance nor the general rule of law in such case requires the serving of a written notice. The owner was twice personally notified by the proper officer and twice refused to take out the license. It is therefore idle to say that he did not have notice.

Under this state of facts McPhail had the sufficient and timely notice intended by the ordinance.

There is no better settled rule of law, founded upon public policy, than that all persons must take notice of the public laws by which they are governed, and that for such reason all persons interested in a transaction, made pursuant to a public statute, are chargeable with notice of all that the law contains. 21 Am. & Eng. Enc. of Law (2d ed.) 588. McPhail therefore, was charged with notice of the provisions of the ordinance, its requirements and its penalties.

It is true that whenever by statute or ordinance, a duty is imposed on an individual, for the neglect of which he is subject to a penalty, notice is required before a liability arises, unless the contrary is expressly provided by law. But it is equally true that a waiver by the party for whose [256] benefit or protection notice should be given, is equivalent to notice, and dispenses with its necessity. 29 Cyc. 1117.

The record discloses that the question of notice is raised in this court for the first time. McPhail appeared in the trial court and entered his plea, and proceeded to trial, without in any manner suggesting the absence or insufficiency of notice. By this con-

duct and by his acts above recited, he clearly waived notice, written or otherwise. The rule as to appearance constituting waiver is well stated in the recent work of Bowers on the Law of Waiver, sec. 355, as follows:

"But the question whether an alleged appearance is to be held a waiver in such cases does not resolve itself into a mere determination of the intention of the defendant; for the appearance for the purpose of contesting the merits of the cause, whether by motion or by formal pleading, is a waiver of all objection to the jurisdiction of the court over the person of the defendant, whether he intended such waiver or not. And the same is true if he in any manner invokes the aid of the court without questioning its jurisdiction over his person. This is upon the well-established principle that he who has the right to object to such defects or irregularities must do so promptly and at the first opportunity before the party committing the error. has taken any further steps in the cause, or been misled into a reasonable belief that the objection is not to be urged."

It was said in *People v. Albright*, 23 How. Pr. (N. Y.) 306: "It can hardly be disputed, as a legal proposition, that a party may waive his right to a statute benefit, or protection; and though, without an express waiver of notice, the occupant or owner of cultivated or improved lands is entitled to the protection afforded by the notices referred to, the law does not, however, demand such absurd formalities to be gone through with as the actual service of notice, where the party who, only, is interested, himself waives or [257] releases. The waiver is equivalent to notice, and dispenses with its necessity."

"It may be further observed that the notice required in the contract was intended for the benefit of the plaintiff. His conduct and declarations were clearly equivalent to a waiver of any benefit intended to be secured to him by this notice. The object of it was to give him a preference in the purchase. He at no time manifested any intention to purchase nor claim the preference secured to him, but on the contrary he advised and insisted that the assignees of Stevens, of whom the defendant was one, should resist a recovery by Mr. Marshall, and retain the possession as long as practicable." *Wood v. Stewart*, 7 Vt. 149.

The notice required by the ordinance was solely for the benefit of McPhail in this case, and its purpose to prevent the owner of a dog from being mulcted by fine without first being advised of the demand of the city that he take out the license. This purpose was served in this case. The proper official twice demanded that McPhail take out the license and McPhail twice positively refused to do so.

Does anyone believe that the serving of a written notice would have been more effective than the personal pleading of the officer, or

that there would have been a different result. Can it be said that defendant has been denied substantial justice. The law does not compel useless or foolish things. After McPhail had twice flatly refused to take out the license, it would have been useless and even foolish, to have served a written notice.

Precisely the same principle applies in this case as in case of refusal in advance to accept a tender. The words and conduct constitute a waiver.

The judgment should be affirmed.

I am authorized to say that Mr. Chief Justice Gabbert and Mr. Justice Bailey, concur in this dissenting opinion.

Rehearing denied June 7, 1915.

#### NOTE.

#### Necessity that Notice Required or Authorized by Law Be in Writing.

##### *Notice in Judicial Proceeding.*

It may be laid down as a general rule that wherever notice is required or authorized by law in any judicial proceeding, the notice must be in writing, although not in terms required to be written. *Mason v. Kellogg*, 38 Mich. 132 (notice to covenantor of warranty to appear and defend action involving title); *Killip v. Empire Mill, etc. Co.* 2 Nev. 46 (notice of intention to move for new trial); *Lane v. Cary*, 19 Barb. (N. Y.) 539 (notice of denial of encroachment in proceeding to remove fence from highway); *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407, 35 How. Pr. 193 (notice of judgment); *Gilbert v. Columbia Turnpike Co.* 3 Johns. Cas. (N. Y.) 107 (notice to owners of land to be taken in condemnation proceedings); *In re Cooper*, 15 Johns. (N. Y.) 533 (notice to show cause against appointment of admeasurers of dower); *Jenkins v. Wild*, 14 Wend. (N. Y.) 539 (notice of judgment); *Foley v. New York*, 1 App. Div. 586, 37 N. Y. S. 465 (notice of intention to commence action for damages); *Ensley v. State*, 4 Okla. Crim. 49, 109 Pac. 250 (notice of appeal required to be served on clerk); *Cleminons v. State*, 5 Okla. Crim. 119, 113 Pac. 238 (notice of appeal required to be served on clerk); *Waitsfield v. Craftsbury*, 87 Vt. 406, Ann. Cas. 1916C 387, 89 Atl. 466 ("notice of condition" of pauper required to be given by town aiding him before it can sue town of his last residence); *State v. Elba*, 34 Wis. 169 (notice of judgment). See also *Borland v. Thornton*, 12 Cal. 440 (notice of motion to dissolve injunction); *Bear River, etc. Water, etc. Co. v. Boles*, 24 Cal. 354; *McEwen v. Montgomery County Mut. Ins. Co.* 5 Hill. (N. Y.) 101; *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240, 6 Abb. Pr. 42;

*Tootle Meat, etc. Co. v. Morse*, 43 Utah 515, 136 Pac. 965 (notice of entry of justice's judgment required to be given by successful party); *Hotel Vermont Co. v. Cosgriff*, 89 Vt. 173, 94 Atl. 496 (notice of judgment rendered in vacation); *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191. And see the reported case. *Compare Miner v. Clark*, 15 Wend. (N. Y.) 425, and *Butler v. Mitchell*, 17 Wis. 52. In *Mason v. Kellogg*, 38 Mich. 132, which involved the question of notice to a covenantor of warranty to appear and defend an action involving title, the court said: "The counsel for the defendant insisted below and insists here that parol notice is not good. The point has not been adjudged in this state, and the proper practice in this particular is to be now settled. On looking abroad we find precedents on both sides. We allude to proceedings in regard to real estate and not to cases concerning personal property. There are ample grounds for making a distinction between these classes. Upon full consideration we think the dictates of policy, the force of analogy and weight of reason require the notice to be in writing. Our policy has always favored written memorials of titles to real estate, and in view of the effect which the law attributes to this proceeding it is sufficiently near being a fact of title to be within the policy. It bears a striking analogy to the ancient process of voucher and summons, and similar proceedings in some of our states (*Stone on Real Actions*, 136 to 138, and form of summons in appendix being No. 44) and of course such proceedings could not be verbal. Then the giving notice is virtually a step, and an important step, in the cause. It contemplates the introduction of the covenantor and the entire prosecution of the defense in complete accordance with his views and under his direction. It is essentially a legal proceeding and it is a well recognized general rule that every notice of that character must be in writing." In *Lane v. Cary*, 19 Barb. (N. Y.) 539, which was concerned with the sufficiency of a verbal denial, where the law authorized a denial of the alleged encroachment to arrest a proceeding to remove an encroachment from a highway, the court said: "But the more important question respects the mode and manner in which the denial shall be made, in order to arrest the further action of the commissioners until the jury has been summoned and the other proceedings taken as required by law. The defendants' counsel argues that although the statute does not in terms require the denial to be in writing, yet as the act is part of a legal proceeding, to be legal and effectual it must be in writing; and upon principle and authority I think this proposition can be maintained. It should be so, both for the

sake of avoiding all mistake or misconception as to its tenor and import, and of preserving record evidence of a proceeding which is to determine a pretty important right, and for the security and protection of the commissioners who are called upon to put the machinery in operation by which the vital question between the parties is to be adjusted." In *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407, 35 How. Pr. 153, it was said: "The language of the statute is quite plain: 'He shall have twenty days after personal notice of the judgment.' This does not mean twenty days after he shall ascertain by his own inquiries or investigation, that such judgment exists against him, but twenty days after he shall receive personal notice of the judgment from the party himself in whose favor the judgment was entered. This, I have no doubt, was the intention of the framers of this statute. The legislature never were guilty of the absurdity of limiting the important right of appeal in such cases as this, where there has been no personal service of process upon the party, to twenty days after he might be informed, by some means or somehow, and perhaps by a stranger, of the existence of the judgment. The only reasonable construction which can be put upon the statute is to hold that personal notice means a personal notice from the party who has obtained the judgment. . . . The rule is well settled, that where a notice is required or authorized by statute, in any legal proceedings, it means written notice." In *Foley v. New York*, 1 App. Div. 586, 37 N. Y. S. 465, the court said: "The action was brought to recover damages for injuries which plaintiff alleged she sustained by reason of the negligence of the defendant. The complaint did not allege that notice of an intention to commence the action had been filed with the counsel to the corporation within six months after the cause of action accrued, as required by chapter 572 of the Laws of 1886. Before any evidence was given the court dismissed the complaint on the defendant's motion, it being conceded that no written notice had been filed, but that only oral notice had been given. An oral notice is not a compliance with the statute. When the law requires a notice to be filed, it implies that the notice shall be in writing. . . . A notice by word of mouth cannot be filed. The filing of the notice is a condition precedent to the existence of the cause of action." In *Ensley v. State*, 4 Okla. Crim. 49, 109 Pac. 250, it was said: "Then all that is left for plaintiff in error to stand on is the fact that he gave oral notice of appeal to the proper officers, in open court: and here we are brought face to face with the real question in the case, is oral notice sufficient? We think not. It may be laid down as a gen-

eral proposition, first, that wherever the statute requires notice to be served in a legal proceeding, a written notice capable of legal service, and of proof and return, and capable of being filed, is intended; and especially is that true where service of such notice and proof thereof are matters jurisdictional, as they are in this character of proceedings."

In *Miner v. Clark*, 15 Wend. (N. Y.) 425, however, it was held that verbal notice to a grantor to come in and help his covenantor defend an action of ejectment was sufficient. In that case *Bronson, J.*, in a strong dissenting opinion, maintained the view that such a notice must be in writing. Likewise, in *Butler v. Mitchell*, 17 Wis. 52, it was held that where a statute authorized a motion to vacate a judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect, within one year after notice of the rendition of the judgment, the notice need not be in writing and that by the word "notice" the statute meant knowledge. The court said: "It is true that in matters of practice where notice is required, it must generally be a written notice. But the very nature of the provision in section 38, chapter 125, R. S. shows conclusively that no written notice was intended there, but the party was required to act upon any reasonable knowledge of the fact, in order to entitle himself to the relief."

In *Borland v. Thornton*, 12 Cal. 440, it was held that a verbal notice given in open court, of which a minute is made by the clerk, is a written notice within the rule that all notices required in legal proceedings must be in writing. The court said: "The objection of want of due notice of the motion to dissolve is not tenable. Verbal notice, it is true, is not such notice as the statute requires. When the statute speaks of notice, it means written notice, or notice in open court, of which a minute is made by the Clerk." But the same court in *Bear River, etc. Water, etc. Co. v. Boles*, 24 Cal. 354, limited this rule to verbal notice given in open court in the presence of the adverse party, and held that a notice given verbally in open court and placed on the minutes by the clerk after verdict and judgment in the absence of the adverse party was not a valid notice of motion for a new trial. The court said: "The only notice of the motion for a new trial given, is that which appears in the minutes of the court, just quoted. We do not think this sufficient. The entry was made on the next day after the verdict was rendered and judgment thereon entered. It does not appear that the party to be affected by it, or his attorney, was in court, or had any knowledge of this proceeding. The case had been disposed of and judgment entered in plaintiff's favor on the preceding day, and

that was the end of the matter as to him till some other proceedings should be taken of which he was entitled to notice. After the entry of his judgment, the plaintiff was not bound to watch the court to see whether or not any other proceedings would be taken. The law provides that notice of a motion for a new trial shall be given, and the notice intended is a written notice. Perhaps a notice given him in open court, and entered in the minutes, in his presence, would be sufficient; but, in such case, the record should at least affirmatively show, with reasonable certainty, that the party was present, and actually had notice." In *Hunter v. Territory* (Ariz.) 36 Pac. 175, it was held that where a statute providing for an appeal in a criminal case required a notice to be filed with the clerk, a written notice must be filed, and a notice given in open court verbally, which was noted by the clerk on the minutes, was not written notice within the rule and was not sufficient.

A fortiori where a statute requires that a notice in a judicial proceeding shall be "filed," only a written notice will be valid, as only a written notice can be filed. *Norton v. New York*, 16 Misc. 303, 38 N. Y. S. 90; *Foley v. New York*, 1 App. Div. 586, 37 N. Y. S. 466. *Hunter v. Territory* (Ariz.) 36 Pac. 175, wherein the court said: "The word 'filing,' as used in the section quoted, can be construed only as requiring a placing or depositing with the clerk a written notice of intention of taking an appeal."

The English rule, however, seems to be that a statutory requirement of notice in judicial proceedings does not make notice in writing necessary. *Rex v. Surry*, 5 B. & Ald. 239, 7 E. C. L. 183, wherein the court held that the statutory requirement that notice of appeal must be given did not mean that such notice must be in writing. The court said: "We are of opinion, that where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the fact is disputed, we shall only grant a mandamus to the justices, commanding them to examine whether reasonable verbal notice has been given, and, in that case, to enter continuances, and hear the appeal."

#### *Notice Other than in Judicial Proceeding.*

Under mechanic's lien laws, it has been held that the requirement of the statute that the lienor must give to the owner of the property notice of his intention to rely on the lien, as prerequisite to his right thereto, does not mean a notice in writing and that verbal notice is valid. In *re Farmer's Sup-*

*ply Co.* 170 Fed. 502; *Vinton v. Builders, etc. Assoc.* 109 Ind. 351, 9 N. E. 177; *McLeod v. Capell*, 7 Baxt. (Tenn.) 196. The court said in the case of *In re Farmers' Supply Co. supra*, "Section 3185, Rev. St. Ohio, provides that, within 30 days after a principal contractor shall have filed an affidavit for a mechanic's lien on the owner's property, he shall notify the owner, his agent or attorney, that he claims such a lien, and, if he fail so to do, the lien secured shall be null and void. . . . The statute does not specify the kind of notice to be given, but, wherever written notice is required by the Ohio mechanic's lien law, such requirement is expressed in clear and unmistakable terms or by necessary implication. 'Notice' means 'information by whatever means communicated; knowledge given or received.' . . . Where a mechanic's lien statute requires notice to the owner without using any language to indicate that written notice is intended, an oral notice is sufficient. *McLeod v. Capell*, 7 Baxt. (Tenn.) 196; *Vinton v. Builders, etc. Assoc.* 109 Ind. 351, 9 N. E. 177; *Boisott on Mechanics' Liens*, sec. 355; *White v. Fleming, supra*; 21 Am. & Eng. Enc. of Law (2d ed.) 583; *Treadway & Marlatt's Ohio Mechanic's Lien Law*, sec. 180." In *Vinton v. Builders, etc. Assoc. supra*, it was said: "According to the best American Lexicographers of the English language, Webster and Worcester, the secondary meaning of the word notify is 'to give notice to;' though it is conceded that the use of the word, in this secondary sense, is not sanctioned by English usage. Webster gives and illustrates this secondary meaning of the word 'notify,' as follows: 'To give notice to; to inform by words or writing, in person or by message, or by any signs which are understood; as, the constable has notified the citizens to meet at the city hall; the bell notifies us of the time of meeting.' It is clear from these secondary definitions of Webster, and clearer still, if possible, from his illustrations, that the word notify never imports or implies, of necessity, a notice in writing. Whenever it is intended that the word 'notify,' as used in a statute, shall signify a notice in writing, we think that such intention should be expressed in words, or should be implied by, or be apparent from, other provisions of the same statute. There is nothing in the statute under consideration to indicate that the word 'notify' is used in section 5 of the act, in any other than its primary and literal meaning. On the contrary, we think it clearly appears from all the provisions of the statute, that whenever it was intended by the lawmaking power that notice in writing must be given, such intention is expressed therein in clear and unmistakable terms. Indeed, the rule is general that, unless otherwise provided by statute,

a verbal notice will, in all cases, be as effective as a written notice, provided it conveys the necessary information between the proper parties, at or within the prescribed time."

A majority of the cases hold that where a statute requires notice of a called meeting of a board to be given to its members, such notice need not be in writing and the meeting will be legal if only verbal notice is given. *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 (notice of meeting of county commissioners) *Gallagher v. Willow School Tp. (Ia.)* 154 N. W. 437 (notice of called meeting of board of school directors). And see the note to *Whipple v. Christie*, Ann. Cas. 1914D 856 as to notice of a corporate meeting. Compare *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499. In *White v. Fleming*, supra, the court said: "In the first paragraph of the complaint it is alleged that the members of such board came together at the county auditor's office on April 14th, 1884, to settle with the outgoing trustees of the several townships, 'with nothing but an oral notice from the auditor of said county.' Plaintiff's counsel insist that the board of commissioners were not in legal session, because an oral notice from the county auditor was not sufficient to call the board together in special session; but such notice, counsel say, must be in writing. The statute does not require, however, that the notice of a special session of the county board must be in writing. Section 5738, R. S. 1881. 'Notice shall be given,' is the language of the statute. Webster thus defines notice: 'Intelligence, by whatever means communicated; knowledge, given or received.' Worcester's definition is substantially the same as Webster's. . . . In the case in hand we think that an oral notice to the members of the county board of the special session as sufficient, under section 5738, supra." In *Gallagher v. Willow School Tp.* supra, it was said: "The sufficiency of this notice is challenged, it being contended that section 2757 of the Code Supplement, providing that the president may call a meeting of the board of directors, 'upon notice specifying the time and place, delivered to each member,' exacts written notice. The mere fact that it must be delivered does not require this construction; for notice by word of mouth may be delivered quite as effectually as one in writing. What this exacts is that it actually reach the several members, so that each shall be informed of the time and place of meeting *Barclay v. Wapsinonoc School Tp.* 157 Ia. 181, 138 N. W. 395. For this purpose, oral notice would be as effective as written, and there is nothing in the context indicating that one was intended rather than the other. If either, oral would be the more likely to be prescribed, because the more likely to be resorted to. It is said in 29

Cyc. 1117, that wherever a statute exacts notice, this should be writing, but the authorities cited do not sustain the text. A contrary conclusion was reached in *Miner v. Clark*, 15 Wend. (N. Y.) 425. In *Jenkins v. Wild*, 14 Wend. (N. Y.) 539, a party aggrieved was given 15 days notice to appeal, and this was held to mean written notice. In *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407, the rule is said to be applicable to legal proceedings. See *In re Cooper*, 15 Johns. (N. Y.) 533; *McEwen v. Montgomery County Mut. Ins. Co.* 5 Hill (N. Y.) 101; *St. Michaels Church v. Philadelphia County*, Bright. (Pa.) 121. In *Foley v. New York*, 1 App. Div. 586, 37 N. Y. S. 465, the notice was required to be filed, and, of course, must have been in writing. The most that can be said of these decisions is that, unless the contrary appears, notice in judicial proceedings is to be construed to mean written notice, but it does not follow that the same rule prevails when the word is found in statutes governing the transaction of other public business. What is intended depends on the language employed, the context, and the subject to which these apply. . . . A different conclusion was reached in *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499, but the reasoning on which it is based does not meet our approval. Certainly it derives no support from the textbook relied on, *Dillon's Municipal Corporations*." However, in *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499, it was held that where notice of a called meeting of a school board was required by law to be given to the members, only written notice would suffice. The court said: "By the English municipal corporation act, 'due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation' (1 Dillon Mun. Corp. sec. 262), and the 'subject of meetings, stated and special, and the notice and summons required, are made matters of express regulation.' Id. sec. 265. So, many of the American states have regulated by statute the manner of giving notice, and it is generally required, it seems, by these statutes that the notice must be in writing, and the courts in this country seem generally, so far as we know, to have followed, in this behalf, the rules adopted in England. 1 Dillon Mun. Corp. sec. 262. Our statute is silent on the question whether a notice of the call meeting of a municipal corporation shall be in writing. But we are of the opinion that when an official notice is required to be given of such a meeting, it is contemplated that it shall be in writing, and that it shall state the time, place and purpose of the meeting. The notice of the meeting at which the contract sued upon in this case was made was not so given,

and the meeting was therefore not a corporate meeting; and the contract is invalid, so far as the corporation is concerned."

In *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240, 6 Abb. Pr. 42, the court construed an ordinance providing that within twenty-four hours after notice of a formal defect in his bid a bidder on a municipal contract might correct the defect. Holding that the notice of defect referred to by the ordinance need not be notice in writing, the Court said: "The ordinance organizing the departments of the corporation (sec. 501) requires all bids to be rejected which are not furnished in conformity with sections 497, 498 and 499, and that thereupon the contract be awarded to the lowest bidder; but provides that no bid shall be rejected for any error of form, provided the person making it shall correct the same and make it, in conformity with the ordinance, within twenty-four hours after notice of such defect. The short time in which our decision is to be made, forbids our doing much more than stating our conclusions, without our reasons for them. The notice required by the ordinance need not be in writing; the law implies that all notices should be in writing which form part of a judicial proceeding, but not those relating to the formation of contracts."

*St. Michael's Church v. Philadelphia County, Bright*. (Pa.) 121, was an action to hold a county liable for property of the plaintiff destroyed by a mob. The statute under which the action was brought provided that no plaintiff should have benefit of the act who, having knowledge of intended or threatened damage, failed to give notice thereof to the county authorities. It was held that the notice required by the statute must be taken to mean notice in writing. The court said: "When a statute directs notice to be given, the rule is, it is to be given in writing, in which respect it differs from the common law."

## CAREY ET AL.

v.

## CITY OF ATLANTA ET AL.

Georgia Supreme Court—February 12, 1915.

143 Ga. 192; 84 S. E. 456.

### 1. Injunctions — Protection of Property — Proper Parties.

Where an owner of a city lot makes a contract of sale, and, upon payment of a part of the purchase money, executes a bond for title,

and places the purchaser in possession, the obligor and the obligee are proper parties to a suit against the city to enjoin an illegal interference with the possession of the property. *Ford v. Commercial Industrial Co.* 132 Ga. 344 (63 S. E. 1120).

### 2. Enjoining Criminal Prosecution.

While equity will not ordinarily enjoin a criminal prosecution (*Georgia Railway & Electric Co. v. Oakland City*, 129 Ga. 576, 59 S. E. 296) yet, where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement. *Hasbrouck v. Bondurant*, 127 Ga. 220 (56 S. E. 241); *Cutsinger v. Atlanta*, 142 Ga. 555 (83 S. E. 263).

### 3. Municipal Corporations — Segregation of Races in Residence Districts.

Sections 1 and 2 of the ordinance of the city of Atlanta, adopted June 16, 1913, and the corresponding sections of an amendment thereto, adopted November 3, 1913, prohibiting white persons and colored persons from residing in the same block, deny the inherent right of a person to acquire, enjoy, and dispose of property, and for this reason are violative of the due process clause of the federal and state Constitutions.

[See note at end of this case.]

(Syllabus by court.)

Error to Superior Court, Fulton county: BELL, Judge.

Action for injunction. *John Carey et al.*, plaintiffs, and *City of Atlanta et al.*, defendants. Judgment for defendants. Plaintiffs bring error. The facts are stated in the opinion. REVERSED.

*George Westmoreland* for plaintiffs in error.

*J. L. Mayson* and *W. D. Ellis, Jr.*, for defendants in error.

[192] ATKINSON, J.—1, 2. The rulings announced in the first and second headnotes do not require elaboration.

[193] 3. The assignment of error complained of the judgment of the trial court refusing to grant an interlocutory injunction. The controlling question is as to the constitutionality of an ordinance of the City of Atlanta which provides for the segregation of residences; the design of the ordinance being to require white persons and persons of color to reside in separate blocks. It appears from the pleadings and evidence that the ordinance was adopted on June 16, 1913, and amended on November 3, 1913. On October 1, 1913, one of the plaintiffs, a colored person, purchased a lot and house from a

white person, in which the latter resided. The property was located in a block occupied by white and colored persons. A white person resided on a lot adjoining the one purchased as above mentioned. On December 9, 1913, the plaintiff above mentioned contracted to sell the lot at an advanced price to the other plaintiff, and executed a bond for title. The former white owner having moved out, the obligee in the bond for title, who contemplated taking up his future residence in the house, caused the same to be temporarily rented to a colored person, and received one month's rent. When the tenant moved in, the white proprietor of the adjoining residence objected to the occupancy of the house by a colored person, and, upon notice from the chief of police that a case would be made against the tenant under the ordinance, the latter moved out, and the plaintiff was required to refund the money paid for rent. The plaintiff was also notified by the chief of police that the ordinance would be enforced against him, or any other colored person who attempted to occupy the dwelling as a residence, upon objection being urged by the adjoining white proprietor.

The particular parts of the ordinance complained of as being unconstitutional are sections 1 and 2 of the original ordinance, and the corresponding sections of the amendment. These are alleged to be void, because they (a) deprive the plaintiffs of the use and enjoyment of their property, (b) deprive the plaintiffs of their property rights, without due process of law, and (c) delegate to individuals the right to say how the plaintiffs shall use their property. By amendment to the petition it was charged that these provisions of the ordinance were void as being violative of art. 1, sec. 1, paragraphs 2 and 3, of the constitution of this State (Civil Code, §§ 6353, 6359), which declare that "protection to person and property is the paramount duty of government, and shall be [194] impartial and complete;" and that "no person shall be deprived of life, liberty, or property, except by due process of law." The ordinance was also charged to be violative of the constitution of the United States, as contained in the 14th amendment (Civil Code, § 6700), which declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The ordinance in its entirety was as follows:

"An ordinance for preserving peace, preventing conflict and ill feeling between the

white and colored races, and promoting the general welfare of the city, by providing for the use of separate blocks by white and colored people for residences, and for other purposes. . . . Sec. 1. That from and after the approval of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in Section 4, on which block the house, building, or structures, in whole or in part, shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in Section 3 hereof. The block into which white persons are herein forbidden to move or occupy, being occupied or used by colored persons as herein set forth, shall be deemed a 'Colored Block' for the purpose of this ordinance. Sec. 2. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in Section 4, on which block the houses, building, or structures shall be occupied or used as residences or places of abode by white persons, otherwise than as provided in Section 3 hereof. The block into which colored persons are herein forbidden to move or occupy, being occupied by white persons as herein set forth, shall be deemed a 'White Block' for the purpose of this ordinance. Sec. 3. That nothing in either of the [195] preceding sections shall be construed or defined to prevent domestic servants from residing in the house or building wherein they are employed or upon the same lots with the houses or buildings which they serve. Sec. 4. That the word 'Block,' as used in this ordinance, is hereby defined to mean that portion of any street or alley together with the lots abutting on same, whether or not, and upon both sides thereof, between the two adjacent intersecting or crossing streets. In case either of said adjacent streets intersect but do not cross the street upon which the block in question may be located, the lots improved or unimproved, upon the side of the last mentioned street, to wit the street facing the intersecting street, shall be included in the block between the two adjacent intersecting crossing streets, without reference to the street which runs to said block but does not cross same. Corner lots, improved or unimproved, shall be deemed located in the block upon the street on which they front or are intended to front when improved. In using the words 'lots' in this section it is intended to include the houses on same where such lots are improved. Sec. 5. That any persons violating the provisions

white and colored races, and promoting the general welfare of the city, by providing for the use of separate blocks by white and colored people for residences, and for other purposes. . . . Sec. 1. That from and after the approval of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in Section 4, on which block the house, building, or structures, in whole or in part, shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in Section 3 hereof. The block into which white persons are herein forbidden to move or occupy, being occupied or used by colored persons as herein set forth, shall be deemed a 'Colored Block' for the purpose of this ordinance. Sec. 2. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in Section 4, on which block the houses, building, or structures shall be occupied or used as residences or places of abode by white persons, otherwise than as provided in Section 3 hereof. The block into which colored persons are herein forbidden to move or occupy, being occupied by white persons as herein set forth, shall be deemed a 'White Block' for the purpose of this ordinance. Sec. 3. That nothing in either of the [195] preceding sections shall be construed or defined to prevent domestic servants from residing in the house or building wherein they are employed or upon the same lots with the houses or buildings which they serve. Sec. 4. That the word 'Block,' as used in this ordinance, is hereby defined to mean that portion of any street or alley together with the lots abutting on same, whether or not, and upon both sides thereof, between the two adjacent intersecting or crossing streets. In case either of said adjacent streets intersect but do not cross the street upon which the block in question may be located, the lots improved or unimproved, upon the side of the last mentioned street, to wit the street facing the intersecting street, shall be included in the block between the two adjacent intersecting crossing streets, without reference to the street which runs to said block but does not cross same. Corner lots, improved or unimproved, shall be deemed located in the block upon the street on which they front or are intended to front when improved. In using the words 'lots' in this section it is intended to include the houses on same where such lots are improved. Sec. 5. That any persons violating the provisions



of Sections 1 or 2 of this ordinance shall, on conviction in the Recorder's Court, be deemed guilty of an offense and be punished by a fine not exceeding one hundred dollars, or sentenced to work on the public works for not exceeding thirty days, either or both punishments to be inflicted in the discretion of the Recorder, and each day's violation of the ordinance to be considered a separate offense. Sec. 6. That, upon the approval of this ordinance, any person desiring to build or erect, for himself or as agent for another, any building or structure to be used as residences or places of abode upon property situated in any block, as defined in section 4 hereof, and within which there are no houses, buildings, or structures used as residences, or otherwise vacant property, shall, in the application for a permit to the building inspector, declare that such houses or structures for which a permit is asked are to be used as residences or places of abode for white persons or for colored persons. Upon the filing of said application the building inspector shall order the same published for two successive weeks in one of the daily newspapers of the City of Atlanta, calling particular attention to said notice, and the fact that the house, building, or structure proposed to be built or erected are to be used as residences by white people or by colored people, as the case may [196] be; and unless within five days from the date of the last publication thereof protest be made, in writing, to the building inspector by a majority of the property-owners in said block against the use mentioned in said notice, the permit desired shall issue, if in other respects said application be in conformity with the ordinances of the city. Thereafter all houses, buildings, or structures erected for houses or residences or places of abode, and all houses, buildings, or structures in said block erected for other purposes, but which it may be desired to use as residences or places of abode, shall be so used, either as residences or places of abode, for white persons or for colored persons, as may be determined by the permit granted in the manner hereinbefore provided. Any person or persons moving into or using as residences or places of abode any of such houses, buildings, or structures, or any part thereof, contrary to the classification as fixed in the manner herein provided, and set out in said permit, shall be guilty of an offense and punished in the same manner as provided in section 5 of this ordinance. If, however, the majority of the property owners in said block in which the proposed building or structure is to be erected and for which permit is asked, as above provided, shall protest against said house, building, or structure in the manner above provided, then in such case no permit shall issue on said application for

the erection of a building or house or structure for the use set out in said application. The provisions of this section are intended to provide a method by which a block which is vacant may be improved and by which its use for either white or colored person may be determined. Sec. 7. That wherever after the passage of this ordinance a majority of the owners of either real or leasehold property in any block which is subject to the operation of sections 1 and 2 of this ordinance shall make application in writing to the building inspector, requesting that he declare the house in said block to be open for occupancy thereafter by either white or colored persons, it shall be the duty of the building inspector to notify the board of police commissioners that said block is not longer subject to sections 1 and 2 of this ordinance, as the case may be. Upon the filing of said application, as above provided, with the building inspector, either white persons or colored person moving into or using as places of abode or residences the houses and buildings in said block shall not be subject to the penalties provided for in this ordinance. Provided, [197] however, that at any time thereafter said block shall be occupied entirely by white persons, to wit, all the residences thereof shall be either white or colored, then said block shall thereupon immediately become subject to the provisions of the other sections of this ordinance with reference to white blocks or black blocks respectively, that is, if white persons entirely occupy said blocks, then it shall thereafter be a white block, and if colored persons entirely occupy said block, then it shall thereafter be a black block and subject to the provisions of this ordinance with reference to white and black blocks.

"Amended by Alderman Nutting: Be it ordained by the Mayor and General Council, that the pending ordinance in Re Segregation of races be amended as follows: That no provisions of the foregoing ordinance shall cause any change in the status of the races as to present occupancy or ownership, and no member of either race shall be forced to move from any present location; but that entire ordinance shall be operative as to the future. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed."

A further amendment was as follows: "That the ordinance adopted by the General Council on the 16th day of June, 1913, and approved by the Honorable J. G. Woodward, Mayor, on the 17th day of June, 1913, providing for the use of separate blocks by white and colored people for residences and for other purposes, be amended by adding thereto the following sections: Section 1. That from and after the approval of this ordinance it shall be unlawful for any colored

person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied by white people, and where white people are still living in houses or buildings adjoining the same, without the consent of the white people living in said adjoining house or buildings. Sec. 2. That from and after the approval of this ordinance it shall be unlawful for any white person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied [198] by colored people, and where colored people are still living in houses or buildings adjoining the same, without the consent of the colored people living in said adjoining houses or buildings. Section 3. The penalty for violation of the previous sections shall be as provided in Section 5 of said original ordinance."

Under the operation of sections 1 and 2 of the original ordinance, and the corresponding sections of the amendment, the following result could be brought about: Assuming that in any mixed block—that is, one occupied by both white and colored persons—there are three adjacent lots owned by separate persons, each of whom resides on his lot, and that the proprietor of the middle lot be a white person, and that the proprietor on one side be a white person and the proprietor on the other be a colored person: if the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or if he should sell to a colored person, the purchaser could not move into the house to reside, or substitute another colored person to do so, if the adjoining white proprietor objected. So also if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwelling, he could not do so if the colored adjoining proprietor objected; or if he should sell to a white person, the purchaser could not move into the dwelling to reside, nor substitute a white tenant to do so, if the colored adjoining proprietor objected. In each of such instances an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law, be deprived for all time of the right to reside on his property, or to substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in

substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due-process clauses of the State and Federal constitutions. Ordinances of this character are of recent origin. The first seems to have been adopted on May 19, 1911, in Baltimore, Md., and has several times been amended. Since then several other cities have adopted segregation ordinances; and the State of Virginia has enacted a statute on the subject. A person was prosecuted for violating the Baltimore ordinance. The [199] defendant attacked the validity of the ordinance. The Supreme Court of the State of Maryland, in dealing with the case (*State v. Gurry*, 121 Md. 534, Ann. Cas. 1915B 957, 88 Atl. 546, 47 L.R.A.(N.S.) 1087), discussed the constitutionality of the ordinance at length, and expressed the view that under the exercise of the police power a law of that character could be adopted, but finally decided that the ordinance was void on the ground that it was so unreasonable as to be unauthorized under the general welfare clause of the charter of the city. On this subject it was stated in the opinion that the serious objection to the provisions of the ordinance was that they wholly ignored all vested rights which existed at the time of the passage of the ordinance. This was put upon the ground that the ordinance affected the rights of an owner existing at the time of the passage of the ordinance. Relatively to them it was said: "To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person; and if he could not use it himself, he would be deprived of not only the income from it, but of such use of it as is guaranteed to every owner of property by the constitution and laws of the land." While this pronouncement seems to indicate a disposition to hold the ordinance void because the ordinance was retroactive, it at the same time recognizes that the ordinance involved *jus disponendi* of the owner, and that that right was within the protection of the constitution. In North Carolina a person, in violation of a segregation ordinance, moved his family into a house to occupy it as a residence. He was tried for violating the ordinance, and found guilty. In the Supreme Court of that State it was ruled: "Charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the better government of the town as the commissioners may deem necessary, does not include power to forbid members of either the white or colored race to live in any block where a majority of the residents are of the other race." *State v. Darnall*, 166 N. C. 300, 81 S. E. 338, 51 L.R.A.(N.S.) 332.

As indicated by the note, the court was not passing on the constitutional question, but much of the reasoning employed in support of the proposition that the ordinance was not authorized under the general welfare clause of the charter of the municipality is pertinent and persuasive on the constitutional question. In the course of the opinion it was said: "Besides, an [200] ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away. In *Bruce v. Strickland*, 81 N. C. 267, it is said: 'The *jus disponendi* is an important element of property, and a vested right protected by the clause in the Federal constitution which declares the obligation of contracts inviolable.' The same doctrine is fully held and discussed in *Hughes v. Hodges*, 102 N. C. 239, 9 S. E. 437, and in the numerous citations to those two cases, which will be found in the *Anno. ed.* This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance, and should happen to be located on a street where a majority of the residents happen to be of such different race. There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners; and if, under such general authority, similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored. . . . There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by constitutional prescription, and which is usually extended from time to time, and the inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters. It was also held in *Mugler v. Kansas*, 123 U. S. 623, 31 U. S. (L. ed.) 205, 8 S. Ct. 273, that, as the State had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to so

use it; but none of these interfere with the fundamental [201] right of every one to acquire and dispose of property by sale." It appears from the report of the case that, in addition to the cases specially mentioned in the foregoing excerpt, the court had before it *Berea College v. Kentucky*, 211 U. S. 45, 29 S. Ct. 33, 53 U. S. (L. ed.) 81, *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256, and many other cases on the subject of race regulations under the police power in matters concerning the administration of educational institutions, the operation of separate cars, and the like, in which it was held that the difference in the races afforded a basis for classification which would support in some instances ordinances, and in others statutes, regulating the conduct of those particular businesses. In those cases the equal-protection clause of the constitution was the one mainly discussed. In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case of *McCabe v. Atchison, etc. R. Co.* 235 U. S. 151, 35 S. Ct. 69, 59 U. S. (L. ed.) 169, where the court had under consideration a statute which allowed railroad companies to furnish dining-cars for white people and to refuse to furnish dining-cars altogether for colored persons, this language was used in reference to the contentions of the attorney-general: "This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one." While the police power is very broad, its limits are within the constitution. In *Cutsinger v. Atlanta*, 142 Ga. 555, Ann. Cas. 1916C 280, 83 S. E. 263, L.R.A.1915B 1097, the following was quoted with approval from the decision in *re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636: "The limit of the [police] power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the [202] conduct of legislators, judges, and private persons; and in so far as it imposes restraints, the police power must be exercised in subordination thereto." In

the opinion it was held: "The constitution of this State not only recognizes the necessary power of the courts to declare laws in violation of the State or Federal constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void."

The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution; and the judge erred in refusing to grant the injunction.

Judgment reversed. All the Justices concur, except Fish, C. J., absent.

LUMPKIN, J. (*concurring*).—I concur in the result reached, but not in all that is said in the opinion of Mr. Justice Atkinson. It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of an owner to use his property is important, but it is not so absolute that he may, at all times and under all circumstances, use it as he pleases, regardless of the public welfare, morals, or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes. Laws prohibiting the erection of wooden buildings within the fire limits of a city restrict the owner's use of his property, although he may contend that a wooden building which he desires to erect would be safe, and that he has not the means to build one of brick or stone. Laws which prevent an owner from using his property for the storage of dynamite, powder, oil, or other dangerous substances in populous communities, likewise place limitations upon the owner's right to use his property as he sees fit. The right to contract has been treated as a part of the liberty of a citizen, and yet it is subject to certain limitations for the public good. Thus usurious contracts have long been prohibited. Many other illustrations might be given in addition to those arising under laws relating to the segregation of the white and negro races in cars and schools. I cannot subscribe to the apparent idea that classification has nothing to do with such [203] laws. Classification as to the particular use to which property is to be put, having in view its location and surroundings, may be an important element in considering laws of this character. In the leading case of *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256, Mr. Justice Brown, delivering the opinion of the court, said: "A statute which implies merely a legal distinc-

tion between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude." Referring to the fourteenth amendment, he said: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law; but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools of white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

In *Pace v. Alabama*, 106 U. S. 583, 1 S. Ct. 637, 27 U. S. (L. ed.) 207, it was held that adultery between blacks and whites could constitutionally be punished more severely than the same crime between persons of the same race, on the ground that the white and black were punished alike, without discrimination. A law prohibiting the intermarriage of the two races has been declared valid. *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42.

Suppose that an owner of property in the best residential portion of a city should claim the right to build upon his lot a large boarding-house or rooming-house, in which he should receive indifferently boarders of both races and sexes, producing a situation of great irritation and calculated to bring about unfortunate results. [204] It is quite possible that the sacred right of property might be subject to regulation for the public safety (which has been declared to be the supreme law), by a reasonable pre-existing ordinance.

In *Plessy v. Ferguson*, *supra*, the law involved was one requiring railway companies carrying passengers in their coaches in the State of Louisiana to provide equal but separate accommodations for the white and colored races, by means of separate cars or by dividing the passenger-coaches by a partition. Such a law necessarily interfered to some extent with the right of the owner of the property to use it as it saw fit. While this

law related to railway companies, the opinion of the majority of the Supreme Court of the United States was not based on that ground. On the contrary, Mr. Justice Harlan, who dissented, referred to the fact that a railway was a quasi public highway, where all might travel. Of course, regulations based on a distinction between the two races must be reasonable and not arbitrary, and the municipal council or other body making them must have authority to do so. In the present case, the petition does not distinctly make the point that the general welfare clause in a city charter does not confer authority to adopt a segregation ordinance, or aver in terms that the ordinance under consideration was unreasonable. It does, however, charge that the ordinance delegated to individuals the right to say how the plaintiffs should use their property. I think that this ground is well taken. If the residence of the two races in close proximity was a matter requiring regulation by ordinance, the legislative body should determine the fact, and not leave it to depend upon the will of individuals, perhaps the whim of a single resident, and subject to shift from time to time according to the wishes of some of those who for the time being might reside in the block, so that sometimes the block might be classified as "white," sometimes as "black," and sometimes mixed. It provides for no method for determination of the fact by legitimate authority, save as a property-owner's neighbors may wish. A similar ordinance adopted in Baltimore, which seems to have been taken as a guide in preparing the ordinance of Atlanta, was declared invalid by the Supreme Court of Maryland, although that court did not deny the right to use the distinction between the white and black races as a basis of legitimate classification.

[205] The near approach of the end of the term, and the rush of business incident thereto, under a provision of our constitution which requires that all cases shall be decided at the first or the second term, prevents a more thorough discussion of the subject. I agree with the majority of the court that the particular ordinance here involved is unconstitutional and void. But I think the line of reasoning adopted by them may carry them too far.

#### NOTE.

The reported case holds that a segregation ordinance whereby white persons and colored persons are prohibited from residing in the same block is invalid as a denial of the right to use and dispose of property. The only decisions sustaining such an ordinance are *State v. Gurry*, 121 Md. 543, Ann. Cas. 1915B 957, and the circuit court decision in *Ash-*

*land v. Coleman*, 19 Va. L. Reg. 427. The decisions are reviewed in the note to *State v. Gurry*, supra, as reported in Ann. Cas. 1915B 957.

#### SEAY

v.

#### GEORGIA LIFE INSURANCE COMPANY.

Tennessee Supreme Court—October 9, 1915.

132 Tenn. 673; 179 S. W. 312.

#### Insurance — Indemnity against Liability of Physician for Malpractice — Acts of Assistant.

Defendant insured plaintiff, a physician having in his employ two younger doctors as assistants, against loss from liability for bodily injuries or death suffered in consequence of error, mistake, or malpractice by any assistant in his employ "while acting under the assured's instructions." One of his assistants made a mistaken diagnosis, resulting in a judgment for damages against the physician. The diagnosis and treatment was left wholly to the assistant, and the physician apparently had no knowledge of the particular case and gave the patient no personal attention; the assistant merely acting according to previous general instructions and the custom which prevailed under the contract between himself and the physician. Held, that defendant was not liable, since the quoted words were intended to qualify defendant's liability, and if they were treated as covering the physician's general instructions, they would neither expand nor restrict the insurer's liability, but would be altogether meaningless.

[See note at end of this case.]

#### Construction of Contract.

Though an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the insured, it should be construed, like other contracts, so as to give effect to the intention and express language of the parties.

Appeal from Chancery Court, Hamilton county: GARVIN, Chancellor.

Action on insurance policy. John L. Seay, plaintiff, and Georgia Life Insurance Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

*Allison, Lynch & Phillips* for appellant.

*Thompson, Williams & Thompson* for appellee.

[674] GREEN, J.—The complainant, Seay, is a physician, and was under contract to render necessary medical attention to several hundred employees of a mine of the Tennessee Coal, Iron & Railroad Company. He had in his employ two younger doctors as assistants.

A miner was hurt in an accident, and Dr. Seay's office was notified. One of the assistants responded to the call, undertook to diagnose the injuries, and proceeded to treat them. In so doing the assistant acted under general directions, within the scope of his employment, but Dr. Seay appears to have had no knowledge of this particular case, or at any rate he gave the patient no personal attention, not seeing him at this time. The diagnosis and treatment was left wholly to the assistant.

There seems to have been a mistaken diagnosis, and the treatment was consequently unsuccessful. Malpractice was alleged by the miner, who claimed to have [675] suffered a permanent deformity by reason thereof, and suit was brought against Dr. Seay to hold him for damages arising from the conduct of his assistant and employee. There was a judgment against Seay for \$1,000.

The case before us is a suit by Seay on a physician's liability policy issued to him by defendant company; the suit being to recover the amount of the miner's judgment, which Seay has paid, and the costs and expenses of that litigation.

The defendant company answered, denying liability for several reasons, and from a decree in favor of the company, complainant has appealed.

The policy in question undertook to indemnify complainant, the assured, "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of an alleged error or mistake or malpractice by any assistant in the employ of assured while acting under the assured's instructions and occurring while this policy is in force."

The question determining liability is whether the assistant was "acting under the assured's instructions," within the meaning of the policy.

It is conceded that Seay did not personally direct the assistant with reference to the treatment of the injured man, but complainant contends that the assistant acted "in the line of his employment and according to previous general instructions and the custom which prevailed under the contract between himself and Seay." [676] Complainant invokes the familiar rule that an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the assured, and maintains that the policy should be construed to

cover acts performed under general directions or instructions of the assured, or, in other words, as protecting the assured against his assistant acting in the scope of the latter's employment.

We recognize the rule of construction relied on, but we must also bear in mind that "policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties." 15 Cyc. 1037; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 57 N. E. 458, 49 L.R.A. 760; *Ward v. Maryland Casualty Co.* 71 N. H. 282, 51 Atl. 900, 93 Am. St. Rep. 514.

These words "while acting under the assured's instructions," were certainly introduced to qualify the company's liability in some way, but, should we hold an assistant acting under general instructions or within the scope of his employment to be acting under the "assured's instructions," then the qualification attempted entirely fails. If we eliminate the words "while acting under the assured's instructions," we have left an undertaking to indemnify against malpractice, etc., "by any assistant in the employ of assured . . . occurring while this policy is in force." Thus deleted, the contract would mean exactly what complainant argues it now means. It would [677] cover the malpractice of any assistant acting "in the employ," that is, under general directions of assured.

Interpreted as complainant insists the phrase under consideration would neither expand nor restrict the insurer's liability. It would add nothing to the contract, nor would it take anything out of the contract. It would be altogether meaningless.

We may not thus deny effect to the expressed language of the parties.

Moreover, as we have formerly had occasion to observe, all insurance is somewhat personal in its nature, resting to a great extent on the reputation and character of the assured. *Crouch v. Southern Surety Co.* 131 Tenn. 265, Ann. Cas. 1916C 1220, 174 S. W. 1116, L.R.A. 1915D 966.

In a physician's liability contract such as the one before us the learning, experience and ability of the individual insured necessarily and largely enter into the consideration. The risk assumed is the assistant "while acting under the assured's instructions." As a safeguard against the error, mistake, or malpractice of the assistant, the insurer stipulates for the instructions of the assured. The insurer, relying on the professional skill of the assured, contracts for his supervision, or at least for his instructions.

It cannot be held that the insurer by this sort of contract undertakes to answer for the mistakes or malpractice of a doctor's helper acting on his own responsibility without any

advice or directions from the assured; such subordinate being unknown to the insurer, and the policy without provision as to his qualifications. [678] This would be an extraordinary hazard and not one within the purview of this policy.

In the case at bar the assistant diagnosed and treated the patient without suggestion or aid from complainant. From a professional standpoint the assistant was acting independently. The insurer had no benefit of the supervising skill or instructions of complainant for which it had contracted. Such supervision or instructions might have averted the mistaken diagnosis and the consequent malpractice.

Without passing on other defenses, we are satisfied the assistant was not "acting under the insured's instructions," within the meaning of this policy, and the chancellor's decree will be affirmed, and the bill dismissed.

Buchanan and Fancher, JJ., dissent.

#### NOTE.

#### Indemnity Insurance against Liability of Physician for Malpractice.

##### *Nature of Contract.*

The authorities are not agreed as to whether a contract whereby one party undertakes to defend any action for malpractice brought against the other party as a physician constitutes a contract of insurance. The courts of two jurisdictions have taken the view that such a contract is one of insurance. *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 118 C. C. A. 50, 47 L.R.A.(N.S.) 290, *affirming* 188 Fed. 832; *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396. In the federal case cited the court explained the contract as follows: "Now we may look to the contract in question, and determine whether it falls within the category of insurance, and whether a continuance of the issuance of such contracts does or does not constitute insurance business. In case the holder of the contract is sued for damages for civil malpractice, the Defense Company engages to employ a local attorney, in whose selection the holder of the contract shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder, and this to the extent of the exhaustion of the sum named in the policy, which for the defense of one suit is \$5,000; if others in one year, \$10,000. . . . Such a contract, in our opinion, cannot be classed as a contract for personal services. The company is not itself an attorney, and does not undertake the defense as such. What it does undertake is, in case of suit, to employ a local attorney, in whose selection the holder

shall have a voice, who, with the company's attorney, will defend the case, and to relieve the holder from the expense thereof, an expense which must follow the happening of the very contingency provided against. Not only this, but the company must relieve the holder of paying the costs of suit. Suppose the contract had been to repay to the holder whatever sums, not exceeding \$5,000, he should be required to pay out for attorneys and costs in case of such litigation. Could there be any question that there would be a contract of insurance? We think not. Can it change the character of the contract in this respect that it purports to hold the holder harmless against the payment of such expenses and costs? The contract, reduced to its simplest idea, is but an agreement to pay the expenses and costs that the holder would have to pay in the contingency specified. This is indemnity pure and simple, and with whatever verbiage the contract may be clothed it does not serve to cover its real purpose, which is one to indemnify the holder against damage and liability for attorney's expenses and costs of defense, in the event he is sued for malpractice." In *Physicians' Defense Co. v. O'Brien*, *supra*, the court said: "The contract is very carefully and skilfully framed for the purpose of conveying the idea that it is an agreement for the performance of services and not for the indemnification of the physician against loss; but, unless we admit that language was invented to enable us to conceal our thoughts, this is a contract of insurance. Calling it 'prophylactic and preventive' suggests its connection with the medical profession, but does not change its essential character. The books are full of definitions of insurance, and the contract has been variously described and characterized. Underlying all the definitions, except in life insurance, is the idea of indemnity. We are not required to go afield for a definition, as R. L. 1905, sec. 1596, states that Insurance within the meaning of this chapter is any agreement whereby one party for a consideration undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage. The nature of the contract must be determined from its contents and not by its terminology. Comparing this contract with the statutory definition, we find that one party (the company) for a consideration (stated therein) undertakes to indemnify (that is, protect against, make good, by standing the expense of the litigation) another (the physician) to a specific amount (not to exceed \$5,000, etc.) against loss or damage from a specific cause (an action for malpractice). In addition to paying the expenses of the litigation, the company agrees to employ coun-

self and defend suits; that is, in the language of the statute, to 'do some act of value to the insured in case of such loss or damage.' It does not require the citation of authorities to show that an agreement to save the assured harmless from a part of a loss is as much a contract of insurance as an agreement to indemnify against an entire loss. A physician is subject to the ever-present peril of an action for malpractice. The defense of such an action, regardless of its merits, requires the expenditure of time and money. If the defense is successful, there is nevertheless a financial loss; if unsuccessful, the amount of the judgment is added to this initial loss. The judgment in favor of a defendant always leaves him a loser, because but a part of the actual expenses of the litigation are taxable as costs against the plaintiff. If judgment in a malpractice case is rendered against the physician, it is so much in excess of what he has incurred in the defense of the suit. In every case the defendant suffers a financial loss. Under this contract the company does not agree to pay the judgment, but it does agree to defend the action at its own expense, and thus in substance indemnify the physician against the risk or peril of being called upon to defend such an action. The consideration is paid annually. If no action is brought during the life of the contract, the company gains the amount of this compensation, which it received for subjecting itself to the risk of being called upon to defend an action at its own expense. Our attention has been called to *Vredenburg v. Physicians' Defense Co.* 126 Ill. App. 509, and *State v. Laylin*, 73 Ohio St. 90, 76 N. E. 567, where it is held that this contract is a contract for services only. We are not able to accept the conclusion reached in these cases, because they ignore the fact that a physician is subject to a risk of financial loss from the bringing of an action for malpractice entirely separate and distinct from the loss which results when he is required to pay a judgment."

On the other hand, it has been held that a contract to defend any suit for malpractice brought against a physician is not a contract of insurance. *Vredenburg v. Physicians' Defense Co.* 126 Ill. App. 509; *State v. Laylin*, 73 Ohio St. 90, 76 N. E. 567. In the case last cited the court reasoned as follows: "Said contract imposes upon the Company no duty or obligation other than that of defending the physician or surgeon who may hold such contract, against any action that may be brought against him for alleged malpractice. By its contract the Company does not undertake or agree to indemnify or protect its contract holder against loss that may result to him because of any judgment that may be rendered against him in such suit, but any in-

tention or purpose on its part to assume such risk or liability, is in express terms directly negated by the language of the contract itself, which as we have seen provides: 'Said Company does not obligate itself to pay, or to assume, or to secure the payment of, any judgment rendered against the holder thereof in any suit defended by it.' The undertaking of the Company is not that it will compensate the physician or surgeon for loss or injury he may actually sustain, but only that it will, after suit brought against him, undertake and conduct for him his defense, and thereby, if may be, protect him against liability to loss, by preventing judgment being obtained against him. If the Company successfully performs its contract no loss or injury results to the defendant. But if not, and judgment be obtained against him, there is no obligation or liability on the part of the Company to pay or satisfy said judgment or any part of it. Obviously, we think, such contract is not one for indemnity, for under it the liability of the Company ceases, at the precise point and time, that the right to indemnity attaches or begins. We are of opinion, therefore, that the plaintiff Company is not an insurance company, nor the contract it issues an insurance contract."

#### *Risk Covered.*

The reported case holds that a policy of insurance covering a loss imposed by reason of an act by an assistant in the employ of the insured while acting under the insured's instructions, does not cover a loss incurred by the independent act of an assistant.

In *May Creek Logging Co. v. Pacific Coast Casualty Co.* 82 Wash. 301, 144 Pac. 67, L.R.A. 1915C 155, it appeared that an employer had been forced to pay damages on account of malpractice by the employer's physician in treating an employee. In holding that a policy of indemnity insurance did not cover such a loss, the court said: "The respondent's liability, of course, depends upon the conditions of its policy. If it has thereby undertaken to answer for losses arising from claims of damages on account of the negligent failure of the appellant to perform a special contract wherein it undertook to furnish an employee with hospital, medical and surgical services, then it is liable to answer to the suit of the appellant, otherwise not. We cannot think the policy bears this interpretation. It purports to cover only losses arising from claims of damages by the appellant's employees on account of accidental injuries suffered by the employees while in the prosecution of the appellant's logging business, and the departments dependent upon, and the operations connected therewith. Hospital, medical and surgical services are no part of



the logging operations, and the injured employee while in the hospital was performing no service connected with the appellant's logging business. And while the appellant alleges that it is the custom of logging companies to deduct a hospital fee from the wages of each of its several employees, and use the fee in the payment of services to be rendered such employees as become sick or injured, and that the respondent knew of this custom, we cannot think the facts in any way alter or modify the terms of the insurance. Aside from the fact that the recovery was had upon a specific contract, and not upon the custom, the insurance is only against losses arising from negligence in the logging operations, not from losses arising from negligence in the maintenance of the hospital."

**FWLER**

v.

**KOEHLER.**

District of Columbia Court of Appeals—  
March 29, 1915.

*43 App. Cas. (D. C.) 349.*

**District of Columbia — Building Regulations — Force and Effect.**

The building regulations of the District of Columbia as to party walls are neither statutes nor ordinances, but are mere rules for the enforcement of existing rights, and have no force outside the limits of the city of Washington as they existed at the time the regulations were promulgated.

**Party Walls — Establishment.**

There are but two ways in which a party wall can be established, by contract or by the force of a statute.

**Same.**

The erection of a party wall by one of two adjoining owners is not a taking of property for private use but amounts only to the establishment of an easement.

**Acquiescence in Unauthorized Construction.**

If an owner without authority builds a party wall on the adjoining premises and the adjoining owner allows the construction to proceed without protest he estops himself to complain of the trespass.

**Contribution toward Cost.**

A landowner making use of a party wall erected by the adjoining owner is bound to contribute to the cost thereof though the wall was not erected under an agreement to contribute.

[See note at end of this case.]

**Same.**

A person who builds a party wall and then conveys the premises reserving in his deed the right to use the party wall, reserves thereby the personal right to recover contribution from an adjoining owner thereafter using the wall.

[See note at end of this case.]

**Appeal from Supreme Court.**

Action to recover value of interest in party wall. George Koehler, plaintiff, and Mary A. Fowler, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[351] Appellee, George Koehler, brought suit in the supreme court of the District of Columbia to recover from defendant, Mary A. Fowler, the value of an alleged interest in a party wall. Defendant demurred to the declaration on the ground that the plaintiff is without standing to maintain the action. On hearing, the court overruled the demurrer, and, defendant refusing to further plead, judgment was entered for plaintiff, from which defendant appeals.

It appears that plaintiff was the owner of lot numbered 89, block numbered 35, Columbia Heights, in the county of Washington, which adjoins lot numbered 103. Plaintiff never at any time was the owner of lot 103. He constructed a house on lot 89, placing one-half of the west wall on lot 103. He then conveyed lot 89, with the building thereon, to Hannah J. Atkinson, Julia E. Atkinson, and Frances E. Atkinson, by a deed which contained the following reservation: "And the said George Koehler reserves unto himself, his heirs and assigns, the right [352] to the free use of the west wall of the building erected upon the said lot as a party wall." Defendant afterwards purchased lot 103, and constructed a building thereon, using the part of the wall in question as the east wall of her building.

The judgment is assailed on the ground that there is no statute, ordinance, nor regulation pertaining to the establishment of party walls applicable to the property in question, which is situated outside of the limits of the original city of Washington. By the Maryland act of December 19, 1791 (Burch's Dig. 217), ratifying the cession by the State of Maryland of the present territory within the District of Columbia, it was expressly provided that the title to the lands embraced in the original city passed, subject to the terms and conditions contained in the deeds from the owners thereof, to the trustees Beall and Gantt for the purpose of laying out and establishing the Federal city. The deeds to the trustees contained the following provision: "But the said conveyance to the said ——— (the grantor) his heirs and

assigns, as well as the conveyance to the purchasers, shall be on, and subject to such terms and conditions, as shall be thought reasonable, by the President, for the time being, for regulating the materials and manner of the buildings and improvements on the lots, generally, in said city, or in particular streets, or parts thereof, for common convenience, safety and order: provided, such terms and conditions be declared before the sales of any of the said lots, under the direction of the President." Burch's Dig. 332.

Pursuant to the above condition in the grant, and before any lots were sold, President Washington, on October 17, 1791, promulgated building regulations which, among other things, provided as follows: "That the person or persons appointed by the commissioners to superintend the buildings may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof: which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper; and the first builder shall be [353] reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use or break into the wall. The charge or value thereof, to be set by the person or persons so appointed by the commissioners." Burch's Dig. 326.

By act of Congress of May 15, 1820 (3 Stat. at L. 583, 587, chap. 104), it was provided that the corporation of Washington should have power "to regulate, with the approbation of the President of the United States, the manner of erecting, and the materials to be used in the erection, of houses," and also "to regulate party or other walls and fences, and to determine by whom the same shall be kept in repair." Pursuant to this authority, the corporation passed an ordinance March 30, 1822, enacting the building regulations promulgated by President Washington. Congress, in other acts, recognized the existence of party walls in the city of Washington by provisions providing for their construction under proper supervision. Immediately following the act of June 11, 1878, establishing the present commission form of government for the District, Congress, by act of June 14, 1878 (20 Stat. at L. 131, chap. 194), authorized and directed the Commissioners to make and enforce such proper building regulations for the District as they might deem advisable, and that such regulations should have the same force and effect as if enacted by Congress.

*Arthur A. Birney for appellant.*

*George C. Gertman and John Ridout for appellee.*

[355] VAN ORSDEL, J. (*after stating the facts*).—The acts of Congress are not important in this connection, since no attempt has been made, either by Congress or the commissioners of the District of Columbia, to enact a law or an ordinance legalizing the erection of party walls. It may well be that the acts of Congress only conferred power upon the commissioners to regulate the construction of party walls where authorized under existing conditions. In other words, wherever party walls were authorized to be constructed within the limits of the original city, or by contract of the parties outside of said limits, the Commissioners by proper regulations should prescribe the kind of materials to be used and the size, form, etc., of the proposed structure.

The building regulations of the District of Columbia in respect of party walls rise neither to the dignity of statutes or ordinances. They are mere rules for the enforcement of existing rights, established, in this instance, by the order of President Washington, expressly authorized by the provisions of the original grant. The order of the President was necessary, in conjunction with the terms of the grant, to establish this perpetual easement or servitude upon all of the lands embraced within the original city. Being contractual, no legislation was necessary either for the enforcement or the enlargement of the right. Neither Congress nor the commissioners of the District have ever attempted to extend the original party wall regulation promulgated by President Washington. Duties have been imposed from time to time upon the surveyor and inspector of buildings in regard to supervising the construction of party walls; but these can only be interpreted as applying to legal party walls, or such as existed within the original city or by [356] convention of the parties. Indeed, the last building regulations adopted by the commissioners of the District (October 18, 1909) contain the following provision: "Sec. 62. The 4th section of the building regulations. No. 1, approved by President Washington. October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The inspector of buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties." Referring to the regulation of President Washington, Mr. Justice Cox, in *Fowler v. Saks*, 7 Mackey (D. C.) 570, 579, 7 L.R.A. 649, said: "This building regulation, so authorized, is the foundation and the only source of the right claimed by any one here to locate his party wall one-half on his neighbor's land."

There are but two lawful ways in which a party wall can be established,—(1) by contract between the owners of the adjoining properties, and (2) by force of statute. The limitation is well expressed by Justice Cox in *Fowler v. Saks*, *supra*, as follows: "What we understand now by a party wall had no existence at common law, except by convention between coterminus proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience, or for any purpose whatever, without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division wall between himself and his neighbor, partly upon his neighbor's land, is therefore purely the creature of legislation."

It follows that the right conferred by the regulation of President Washington is one purely in contract, imposed by the condition in the original grant. Referring to this regulation, Chief Justice Cranch, in *Miller v. Elliot*, 5 Cranch (C. C.) 543, 17 Fed. Cas. No. 9,568, said: "It is, therefore, a condition annexed to the title of every house lot in the city of Washington, that when the proprietor builds a partition wall between himself and his neighbor he shall lay the foundation equally upon the lands of both; and that any person who shall afterwards use the partition wall, or any part of it, shall reimburse to [357] the first builder a moiety of the charge of such part as he shall use."

We now come to the more difficult questions involved in the present case. The erection of a party wall by one of the two adjoining owners does not, we think, amount to a taking of private property for private use, in the broad sense of the limitations of the Constitution. It amounts only to the establishment of a mutual easement or servitude and benefit. Of course, in the absence of statutory or contractual authority, such a servitude may not be imposed. But, as we shall observe later, it may, under certain conditions, be maintained, though constructed without either statutory or express contractual authority. The erection of a party wall does not change the boundaries nor affect the title of the respective properties. While it stands, each party is permitted to use the wall. The right to its use and enjoyment passes with a conveyance of the properties, and when, for any reason, it ceases to exist, the rights of the respective owners stand as originally.

At common law it was defined as a wall of which two adjoining owners are tenants in common. *Watson v. Gray*, L. R. 14 Ch. Div. (Eng.) 192, 49 L. J. Ch. 243, 42 L. T. N. S. 294, 28 W. R. 438, 44 J. P. 537; *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211, 2 M. & R. 267, 6 L. J. K. B. 306. In this country, many of the States have adopted the rule that the owners of a party wall erected in

part upon the land of each are not tenants in common of the wall, but are owners in severalty of the part standing upon his land, subject to the easement of his neighbor for its support and the equal use thereof. In other words, the owners of the adjoining lands upon which the wall is constructed are neither joint tenants nor tenants in common of the wall, but each owns the soil in severalty up to the dividing line, as well as that portion of the wall resting upon it, and the soil of each, with the portion of the wall belonging to him, is burdened with the easement and servitude of support in favor of the other. *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Fidelity Lodge*, No. 59 v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. [358] 825; *Everett v. Edwards*, 149 Mass. 688, 5 L.R.A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; *Bellefont v. Laube*, 104 Va. 842, 52 S. E. 698.

Undoubtedly this wall, like thousands of others in the District of Columbia outside of the limits of the original city, was constructed in the belief by the owners of the adjoining lots that the builder was authorized by law to construct one-half of the wall on the land of his neighbor. A custom so universally acquiesced in will go far toward composing any equitable or legal differences which may arise in the future over party walls now in existence, and which were constructed without express contractual authority. It is a matter of common knowledge that the officials of the District, in the enforcement of the building regulations, require plans of the buildings to be filed in the office of the inspector of buildings, and permits to be issued, and that general supervision is exercised over the construction of buildings in the District as to the quality of materials, relation to the street and to surrounding buildings, plan of structure, etc. It is also a matter of common knowledge that in many instances rows of houses connected by party walls have been constructed by the same owner, and subsequently sold in this condition. And it may be that additions have been laid out by a single owner with express provision for the construction of party walls between the lots of coterminus owners.

In the present case, however, plaintiff constructed the wall in question, one-half on the adjoining lot, so far as appears from the record, without either statutory or express contractual authority. It is well settled that, where an owner of the lot on to which a party wall extends accepts the wall by attaching his building thereto, he estops himself to complain of the trespass; and the mutual easement or servitude is as completely established as if the wall had been constructed under the authority of a statute or an express contract. We think the same rule will apply where the owner of an adjoining lot has notice

of the construction of a party wall, partly upon his land. If he stands by, and, without protest, permits the erection of the [359] wall to proceed to completion, the law will imply an agreement on his part to accept the benefits thus tendered.

Assuming that no express or implied agreement existed between the adjoining owners at the time of the erection of the wall in question, can defendant, the grantee of the original owner of lot 103, be required to contribute to plaintiff for the portion of the wall appropriated by her in the construction of her house? It is alleged in the declaration, and admitted by the demurrer, that she purchased lot 103 "subject to the condition that no structure should be erected thereon, except such as are allowed in the city of Washington under the building regulations, and with knowledge of the existence of the aforesaid wall as built and located as hereinbefore described, and that shortly thereafter she commenced the construction and building of a dwelling on said lot . . . , and in doing so she used said party wall as such and as the east wall of her said dwelling, and for its support made use of said party wall so as aforesaid built by the plaintiff, in the usual and customary manner, placing or anchoring the joists and supports of her, the defendant's aforesaid dwelling, therein and thereon, and she still continues to so use and occupy said wall; that she has not paid for such use of said wall the value thereof as ascertained and certified by the building inspector of the said District."

There is reputable authority to the effect that a person who uses a party wall, by the acceptance and appropriation of the wall and the use tendered by his neighbor in its construction, becomes liable for the value thereof, though neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it. *Spaulding v. Grundy*, 126 Ky. 510, 13 L.R.A.(N.S.) 149, 128 Am. St. Rep. 328, 104 S. W. 293, 15 Ann. Cas. 1105; *Sanders v. Martin*, 2 Lea (Tenn.) 213, 31 Am. Rep. 598. On the other hand, the majority of the courts in this country adhere to the hard and fast rule of the common law that a person dispossessed becomes absolutely entitled to all improvements made without his request and sanction, without paying for them; and whether the entry is tortious or in good faith, the rule is the same. *Antomarchi v. [360] Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Sherrerd v. Cisco*, 4 Sandf. (N. Y.) 480; *Orman v. Day*, 5 Fla. 385; *Allen v. Evans*, 161 Mass. 485, 37 N. E. 571; *Griffin v. Sansom*, 31 Tex. Civ. App. 560, 72 S. W. 864; *List v. Hornbrook*, 2 W. Va. 340.

Were this an isolated case and of no public importance, we might be inclined to the

latter view. But buildings in large sections of the District of Columbia have been constructed in accordance with an established custom that, where the owner of a lot upon which a party wall has been constructed connects his building to it he should pay his neighbor the value of the portion of the wall used. This custom was extended outside of the limits of the original city, probably in the belief that the regulation of President Washington was in force throughout the District of Columbia. The enforcement, as to walls now in existence, of the custom thus established, will tend to uniformity throughout the District; and for that, if for no other reason, the court should hesitate to adopt a stricter rule which might result in much confusion. For whatever source it may have originated, the custom, when tested in the forum of conscience, is so heavily freighted with justice and equity that no possible evil can result from its adoption. In *Spaulding v. Grundy*, supra, where this exact question was under consideration, the court said: "But back of this, there stands out in support of appellants' claim the substantial fact that appellee has appropriated to his own use a part of this party wall erected by appellants' vendors, without having paid anything therefor. So that, aside from any of the distinctions that involve the law of party walls in obscurity and doubt, there remains the proposition, strongly put in behalf of appellants, that justice and fair dealing demand that appellee should contribute towards the payment of a wall that he has used to his advantage and benefit. Indeed, it might with propriety be said that the question here involved partakes more of the nature of a suit for contribution than one involving the doctrine of party walls. Placing the case upon this ground simplifies very much the question to be disposed of. We need not inquire into the law concerning covenants running with the land, as it bears upon the questions [361] of party walls; nor is it necessary to attempt to reconcile the conflicting decisions touching the rights of remote vendees in respect to them. There is authority, founded in reason and justice, that requires a person who uses a party wall, in the absence of any agreement or contract, to contribute his fair proportion of the cost thereof to the person erecting the wall, or, to put it in another and perhaps a better way, to pay a reasonable price for the use of the wall."

We come now to the right of plaintiff to recover under his reservation in the deed. The construction of a party wall creates a mutual servitude which permits the owner of one of two adjoining properties to build one-half of his wall upon the property of his neighbor. Such a servitude had been established in this case. Hence, when plaintiff sold

his property, the servitude imposed upon the adjoining property passed to the purchaser, as the property could not be used and enjoyed by the purchaser without the full servitude. It follows that the reservation in the deed could not reserve a right which the purchaser acquired in the premises, including the portion of the wall standing upon the land of his neighbor. The whole servitude, of necessity, must pass to the vendee. In *Duperreault v. Roy*, 29 Quebec Super. Ct. 343, where the reservation was the right to the common use of the wall, the court, sustaining the right of the vendor to collect from the adjoining owner the value of one-half of the wall, said: "Then the reserve, of the *droit de mitoyennete* [right to the common use of the party wall] could not have reference to the servitude of the property sold over the other property, for that was clearly and necessarily conveyed by the sale of the house as it stood. And yet the vendor must have sold something that belonged to himself. It follows, then, that he could not have sold the servitude of the neighbor's property over his property, as that did not belong to him. That servitude enabled the neighbor to make use of the wall which the vendor had built for the purpose of supporting a house which would be built on the neighbor's property; that servitude was not by any means in the control of the vendor of the house, but was a servitude which the law gave from [362] public motives to the neighbor. What, then, did the vendor in this case have that he could reserve? That is to say, what right could he have exercised against his neighbor if he had continued to hold the property. Clearly he could not have prevented his neighbor from using the wall which he had built and making it common; the neighbor did not even need to ask his consent for that purpose, but he did have the right to collect from his neighbor the one-half of the value of the wall, when the neighbor chose to exercise his servitude of *mitoyennete* [joint property claims of two neighbors to a wall] upon the wall in question. That is the only thing which he had to reserve; that right was not a servitude, and was not a real right at all, but was a personal right, as the judgment below has found." It was further held that the vendor could not reserve an interest in the wall, because "he had no property in the half of the wall which rested on the land of the neighbor."

The mere exercise of the legal right to place one-half of the wall on the adjoining land created no title in it. It created in the builder of the wall a right to compensation for one-half of its cost when the owner of the adjoining lot should elect to use it. The right to compensation is a mere personal claim, which the law establishes against the adjoining owner when he elects to use the wall; but it creates no interest either in the

property or the wall adverse to such owner. In other words, the wall could only be common property between the owners of the two adjoining properties, in the sense that they had the mutual right to use it. Had the plaintiff become the owner of the adjoining lot, and desired to build, he could have used the wall under the reservation without compensation to anyone, for the right to compensation he had reserved. It follows that, not electing to exercise this personal right reserved to himself, he could enforce it against anyone else exercising it.

The judgment is affirmed, with costs.  
Affirmed.

#### NOTE.

#### Liability of Adjoining Landowner for Use of Party Wall in Absence of Agreement to Contribute.

The purpose of this note is to review the recent cases discussing the liability of an adjoining landowner for the use of a party wall in the absence of an agreement to contribute. A collection of the earlier cases will be found in the notes to *Spaulding v. Grundy*, 15 Ann. Cas. 1105, and *Dunscomb v. Randolph*, 89 Am. St. Rep. 915.

The recent decisions assert the liability of the adjoining owner to contribute. *Conner v. Joy* (Tex.) 150 S. W. 485; *Miller v. Phillips*, 92 Kan. 662, 141 Pac. 297. Thus, in the case first cited, the court held that where the plaintiff had erected and used a wall for more than ten years, the wall would be presumed to have been erected as a party wall, and that before the defendant could use the wall, he must contribute to the cost regardless of whether the wall was partly on his land. The same court had formerly held in *Fewell v. Kinsella* (Tex.) 144 S. W. 1174, that a builder who had erected a wall wholly on his property could restrain the adjoining owner from using it even though the new wall was in the same place where a party wall had stood in the immediate past. But in *Cherry v. Brizzolara*, 89 Ark. 309, 116 S. W. 668, 21 L.R.A. (N.S.) 508, it appeared that the plaintiff built a house and sold it to the defendant, the lot containing the whole of a party wall. The plaintiff reserved no right to use the wall, but he attached another building to it, the grantee acquiescing therein. It was held that equity would not imply a reservation by the grantor to use the wall, but that the grantee was estopped to forbid the grantor's using the wall as long as it remain in its then condition. The court said: "Thus by his conduct and attitude toward the use of said wall he has permitted a condition to exist and continue relative to use of said wall by appellant which should

not be changed or abridged until there shall arise an actual change in the condition of said wall by substantial alterations in good faith or destruction thereof by appellee, or until appellee shall actually and in good faith intend and determine to substantially change, alter or tear down said wall. The appellee should have and does have the full right to substantially change and alter said wall by building to or tearing down, but until that is actually done or actually and in good faith determined to be done by appellee the appellant should retain the present and temporary use he has of said wall and retain such use as long as the wall is permitted by appellee to remain in its present condition and to the extent only that he is now using the same."

In *Louisiana* the right to contribution for the use of a party wall is regulated by statute. See *Cordill v. Israel*, 130 La. 138, 57 So. 778, 39 L.R.A. (N.S.) 931; *Tulane Educational Fund v. Israel*, 132 La. 676, 61 So. 734.

In *Pennsylvania* statutes control the matter. See *German Nat. Bank v. Mellor*, 238 Pa. St. 415, 86 Atl. 467; *Stevenson v. Mellor*, 246 Pa. St. 596, 92 Atl. 713; *Stevenson v. Mellor*, 252 Pa. St. 219, 97 Atl. 293; *Benner v. Pollard*, 53 Pa. Super. Ct. 227.

In *Delaware* an ordinance of the city of Wilmington on the subject is interpreted in *Pfrommer v. Taylor*, 4 Boyce 113, 86 Atl. 212.

In the *District of Columbia* there are regulations dealing with the erection of party walls. These are confined strictly to the city of Washington, and are contractual in their nature. See *Smoot v. Heyl*, 34 App. Cas. (D. C.) 480; *Robinson v. Hillman*, 36 App. Cas. (D. C.) 576; *Kosack v. Johnson*, 38 App. Cas. (D. C.) 62; *Schwartz v. Atlantic Bldg. Co.* 41 App. Cas. (D. C.) 108. And see the reported case.

In *Canada* a statute provides for contribution by the adjoining landowner. *Laberge v. Fortin*, 47 Quebec Super. Ct. 475.

# **NORTHERN PACIFIC RAILWAY COMPANY**

v.

## **STATE ET AL.**

Washington Supreme Court—March 22, 1915.

84 Wash. 510; 147 Pac. 45.

### **Railroads — Abandonment of Functions.**

A "railroad" is a public service transportation corporation, all of whose operating prop-

erty is devoted to the public service of transportation over lines and terminals having a fixed location, as other real property, and whose operating personal property is fixed in location and use in the sense that it must be used in connection with and upon its lines and terminals; it cannot abandon its duty to serve the public, nor dispose of its real or personal property so as to cause a discontinuance of such service, but is bound to maintain it, and incidentally to maintain an organized entity necessarily consisting of equipment and operating property such as will make such public service possible.

[See generally Ann. Cas. 1914C 1271.]

### **Taxation — Valuation of Railroad Property.**

Rem. & Bal. Code, § 9141, requires the state board of tax commissioners to make an annual assessment of the operating property of all railroads. Section 9148 requires it to include the real estate, right of way, tracks, terminals, equipment, and franchises, and all other real and personal property, so as to include its entire property and franchises, and that in valuing such property it shall consider the value of the entire system and of the part within the state, together with such facts as will enable a substantially correct determination of its assessment value, subject to revision by the state board of equalization. Public Service Commission Law (Laws 1911, p. 604) § 92, provides that, when the Commission values the property of a public service company, nothing less than the market value shall be taken as the true assessable value of its property used for the public convenience. Held, that an added item of \$12,290,000 on account of density of traffic and volume of business along its line, the nature of the country through which its line ran, the facilities for transacting railroad business owned by private individuals, such as warehouses and docks, the proximity of extensive coal mines enabling it to obtain coal at reduced cost, regardless of its ownership, the resources of the country adjacent to its line, and the density of population and development of the tributary territory, considered as intangible elements affecting the value of its operating property, as distinguished from mere good will, was legal.

[See note at end of this case.]

### **Same.**

Such assessment of plaintiff's operating property was not unlawful, because such intangible elements or good will were not included in the physical valuation of other properties, such as hotels, theaters, wholesale and retail mercantile establishment, and other private business concerns; since such alleged item of good will value would attach to their business, rather than to their physical property, and since, even if the county assessors, required by Rem. & Bal. Code, §§ 9102, 9112, to determine the value in money of each tract or lot of real property, and to value each article of property by itself, might not include such good will, the assessment of railway operating property is committed to the state board of tax com-

missioners for valuation as a unit, instead of by lot or article of property.

[See note at end of this case.]

**Same.**

The valuation of the operating property of a railroad for taxation by the state board of tax commissioners, as an entirety, and the apportioning of such valuation to the several counties through which its line runs, is a lawful method.

[See note at end of this case.]

**Same.**

The assessment of railroad operating property on the basis of its value as an entirety, including intangible elements such as volume of business, nature and resources of country, etc., affecting the value of its property, while such intangible elements, or good will, are not included in the valuation of other property, does not violate Const. art. 7, § 1, declaring that all property shall be taxed in proportion to its value, section 2, declaring that the legislature shall provide a uniform and equal rate of assessment and taxation on all property according to its value in money, or section 3, declaring that the legislature shall provide by general law for assessing taxes on all corporation property as nearly as may be by the methods provided for assessing individual property.

[See note at end of this case.]

**Same.**

Nor does such assessment violate the due process and the equal protection of the law clauses of Const. U. S. Amend. 14 to the federal Constitution.

[See note at end of this case.]

**Same.**

An assessment of plaintiff railroad's operating property, as a unit, at \$126,000,000, including an item of \$12,000,000, or 10 per cent, as the valuation of certain intangible elements, such as the volume of, and facilities for, business, the nature, resources, population, and development of the country through which its line runs as affecting the physical value of such operating property, in the absence of any wilful fraudulent acts charged against either the state board of tax commissioners making the assessment of the state board of equalization adopting it, or any charge that such boards refused to hear evidence as to value or acted arbitrarily, would not be interfered with merely on the ground that it was excessive, and because of a radical change in conditions resulting in large decrease in net earnings of the property and a permanent impairment of its value.

[See note at end of this case.]

Appeal from Superior Court, Thurston county: MITCHELL, Judge.

Action to recover taxes paid under protest. Northern Pacific Railway Company, plaintiff, and State of Washington et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AF- FIRMED.**

*Geo. T. Reid, J. W. Quick, and L. B. daPonte for appellant.*

*The Attorney General and Edward W. Allen for respondents.*

[512] PARKER, J.—This action was commenced in the superior court for Thurston county by the Northern Pacific Railway Company against the state of Washington and the counties through which the company's lines of railway are maintained, seeking to compel the acceptance by the several county treasurers, in full payment of the general tax payable by the railway company for the year 1913, sums computed upon a less valuation of its property than that which was assessed by the state board of tax commissioners and equalized by the state board of equalization as the value of such property for purposes of taxation for that year. Before final disposition of the case in the superior court, the railway company, to avoid the accumulation of interest and penalties, paid to the several county treasurers the full amounts claimed by the defendants to be due, which payments were made under protest. These facts, occurring after the filing of the original complaint, were pleaded by supplemental complaint, which concluded with a prayer for money judgments for the amounts of excess thus so claimed to have been paid by the railway company. This prayer was in lieu of the equitable relief prayed for in the original complaint. The defendants demurred to the complaint upon the ground that the facts therein stated are not sufficient to constitute a cause of action. The superior court sustained the demurrer, and the railway company electing to stand upon its complaint and not plead further, judgment of dismissal was accordingly entered against it. From this disposition of the cause, the railway company has appealed to this court.

Before proceeding to analyze the facts as stated in the complaint, the sufficiency of which to entitle the appellant to relief is the problem here for solution, we may state that appellant's [513] contention, stated generally, is that the assessing of its property by the state board of tax commissioners, and equalization thereof by the state board of equalization, in the year 1913, was excessive in amount to the extent of \$12,291,805 over and above the amount such property should have been valued at for the purposes of taxation in that year. This result, it is insisted, was brought about by the erroneous and arbitrary action of these boards, amounting, at least, to a constructive fraud upon appellant's rights in the premises. As we proceed, we think it will be made apparent that neither of these boards, nor any of the members thereof, are charged with any acts that can properly be characterized as wilfully fraudu-

lent. The material facts, as found in the complaint, and others which we take judicial notice of in connection therewith, may be summarized as follows:

Prior to December 31, 1908, the state railroad commission commenced a proceeding against appellant under the then railroad commission law for the purpose of ascertaining the total market value of the lines, equipment and property of appellant used for public convenience within the state, commonly called operating property. Having, on December 31, 1908, completed its investigation in that behalf, in which we must presume that appellant was awarded full and fair hearing, as provided by that law, the railroad commission made and signed detailed findings of fact wherein it found, among other things, in substance, as follows:

That it would cost to reproduce the lines of railway belonging to appellant, considering the improvements and structures as new.....	\$ 61,680,340.75
That it would cost to reproduce the equipment owned and used by appellant.....	14,724,695.94
[514] That it would cost to reproduce the right of way and terminals owned and used by appellant.....	32,862,872.00
<hr/>	
Such total reproduction cost aggregating .....	\$109,267,908.69
That the lines of railway owned by appellant, considering their depreciation by wear and tear, are of the value of.....	\$ 55,475,827.25
That the equipment owned by appellant, considering its depreciation by wear and tear, is of the value of....	9,677,946.87
That the real property, consisting of right of way and terminals, owned and used by appellant for railway purposes, is of the value of	32,862,872.00
<hr/>	
The total value as so found, aggregating .....	\$ 98,016,646.12

The complaint continues as follows:

"Having so determined the then actual cash market value of the said railway system and equipment belonging to plaintiff in this state to be the sum of \$98,016,646.12, as aforesaid, the said railroad commission, in said proceeding, further found, ascertained and determined the density of traffic and the volume of business along the line of plaintiff's said railway in the state of Washington, the nature of the country through which

the line ran, the facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks; the price at which plaintiff purchased its fuel supply, the resources of the country adjacent to its line and the density of population living contiguous thereto, and from such findings, circumstances and considerations, said railroad commission assumed and pretended to ascertain and determine the value of plaintiff's said railway lines, equipment and appurtenances [515] as a whole over and above and in addition to the actual cash market value thereof, so found by said commission to be the sum of \$98,016,646.12, on account of said facilities and the said other considerations last mentioned, to wit: on account of the facilities for the transaction of business by said railway system in this state and the supposed favorable location, as aforesaid, and the facilities owned by other parties, the cost of fuel, etc., and thereupon . . . found and determined the then value of the said property to be the sum of \$110,308,451.12, . . . thereby adding to the value of plaintiff's said railway system, equipment and improvement the sum of \$12,291,805.00 over and above the actual cash value of the said properties, and the whole thereof, as theretofore determined by said railroad commission."

Thereafter, on the 12th day of August, 1911, the public service commission of the state, having succeeded to the powers and duties of the railroad commission, upon further investigation, in which we must presume that appellant had a full and fair hearing as provided by the public service commission law, made additional findings supplemental to those made by the railroad commission on December 31, 1908, by which additional findings it was determined that appellant had expended certain sums for new equipment and for additions and betterments amounting in the aggregate to the sum of \$16,938,172.06, which was added by the public service commission to the total valuation found by the railroad commission on December 31, 1908, so that the total value of appellant's operating property within the state was found by the public service commission to be \$127,246,626 on August 12, 1911.

We note here that the complaint contains no allegation that these findings of "total market value of the line, equipment and property of . . . (appellant) . . . used for the public convenience within the state," using the language of the former railroad commission law and the present public service commission law as to the ultimate findings to be made by the commission, have been appealed from, as [516] provided by law, or that they were not at all times herein involved, in full force and effect and conclusive



as of the time of their making, as expressly provided by the railroad and public service commission laws.

Appellant's net annual earnings have decreased from approximately \$7,000,000 in 1907 to proximately \$4,000,000 in 1912, the years immediately preceding those in which the railroad commission's findings of value were made and in which this assessment and equalization was made. This fact is set out in the complaint evidently as tending to show a decrease in the value of appellant's property between the time of making the findings by the railroad and public service commissions and the assessing of appellant's property for the year 1913.

The complaint continues as follows:

"In the month of May, 1913, the tax commission of the state of Washington adopted said valuation by said public service commission, less the value of certain property not yet put into operation and therefore subject to local assessment, and ascertained and determined the value of plaintiff's said railway system, equipment and appurtenances in the state of Washington by arbitrarily adding the sum of said expenditures (less said property not yet in operation) and found the same to be \$126,165,337; and pursuant to the provision of statute certified said valuation so found and determined to the state board of equalization. In the month of April, 1913, plaintiff duly appeared before the said board of tax commissioners, at a hearing fixed by said board for that purpose, and offered evidence to said board tending to show and showing the facts hereinbefore set forth concerning the erroneous and wrongful inclusion in the said valuation by the railroad commission of plaintiff's property of said item of \$12,291,805 in addition to the actual cash value of said property; and the plaintiff duly objected and protested against the inclusion of said amount in the valuation of the said property for the purpose of taxation by said board of tax commissioners; but said board of tax commissioners wholly overruled and rejected the said objections and protest of the plaintiff, and, notwithstanding the same, [517] and contrary to the undisputed evidence adduced before it, wrongfully and erroneously included said item of \$12,291,805 in the value of plaintiff's property for taxation."

This action of the board of tax commissioners was, we must assume, taken in pursuance of the law touching its powers and duties as the assessor of the operating property of railway companies, Laws of 1907, page 132; Rem. & Bal. Code, § 9141 and following; and also in pursuance of the mandatory provisions of the public service commission law of 1911, relating to the valuation of operating railway property by the public service

commission and the controlling effect of such valuation for purposes of taxation, Laws of 1911, pages 601, 604, § 92 (3 Rem. & Bal. Code, § 8626-92), which was in force at the time of the making of the assessment of appellant's operating property by the board of tax commissioners in May, 1913, hereinafter quoted.

The complaint continues as follows:

"Thereafter, in the month of September, 1913, the board of equalization of the state of Washington duly convened pursuant to the provisions of the statute creating said board and defining and prescribing its powers and duties, and the plaintiff duly appeared before said board at a hearing fixed by it for that purpose, and adduced before the said board evidence tending to show and showing all of the facts hereinbefore set forth, and in due form requested the said board of equalization to deduct from the said valuation of the plaintiff's property the said item of \$12,291,805 so erroneously and wrongfully included therein, and certified to the said board by the said tax commissioners, and to eliminate said sum and amount from the valuation of plaintiff's said property for the purposes of assessment and taxation in the defendant counties for the year 1913, and objected and protested against the inclusion by said board of equalization of the said item of \$12,291,805 in the valuation of plaintiff's property for taxation in said year.

"The board of equalization wholly ignored the evidence tendered by the plaintiff with respect to said matters and wholly rejected and overruled the protest of plaintiff, and contrary to the undisputed proof, and contrary to the laws [518] and constitution of the state of Washington and the constitution of the United States, arbitrarily and wrongfully, and wholly without inquiry or the exercise of their own independent judgment, fixed and determined the value of plaintiff's said property in this state for the purposes of assessment and taxation for the year 1912 by arbitrarily adopting the said findings of value so made by the said railroad commission on the 31st day of December, 1908, supplemented by the findings of said commission in the same proceeding on the 12th day of August, 1911, in the said sum of \$126,165,337; and after determining the ratio at which property was generally assessed in the various counties of the state, including the defendant counties, did, in the form and manner prescribed by law, certify to the assessors of each of said defendant counties the respective proportion of the total value of said property that the mileage therein bears to the total mileage in the state, as is hereinafter more particularly set forth and alleged, and said valuation was equalized in the defendant counties at the same per cent of true value

as adopted for other property in the county, . . .

"The effect and result of the inclusion of said item of \$12,291,805 and addition thereof to the valuation of plaintiff's property for 1913 is the assessment of said property to include the supposed value of 'good-will' of plaintiff's business, over and above value of its property, and over and above each and every element and item of value pertaining thereto and valuation of said property by \$12,291,805 over and above cost of reproduction thereof, as so found and determined by said railroad commission, is valuation and assessment for taxation of a mere incident of property, in no sense property subject to taxation within the meaning of the constitution and laws of the state of Washington. . . .

"Valuation of plaintiff's said property in a sum more than twelve million dollars in excess of its true and fair physical value was a purely arbitrary valuation, depending upon no known definite or ascertainable criteria, wholly incapable of verification or admeasurement, a mere caprice of the taxing authorities, adopted blindly and without inquiry or the exercise of judgment, and added to the true and fair value of plaintiff's property for the sole purpose of assessment and taxation, thus swelling the taxation value of said property far beyond the valuation on which plaintiff can or is permitted [519] by the public service commission of this state to earn a reasonable or any return. . . .

"There are and were in the year 1913 in this state many and various kinds and classes of property, including hotels, theatres and places of public amusement, restaurants and places of public entertainment, wholesale and retail mercantile establishments and manufacturing plants, and many other properties comprising and including all kinds of business properties and institutions engaged in business as going concerns, to which there does and did in the year 1913, and at all other times appertain large values on account of facilities for the transaction of their respective businesses, and to which there did and does appertain large values on account of 'good-will' belonging thereto, so that said business properties were, as going concerns, worth many millions of dollars more than the fair physical value of the tangible real and personal property involved therein; and the same were of the true and fair market value as going concerns, including good-will or commercial value, of many millions of dollars over and above the cost of reproduction or replacement thereof; and the said business institutions and properties were as susceptible and capable of valuation and assessment for taxation in the year 1913 and at all times, with respect to such intangible

values, as was the property of plaintiff. But in no county of the state were any of said business institutions or the property devoted thereto, whether corporations or individuals, assessed for taxation upon a basis including aggregation or going concern value. In every instance all of said other properties were assessed in detail upon the basis only of fair value of the several parcels and items of real and personal property composing the same. The various assessors and taxing authorities in valuing said business properties for taxation for 1913, and at all other times, have in no instance ever considered the value thereof as going concerns, or assessed or added to the value of the physical property anything for 'good-will' or commercial value, or otherwise; and have never considered the earnings of said properties or their value as a whole over and above the value of the several parcels and items of real and personal property composing the same; nor has any assessor ever pretended to assess any property in this state above the cost of reproduction or replacement thereof, nor for even as much [520] as such cost of reproduction or replacement, without making liberal allowances for depreciation; nor have the taxing authorities of the state in any other way or by any other means assessed general business property in the state in a manner or upon a basis to produce values analogous or similar to the values given plaintiff's said property in the year 1913 as aforesaid. Had plaintiff's said property been valued by the same method and upon the same basis as the general property in the state, it would have been valued at no more than said sum of \$98,016.645 (plus said additional property) so found by said railroad commission to be the true and fair value thereof, and the said sum of \$12,291,805 would not have been added thereto. All of which was well known to the said taxing authorities of the state of Washington at all times, and especially well known to said state board of tax commissioners: yet said board never has made any attempt to secure assessment and valuation for taxation of said general property in the state by any similar method or on any similar principle, although vested by law with full power and authority over local assessors and taxing authorities in the premises. The said board of tax commissioners and the assessors and other taxing officials have uniformly construed and applied the revenue laws of the state as not contemplating assessment for taxes on the basis of aggregations or going concern value, or the valuation of 'good-will' with respect to property generally, except railways. But the tax authorities have construed and applied the laws of the state with the intent and effect unjustly and illegally

to discriminate against plaintiff in the valuation of its property for taxation."

The complaint contains further allegations showing the apportioning of this assessed and equalized value of appellant's operating property to the several counties; and the tender of payment of taxes by appellant to the several county treasurers, computed upon a valuation of its operating property in a sum equal to the assessment less the \$12,291,805 alleged by appellant as excessive. The supplemental complaint also alleges facts showing payment under protest to the several county treasurers of the full amount of taxes claimed by the respondents to be due. No question is raised [521] touching the sufficiency of the allegations of tender and payment under protest, to entitle appellant to relief, providing it has alleged sufficient other facts entitling it to relief.

This statement of the somewhat involved facts, as counsel for appellant apparently view them, may seem unduly lengthy. However, we proceed at such length and in detail to the end that no really material fact disclosed by the complaint, and other facts relative thereto within our judicial knowledge, be lost sight of.

In the allegations of the complaint reference is made by number to the published findings of the railroad commission of December 31, 1908, touching the affairs of and the value of the property of appellant, though no copy of such findings is attached to the complaint nor physically made a part thereof. However, counsel for appellant asks that we take notice of all of these findings in so far as they are applicable to this controversy. This request seems to be rested upon the ground that we should take judicial notice of such findings without their being pleaded. However, counsel has filed in this cause a copy of these findings, and we will take notice of them, assuming for argument's sake that they are a part of the complaint. We express no opinion upon the question of our right to take judicial notice of them regardless of their being pleaded. These and possibly some other facts will be noticed as may become necessary in our discussion of the several contentions of counsel.

Counsel for appellant state the first of their principal contentions as follows:

"The valuation of appellant's operating property by including the value of the 'good-will' or its supposed value as a whole and as a going concern at a sum \$12,291,805 in excess of the full and fair value of each and every parcel of real and article of personal property used in the operation of appellant's railway system, and in excess of the cost of reproduction thereof, is not warranted by the constitution and revenue laws of this state."

[522] To the end that we may not be led astray by the words "good-will," which coun-

sel for appellant have here and in the complaint used as descriptive of that intangible value attaching to appellant's operating property, which the railroad commission regarded as adding \$12,291,805 to the value of the physical components of such property viewed separate and apart from the assembling of such components into an organized whole with the attendant advantages and privileges resulting therefrom, let us see what this so-called "good-will" is, in fact and substance. Is it that intangible something which is so intimately connected with the personal element entering into the conduct of a private business concern having no duties relating to the public other than those of private persons and no privileges or advantages save such as all private persons may acquire, which intangible something adds in some degree to the value of such business because it materially influences its earning power? Is it not rather more akin to that intangible element which enters into the value of real property by reason of its locality, its peculiar adaptability to some particular use wherein there enters no personal element whatever, but only that intangible something influencing the value of such property which is inseparable from the physical property itself regardless of its ownership? If this element of intangible value found by the railroad commission to constitute a substantial portion of the value of appellant's operating property is more of the nature suggested by the latter than the former question, we apprehend that it is not in substance mere "good will" within the commonly accepted meaning of those words as applied to the business of a going private concern.

Recurring to the allegations of the complaint first above quoted, we are informed that the elements considered by the railroad commission in determining the amount of this intangible added value of appellant's operating property are:

[523] (1) "Density of traffic and volume of business along the line of plaintiffs' said railway in the state of Washington."

(2) "The nature of the country through which the line runs."

(3) "The facilities for transacting railroad business owned and operated by private individuals, such as warehouses and docks."

(4) "The price at which plaintiff purchases its fuel supply."

(5) "The resources of the country adjacent to its line and the density of the population living contiguous thereto."

Now in considering these elements as adding value to appellant's operating property in connection with the question of whether such value resulting therefrom is nothing more substantial than "good will" value, let us keep in mind as we proceed that appellant is not a private business concern but is a pub-

lic service transportation corporation; that appellant's operating property is all devoted to the public service of transportation over lines and terminals having a fixed location; that not only are appellant's lines and terminals as fixed and permanent in location as other real property, but its operating personal property is also in a sense equally fixed in location and use, in that it must be used in connection with and upon such lines and terminals; that appellant cannot abandon its duty to serve the public, nor can it dispose of its property real or personal in such manner as to result in discontinuance of such service; that appellant and its successors in ownership of such property are bound to maintain such service, and incidentally to maintain an organized entity necessarily consisting of equipment and operating property, both real and personal, as a unit organization such as will make the rendering of such service possible. Having in mind this entity, all parts of the physical property of which, both real and personal, is, so to speak, dedicated by law to the particular public service to be rendered upon appellant's fixed lines and terminals and not elsewhere, [524] what is there about these intangible elements considered by the railroad commission as adding value to the whole materially different in substance from those intangible elements which enter into the value of real property.

The density of traffic and the volume of business along the line of appellant's railway add value to its operating property just as the density of traffic and volume of business add value to the real property, regardless of its ownership. The nature of the country through which appellant's lines run influences the value of its operating property in the same manner, regardless of the ownership of such property. The facilities for transacting railroad business owned and operated by private individuals and others, such as warehouses and docks adjacent to appellant's railway lines, add value to appellant's operating property for substantially the same reasons, and this would be true regardless of the ownership of such property. The resources of the country adjacent to appellant's line and the density of population living contiguous thereto add value to its operating property in the same manner. The price at which appellant purchases its fuel supply, taking the allegation of the complaint alone, relative thereto, may not seem to add intangible value to appellant's operating property of this same nature; but turning to the findings of the railroad commission, which for argument's sake we are treating as properly pleaded, we are informed that appellant, by virtue of its ownership of the capital stock of a subsidiary corporation, controls valuable and extensive coal mines which are located in close proximity

to its main line of railway and which are also located near the summit of the Cascade mountains, thereby enabling the appellant to distribute coal therefrom for the most part by down grade haul along its railway for consumption by its locomotives and,

"That, by reason of the proximity of the said coal lands to the said line of railroad and by reason of the said road owning and controlling said mines, it adds great value to the [525] lines of the said road within the state of Washington, in that it enables said road to lay down its fuel at the different distributing points along its line, used and consumed by it in the operation of its trains, at greatly reduced cost over other lines operating in the state of Washington."

Aside from the ownership and control of these mines by appellant, it is manifest that their presence alone in such proximity to appellant's main line of railway adds value to the entity constituted by its operating property, of a nature akin to that which favorable location adds to the value of real property, and such would be presumably true regardless of the ownership of the mines, and regardless of the ownership of appellant's operating property; assuming, of course, as we must, that such operating property is to remain intact as an organized entity. The ownership of these mines by appellant, however, is an element which we concede is of a somewhat different nature, which we will notice later.

Another intangible element considered by the railroad commission as adding value to appellant's operating property not specifically mentioned in its complaint but complained of by counsel as being so-called "good will," appears in the railroad commission's findings as follows:

"That since the construction of the line of the Northern Pacific Railway Company through the state of Washington, said company has expended large sums of money advertising and exploiting the resources of the country adjacent to its lines and has encouraged immigration along its lines so that the country adjacent and tributary to its rail lines has a comparatively large population and the density of traffic and the country tributary to its lines are comparatively highly developed, compared with other portions of the state of Washington, which density of traffic and population add value to the said lines."

This, in its final analysis, is but a finding touching the extent of the development of the country tributary to appellant's railway lines. It manifestly is not the effort of appellant to populate and develop such tributary country that [526] constitutes the intangible value considered by the railroad commission, but it is the fact that such tributary country is

populated and developed. This intangible element of value of appellant's operating property exists without reference to the manner of its bringing about and is in substance of the same nature as the resources of the country adjacent to appellant's railway lines above noticed.

Another finding of the railroad commission complained of by counsel for appellant, though not specifically mentioned in the complaint, appears in the commission's findings as follows:

"That in addition to the properties hereinbefore set out as being owned by the Northern Pacific Railway Company, said company is the owner of the right to select Government land in lieu of lands relinquished by it to the United States included within its land grant in the state of Washington, amounting to 631,252.88 acres, which right the commission estimates to be of the reasonable value of \$8 per acre."

Counsel seem to argue that this was regarded by the railroad commission as adding an element of intangible value to appellants operating property. This finding does not so indicate, and we think the findings as a whole negative the idea that this right of appellant was considered by the railroad commission as adding value to appellant's operating property.

These are the only intangible elements claimed by counsel for appellant to have been regarded by the railroad commission as adding value to appellant's operating property to which our attention has been directed in such manner as to call for our special notice. Aside from the consideration by the railroad commission of the control of the coal mines by the appellant as adding to the intangible value of its operating property, we see nothing in the intangible elements of value actually regarded by the railroad commission as adding such value of a substantially different nature from those intangible elements which enter into and inhere in the value [527] of real property, regardless of its ownership; and we are of the opinion that the element of appellant's control of the coal mines, as found by the railroad commission, is of too small consequence to render the nature of the intangible elements entering into the value of appellant's operating property materially different from that which enters into the value of real property. This we think is the real nature of this intangible added value. It is, as we view it, something quite different from mere "good-will."

Appellant does not allege, as we read its complaint, nor does its counsel seriously contend, as we read their briefs, that its operating property within the state in the year 1913, viewed as a unit, was not then in fact of the total market value of \$126,165,337, as

determined by the state boards of tax commissioners and equalization; but the contention is, in substance, that such total valuation was determined by a method which included an element of intangible value of the same nature as that which attaches to a large quantity of other property within the state, which element of intangible value was not included in the valuation of other property by the county assessors in determining the value of such property for taxation in that year. Now let us again recur to the allegations of the complaint and see what this other property claimed by counsel to have been assessed without the inclusion of this intangible element of value is. In the beginning of the last above quoted paragraph of the complaint we are informed that:

"There are and were in the year 1913 in this state many and various kinds and classes of property, including hotels, theatres and places of public amusement, restaurants and places of public entertainment, wholesale and retail mercantile establishments and manufacturing plants, and many other properties comprising and including all kinds of business properties and institutions engaged in business as going concerns, to which there does and did in the year 1913, and at all other times, appertain large values on account of facilities for the transaction of their respective businesses, [528] and to which there did and does appertain large values on account of 'Good-will' belonging thereto, so that said business properties were, as going concerns, worth many millions of dollars more than the fair physical value of the tangible real and personal property involved therein;"

These are the properties claimed to have been valued for taxation without the inclusion of this so-called "good-will" value attaching thereto. We are unable to read this statement of what such property consists of, so as to include therein operating property of any other railway company, nor does the language point with any degree of certainty to the operating property of any other public service corporation. We think this allegation means nothing more than that the "good-will" value of private business concerns was not added to the value of their physical property in determining its value for taxation by the county assessors in the year 1913. We understand counsel for appellant to contend that it would not have been lawful for the county assessors to have added "good-will" value, to the value of the physical property of such concerns for the purpose of taxation. Indeed, their whole argument seems to be rested upon the theory that such "good-will" value is not taxable as property at all. In support of this theory, they cite, among other portions of our revenue laws relating to the duties of county assessors, the following:

"He shall actually determine as nearly as practicable the true and fair value of each tract or lot of real property." Rem. & Bal. Code, § 9102 (P. C. 501 § 121).

"He shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time the assessment is made." Id. § 9112 (P. C. 501 § 113).

These provisions of the statute with others, it is insisted, evidence a legislative intent to have each lot, tract, article and piece of property, whether real or personal, valued by the county assessors for taxation by itself; which precludes [529] the idea of the intangible element of "good-will" entering into such valuation. We shall so assume for the purposes of this controversy.

The county assessors are not, however, the assessors of railway operating property; that duty being committed by law to the state board of tax commissioners. The statute so providing, we think renders it plain that the assessed valuation is to be placed upon the entire operating property of each railway company as a unit. Sections 9141 and 9148, Rem. & Bal. Code, provide, among other things, as follows:

"The state board of tax commissioners shall make an annual assessment of the operating property of all railroad companies within this state, for the purpose of levying and collecting taxes as hereinafter provided."

"The board shall prepare assessment-rolls and place thereon, after the name of each railroad company assessed, the general description of the property of such railroad, which shall include its real estate, right of way, tracks, stations, terminals, appurtenances, rolling stock, equipment, franchises and all other real and personal property of said company, which shall be deemed and held to include the entire property and franchises of such railroad company within the state, and all title and interest therein.

... In case of railroad companies which own or operate railroads lying partly within and partly without the state, the said board shall only value and assess the property within this state. In determining the value of the portion within the state, the board shall take into consideration the value of the entire system, the mileage of the whole system, and of the part within this state, together with such other information, facts and circumstances as will enable the board to make a substantially just and correct determination. When the value of the property of the railroad company within this state shall have been ascertained and determined, the amount thereof shall be entered upon said assessment-rolls, opposite the name of the company, and shall be and constitute the

value of the entire property of such railroad company within this state, for the levy of taxes thereon, subject to revision and correction by the state board of equalization as hereinafter provided."

[530] This language of the latter section manifestly refers to operating property, or as termed in the railroad and public service commission laws, "property used for the public convenience," and is the same class of property which it was the duty of the railroad commission in 1908 to determine the "total market value of," which duty later devolved upon the public service commission. This, we think, is rendered plain by a reading of § 9148, above quoted, in connection with the provisions of the railroad commission law, especially as amended by the public service commission law of 1911 touching the duty of the commission and the effect of its finding of value of such property; the Laws of 1911, § 92, at page 604, reading:

"When the commission shall have valued the property of any public service company, as provided for in this section, nothing less than the market value so found by the commission shall be taken as the true value of the property of such company used for the public convenience for the purposes of assessment and taxation." 3 Rem. & Bal. Code, § 8626-92.

In *State v. Clausen*, 63 Wash. 535, 116 Pac. 7, and *Spokane, etc. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, we held, in effect, that the property to be assessed by the state board of tax commissioners and the property to be valued by the railroad and public service commissions is the same property. We are prompted to make this observation so that it may be rendered plain that the organized entity consisting of appellant's operating property, so valued for purposes of taxation, did not include any property other than the property of appellant "used for the public convenience," and that whatever other property may have been owned by appellant in that year was not valued for taxation by the state board of tax commissioners, but by the county assessors, and was not regarded as entering into or forming part of appellant's operating property.

[531] This court has recognized, in harmony with what seems to be the well settled law as established by the decisions of the courts generally, that the valuation of the operating property of a railway company for purposes of taxation by the state board of tax commissioners as an entirety and the apportioning of such valuation to the several counties through which the line of such railway company runs, notwithstanding certain provisions of our constitution which we will presently notice, is a lawful method of valuing such property for purposes of taxation.

Great Northern R. Co. v. Snohomish County, 48 Wash. 478, 93 Pac. 924; Great Northern R. Co. v. Snohomish County, 54 Wash. 23, 102 Pac. 881; State v. Back, 72 Neb. 402, 100 N. W. 952, 69 L.R.A. 447; Wells, etc. Express v. Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L.R.A. 371; State v. Western Union Tel. Co. 96 Minn. 13, 104 N. W. 567; Chicago, etc. R. Co. v. State, 128 Wis. 553, 108 N. W. 567; State Railroad Tax Cases, 92 U. S. 575, 23 U. S. (L. ed.) 663; Chicago, etc. R. Co. v. Babcock, 204 U. S. 585, 51 U. S. (L. ed.) 636.

The last cited case is particularly applicable here, because it was there held that a state may tax that portion of the operating property of an interstate railway lying within the state as an organic portion of the whole. However, counsel do not contend against the effect of the unit rule of assessment except in so far as such rule has, as they claim, been applied by the state board of tax commissioners so as to make a part of the total valuation of appellant's operating property the intangible elements of value amounting to \$12,291,805.

There has not come to our notice any decisions of the courts dealing directly with the exact problem thus presented. Some pertinent observations, however, have been made by the courts of Michigan and Wisconsin which are in harmony with our view already indicated that this intangible value is something different from "good will" value. In *Detroit Citizens' St. R. Co. v. Detroit*, 125 [532] Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589, involving the taxation of the company's franchise in connection with, or rather as an intangible element of, value attaching to its physical property, Justice Hooker, speaking for the court, said:

"When, however, they [franchises] are associated with property which makes them available, the property with which they are connected generally takes on a new form in the law, and is enhanced by the privileges and uses to which it is adapted and applied, and pays a correspondingly increased tax, because it has an increased cash value. . . .

"The relator contends that the personal property should be assessed upon the basis of the component parts of the railway system, i. e., a given price per mile for track and overhead construction, an average sum per car, and a certain sum for machinery, all bearing some relation to their cost or the price at which similar articles can be obtained. In fact, the relator claimed upon the hearing below that the tangible property was so valued, and that some \$2,000,000 or more was then added for the value of the franchise. The court set the matter at rest, however, by finding that, in fixing the value of the personal property, the assessors took

into consideration and included the franchise in the streets. . . . The individuality of the elements of the road as chattels, i. e., spikes, rails, ties, poles, wire, etc., has become lost, as in other cases of fixtures, by being transformed into other property, the value of which is to be determined by relation to that kind of property, and not to spikes, ties, rails, etc., just as fine furniture is valued by comparison with similar articles, and not with similar materials to those entering into its construction.

"It is obvious that the relator's property is worth much more as a street railway, equipped and in successful operation, than the elements which enter into its construction would be as second-hand railway material. It may be worth much more than what it would cost to reproduce the physical aggregation of property constituting such railway and its equipment, and circumstances might exist which would make it worth less. The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the [533] various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted.

"We may take judicial notice that the relator's street railway has a large market value, much in excess of any amount that could be obtained for the same if it were to be dismantled, and its rails, cars, motors, wires, etc., sold separately. In such a case it would practically go as junk. Again, the easement of a steam railroad in a continuous right of way through the state, over a desirable route, and in use, has a much greater value than the same kind of a right not in use, or in small, disconnected parcels, or in a remote region, where it cannot be used profitably. Manufacturing establishments and large buildings, favorably located and adapted to special uses, illustrate the same principle, and we think it is incorrect to say that the recognition of this principle, and its consideration in assessment, is taxing the good will of a business, which, like executory contracts, has not, usually, been thought to be taxable."

In *Washburn v. Washburn Waterworks Co.* 120 Wis. 575, 98 N. W. 539, Justice Marshall, speaking for the court touching the element of intangible value entering into the operating property of a public service corporation having reference more particularly, however, to its franchise, after citing decisions, observed:

"An examination of those and other cases decided here, that might be referred to,

shows that it has been as firmly established as anything can be by judicial determinations, that all the property of a public service corporation, such as appellant, street and other railway companies, and public lighting companies, whether real, personal or mixed, in the ordinary sense of those terms, including franchises other than the mere right to be a corporation, is one entire indivisible thing; that all the parts partake of the nature of the franchise from which springs the public duty, and as that is deemed to be personality, all should be regarded as such. In that view it would be the height of absurdity to consider value and impose a tax upon one part of such entire thing separate from the rest. There can be no separation [534] without destruction. Therefore the separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itself would be valueless. The plant in its parts as realty and personalty according to the character thereof, irrespective of the combination of all into one entire thing, might be of little value, and probably would be, as compared to what they would represent in the new form, produced by the union of many parts into one. The great value is produced by the combination of parts into one complete working machine, adapted in a high degree to the service of man. One might as well endeavor to value one part of any mechanical device by itself as to so value the franchise of a public service corporation by itself, or so value its land, or likewise its movables. To do so leaves out of view the great and often chief element of value which is produced by the combination. So in order to deal justly in the distribution of public burdens, the entire property in use and for use in the exercise of the public franchise, for the purposes of taxation, should be regarded as realty, the franchise and movables being viewed as appurtenant to the lands, or the intangible element regarded as personality, and the physical elements, consisting of lands and movables, be regarded as appurtenant thereto and partaking of its character."

Assuming that the Michigan and Wisconsin courts in these decisions were dealing with no other intangible element of value than that of a franchise, we think, nevertheless, their observations are applicable here, in that such franchise value attaching to the physical property involved in those decisions attaches to the physical property in the same way and is of the same nature as such elements of value considered by the railroad commission and the tax boards in this controversy. The intangible value here involved is no less inseparable from the value of the physical property.

We are of the opinion that this intangible value, considered by the railroad commission, the state board of tax commissioners and the state board of equalization as entering into and enhancing the value of appellant's operating property, [535] was not the application of an unlawful measure of value of such property for purposes of taxation, nor was it a measure of the value by a different standard than that applied by the county assessors to the property of the concerns of the nature mentioned in appellant's complaint, notwithstanding the "good will" of such concerns was not considered as an intangible element of value attaching to their property. The element of "good will" value, which it is insisted was omitted by the county assessors from the value of the property of business concerns, attaches to the business rather than to the physical property of the concern; while this intangible element considered by the railroad commission and the state taxing boards as enhancing the value of appellant's operating property attaches to and inheres in such property regardless of its ownership. This, we think, logically results from the fact that such property constitutes an organized entity having a fixed physical location—dedicated by law, in a sense, to public service; and constitutes an entity which neither appellant nor its successors in ownership, whoever they may be, can destroy or impair so as to result in a discontinuance of such public service. This intangible element of value, as already suggested, is much more akin to that intangible something which has so much to do with the value of real property, inseparable therefrom so long as such intangible element exists, regardless of the ownership of such property.

We are reminded by counsel for appellant that the public service commission law was amended in 1913 touching the force and effect of the findings of the public service commission as to the value of appellant's operating property, to read as follows:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or [536] any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested." (Laws of 1913, p. 665, § 92 [3 Rem. & Bal. Code, § 8626-92]); which amendment became effective on June 12, 1913, before the equalization of the value of appellant's operating property by the state board of equalization in September of that year. In this connection, we note that, in 1913, before the pas-



sage of this amendment, another act was passed amending the general revenue laws of the state, reading in part as follows: "All property shall be assessed at not to exceed fifty per cent of its true and fair value in money." Laws of 1913, p. 438 (3 Rem. & Bal. Code, § 9112); which amendment also became effective on June 12, 1913. This amendment, which changed the statutory measure of values for taxation purposes from the true value as prescribed by Rem. & Bal. Code, § 9112 (P. C. 501, § 113), to "not to exceed fifty per cent" thereof, would seem to have been rendered necessary by the amendment to the public service commission law in this respect, to the end that the uniform rule of taxation prescribed by article 7 of our constitution be not violated. We therefore have a different rule for the valuing of all property within the state for taxation, coming into existence on June 12, 1913.

Counsel argue that the state board of equalization disregarded its duty in giving any consideration to the findings of the railroad and public service commissions of 1908 and 1911 as to the total value of appellant's operating property, because the measure of value applied by those commissions was, in no event, applicable in September, 1913, for purposes of taxation, another rule having been prescribed by statute and become effective on June 12, 1913. But let us also be reminded that the state board of tax commissioners valued appellant's operating property for taxation for the year 1913 and certified the same to the state board of equalization, as the statute required, in May, 1913; and that [537] the county assessors had made their assessments within their respective counties for that year prior to this statutory change in the measure of value, occurring on June 12, 1913. Rem. & Bal. Code, § 9102 (P. C. 501, § 121). So it is apparent that all of the property of the state had been assessed by the county assessors and the state board of tax commissioners before any change in the law touching the value of property for taxation had become effective. Manifestly then, such assessments were, at the time they were made, strictly legal unless that made by the state board of tax commissioners was excessive for some other reason than because of the inclusion therein of the intangible element of value complained of by appellant. Now, confining ourselves to this particular branch of the controversy—that is, the question of the inclusion of this intangible element of value in the assessment of appellant's operating property, the problem, in its last analysis, is, Was such intangible element of value properly included by the *state board of tax commissioners*? This question manifestly can only be answered in the affirmative in

view of the state of the law in May, 1913, when that board assessed appellant's operating property and the county assessors had completed their assessments within the respective counties for the year 1913, all of the assessments of property within the state occurring when the prescribed statutory measure of value of all property for taxation was "market value." Reviewing the law upon this subject, as then existing, in Spokane, etc. R. Co. v. Spokane County, 75 Wash. 72, 87, 134 Pac. 688, we said:

"These provisions, in their last analysis, seem to us to plainly fix the same measure of value, which reduced to its simplest terms, is 'market value.' Neither the revenue laws nor the public service commission law recognize any other standard of value. It follows that these laws, if administered according to their terms, will not result in unequal values being placed upon property of different owners, nor require [538] such owners to pay taxes other than in proportion to the value of their property, all measured by the same standard."

So it is not a question of the state board of equalization's adopting the findings of the railroad and public service commissions as to the value of appellant's operating property; but it is a question of that board's adoption of the value of appellant's operating property as determined by the state board of tax commissioners, the lawfully constituted assessor thereof. It is an assessment strictly legal when made, in so far as it included the intangible element of value above noticed, unless excessive because of changed conditions. We conclude that the change in the law touching the standard of value of property for taxation purposes did not render the duty of the state and county boards of equalization touching the equalization for the year 1913 different from what such duties would have been, in the absence of this particular change in the law.

Counsel for appellant state the second of their principal contentions as follows:

"The assessment of appellant's operating property on the basis of its supposed value in the aggregate, while assessing the general property of the state on a much more favorable basis, constitutes an illegal discrimination and violates sections 1, 2 and 3 of article 7 of the state constitution, and the 14th amendment to the Constitution of the United States."

Our foregoing discussion, we think, leaves little to be said upon this contention, since we have determined that other property within the state was not assessed upon a more favorable basis than was appellant's operating property for the year 1913, in view of the nature of such property as an organized entity. So far as the measure of value of

appellant's operating property as compared with the measure of value of other property within the state adopted for taxation purposes is concerned, we rest our conclusion that there has been no violation of the rule of uniformity prescribed by article 7, of our constitution, upon the grounds already [539] noticed. Upon the same grounds we rest our conclusion that no right guaranteed by the fourteenth amendment to the Federal Constitution has been violated. We are reminded by counsel for appellant of the provisions of § 3, of art. 7, of our state constitution, reading as follows:

"The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property."

The framers of this constitutional provision evidently recognized that it might be desirable, and even more conducive to the rule of uniformity prescribed by other sections of the constitution, that corporate property, by reason of the peculiar nature of much of such property, so far as the intangible elements entering into its value is concerned, be assessed by a method differing in some degree from that employed in the assessing of other property. We are of the opinion that the mere fact that the assessing of appellant's operating property as a unit by the state board of tax commissioners as prescribed by the law relating to assessment of railway operating property, instead of by the county assessors as other property is to be assessed under the general revenue laws, is not violative of this provision of the constitution; so long as such property is charged by the same rate of levy and its assessed value measured by the same standard as other property within the state. There is no question here involved as to the rate of levy; and we think we have already demonstrated that the measure of value applied to appellant's operating property is the same as that applied to other property within the state for the purpose of taxation. Our decisions in *State v. Clausen*, 63 Wash. 535, 116 Pac. 7, and *Spokane, etc. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, are in harmony with this conclusion, though this exact question was not there considered.

[540] In support of their claimed violation of appellant's rights guaranteed by the fourteenth amendment to the Federal Constitution, counsel for appellant cite, and apparently rely most strongly upon, the decision of the United States Supreme Court in *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 12 Ann. Cas. 757, 28 S. Ct. 7, 52 U. S. (L. ed.) 78. A critical reading of that case, we think, will show that a discrimina-

tion of the nature there involved does not exist, as claimed by counsel, in this controversy. The nature of the discrimination there involved is found in the statement of Justice Peckham, at page 36 of the official report, as follows:

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state, which the state might do, *Coulter v. Louisville, etc. R. Co.* 196 U. S. 599 [25 S. Ct. 342, 49 U. S. (L. ed.) 615], but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations."

It is not claimed that, in the assessing and equalization of the value of appellant's operating property, there was any discrimination made by the taxing officers as between it and other railway corporations. Even should we view the allegations of the complaint as having some reference to property and the intangible value thereof other than the mere good will of private business concerns, it is apparent that the allegations of the complaint do not even, as so [541] viewed, point with any degree of certainty to any material quantity of such property which had been assessed by the use of a different standard of value than that employed in assessing appellant's operating property; which, in any event, would render the complaint insufficient so far as this branch of the controversy is concerned. *Aberdeen First Nat. Bank v. Chehalis County*, 6 Wash. 64, 32 Pac. 1051; *Puget Sound Nat. Bank v. Seattle*, 9 Wash. 608, 38 Pac. 219.

We think we have shown that the intangible element of value attaching to appellant's operating property and considered by the railroad and public service commissions in determining the total value of such property is something more and quite different from mere "good-will" value attaching to a business of a private concern, and that the measuring of the value of such operating property

by the inclusion of this intangible element therein is not a different measure of value than that applied to property of private concerns without regard to the good will value of the business of such concerns; because such good will value does not enter into the value of the physical property of such concerns, nor has the property of such concerns any intangible value of the nature which attaches to appellant's operating property. This, we think, in its last analysis, is the alleged discrimination which counsel insists has resulted from the valuation of property within the state for taxation in the year 1913. It seems plain to us that there has been no violation of any right guaranteed to appellant by either the state or Federal constitutions.

Counsel for appellant state their third and last principal contention as follows:

"The assessment of appellant's property so as to include the item of \$12,291,805 in excess of the full cost of reproduction of the property was grossly excessive in the year 1913."

This contention apparently does not mean that appellant's operating property, viewed as a unit, was not in fact of the [542] total market value of \$126,165,337, in the year 1913, as determined by the state board of tax commissioners and the state board of equalization for that year, and as was previously determined by the findings of the railroad and public service commissions in the years 1908 and 1911. We have already noticed that the appellant does not allege unqualifiedly that the total value of its operating property viewed as a unit did not in fact equal that sum in the year 1913. Counsels' whole argument seems to avoid, with marked circumspection, committing themselves to an unqualified contention that appellant's operating property viewed as a unit was not of that total value in the year 1913; but is directed to the question of the total value of appellant's operating property, eliminating its intangible value when viewed as a unit, as compared with the value of other property within the state. Assuming, for argument's sake, that this is not a wholly fair statement of counsels' position upon this, their third principal contention, what facts are alleged in the complaint pointing to a material depreciation in the market value of appellant's operating property such as to warrant a court of equity interfering with the assessment thereof for purposes of taxation by the proper taxing officers of the state? Counsel assert, under their third principal contention, that:

"The assessment is excessive because of the radical change in conditions, resulting in a large decrease in the net earnings of the property, and a consequent permanent impairment of its value."

The only facts alleged or urged in support of this particular contention are the allegations of the complaint touching depreciation in the net earnings of appellant's operating property from approximately seven million dollars in the year 1907 to approximately four million dollars in the year 1912; the latter being the year immediately preceding that in which this assessment was made. We also note that the only specific sum claimed as the amount of such depreciation [543] is the \$12,291,805, mentioned in their complaint and in the preceding portion of their argument, claimed as unlawfully added to the value of appellant's physical operating property as its intangible value when viewed as a unit. We have also noticed that there is no willful fraudulent act charged against either the state board of tax commissioners or the state board of equalization; nor is it charged that either of these boards refused to hear all the evidence that was submitted to them by the appellant when they were considering the value of appellant's operating property. While it is alleged that these boards arbitrarily reached their decisions and refused to exercise their honest judgment, this, we think, amounts to practically nothing more than that they erroneously reached their decisions when the facts left no room for difference of opinion as to what their decisions ought to have been as to the value of appellant's operating property. To sustain this particular contention of counsel, it seems to us would mean nothing more than to say that the valuation of appellant's operating property as a unit in the total sum of \$126,165,337, in the year 1913, was excessive and the result of arbitrary and capricious action on the part of these taxing boards, simply because it must be so presumed from the sole fact of this alleged excess of \$12,291,805; which in no event would constitute an excess valuation exceeding ten per cent. We think no decision can be found where a court of equity has ever interfered with an assessment upon such a showing as this, in the absence of a showing of actual fraud on the part of the taxing officers. Counsel call our attention to, and rely principally upon, our recent decision in *Spokane, etc. Empire R. Co. v. Spokane County*, 82 Wash. 24, 143 Pac. 307, to support their position in this particular contention, but in that case the railroad company's operating property viewed as a unit was alleged to be assessed at \$12,500,000, when its market value at the time was in fact not in excess of \$6,645,000. In other words, the allegations of the complaint in that case showed that the [544] railroad company's operating property was assessed substantially double its real value. If this could be clearly proven upon trial, together with other circumstances there pleaded, as was held, it

would be an excessive assessment, and such as would warrant interference with by a court of equity, and would of itself raise a presumption of constructive fraud. The view there expressed is but in harmony with the previous decisions of this court holding, as stated by Justice Main, in *Simpson Logging Co. v. Chehalis County*, 80 Wash. 245, 141 Pac. 344, that:

"The value of property for the purposes of taxation as equalized or adopted by the board of equalization may be so grossly in excess of the actual value as to constitute constructive fraud. In such a case, the court has jurisdiction to review the assessment in a proper proceeding."

In no case has this court ever interfered with an assessment of property for purposes of taxation upon the sole ground of excessive assessment, in the absence of a showing of actual fraud on the part of the taxing officers, where the difference between the assessed value and the actual value was as small as ten per cent. We conclude that we should not interfere in this case, however strong the proof might be as to the actual value of the property being only ten per cent less than the amount it is valued by the proper assessing authorities—that, necessarily, being a question of opinion, and there being practically no other fact upon which to rest an attribution of fraud to such assessing and equalizing authorities.

Other minor contentions, are, we think, necessarily disposed of by what we have already said.

The judgment is affirmed.

Morris, C. J., Ellis, Fullerton, Mount, Main, Crow, and Holcomb, JJ., concur.

### NOTE.

#### Valuation of Railroad Property for Purpose of Taxation.

- I. Introductory, 1180.
- II. Cost of Construction or Reproduction, 1180.
- III. Productiveness:
  1. In General, 1181.
  2. Rental Value, 1182.
  3. Earning Capacity, 1182.
- IV. Proportionate Mileage within Taxing Jurisdiction, 1185.
- V. Valuation of Particular Kinds of Property:
  1. In General, 1187.
  2. Stocks and Bonds, 1188.
  3. Real Estate, 1191.
- VI. Deductions, 1193.

#### I. Introductory.

The problem of determining the valuation of railroad property is one of no little diffi-

culty, and the courts have not been entirely uniform in the adoption or exercise of methods of valuation. Some courts have held that the cost of reproduction is the most practical theory. Others have considered this as merely a detail among others from which to arrive at the true value. The theory that railroad property should be valued on the same basis as adjoining property is again met by the contrary view that railroad property is to be valued according to its use, income or productiveness, and various other theories have both produced assent and provoked dissent. Owing to this lack of harmony any attempt at complete generalization must fail and the cases are accordingly classified according to the various theories or elements of valuation which have been considered.

#### II. Cost of Construction or Reproduction.

It may be stated as a general rule that the cost of construction, reproduction, or acquisition is an important item to be taken into account in determining the value of railroad property. *Great Northern R. Co. v. Okanogan County*, 223 Fed. 198; *People v. State Board of Equalization*, 205 Ill. 296, 68 N. E. 943; *Owensboro, etc. R. Co. v. Logan County*, 11 S. W. 76, 11 Ky. L. Rep. 99; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1, 7 Atl. 306; *People v. Pond*, 13 Abb. N. Cas. (N. Y.) 1; *People v. Hicks*, 105 N. Y. 198, 11 N. E. 653, *affirming* 40 Hun 598, 2 N. Y. St. Rep. 294; *People v. Hoosic, etc. Assessor*, 2 N. Y. S. 240; *Oregon, etc. R. Co. v. Jackson County*, 38 Ore. 589, 64 Pac. 307, order *modified* on rehearing, 38 Ore. 627, 65 Pac. 369; *State v. Clausen*, 116 Pac. 7, 63 Wash. 535. And see the reported case. Thus in *Great Northern R. Co. v. Okanogan County*, 223 Fed. 198, it was said: "The value of a completed railroad is not easy of ascertainment. Railroads are not usually bought and sold on the open market. Their value is in use, rather than in exchange, and many elements go to make up that value. The cost of construction or reproducing, the income, the earning capacity, the value of stock and bonds, have all been taken into consideration by the courts. None of these elements are controlling, however. A railroad may cost more or less than its actual worth; its income or earning capacity may depend on the future development of the country through which it passes, and the stock market may be demoralized."

Some of the New York decisions seem to lay especial emphasis on the reconstruction theory. Thus in *People v. Clapp*, 152 N. Y. 490, 46 N. E. 842, 39 L.R.A. 237, it was said: "There is no reason that we can perceive for assessing this property at a greater sum than the cost of replacement. It may

not in every case be worth what it would cost to reproduce it. That would depend upon the income or earning capacity of the road after it is built. But this is the case of a paying railroad, and, when valued at what it would cost to procure the land, construct the roadbed, put down the ties and rails, and erect the buildings and other structures, all new, it is difficult to see any ground for assessing it at a larger sum. The intricate theory of valuation upon which the assessors proceeded included so many elements foreign to the value of the real estate that it cannot be approved. The assessors are not bound by the estimate of the cost of reproduction given by the railroad or its agents. They may inquire into that question themselves, and in their own way, but they have no right to disregard uncontradicted proof. It may, in any case, be competent to consider all the elements of value that they have considered in this case, but in the end, when they come to make their decision as to value, for the purpose of taxation, it may properly be much less, but can never exceed the actual cost of producing the property in the condition in which it is found by the assessors at the time of making the assessment. Such a rule of valuation is reasonable and possible. But to ascertain the value of a few miles of railroad in a country town upon a complex theory based upon the income or rentals of 200 miles in this state of an intricate railroad system extending into other states, is impracticable, and, if permitted, would, in many cases, result in injustice. An assessment based upon the cost of reproduction eliminates from the question all extraneous elements, and at the same time subjects railroad property, to its just share of the public burdens." To the same effect see *People v. Hilts*, 62 N. Y. S. 1145, *affirmed* in 163 N. Y. 694, 57 N. E. 1122, and *following* *People v. Clapp*, 152 N. Y. 490, 46 N. E. 842, 39 L.R.A. 237. In *People v. Shaw*, 143 App. Div. 811, 128 N. Y. S. 177, while the court recognized the efficacy of the reconstruction cost theory as laid down in *People v. Clapp*, *supra*, it declared that that theory applied only to a paying railroad and held that in the case of a nonpaying road, the property was to be valued on the same basis as surrounding property. The court said: "The reproduction cost is therefore the maximum valuation for the best and most profitable railroad, and may properly be considered the proper basis for valuation of a part of a paying road. It is manifest that if a larger amount of money is spent in building a line of railroad which produces no revenue, or no substantial revenue, that a great part of the money is practically lost, and that the reproduction cost is no real measure of its value. . . . A railroad is owned by the

stockholders of the corporation, and is private property. It is built for the profit of the owners and the reasonable accommodation of the public. The public, so far as the right to receive a reasonable service at reasonable rates, is interested in the road, and may dictate to a considerable extent the manner and rates of service. The fact that the railroad has this quasi public quality does not permit that it may be used to relieve the other taxpayers of the town of their just share of taxation. For purposes of taxation the railroad is like any other property belonging to individuals, and its valuation should be determined upon a fair basis in the same manner; and while a railroad company should not escape any burden justly resting upon it as a property owner, it is not in the town for the purpose of having the burden of taxation which should properly fall upon the other taxpayers shifted upon it by local authorities. The assessors and the courts are not, therefore, called upon to indulge in imaginary or unwarrantable or unjustifiable figures to impose undue taxation upon a railroad company. An honest effort must be made to place the burden of taxation so that it will rest equally upon all property according to fair valuations." In *People v. Hanking*, 152 App. Div. 488, 137 N. Y. S. 365, it was said: "The general rule for the assessment of the real estate of a railroad corporation within the boundaries of a town where the railroad itself, as in this case, traverses several towns, is that the reasonable cost of reproducing the railroad structures, added to the value of the roadbed as land, is presumptively the value of the railroad considered as real property for the purposes of assessment for taxation. *People v. Clapp*, 152 N. Y. 490, 46 N. E. 842, 39 L.R.A. 237. This rule is presumptive rather than conclusive, for there may be instances where the structures existing upon the land are disproportionate to the proper use of the land for railroad purposes, and thus do not, to the extent of the cost of reproduction, add to the value of the railroad system considered as real estate."

### III. Productiveness.

#### 1. IN GENERAL.

But while much importance has been given to the part played by the element of cost in the determination of the value of railroad property, the more general opinion is that productiveness is a more reliable criterion than cost. *Atchison, etc. R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1; *State v. New York, etc. R. Co.* 60 Conn. 326, 22 Atl. 765; *State v. Illinois Cent. R. Co.* 27 Ill. 64, 79 Am. Dec. 396; *People v. State Board of*

Equalization, 205 Ill. 296, 68 N. E. 943; Indianapolis, etc. R. Co. v. Kilmer, 69 Ind. 71; Morgan's Louisiana, etc. R. etc. Co. v. Board of Reviewers, 41 La. Ann. 1156, 3 So. 507; Detroit Citizens' St. R. Co. v. Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; State v. Savage, 65 Neb. 714, 91 N. W. 716; New Jersey Junction R. Co. v. Hendrickson, 84 N. J. L. 413, 87 Atl. 68; Long Dock Co. v. Hendrickson, 85 N. J. L. 536, 89 Atl. 1031; People v. Pond, 13 Abb. N. Cas. (N. Y.) 1; People v. Keator, 36 Hun (N. Y.) 592, *affirming* 67 How. Pr. 277; People v. Barker, 48 N. Y. 70, *affirming* 48 Barb. 173, 33 How. Pr. 150; People v. Hicks, 105 N. Y. 198, 11 N. E. 653; People v. O'Donnell, 130 App. Div. 734, 115 N. Y. S. 509; Chicago, etc. R. Co. v. State, 128 Wis. 553, 108 N. W. 557; People v. Hoosic, etc. Assessors, 2 N. Y. S. 240. Compare Albany, etc. R. Co. v. Osborn, 12 Barb. (N. Y.) 223; Albany, etc. R. Co. v. Canaan, 16 Barb. (N. Y.) 244.

The reported case in adding to the existing valuation of a railroad an additional sum for its good will, based on the density of traffic, volume of business, locality and surrounding physical and commercial advantages, illustrates the operation of this rule. In *State v. Austin*, etc. R. Co. 94 Tex. 530, 62 S. W. 1050, in speaking of the elements to be considered in valuing railroad property, the court said: "Article 5062 provides that 'Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures, and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in anywise appertaining thereto, and all mines, minerals, quarries, and fossils in and under the same.' It seems to us the plain purpose of the article last quoted to require that in assessing real estate for taxation, whether held by a natural person or a corporation there shall not only be included in the valuation the value of the land itself merely as land together with the improvements thereon, but also all franchises and privileges appurtenant thereto and all the advantages for a profitable prosecution of the business to which it is appropriated. As a rule, the value of improved real estate is proportionate to the net income which it will yield. The value of a railroad is not the mere value of its right of way, roadbed and superstructure, its depot grounds and structures thereon, considered by themselves, but the value of all these as an operating, 'going concern,'—this value being in general determinable by the profits which result from its operation. The statute requires all property to be assessed 'at its true and full value,' and in effect defines that value to be what it would probably sell for at a voluntary sale

for cash. Persons proposing to sell or buy a railroad, in forming their opinion as to its value, would doubtless consider the condition of its physical properties, but would ultimately reach their conclusion upon the question by a careful estimate of the probable net income which its operation will produce. There are no special 'rights and privileges belonging to or in anywise appertaining' to the great mass of the real property of the state, such as farming lands and town or city lots, but the terms are applicable to the real estate of railroad companies and suggest the thought that the Legislature had such property in mind when it inserted the provision, and that it was intended that in valuing a railroad for taxation the valuation should include every right and privilege which was exercised in producing its income, and that it was not intended to disassociate the soul from the body of the living concern and value by itself the lifeless remains." In *Louisville, etc. R. Co. v. Bate*, 12 Lea (Tenn.) 573, the objection that the roadbed franchise and superstructure were assessed together was considered not to be well taken. The court said: "The next objection, that the roadbed franchise and superstructure were assessed together, is, we also think, not well taken. These three components are so essentially intermingled, and each so indispensable to the value of the others, that we do not see how they can be separately estimated, one without the other two would be utterly valueless for railroad purposes. It takes all these to make a road that can be owned and operated, and no other road is taxable. The franchise is the right to use the bed and superstructure. its value depends solely upon their use and the profit derived therefrom."

## 2. RENTAL VALUE.

It has been held that the rental value of the road should be taken into consideration in arriving at the productiveness valuation. *Clark v. Vandalia R. Co.* 172 Ind. 409, 86 N. E. 851; *Atlantic, etc. R. Co. v. State*, 60 N. H. 133; *New Jersey Junction R. Co. v. Hendrickson*, 84 N. J. L. 413, 87 Atl. 68; *Oregon, etc. R. Co. v. Jackson County*, 36 Ore. 589, 64 Pac. 307, 65 Pac. 369.

## 3. EARNING CAPACITY.

In arriving at the productive value of railroad property the earning capacity has been generally held to be an item of no little consequence. *Louisville, etc. R. Co. v. Coulter*, 131 Fed. 282, *reversed* on other grounds in 196 U. S. 599, 25 S. Ct. 342, 49 U. S. (L. ed.) 616; *State v. Illinois Cent. R. Co.* 27 Ill. 64, 79 Am. Dec. 396; *Conn v. Ledman*, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; *Morgan's Louisiana, etc. R. etc. Co. v.*

Board of Reviewers, 41 La. Ann. 1156, 3 So. 507; *State v. Savage*, 65 Neb. 714, 91 N. W. 716; *State v. Virginia*, etc. R. Co. 23 Neb. 283, 46 Pac. 723, 35 L.R.A. 759, 23 Nev. 432, 49 Pac. 38; *State v. Virginia*, etc. R. Co. 24 Nev. 53, 49 Pac. 945, 50 Pac. 607; *Oregon*, etc. R. Co. v. Jackson County, 38 Oregon, 589, 64 Pac. 307, 65 Pac. 369; *State v. Austin*, etc. R. Co. 94 Tex. 530, 62 S. W. 1050; *State v. Clausen*, 63 Wash. 535, 116 Pac. 7; *Spokane*, etc. Empire R. Co. v. Spokane County, 82 Wash. 24, 143 Pac. 307. In *Atlantic*, etc. R. Co. v. *State*, 60 N. H. 133, the court stated clearly the rule with reference to the relation of the earning capacity of a road to the value, saying: "The market values of some roads are shown by their earnings, the profits made by those who operate them. It is claimed that the evidence on this point shows that the market value of the New Hampshire part of this road is less than nothing, that part being run at a loss. This is a point to be thoroughly investigated. The question of profit or no profit is one of fact, to be decided upon all the evidence that both parties produce. If no net profit is derived from the operation of the road, it does not necessarily follow that the road has no market value. A railroad that makes no profit by the transportation of freight and passengers, may be of some value for increasing the business of other roads, or being useful in some other way. *Reg. v. London*, etc. R. Co. L. R. 9 Q. B. (Eng.) 134. The fact that net earnings are or are not derived from the transportation of freight and passengers is, of course, material evidence on the question of the value of the road. If the road is so situated, and in such a condition, that without net earnings it can in a fairly managed market be sold or leased at some price, that price is evidence on the question of value. . . . The taxable value of the road is the market value which the defendant would pay for it if it were taken from its owners by the defendant for free public use, as turnpikes and toll-bridges have been taken, by an exercise of the power of eminent domain." In *State v. Nevada Cent. R. Co.* 28 Nev. 186, 81 Pac. 90, 113 Am. St. Rep. 834, much stress was laid on the importance of net earnings as a determinant of the value of a railroad. The court said: "Following decisions in other states, this court long ago laid down the rule that the cash value of a railroad for the purposes of taxation—which means the amount at which the property would be appraised if taken in payment of a just debt from a solvent debtor—must be determined mainly by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in its earning capacity. The actual cost of the road may be shown,

for, *prima facie*, that is the value. But if it appears that the actual cost was in excess of the necessary cost, the necessary cost is the proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so; or if, in short, the utility of the road is not equal to its cost, then its value is less than its cost, and must be determined by its utility alone. If the road does not pay current expenses, and cannot be expected to do so, then it is worth no more than the value of its movable material, less the cost of taking it up and getting it to market. *State v. Central Pac. R. Co.* 10 Nev. 74; *State v. Virginia*, etc. R. Co. 23 Nev. 295, 46 Pac. 723, 35 L.R.A. 759.) In the latter case it was said that railroads are bought and sold so seldom, and the value of each road depends so entirely upon its surroundings, that in determining the amount we must resort to principles other than those governing ordinary kinds of property which have a market value. It is apparent that a most important question here concerns the amount the road earns or ought to earn, and the necessary expenses of operation. As held by this court in *State v. Virginia*, etc. R. Co. 24 Nev. 80, 49 Pac. 945, 50 Pac. 607, the *net income of a railroad*, when necessary to be determined for the purposes of taxation, is the difference between the gross receipts and necessary expense under reasonably economical and prudent management. The *gross receipts* to be considered for this purpose are not necessarily those in fact received, but such receipts as would be received under a reasonably economical and prudent management; and the expenses to be deducted in order to determine the net income are not necessarily the expenses which were in fact incurred, but such expenses as would be incurred under a reasonably economical and prudent management." In *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. 395, the court said: "The value of a railroad, especially a new one, is a problem of no easy solution. It is quite evident that the respondent assessed the value of that part of this railroad in Roane county mainly from the cost of its construction. In his answer he says that 'he believes that the cost and value of the road lying and situate in Roane county was and is above the average of said road. There are several tunnels and bridges in said county, and cost, as he is informed, about as follows: Emory river bridge, \$100,000; White's Creek bridge, \$20,000; Kegan's tunnel, \$250,000.' etc. To make the cost of a thing, especially a railroad, the measure of its value, or even a chief constituent thereof, is most fallacious. A railroad that costs \$20,000 per mile is worth as much as one that costs \$50,000 per mile, if its business and net earnings be as

great or greater. Indeed, it is more valuable, in one sense, as it makes a better return on the investment. The expenses of keeping a road in repair which runs through hills and mountains, and over rivers, are greater, because it requires greater labor to keep its tunnels, bridges, and roadbed in repair, than it does in case of a road over a level country. There must be a greater number of watchmen at the bridges, tunnels, curves, and cuts and fills. The grades are heavier and running expenses more. Sometimes, indeed often, property may cost much and be worth very little, or cost little and be of great worth. Its cost may be looked to as an element entering into its value, but not as its sole or even chief element. The earnings of a railroad, present and prospective, must form a most important ingredient in the estimation of its value. What amount of business has it done, is it doing, and what is it likely to do? What through freights, local freights, etc., does it carry and will it carry? Many things must be considered in arriving at its value."

While the earlier New York decisions disregarded the income of a railroad as an element of valuation, the later cases have considered it. *People v. Keator*, 36 Hun 592, *affirming* 67 How. Pr. 277; *People v. Reid*, 64 Hun. 553, 19 N. Y. S. 528; *People v. Feitner*, 75 App. Div. 527, 78 N. Y. S. 308, *affirmed* in 174 N. Y. 532, 66 N. E. 1114. *People v. Hicks*, 105 N. Y. 198, 11 N. E. 653, *affirming* 40 Hun 598, 2 N. Y. St. Rep. 294; *People v. Hoosic, etc. Assessor*, 2 N. Y. S. 240; *People v. Harer*, 50 Hun 605 mem. 3 N. Y. S. 86. *Compare Albany, etc. R. Co. v. Osborn*, 12 Barb. 223; *Albany, etc. R. Co. v. Canaan*, 16 Barb. 244. Thus in *People v. Wilder*, 3 N. Y. St. Rep. 159, it was said: "Upon the law as laid down in some of the late cases in the supreme court there is no doubt but that one of the chief factors in determining the value of a railroad for the purposes of assessment, is the earnings of the company, or its capacity to do business, and the return of a fair equivalent to its stockholders for the money invested. The case of *People v. Barker*, 48 N. Y. 70, cited by the learned counsel for the defendants, it seems to me, is not at war in the slightest degree with the law as laid down in the supreme court. In the case in 48 N. Y., the court holds that, in assessing the real estate of a railroad corporation, assessors are not required to assess it as an isolated piece of land, but each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom. That is substantially the rule as laid down by the supreme court. Here is a property which cost a very large amount of money. That portion of it which is situated

in the town of Hoosac, for the purpose of taxation, is to be regarded as part and parcel of the whole railroad, and the whole line is to be taken into consideration, its capacity for earnings, and its expenses, are all to be taken into account, and from that among other things is to be evolved the proper amount which should be assessed upon the company's property in each town through which the line passes."

In *Oregon, etc. R. Co. v. Jackson County*, 38 Ore. 589, 64 Pac. 307, 65 Pac. 369, the New York decisions were followed, the Court saying: "To the same purpose is the following excerpt from *People v. Hicks*, 40 Hun 598: 'The estimate of value of any portion of the road cannot be intelligently made without some knowledge or information of it as a whole, and its business, earnings, and ordinary expenses. Railroads are constructed with a view mainly to revenue and profit upon investments, and hence the productive capacity and its earnings are matters for consideration in the estimate of their value. And the extent to which actual net earnings of a road should govern or aid such estimate is dependent upon circumstances. No arbitrary method can be prescribed of ascertaining value. In some cases the earnings of the road may be entitled to much more consideration than in others. The cost of the road is also usually to be taken into account, and the value depends upon relations present and in reasonable contemplation, because the value of property may considerably be dependent upon defined unappropriated means and facilities for increased business connections and relations and the importance of the consequences to follow. . . . And the average net earnings of the entire line of a railroad for a number of consecutive years may properly be shown to aid the estimation of the value of the several portions of it.' Again, Mr. Justice Andrew says, in *People v. Taxes Com'rs*, 104 N. Y. 240, 246, 10 N. E. 440: 'The rental value of real estate is frequently resorted to as a guide in fixing its aggregate value. In many cases it is a reasonable assumption that real property is worth a capital sum equal to that represented by the capitalization of its ordinary net rental. So, also, the property of a railroad corporation may be worth a sum capitalized on the basis of its average income and earning capacity. But, since the income is derived from the use of its real and personal property and also of its franchise, it is manifestly quite impossible to ascertain, from proof of the income alone, the value of either element entering into the average value of the corporate property,' and in summarizing continued, 'In determining, therefore, the value of a railroad which may be said to have no current value, several elements must be



taken into consideration, namely, the cost of construction, the cost of replacement, its connections with roads and advantages in a commercial way for commanding the carrying trade, its rental value, its net earnings, and the market value of its stocks and bonds. These elements are relative, and the peculiar facts of each particular case as it arises should determine which shall preponderate in importance. The attending circumstances and conditions usually suggest the safer guide, and by giving strict attention thereto the true cash value of the property involved may be approximately determined."

#### **IV. Proportionate Mileage within Taxing Jurisdiction.**

In determining the value of a portion of a railroad line within definite limits within a jurisdiction, the mileage rule has been generally adopted by the courts. That is, a portion of a railroad is valued at the same ratio to the entire value that the mileage of that particular division bears to the entire mileage of the system. *State R. Tax Cases*, 92 U. S. 575, 23 U. S. (L. ed.) 663; *Vanceburg, etc. Turnpike Road Co. v. Maysville, etc. R. Co.* (Ky.) 63 S. W. 749; *Owensboro, etc. R. Co. v. Com.* 73 S. W. 744, 24 Ky. L. Rep. 2178; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Back*, 72 Neb. 402, 100 N. W. 952, 69 L.R.A. 447; *Louisville, etc. R. Co. v. Bate*, 12 Lea (Tenn.) 573; *Chattanooga, etc. R. Co. v. Nashville, etc. R. Co.* 7 Lea (Tenn.) 561, *overruling Louisville, etc. R. Co. v. State*, 8 Heisk. (Tenn.) 663; *State v. St. Louis Southwestern R. Co.* 43 Tex. Civ. App. 533, 96 S. W. 69; *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924, 54 Wash. 23, 102 Pac. 881. And see the reported case. In *Jessup v. Chicago, etc. R. Co.* 7 Chicago Leg. N. 229, 13 Fed. Cas. No. 7,300, it was declared that in distributing the value, allowance must be made for portions of the road of relatively higher value than other portions. The court said: "The principal property of a railroad company consists, ordinarily, of the right of way, the railroad track, the stations and other houses and warehouses, the shops connected with the operations of the road, and the various rolling-stock. These bills show that in the assessment and levy of the taxes against the railroad company, the whole property, real and personal, has been distributed along the line of the road; which results in such a levy and assessment of taxes for county and municipal purposes, that property belonging to the railroad in one county, pays a tax in another, for example if ten miles of the line of a road is situate in one county in which the road has in addition, property of immense value, as warehouses, station houses and shops for the repair and manufacture of its

various machinery, and has ten miles of the line of its road in another county, in which it has none of that kind of property, the distribution which has been made (to say nothing of the difference in rails, as of steel or iron, and right of way) causes taxes for county and municipal purposes assessed on the railroad property in the two counties to be substantially the same. We do not see how all this can be reconciled with the provisions of the constitution which declares that, in the imposition of taxes, every person and corporation shall pay a tax in proportion to the value of his or its property. There may be difficulties connected with the assessment and collection of the taxes upon the rolling stock, and the movable property of the company, but there can be none as to the fixed property in the various counties in the state through which the railroad runs." And in *Northern Pac. R. Co. v. Kootenai County*, 19 Idaho 75, 112 Pac. 320, the rule of proportionate mileage valuation was applied between county and county, and in support of that method of valuation the court said: "Sec. 1715 provides that when the total valuation of railroad property has been determined and assessed in accordance with the provisions of sec. 1714, 'the state auditor shall prepare a statement to be sent to each county in which such . . . railroad property may be situated, specifying the number of miles of such line or road within the county, the assessed value per mile and the number of miles of main line or main track in each district, city or incorporated town therein.' Reading these several sections of the statute together, and following the directions of sec. 1714, *supra*, it will be observed that it is the intention and direction of the statute that all railroad property comprising right of way, stations, and superstructures upon the right of way, sidetracks, switches, turnouts, and second tracks, rolling stock and all such property, including the franchises used by any one line of road shall be ascertained, estimated and valued as a whole for the full length of the line within this state, and the total valuation so found is to be divided by the total number of miles of 'main track' or 'main line' so as to have a uniform valuation per mile throughout the 'main line or main track' in each county, city, incorporated town or assessment district. The validity of this method of assessment has frequently been before the courts and has received a very careful and extended consideration and review, and has been sustained as constitutional and valid legislation. . . . As we understand the statutes above cited, it is the duty of the state board of equalization to ascertain the total value of the main line or track, stations, switches, turnouts, 'second tracks' and right of way, and other

appurtenances, all of which comprise what the statute terms the 'railroad track' and add thereto the value of the 'rolling stock' and franchises, and to assess the main line the amount per mile which if multiplied by the total number of miles of main line will equal the total valuation of the property so ascertained. And when the valuation and assessment have been made, the certification to each county is for so many miles of 'main line or main track' at such sum per mile as the board has valued the property. When the board makes such valuation and assessment, it is to be presumed that they have followed and complied with the law in computing all the appurtenances and incidents which go to make up the 'railroad track' or 'main line.' In *State v. Aldridge*, 66 Ohio St. 598, 64 N. E. 562, in valuing rolling stock the rule was laid down that rolling stock is to be apportioned by the mileage method according to the division, branch or line of the road on which it is used, but if the rolling stock is not local but is used throughout the entire system, it is to be valued by the mileage rule applied to the entire system. The court said: "The value of the rolling stock which belongs to, or is used solely on the main line is required to be apportioned among the counties through or into which the main line passes according to the number of miles of such track in each county, and the same rule applies to the division and branch. A division or branch cannot separately own any part of the rolling stock, because all the rolling stock is owned by the company; but it often occurs that a branch or division is constructed, equipped and financed by itself, and separate books and accounts kept of the earnings, running expenses, equipage, interest, bonds, etc., and in such cases the rolling stock while owned by the company, is regarded as belonging to such branch or division for operating purposes, and in such cases its value is required by said section 2774, to be apportioned to the counties through, or into, which the track of such branch or division passes, according to the number of miles of track in each county. If there is no such separate construction, equipage or accounts, but still certain parts of the rolling stock are used solely upon such division or branch, the same result would follow as if such rolling stock, belonged in the above sense to such division or branch. But if none of the rolling stock so belongs to any division or branch, and is not used solely thereon, then the whole value of the rolling stock upon the whole road, is, by said section, required to be apportioned among all the counties according to the number of miles of track in each, whether main line, division or branch." In *State v. Southwestern R. Co.* 70 Ga. 17, wherein the question arose whether the valuation of a

portion of a railroad should be based on the mileage theory or valued as a separate and distinct road the court said that all possible information on either theory should be submitted to the jury. In *Mudge v. McDougal*, 222 Fed. 562, the court applied the following Arkansas statute: "'Sec. 12 . . . In valuing the property of every railroad the commission shall take into consideration the entire railroad, whether all or only a part of it is in this state. Sec. 13. The commission shall determine in the case of each railroad it assesses the value per mile of the main track, the value per mile of the side track, turnouts, the value of each building and the value of the average stock of materials, including machinery and repair shop stores, timber, ties and rails carried the next year preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads in this state the commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads if this state filed and prepared in accordance with the requirements of this act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the value per mile of the rolling stock of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles or fraction of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in such county. Sec. 14. The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made.'"

In the case of a railroad extending out of a state, the same proportionate mileage rule has been followed, viz.: The line within the state is valued with respect to the entire value by the ratio of the length of the road within the state to the length of the entire road, unless there are special properties of the road giving to certain portions of it a

relatively higher value than other portions. Indianapolis, etc. R. Co. v. Backus, 154 U. S. 438, 14 S. Ct. 1114, 38 U. S. (L. ed.) 1040, *affirming* 132 Ind. 625, 33 N. E. 432; Chicago, etc. R. Co. v. Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 U. S. (L. ed.) 636; Louisville, etc. R. Co. v. Coulter, 131 Fed. 282, *reversed* on other grounds, 196 U. S. 599, 25 S. Ct. 342, 49 U. S. (L. ed.) 615; Louisville, etc. R. Co. v. Bosworth, 209 Fed. 380; State v. New York, etc. R. Co. 60 Conn. 326, 22 Atl. 765; State v. Southwestern R. Co. 70 Ga. 11; Indianapolis, etc. R. Co. v. Backus, 133 Ind. 609, 33 N. E. 443; Evansville, etc. R. Co. v. West, 138 Ind. 697, 37 N. E. 1012; Jeffersonville v. Louisville, etc. Bridge Co. 169 Ind. 645, 83 N. E. 337; State v. Wiggins Ferry Co. 208 Mo. 622, 106 S. W. 1005; State v. Savage, 65 Neb. 714, 91 N. W. 716. And see for the application of the proportional mileage rule to the valuation of capital stock subdivision VI, 2 post. In Pittsburgh, etc. R. Co. v. Backus, *supra*, it was said: "When a road runs through two states it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in State Railroad Tax cases, on page 608, it was said: 'It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.'" In Cleveland, etc. R. Co. v. Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 U. S. (L. ed.) 1041 (*affirming* 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729), it was declared that in assessing the value of an interstate railroad the mileage method was the proper one and that estimation or valuation of the portion of the railroad within the state as an independent and exclusively operating line would not be correct. It was said: "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the

property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt."

## VI. Valuation of Particular Kinds of Property.

### 1. IN GENERAL.

In Lake Tahoe Ry. Transp. Co. v. Roberts, reported in full, post, this volume, at page 1196, under a constitutional provision declaring a state tax on certain enumerated properties of railroad companies "and other property or any part thereof used exclusively in the operation of their business in this state," a steamboat used partly in the service of the railroad was considered not to be an element to be considered in assessing the railroad properties.

In the case of *In re Long Dock Co.* 75 N. J. L. 325, 68 Atl. 126, it was held that a ferry terminal and other property owned by a railroad company and used in connection with train service was assessable on the same basis as other railroad property.

It has been declared that in the valuation of railroad property, the depreciation of land adjoining railroad property, due to the existence of the railroad, is not to be included and assessed as part of the railroad property. *People v. Hiltz*, 62 N. Y. S. 1145, *affirmed* in 163 N. Y. 594, 57 N. E. 1122.

In *Jersey City v. State Board of Assessors*, 73 N. J. L. 164, 63 Atl. 21 (*modified* 75 N. J. L. 571, 69 Atl. 200), wherein it appeared that the method of assessing railroad property included a division thereof into main stem, and second class railroad property, it was held that railroad tracks which originally

formed a part of the main line of a railroad company but which after certain alterations in the road came to be used as siding, were not part of the main stem of the road, and were not part of the main stem of a branch road, but it was held that a branch line, although principally used for freight transportation, was assessable as part of the main stem. And in *Jersey City v. State Board of Assessors*, 74 N. J. L. 720, 68 Atl. 227 (*reversing* 73 N. J. L. 170, 63 Atl. 23), under a statute assessing the main stem separately from other property and defining the main stem to be "the roadbed, not exceeding one hundred feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith," it was held that all tracks outside of the one hundred feet and the land on which they were laid, and tracks used exclusively for chutes into factories, and for yards, and the like, or used in the ordinary transaction of business for cars at rest, were not embraced within this definition.

It has been held that a railroad company taking over or leasing another road should be assessed separately thereon, the court pointing out that even though one direct line was made of them, yet having originated under separate charters they must be treated for taxing purposes as separate roads. *Louisville, etc. R. Co. v. Bate*, 12 Lea (Tenn.) 573.

Some jurisdictions have considered the railroad franchise as an element to be considered in estimating the value of the property to be taxed. *Jessup v. Chicago, etc. R. Co.* 7 Chicago Leg. N. 229, 13 Fed. Cas. No. 7,300; *Porter v. Rockford, etc. R. Co.* 76 Ill. 561; *Com. v. Ledman*, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; *Jersey City v. State Board of Assessors*, 74 N. J. L. 720, 68 Atl. 227, *reversing* 73 N. J. L. 170, 63 Atl. 23; *Louisville, etc. R. Co. v. Bate*, 12 Lea (Tenn.) 573; *State v. Austin, etc. R. Co.* 94 Tex. 530, 62 S. W. 1050. *Compare* *Long Dock Co. v. Hendrickson*, 85 N. J. L. 536, 89 Atl. 1031. The reported case, it may be observed, includes the franchise in the property valuation. Thus in *Atchison, etc. R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1, in answer to the contention that the franchise should not be included in the market value of stocks and bonds, the court said: "They complain because the market value of the stock and bonds includes the value of the franchises of the company and of its right to conduct interstate commerce. The right to carry on interstate commerce is exercised by the company within as well as without the state of Colorado, and is appurtenant to each mile of its railroad wherever situated, and the tax levied upon the assessment made upon the mileage basis is not a tax upon interstate commerce; but it is a tax upon the property

of the company in the state. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 697, 698, 15 S. Ct. 268, 360, 39 U. S. (L. ed.) 311; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 195, 220, 226, 17 S. Ct. 305, 41 U. S. (L. ed.) 683. It is true that the current cash value of the whole funded debt and of the entire stock of a railroad company shows what, in the opinion of those who own and deal in its securities and who are perhaps best able to judge, the value of all the property of the company is, and that this value includes all the tangible and all the intangible property of the company, all its corporate franchises, all its privileges and contracts, and all its good will. *State R. Tax Cases*, 92 U. S. 575, 605, 23 U. S. (L. ed.) 663; *Pittsburg, etc. R. Co. v. Backus*, 154 U. S. 421, 429, 14 S. Ct. 1114, 38 U. S. (L. ed.) 1031; *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 221, 222, 17 S. Ct. 604, 41 U. S. (L. ed.) 965. But all the tangible property convenient for railroad purposes, the roadbed, the rails, the ties, the station houses, is combined unavoidably and inextricably with the intangible property, with the franchises, privileges, and contracts of the corporation into a single corporate plant, a single profit-producing unit used for railroad purposes. This intangible property unavoidably and automatically distributes itself wherever the tangible property is, and it enhances the value of every part of it. There are 26 miles of the complainant's railroad in Bent county. There is uncontradicted evidence that this part of the railroad, excluding rolling stock and shop machinery, could be reproduced for from \$20,000 to \$21,000 per mile; but this part of the complainant's railroad, separate from the system or from the operating unit of which it is a component portion, would be worth far less than it now is, because the franchise of the complainant to be, its franchise to do, its privilege to carry on, interstate commerce, all its franchises and privileges and its good will, are appurtenant to this portion of its railroad, are exercised to operate it, and become a part of its value."

## 2. STOCKS AND BONDS.

The market value of its stocks and bonds has been held to be a considerable item making up the value of the property of a railroad company. *Taylor v. Louisville, etc. R. Co.* 88 Fed. 350, 31 C. C. A. 537; *Atchison, etc. R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1; *Great Northern R. Co. v. Okanogan County*, 223 Fed. 198, *certiorari denied*, 172 U. S. 647, 19 S. Ct. 887, 43 U. S. (L. ed.) 1182; *People v. Reid*, 64 Hun 553, 19 N. Y. S. 528; *State v. Savage*, 65 Neb. 714, 91 N. W. 716; *Oregon, etc. R. Co. v. Jackson County*,

38 Ore. 589, 64 Pac. 307, 65 Pac. 369. See *New Jersey Junction R. Co. v. Hendrickson*, 84 N. J. L. 413, 87 Atl. 68. Thus in *Atchison, etc. R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1, the court said: "They complain because the market value of the stock and bonds includes the value of the franchises of the company and of its right to conduct interstate commerce. The right to carry on interstate commerce is exercised by the company within as well as without the state of Colorado, and is appurtenant to each mile of its railroad wherever situated, and the tax levied upon the assessment made upon the mileage basis is not a tax upon interstate commerce; but it is a tax upon the property of the company in the state. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 697, 15 S. Ct. 268, 360, 39 U. S. (L. ed.) 311; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 195, 220, 226, 17 S. Ct. 305, 41 U. S. (L. ed.) 683. It is true that the current cash value of the whole funded debt and of the entire stock of a railroad company shows what, in the opinion of those who own and deal in its securities and who are perhaps best able to judge, the value of all the property of the company is, and that this value includes all the tangible and all the intangible property of the company, all its corporate franchises, all its privileges and contracts, and all its good will. *State R. Tax Cases*, 92 U. S. 575, 605, 23 U. S. (L. ed.) 663; *Pittsburg, etc. R. Co. v. Backus*, 154 U. S. 421, 429, 14 S. Ct. 1114, 38 U. S. (L. ed.) 1031; *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 221, 222, 17 S. Ct. 604, 41 U. S. (L. ed.) 965. But all the tangible property convenient for railroad purposes, the roadbed, the rails, the ties, the station houses, is combined unavoidably and inextricably with the intangible property, with the franchises, privileges, and contracts of the corporation into a single corporate plant, a single profit-producing unit used for railroad purposes. This intangible property unavoidably and automatically distributes itself wherever the tangible property is, and it enhances the value of every part of it. There are 26 miles of the complainant's railroad in Bent county. There is uncontradicted evidence that this part of the railroad, excluding rolling stock and shop machinery, could be reproduced for from \$20,000 to \$21,000 per mile; but this part of the complainant's railroad, separate from the system or from the operating unit of which it is a component portion, would be worth far less than it now is, because the franchise of the complainant to be, its franchise to do, its privilege to carry on, interstate commerce, all its franchises and privileges and its good will, are appurtenant to this portion of its railroad, are exercised to operate it, and become a part

of its value. . . . Counsel for the company insist that the current cash value of the stock and bonds is an erroneous and misleading fact from which to deduce the value of the company's railroad property in Colorado, because the portions of its railroad in some more populous states are of greater value per mile than the part of its railroad in Colorado. It is undoubtedly a fact that there must be this difference in value of the separate parts of the railroad. But this difference in value exists in the case of every other corporation which has been or is assessed upon the mileage basis according to the rule of the unit of use, and notwithstanding this fact that rule probably presents the best, and it certainly presents a lawful, method of ascertaining the value of such property for assessment, when the board or court which is finding the value gives due consideration and effect to considerations and evidence relative to the value of the entire corporate plant, relative to the value of that part of the company's property not included within the plant, which must be deducted from the value of its entire property, and to considerations and evidence relative to the value of different parts of the corporate plant and of the franchise appurtenant thereto; and in view of this fact the market value of the stock and bonds must be competent and persuasive evidence from which to ascertain the value of the railroad in the state of Colorado, or in any other state. Counsel contend that the market value of the stock and bonds is a misleading fact from which to deduce the value of the railroad property in Colorado, because the complainant has other property than that used for railroad purposes, the value of which should be deducted from the market value of the stock and bonds, and because the company has more valuable terminals at Chicago, Kansas City, Galveston, Los Angeles, and San Francisco than it has in the state of Colorado; but there is no competent evidence in the record of the amount and value of the property which the complainant owned in the year 1904 that was not a part of the profit-producing unit, nor of the value of complainant's terminals outside of Colorado or within that state. The company was called upon in accordance with the statute to make a return of its corporate plant as a basis for the assessment of its property. It made that return, and it has been introduced in evidence in this case. The presumption is, in the absence of evidence to the contrary, that a railroad company holds all its property for railroad uses, and that the value of the stock and bonds stated in the return indicates the value of the complainant's property held for those purposes. If it had accumulated property that it was not using or holding for such purposes, or if its case was one of those ex-

ceptional cases wherein some parts of its railroad in other states were of extraordinary value, it would have been competent for it to have proved that fact at the hearing below. In the absence of any such proof, the legal presumption must prevail, and the market value of its stock and bonds, divided by the number of the miles of its railroad, must be substantial evidence of the value of its railroad per mile in the state of Colorado and in the county of Bent. . . . The gross and net earnings and the current cash value of the obligations which evidence the funded debt and of the stocks of a railroad company are neither exclusive nor conclusive evidence of the value of its railroad property, or of the part of its profit-producing unit in any state. But they are competent and more persuasive evidence of such value than the mere cost of reproducing the tangible property which constitutes the railroad, or any part of it, because this cost of reproduction excludes the value of the intangible property of the company, of its good will, its franchises, its privileges, and its contracts, which is sometimes greater than the value of its tangible property (*Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 221, 223, 224, 17 S. Ct. 305, 41 U. S. (L. ed.) 683) and because those who actually buy, sell, and own the stocks and bonds of a railroad company are generally better qualified than strangers to form correct opinions of the value of its property, and the current market value of all these securities is very persuasive proof of their estimate of the value of the property of the company. *State R. Tax Cases*, 92 U. S. 575, 605, 23 U. S. (L. ed.) 663; *Pittsburg, etc. R. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 U. S. (L. ed.) 1031." In *Chicago, etc. R. Co. v. Cole*, 75 Ill. 591, the rule of valuation laid down was the value of the capital stock plus the amount of the company's indebtedness, but it was held that the rule was misapplied when a railroad was valued by its capital stock plus its indebtedness and the indebtedness of six other roads of which it was lessor but for the debts of which it was not responsible.

In appraising the capital stock of a railroad, the fair market value of the stock issued and outstanding should be the criterion. *Jessup v. Chicago, etc. R. Co.* 7 Chicago Leg. N. 229, 13 Fed. Cas. No. 7,300; *Ohio, etc. R. Co. v. Weber*, 96 Ill. 443. Thus in *Com. v. Ledman*, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452, the court said: "Under section 4079 of the Kentucky Statutes of 1903 the duty of the board of valuation and assessment was to value the capital stock of the railway company, and in order to do this it had to take into consideration in its valuation, every element of property, tangible or intangible, owned by that company. In fix-

ing this valuation the board is not governed by the property value of the railway company's shares (as decided in *Henderson Bridge Co. v. Com.* 99 Ky. 623, 17 Ky. L. Rep. 389, 31 S. W. 486, 29 L.R.A. 73); but it must take into consideration its franchise, its earning capacity, and its assets of every description. From the report, as filed by the company, and such other information as it may possess, it assesses the property at a fair valuation, and when once so assessed the action of the board is final and conclusive, and no further action can be taken looking to a further assessment or revaluation of the property." In *State v. Karr*, 64 Neb. 514, 90 N. W. 298, 300, wherein it appeared that the capital stock of a railroad corporation had no market value, it was said: "The assessor, then, should have ascertained the actual value of the capital stock by adding the value of the corporate franchise to the value of the tangible property of the corporations. From the value of the capital stock so found should be deducted the value of real and personal property already assessed, and the remainder would be the value of the capital stock for assessment." In *People v. New York Tax Com'rs*, 1 Thomp. & C. (N. Y.) 635, it was declared that the capital stock of a railroad corporation should be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county, that in arriving at this value the actual value of the capital stock would in itself allow for the company's indebtedness and that this value minus the cost price of the real estate would give the assessable value of the capital stock.

In *Boston, etc. R. Co. v. Com.* 157 Mass. 68, 31 N. E. 696, it was held that in assessing the value of the shares of a railroad's capital stock, the proposed but unissued new shares, even though paid for, should not be included as part of the capital stock.

The problem of apportioning the appraised value of the entire capital stock of a company whose road extends outside of the state has been solved by apportioning the valuation in the ratio that the number of miles within the state bears to the entire mileage of the road. *Ohio, etc. R. Co. v. Weber*, 96 Ill. 443; *Southern Pac. Co. v. Com.* 134 Ky. 410, 120 S. W. 309; *Com. v. Delaware, etc. R. Co.* 145 Pa. St. 96, 22 Atl. 157; *Com. v. Pullman's Palace Car Co.* 13 Pa. Co. Ct. 54, 2 Pa. Dist. 618. Thus in *State v. New York, etc. R. Co.* 60 Conn. 326, 22 Atl. 765, it was said: "The entire process of determining what sum the defendant ought to pay to the state in taxes in any year consists of several parts. The valuing of its entire capital stock is one part. But the whole value is not to be taxed; only that part which bears a ratio to the whole equal to the ratio which the length of the

defendant's railroad in this state bears to the entire length of its road." In *Com. v. Southern Pac. Co.* 150 Ky. 97, 149 S. W. 1105, the court in construing a statute regulating that question declared that the method was not conclusive, but should be considered by the board of assessors. The court said: "Nor is there much of difficulty about the constitutionality of the amendment of 1906 to section 4081 of the statutes. That statute reads as follows, the amendment named being in italics: 'If the corporation organized under the laws of this state, or of some other state government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company or a corporation performing any other public service, the lines of which extend beyond the limits of the state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable for taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this state; but if any such railroad or other corporation organized under the laws of this state have all of its lines outside of this state, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this state for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned shall be the value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this state and in the county, city, town and district where its principal place of business in this state may be located.' Prior to the enactment of the amendment the appellee company was of substantially the same character as it is now. Then as now no part of its lines lay in Kentucky. The company then insisted that it was not liable to any tax under section 4081; but the state board assessed it, the company finally acquiescing in the value fixed. Later, an action was instituted by the Attorney General of the Commonwealth in which it was charged that the valuation made by the state board was unauthorized, illegal, fraudulent and void. It is true that not the right of the board to assess, but the valuation fixed in the assessment, was the object of the attack. But in

disposing of the case here, construing the statute as it then stood, we upheld the assessment made by the state board, and in the course of the opinion said that the statute did not provide that the proportion between the lines in this state and the lines in and out of this state, should be conclusive, but only that it should be considered by the board. *Southern Pac. Co. v. Com.* 134 Ky. 410."

### 3. REAL ESTATE.

In appraising the value of the real estate of a railroad company the rule that it must be valued not as the land of adjoining owners, but as part of a railroad system, its value being regulated by the purpose, is the more general one. *Central Pac. R. Co. v. Evans*, 111 Fed. 71; *Huntington v. Central Pac. R. Co.* 2 Sawy. 503, 1 Am. L. T. Rep. N. S. 94, 12 Fed. Cas. No. 6,911; *Chicago, etc. R. Co. v. Lee County*, 44 Ill. 248; *Oregon, etc. R. Co. v. Jackson County*, 38 Ore. 589, 64 Pac. 307, 65 Pac. 369. Compare *Huntington v. Central Pac. R. Co.* 2 Sawy. 503, 1 Am. L. T. Rep. N. S. 94, 12 Fed. Cas. No. 6,911; *Albany, etc. R. Co. v. Osborn*, 12 Barb. (N. Y.) 223; *Albany, etc. R. Co. v. Canaan*, 16 Barb. (N. Y.) 244; *People v. Shaw*, 143 App. Div. 811, 128 N. Y. S. 177. Thus in *People v. Reid*, 64 Hun 553, 19 N. Y. S. 528, it was said: "After taking this large mass of testimony, the referee adopted a very simple and obviously correct method of arriving at the value of the property in question. The property assessed formed a part of a great railroad. To assess the portion of it passing through the town of York, consisting of a narrow strip of land, with its ties, rails, bridges, depots, etc., ignoring the fact that it formed a part and portion of the entire system of a great railroad, would have been very absurd. Had the assessments through the entire length of the road been made upon that theory, the assessed valuations of the property would aggregate, but a nominal sum, and would result in the road, which, as a whole, is worth many millions of dollars, practically escaping taxation. Inquiries as to the value of the land for farming purposes afford very little, if any, assistance in the inquiry."

In *St. Louis Bridge, etc. R. Co. v. People*, 127 Ill. 627, 21 N. E. 348, it was held that the mere fact that railroad property was assessed at a value exceeding other railroad lines not doing so much business did not militate against the fairness of the tax, the higher valuation being based on the increased value of the property of the complaining railroad.

But in *Long Dock Co. v. State Board of Assessors*, 78 N. J. L. 44, 73 Atl. 53, affirmed

79 N. J. L. 604, 80 Atl. 1135, under a statute providing for the separate distribution of the property tax and the franchise value as an element of the property tax on second class railroad property it was held that in placing a valuation on the property of the railroad minus its franchise value, the market or money value of the property should be taken, irrespective of the use as a railroad.

In *Missouri, etc. R. Co. v. Labette County*, 9 Kan. App. 545, 59 Pac. 383, it was held that all railroad property was to be assessed as personal property. The court said: "Under section 6873, General Statutes of 1889 (Gen. Stat. 1897, ch. 158, §§ 99-101; Gen. Stat. 1899, 7212) all property used or held by a railway company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property. The statute declaring such property personal property for the purposes of assessing a tax against it, it follows that such tax must be collected as a tax upon personal property, and it is a tax due upon personal property. The legislature had the power to enact the statute declaring the right of way, road-bed and other property held or used in the operation of the railroad to be personal property for the purposes of taxation, and the ruling of the trial court was correct." To the same effect see *Leavenworth, etc. R. Co. v. Clemmans*, 14 Kan. 82.

It has been held that in appraising land owned by a railroad company but not converted to railroad uses, it should be valued as ordinary property. *Toledo, etc. R. Co. v. Lafayette*, 22 Ind. 262. So in *Northern R. Co. v. Pierce Co.* reported in full post, this volume at page 1194, it was held that a tract of land to be used as a railroad road-bed but as yet unimproved could not be valued with respect to its use for railroad purposes and that the mere fact that it formed a continuous strip of property in the hands of one owner would not entitle the assessors to value it at five or six times the value of surrounding land.

In some jurisdictions, the statutes direct that the buildings or other improvements shall be separately valued. *Pittsburgh, etc. R. Co. v. West Virginia Board of Public Works*, 172 U. S. 32, 19 S. Ct. 90, 43 U. S. (L. ed.) 354; *Cowen v. Aldridge*, 114 Fed. 44, 51 C. C. A. 670. In *Huntington v. Central Pac. R. Co.* 1 Am. L. T. Rep. N. S. 94, 2 Sawy. 503, 12 Fed. Cas. No. 6,911, it was held that by statute railroad property must be valued the same as other real estate, without regard to the uses to which it is to be put. The court said: "The statute, for some wise reason, it must be presumed, expressly requires that the interest in the land, and the improvements 'must' be separately assessed and separately equalized. This has not been

done, and these assessments could not be separately equalized, because the board of equalization would have no data in view of the mode of assessment by which it could be determined what part had been assessed to the land, or what to the improvements. In states where the statutes contain provisions similar to those in this state, defining real estate for the purposes of taxation, and as to the mode and principle of assessing real estate, as in New York, it has been repeatedly held that the railroads are taxable 'as real estate in the several towns in which such real estate is to be taxed upon its actual value at the time of the assessment, whether that value is more or less than the original cost thereof;' that 'the assessors are simply to ascertain the value of the land, and of the erection of fixtures thereon, irrespective of the consideration whether the road is well or ill-managed, whether it is profitable to the stockholders or otherwise. Such property is to be appraised in the same manner as the adjacent lands of individuals, and without reference to other parts of the railway.' *Mohawk, etc. R. Co. v. Clute*, 4 Paige (N. Y.) 395; *Albany, etc. R. Co. v. Osborn*, 12 Barb. (N. Y.) 225; *Albany, etc. R. v. Canaan*, 16 Barb. (N. Y.) 244. See also *Sangamon, etc. R. Co. v. Morgan County*, 14 Ill. 163; In re *Tax Cases*, 12 Gill & J. (Md.) 117. Decisions under different statutes of course have no application. The statute of New York, under which the decisions cited were made, gives a similar definition of real estate as that cited from the code of California, and provides that 'all real and personal estate liable to taxation shall be estimated and assessed by the assessor at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor.' St. N. Y. (1851) 333. Section 3627 of the Political Code of California is substantially the same. It provides that 'all property must be assessed at its full cash value;' and section 3617 provides that 'the term' full cash value, 'means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.' And the assessor must ascertain 'all the property in his county subject to taxation, and must assess such property to the persons who own, claim, have the possession or control thereof.' That is to say, the property in each county must be assessed in the county, without reference to property in any other county, and the value must be estimated at the amount at which that particular land and improvements thereon would be 'appraised if taken in payment of a just debt due from a solvent debtor,' if taken by itself out of its connections. For it is that portion only that can be taxed and that can be sold, in any given county. In



adopting the provisions of the statute of New York, the construction before put upon the statutes by the courts of New York must be presumed to have been contemplated. The bill alleges that the railroad and its appurtenances were not assessed or equalized upon that principle in any of the counties whose collectors are made parties; but that, on the contrary, they lumped said lands and superstructure and considered them as one thing, and ascertained their value by taking into account the franchises of said company and their value, the cost of construction, fills, embankments, tunnels, cuts, and snow-sheds, and the fact that said road extends from San Jose, in the state of California, to Ogden, in the territory of Utah—a distance of about eight hundred and seventy-five miles—and there forms a junction with the Union Pacific, and constitutes a part of a line of railways extending from the Pacific to the Atlantic Ocean, and the amount of business transacted by said plaintiff on said road, and the profits derived by said plaintiff therefrom; all of which, as complainants aver, was contrary to the rules prescribed by the statute of such state in such cases made and provided.' If this is so—and, for the purposes of this motion heard upon the bill alone, the allegation must be taken as true—the assessment was made in direct violation of the provisions of the statute. Upon the hypothesis alleged many elements were considered which the statute does not contemplate. In addition to other improper elements considered, such an assessment would be equivalent to taking the valuation of an undivided part of the whole road extending entirely across two states and a part of a territory, and in principle like the case of Sangamon, etc. R. Co. v. Morgan County, 14 Ill. 163. It would be taking into consideration value given to it by its connection with other property outside of the said counties, and even outside the state in which the assessments were made; or, in other words, assessing the entire road, including property outside of the several counties and state where the assessments were made, and then taking a proportionate part of the whole, corresponding to the number of miles of road situated in the particular county where the assessment is made. If the assessment had been made in the mode, and upon the principle prescribed by the statute without actual fraud; it would, doubtless, be incompetent for the court to inquire into any error of judgment in ascertaining the value, however gross it might be. The law has devolved upon the assessors the sole duty of determining the amount and upon the boards of equalization the duty and power of equalizing, and their determination is final, provided they act in the mode and upon the principle which the statute requires.

But they cannot depart from the mode or the principle prescribed, for when they do this, they act without authority. The court can only inquire as to whether they have pursued the statute. In this case, the allegations of the bill being taken as true, as they must be, as now presented, it is apparent that the assessment has not been made, or equalized in pursuance of the statute, either in the mode of assessment, namely, by assessing the land and improvements separately, or in the principle adopted for ascertaining the value."

The value of railroad bridges is arrived at in the same manner as other real estate and they are valued as a part of the system and not at their bare cost. Alexandria Canal R. etc. Co. v. District of Columbia, 1 Mackey (D. C.) 217; People v. Atchison, etc. R. Co. 206 Ill. 252, 68 N. E. 1059; State v. Hannibal, etc. R. Co. 97 Mo. 348, 10 S. W. 436; State v. Louisiana, etc. R. Co. 215 Mo. 479, 114 S. W. 956; Williams v. Bettie, 50 N. J. L. 132, 11 Atl. 17; Schmidt v. Galveston, etc. R. Co. (Tex.) 24 S. W. 547. Compare State v. Hannibal, etc. R. Co. 89 Mo. 98, 14 S. W. 511. In Chicago, etc. R. Co. v. Com. 115 Ky. 278, 72 S. W. 119, 24 Ky. L. Rep. 2124, it was said: "It is the contention of appellee that this bridge has a franchise value separable from the general franchise of the railway company. We think not. When a bridge is a part of one system, built and operated under one charter and owned by the same company as the railway line with which it is connected, it does not have a separate franchise value for the purpose of assessment for taxation. The whole scheme of such assessment, under our statute, contemplates the valuation of the franchises of railway companies as entireties. It was shown by the facts in this case that the State Board of Assessment and Valuation had included the earning capacity and earnings of this bridge, together with appellant's other property and earnings, in arriving at the valuation placed upon the franchises of the companies for each of the years 1895 to 1899, inclusive." And in Minneapolis St. P. & S. S. M. Ry. Co. v. Douglas Co. reported in full post, this volume at page 1199, an ore and merchandise dock was valued as an integral part of the entire system.

#### VI. Deductions.

In Coulter v. Louisville, etc. R. Co. 196 U. S. 599, 25 S. Ct. 342, 49 U. S. (L. ed.) 615, reversing 131 Fed. 282, wherein it appeared that a general undervaluation of property in a state was not extended to railroad property by the state board of valuation and assessment, but that the assessment was made in good faith, it was held that the valuation would stand. In Taylor v. Louis-

ville, etc. R. Co. 88 Fed. 350, 31 C.C.A. 537, *certiorari denied* 172 U. S. 647, 19 S. Ct. 887, 43 U. S. (L. ed.) 1182, wherein it appeared that railroad property was assessed on a twenty-five per cent higher basis than other property the assessment was held to be invalid. See also *Cincinnati v. Southern Ry. v. Guenther*, 19 Fed. 395. Compare *Illinois, etc. R. Co. v. Stookey*, 122 Ill. 358, 13 N. E. 516, 31 Am. & Eng. R. Cas. 479.

It has been declared that among other deductions to be made in fixing the amount of a railroad company's tax, was the amount paid for taxes on real estate not used for railroad purposes. *State v. New York, etc. R. Co.* 60 Conn. 326, 22 Atl. 765. It has been held that where a domestic railroad corporation acquired the property of another railroad company which was subject to certain liens, the liens should be deducted in arriving at the valuation of the property. *People v. Feitner*, 61 App. Div. 129, 70 N. Y. S. 500, *affirmed* 171 N. Y. 641, 63 N. E. 786.

## NORTHERN PACIFIC RAILWAY COMPANY

### PIERCE COUNTY ET AL.

Washington Supreme Court—January 8,  
1914.

77 Wash. 315; 137 Pac. 433.

#### Taxation — Valuation of Railroad Property.

A strip of land approximately 100 feet wide and 21 miles long, procured by a railway company for the relocation of its road, was valued at \$137,980, being an average valuation of \$1,000 per acre on land within city limits and of \$500 per acre on land outside the city limits. The average valuation of other land within the city was less than \$150 per acre and on other land outside the city less than \$40 per acre, and no shore lands similarly situated to the railroad land was valued to exceed one-third of the value placed upon the railroad land. The railroad land extended along the shore, but the company had no monopoly of shore lands, since not only were there other lands on the shore suitable for right of way purposes but, under the Deifle Act (Laws 1890, p. 301), any other railroad company could in case of necessity, require surrender of a portion of such railroad land. The state tax commissioner valued all railroad grades upon which ties were not laid at \$1,320 per mile, and an extension of the strip of land in question

into another county was there valued at this rate, and this strip in the preceding year was valued at only about one-fourth of the present valuation, though lands generally were worth more then than now. Held, that the discrepancy in the valuation of the lands was so gross as to amount to constructive fraud, and that no valuation of such strip of railroad land in excess of \$45,993.34 could stand. [See note at end of this case.]

Appeal from Superior Court, Pierce county:  
EASTERDAY, Judge.

Action to recover taxes paid under protest. Northern Pacific Railway Company, plaintiff, and Pierce County et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Geo. T. Reid, J. W. Quick, and L. B. de  
Ponts for appellant.

Lorenzo Dow and W. W. Keyes for respondents.

[316] FULLERTON, J.—In the years 1911 and 1912, the appellant, Northern Pacific Railway Company, owned a tract of land, approximately 100 feet in width and 21 miles in length, extending from a certain point in the city of Tacoma, called in the record the west portal of the Point Defiance tunnel, southerly, following near the shores of Puget Sound, to the boundary line between the counties of Pierce and Thurston. The land was procured by the railway for railway purposes; it being intended for use as a part of its right of way for the relocation of its railroad between the city of Tacoma, in Pierce county, and the town of Tenino, in Thurston county, which the company contemplated making. The land lies wholly within the county of Pierce and, for approximately one-third of the way, within the boundary lines of the city of Tacoma. For the purposes of taxation for the year 1912, the assessor and board of equalization of the county of Pierce valued the land lying within the boundaries of the city of Tacoma at an average of \$1,000 per acre, and that lying without such limits, at an average of \$500 per acre. The land at that time contained no improvements whatever, but lay in a state of nature, and was undistinguishable from the abutting and adjacent lands, save only as it may have been marked off by stakes driven to mark its general course. On the assessment roll, the land was described as parts of the several tracts from which it was originally taken, and separately assessed as such, although, as we say, at a uniform rate per acre. The assessed valuation aggregated \$137,980, on which a levy was made of \$3,272.58.

The appellant railway company conceived that the property had been grossly overvalued,

and, estimating that its actual value was not to exceed \$31,360, and that a proper levy thereon would not exceed \$737.21, tendered this sum in lieu of the assessment actually levied. The taxing officers refused to receive the amount tendered in satisfaction of the levy, whereupon the railway company paid the entire sum under protest, and thereupon instituted the present action to recover [317] back from the county the difference between the amount of the tax it concedes to be due and the amount actually paid. The lower court, after a trial, dismissed the action. This appeal followed.

If we are to consider the land in question as merely a part and parcel of the general territory of which it forms a part, the evidence discloses that it is palpably and grossly overvalued by the assessor. It was shown that, whereas, the lands of the appellant in the city limits of the city of Tacoma were valued at the rate of \$1,000 per acre, the abutting and adjoining lands, in many instances and tracts from which the right of way was taken, were assessed at from \$40 to \$300 per acre, the average valuation being less than \$150 per acre; that, outside of the city limits, while the right of way was assessed at an average valuation of \$500, the adjoining and abutting lands were assessed at from \$5 to \$165 per acre, the average valuation being less than \$40 per acre. Since it was shown that these adjoining and abutting lands were assessed at their fair value, it requires no argument to demonstrate that, if these several tracts of land forming this right of way were still in the hands of the owners from whom the appellant purchased them, they are grossly overvalued, so much so, indeed, as to require relief.

Is the land of greater value than the adjoining and abutting lands because of its single ownership, or peculiar situation? The respondent argues that it is. It does not claim, of course, that the land has any peculiar or any greater value than the surrounding lands because it is owned by a railroad company, or because it will be used for railroad purposes; but it contends that it occupies the water front of Puget Sound for the greater part of the way, and is the only feasible and practicable means of approach, with proper grades and curves, for a railroad into the city of Tacoma from the south, and as such has a special and peculiar value not possessed by the adjoining and abutting lands. It contends further, also, that there is no evidence in the record that the [318] land when considered with reference to these particular features, is grossly or excessively overvalued.

But it seems to us that these contentions are not wholly justified by the record. The strip of land in question, it is true, follows the general contour of the shores of Puget

Sound for its greater distance, but the plats introduced in evidence show that it is taken, for the greater part, from the uplands. The tracts left between the strip and the shore line are, in many instances, narrow, but they are of sufficient width for use, and no monopoly of the shore lands was acquired by the acquisition of the right of way. In this connection, it may be noticed, also, that the valuations placed upon the shore or tide lands by the assessor which were not taken by the railway company did not, in any instance to which our attention has been called, exceed one-third of the value placed on the lands of the railway company. As to this being the only feasible and practicable pass for a railway into Tacoma from the south, the only witness who was seemingly competent to give evidence on the question, a civil engineer, testified that another railroad could be built paralleling one built upon this tract of land at practically the same cost. Moreover, if the contention of the respondent that this was the only feasible route for a railway were true, the railway company first acquiring it could have no monopoly of its use. Under the act of the legislature of this state known as the Defile Act, any other railway company finding it necessary to build over the same route can compel the present owners to surrender to it a part of the right of way at all places where the necessities of the case required it. Laws 1890, p. 301; Rem. & Bal. Code, § 933 (P. C. 171 § 180c). *North Coast Ry. v. Northern Pac. R. Co.* 48 Wash. 529, 94 Pac. 112.

Since, therefore, the tract, at the time the valuation was made, was in a state of nature, unimproved in any particular, and undistinguishable from the adjoining and surrounding lands to the ordinary observer, its only claim to an enhanced [319] value is that it formed a continuous strip in the hands of a single owner. But conceding that this gives it a value in excess of the surrounding lands the title to which is in the hands of a number of owners, we cannot think the added value anywhere near equals the added value the assessor chose to put upon it. Indeed, it appears to us that discrepancy is so gross as to amount to constructive fraud. Its actual assessable value is, however, not easily determinable from the record, but we think there was evidence from which a proper value could be ascertained. In addition to showing the excess of valuation over the abutting and surrounding lands, it was shown that the state tax commission, on lands coming within their jurisdiction situated similarly to these lands, that is to say, "All railroad grades, and rights of way, upon which the ties have not been laid," had placed a uniform valuation of \$1,320 per mile, or 25 cents per lineal foot, and that the assessor of Thurston

county had placed a value on this same right of way where it extended into Thurston county at this rate. It was shown, also, that the assessor of Pierce county for the year preceding the year of this assessment had placed a value thereon of about one-fourth of the present valuation, and that lands generally in this vicinity had rather decreased than increased in value during the interim. Taking these figures as a basis, we are satisfied that no assessment in excess of \$45,993.34 should be permitted to stand.

The judgment of the court below is therefore reversed, with directions to allow a recovery of the taxes paid in excess of a tax based on an assessed valuation of \$45,993.34.

Crow, C. J., Mount, Morris, and Parker, JJ., concur.

#### NOTE.

The holding of the reported case, that a tract of land held by a railroad company and intended to be used as a railroad bed, but as yet unimproved, could not be valued, because of the fact that it formed a continuous strip of land in the hands of one owner, at five or six times the value of surrounding land, does not conflict with the general rule that railroad property must be valued as part of an entire system. For a collection of the cases discussing the valuation of railroad property for the purpose of taxation, see the note to Northern Pacific Railway Co. v. State, reported, ante, this volume, at page 1166.

#### LAKE TAHOE RAILWAY AND TRANSPORTATION COMPANY.

v.

ROBERTS.

California Supreme Court—October 5, 1914.

168 Cal. 551; 143 Pac. 786.

#### Taxation — Valuation of Railroad Property.

A steamboat in operation being a single indivisible fabric, where it is not used exclusively in the business of a railroad company, a part thereof cannot be so exclusively used within Const. art. 13, § 14, imposing a tax based on gross revenue on certain enumerated properties of railroad companies and on other property or any part thereof used exclusively in the operation of their business.

[See note at end of this case.]

#### Same.

Under Const. art. 13, § 14, imposing a tax on any property or any part thereof used exclusively in the operation of a railroad company's business, only property used exclusively or a severable part of property so exclusively used in the operation of the business can be taxed, and where property is partly used for railroad purposes the gross returns from the partial use are not an element in assessing the tax.

[See note at end of this case.]

#### Same.

That the operation of steamboats by a railroad company stimulates and increases its rail receipts and induces travel over its rails does not render the steamers taxable as property used exclusively in the operation of the railroad business within Const. art. 13, § 14.

[See note at end of this case.]

#### Same.

If St. 1911, p. 534, § 8, providing relative to the taxation of public service corporations that the operative property of the companies enumerated therein shall also include any property not enumerated that may be reasonably necessary for use by such companies exclusively in the operation and conduct of the particular kinds of business enumerated in that act, conflicts with Const. art. 13, § 14, limiting the tax on the property of railroad companies to property or any part thereof used exclusively in the operation of their business, the provision of the Constitution must prevail and the statute cannot be upheld.

[See note at end of this case.]

#### Ferries — What Is Ferryboat.

Steamers operated by a railroad company on Lake Tahoe which carry goods and passengers between California points, Nevada points and interstate points are not "ferryboats" within Pol. Code, § 3643, defining a ferryboat as a vessel traversing across any of the waters of the state between two constant points regularly employed for the transfer of passengers and freight, authorized by law so to do, and also any boat employed as a part of the system of a railroad for the transfer of passengers and freight plying at regular and stated periods between two points.

Appeal from Superior Court, City and County of San Francisco: STURTEVANT, Judge.

Action to recover taxes paid under protest. Lake Tahoe Railway and Transportation Company, plaintiff, and E. D. Roberts, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

U. S. Webb and Raymond Benjamin for appellant.

Pillsbury, Madison & Sutro, Alfred Sutro and A. D. Plaw for respondent.

[552] HENSHAW, J.—This action was brought to recover taxes paid by plaintiff under protest as having been illegally exacted. Judgment passed for plaintiff and the defendant as state treasurer appeals.

Plaintiff is a California corporation and owns a railroad running from the town of Truckee to the town of Tahoe in the state of California. At Truckee its railroad connects with the Southern Pacific railroad. It also owns four steamers which are operated on Lake Tahoe and which carry goods and passengers between California points on the lake, between Nevada points on the lake, and between interstate points on the lake. It has a traffic arrangement with the Southern Pacific Company by which rail passengers of the latter may be conveyed over the railroad of the plaintiff and upon its steamers to designated points on Lake Tahoe in either California or Nevada. It therefore publishes and files, as required by law, with the railroad commission of the state of California and with the interstate commerce commission, official tariff sheets indicating these facts and specifying its charges for transportation. The steamers are not only owned by but operated by the corporation plaintiff. Forty-five per cent of the gross receipts from the operation of the steamers is obtained from purely local traffic. In the winter months the railroad entirely suspends operations, but the steamers continue in business carrying passengers, mail, freight, and express. No part of the receipts of the steamer transportation is received as compensation for railroad service, and conversely, no part of the receipts from the railroad transportation is received as compensation for steamer service.

As required by law the plaintiff filed with the state board of equalization its report of the matters and things required for purposes of taxation for the year 1912. Subsequently, pursuant to a request of the board and under protest, it furnished a statement of its gross receipts from the operation [553] of its steamers. This consisted of the total amount of receipts from the business of the steamers beginning and ending within the state of California, and a proportion of the interstate business based upon the relation of the mileage of such business conducted within the state to the entire mileage of the interstate business as provided in section 14 of article XIII of the constitution. The board of equalization levied a tax amounting to \$908.68 against plaintiff upon the steamer earnings. Plaintiff paid this tax under protest and subsequently brought its action for the recovery thereof. The court found that the steamers were not used exclusively in the operation of the railroad business of the plaintiff, in whole or in part, and they were not and are not properly, reasonably, or at all necessary

for the use by plaintiff exclusively in the operation of its railroad business. The court therefore concluded that the steamers were not subject to taxation under the gross revenue system but were subject at the hands of local assessors to *ad valorem* taxes which they had paid.

The question thus presented is an extremely simple one, resting as it does, solely upon the meaning of the language of section 14 of article XIII of the constitution, which declares, that based upon gross revenue railroad companies shall pay a tax to the state upon certain enumerated properties "and other property, or any part thereof, used exclusively in the operation of their business in this state." The brief statement of facts above set forth shows conclusively that the steamboats of the plaintiff were not used exclusively in their railroad business, and with equal conclusiveness it shows that no severable part of the steamers is used exclusively in the operation of the business, for manifestly a steamer in operation being a single, indivisible fabric, while it may be said that it is partly used for a given purpose, it cannot be said, as the constitution declares, that "any part thereof" is so used.

But appellant argues that the tax commission which framed this constitutional provision, and the legislature which proposed it, were composed of men of experience and knowledge "who ought not to be charged even by inference with having intended when indicating the character of the property to be taxed in the manner proposed, to have deliberately used language with a view to the result that would necessarily follow" from the most natural construction of that language above [554] indicated. Therefore, appellant argues that the language does not mean what it says but does mean that if any property is *partly* used for railroad purposes, that *partial* use to the extent of its value estimated upon the business' gross returns, is subject to be thus taxed. To the inference of the experience and intelligence of the tax commission and of the legislature we may give ready assent, but it is precisely for this reason and because these constitutional provisions were thus prepared with care by men understanding the plain use of plain language that the construction for which appellant contends may not be sustained. Appellant, while arguing for the intelligence of the framers of this constitutional provision, asks us to declare that their language does not mean what it says, but something radically and essentially different from what it says. Thus, if the framers of this provision had meant that any piece of property partially used in the railroad business should be partially taxed they would have said so. But what they have said is that only property

exclusively used, or only some part of it exclusively used, should be so taxed, with the result that when not so exclusively used the old form of local taxation should still obtain. If confirmation of this meaning of plain language were required it will be found in the practical difficulties which would arise from the construction contended for by appellant, difficulties which, if that construction was ever contemplated by the framers of the constitutional provision, they would have removed by provisions of law. To illustrate, if this substituted percentage tax based on revenue is to apply to a single piece of property partly used for railroad purposes, that indivisible portion of it not so partly used must be subject to local taxation by local assessors under the strict *ad valorem* tax, or it escapes taxation altogether. How shall a local assessor assess a portion of a steamboat? What portion shall be assessed and what shall be the *ad valorem* value placed upon the portion which he does assess? All these would be practical questions under appellant's contention and would require answer at the hands of the law. The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the constitution meant what they said,—namely, that only property used exclusively, or only a severable part of property used exclusively in the operation of the business of the company, should be included in the list of property [555] whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax.

The cases uniformly so hold. Thus, in Chicago, etc. R. Co. v. Rhein, 135 Ia. 404, 112 N. W. 823, the statute declared that the railway property taxed should include all property "real or personal, exclusively used in the operation of such railway." The supreme court held that the telegraph lines of the railroad which were used in the ordinary transaction of its railroad business but which were also leased to the Western Union Telegraph Company were not exclusively used in the railroad business and therefore were not within the purview of the statute. In Herter v. Chicago, etc. R. Co. 114 Ia. 330, 86 N. W. 266, it was decided that while grain elevators, operated by a railroad, were necessary and proper in the conduct of the road, they were not exclusively used in such conduct within the taxing statute if they were used by others. And to like effect is the decision of the supreme court of Illinois in Illinois Cent. R. Co. v. People, 119 Ill. 137, 6 N. E. 451.

Further, it is argued that the steamboats are a necessary part of plaintiff's business and "to say that they are not a necessary part

is to say that plaintiff would carry as many passengers over its rails to Tahoe if no way existed for those passengers to reach other points on the lake besides Tahoe. We doubt if any one would deny that the operation of the steamboats on the lake stimulates and increases plaintiff's rail receipts and induces travel over its rails that would not be gained if Tahoe was the only destination." All this may be conceded but it is in no sense determinative of the question here, which is one of exclusive use. Thus, in Illinois Cent. R. Co. v. Irvin, 72 Ill. 452, where the precise question was whether a steamboat owned by a railroad was railroad property, it was said that "The only purpose and use of the steamboat is to facilitate and extend appellant's business as a common carrier to and from points south of Cairo," and the court declared that the boat was not railroad property and that the fact that the use of it added greatly to the revenue of the company was not relevant to prove that the boat was railroad property. In the same way the supreme court of Minnesota in Hennepin County v. St. Paul, etc. R. Co. 42 [556] Minn. 238, 44 N. W. 63, decided that a hotel owned by the railroad company on the shores of Lake Minnetonka, over ninety per cent of the guests of which came over defendant's railroad and which thus largely contributed to its business and income, bore no other relation to the operation of the railroad than did any other enterprise which might tend to improve the latter's business. And to the same effect is Milwaukee, etc. R. Co. v. Crawford County, 29 Wis. 116.

We need not be at pains to discuss the proviso in the act of the legislature of 1911 (Stats. 1911, chap. 335, subd. 8) which defines operative property. If the definition is in harmony with the language of the constitution it does not affect the discussion hereinbefore had. If the definition does violence to the language of the constitution to that extent it cannot be upheld for the definition of the constitution itself must prevail. San Diego, etc. R. Co. v. State Board of Equalization, 165 Cal. 564, 132 Pac. 1044.

That these steamers may not be classed as ferryboats under section 3643 of the Political Code is manifest from a reading of the section, as well as from the authority of Illinois Cent. R. Co. v. Irvin, 72 Ill. 452.

For these reasons the judgment appealed from is affirmed.

Lorigan, J., Sloss, J., Shaw, J., and Melvin, J., concurred.

#### NOTE.

The reported case, in construing a constitutional provision declaring a state tax on

certain enumerated property of railroad companies and other property or any part thereof used exclusively in the operation of their business in the state, holds that a steamboat used partly in the service of the railroad and partly in other service, is not to be valued as property used exclusively in the railroad business. For a comprehensive discussion of the valuation of railroad property for the purpose of taxation, see the note to *Northern Pacific R. Co. v. State*, reported, ante, this volume, at page 1166.

**MINNEAPOLIS, ST. PAUL AND  
SAULT STE. MARIE RAILWAY  
COMPANY**

v.

**DOUGLAS COUNTY ET AL.**

Wisconsin Supreme Court—January 12, 1915.

159 Wis. 408; 150 N. W. 422.

**Taxation — Valuation of Railroad Property.**

An ore dock and merchandise dock constructed by a railroad company at a lake terminal, equipped with the proper appliances "necessary" to enable the railroad to properly handle freight, constitute an integral part of the railroad system, and cannot be separated from it for the purpose of taxation, even though a considerable part of the ore dock was used to transfer ore to lake carriers; the word "necessary" meaning reasonably required in the exercise of sound business prudence.

[See note at end of this case.]

**Same.**

The taxation of an ore and merchandise dock, which are a necessary part of the terminal facilities of a railroad by local authorities, at a higher rate than the balance of the railroad's property under the ad valorem law, is a violation of the constitutional rule of uniformity.

[See note at end of this case.]

**Same.**

The exception in St. 1913, § 51.02, subsec. 7, of "ore docks and merchandise docks" from taxation under the state ad valorem law, must be held to include such docks only when they are not necessarily used by the railroad as a common carrier.

[See note at end of this case.]

Appeal from Circuit Court, Douglas county: Ross, Judge.

Action to set aside taxes levied. Minneapolis, St. Paul and Sault Ste. Marie Railway Company, plaintiff, and Douglas County et al., defendants. Judgment for defendants. Plaintiff appeals. **REVERSED.**

[409] The facts in brief are these: The appellant company owns and operates between three and four thousand miles of railroad, extending from Superior to the grain fields of Minnesota and the Dakotas, as well as the iron ranges of Minnesota and the mining regions of Northeastern Wisconsin and Michigan. In August, 1910, it obtained from the Wisconsin railroad commission a certificate of convenience and necessity, authorizing it to build its ore railroad, commencing at its then main track and extending northerly through the city of Superior to the harbor line on the southerly side of St. Louis Bay. It built this ore railroad, including the elevated structure known as the approach to the dock, and the dock itself extending into St. Louis Bay or river to the government dock line, and this dock is the dock mentioned in the complaint, and situated upon the lands there described. The dock is 1,800 feet in length, about eighty feet in height, and has 300 pockets which hold approximately 300 tons each. The railroad tracks are laid on top and the full length of the [410] dock, and it has always been owned and operated by the appellant exclusively for its own use in temporary storing and delivering of ore by it to boats, which in turn carried the ore to Eastern markets. At the time the appellant built this dock there were no other facilities at Superior which it could use for the purpose of storing, handling, or loading into lake carriers the ore which it transported. When the appellant built its railroad into Superior there were two merchandise docks there, one operated by the Great Northern Railway Company, which was insufficient in capacity to handle the business of that company, and the other operated by the Omaha Railway company, located on Allouez Bay, several miles from any point on the appellant's road. Private capital has never furnished any docks or other terminal facilities at Superior for the transfer from rail to lake or lake to rail of either ore or merchandise. The appellant constructed a merchandise dock at Superior at the north end of Connor's Point, near the Interstate bridge, it being 1,000 feet long, eighty feet wide, with a water slip on one side, and four railroad tracks, for the service of the dock, immediately adjoining the other side, and it continued to own and operate this merchandise dock and tracks laid thereto for the purpose of temporary storage of freight hauled by it over its railroad, and loaded from the dock to vessels on the water side,

and in receiving from the vessels freight coming in by water and destined to points upon the appellant's railroad.

No other use is made of the appellant's ore and merchandise docks except to receive ore and freight coming into Superior over appellant's lines and temporarily store and deliver the same to lake carriers, and to receive from lake carriers merchandise and freight destined for transportation over the appellant's railway lines, and temporarily store and load the same on cars for such transportation. The ore dock is elevated about eighty feet above the water and is furnished [411] with large pockets, the ore being dumped into the pockets, where it remains until a lake carrier is ready to receive it, when it is loaded into the carrier by gravity.

By ch. 540 of the Laws of 1911, sub. 3 of sec. 1212, Stats. (now sub. (7) of sec. 51.02, ch. 51, Stats. 1913), being the *ad valorem* railway taxation act, was amended so as to read as follows:

"3. The term 'property of the railroad company,' as used in this act, shall include all franchises, right of way, roadbed, tracks, stations, terminals, rolling stock, equipment and all other real and personal property of such company, used or employed in the operation of the railroad or in conducting its business, and shall include all title and interest in such property as owner, lessee or otherwise. Real estate not adjoining its tracks, stations or terminals; grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks and real estate not necessarily used in operating the railroad are excepted, and shall be subject to taxation like the property of individuals."

Claiming to act under this section, the city officers of the city of Superior listed the appellant's said ore dock and merchandise dock, including the lands on which they stand, for taxation, placed the same upon the assessment roll, and levied taxes thereon like other real estate in the city in the year 1912. The taxes not being paid, the lands were returned as delinquent and will be sold at tax sale unless such sale be restrained. The rate of taxation applied to the plaintiff's railroad by the tax commission for the year 1912 under the *ad valorem* railway taxation act was .01108 plus, the rate of taxation on property in the city of Superior for that year was .02678, and the said docks were taxed at that rate.

The circuit court concluded that the docks were essentially wharf property, and might be assessed and taxed separately from the railroad itself, and dismissed the complaint. From this judgment the plaintiff appeals.

*Luse, Powell & Luse, A. H. Bright and J. A. Murphy* for appellant.

*Arch'd McKay and H. V. Gard* for respondents.

*C. H. Van Alstine, amicus curiae.*

[412] WINSLOW, C. J.—The question in this case is whether the ore and merchandise docks can be separated from the balance of the plaintiff's property for purposes of taxation and subjected to a different tax rate. The answer to this question must unquestionably be in the negative, and the propositions on which that answer is based are simple.

1. The property of a public-service corporation, like a railway, including its franchises, terminals, and real and personal property, reasonably necessary to be used and in fact used in the performance of its duties to the public, is an entirety and is not to be separated for the purpose of taxation. *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Washburn v. Washburn Waterworks Co.* 120 Wis. 575, 98 N. W. 539; *Chicago, etc. R. Co. v. State*, 128 Wis. 553, 619, 108 N. W. 557.

2. Terminal facilities, such as freight houses, grain elevators, and warehouses, owned by the carrier, equipped with the proper appliances necessary to enable the railroad to perform its full duty of transportation and delivery of freight of all kinds, either to the consumer, the dealer, or a connecting carrier, constitute property necessarily used in the operation of a railroad, and hence become part of the entirety. The word "necessary" here does not mean "inevitable" on the one hand, nor merely "convenient" or "profitable" on the other, but a stage of utility or materiality to the carrier's business less than the first but greater than the latter of these expressions. Perhaps the phrase "reasonably required in the exercise of sound business prudence" would express the idea fairly well. [413] *Chicago, etc. R. Co. v. Douglas County*, 122 Wis. 273, 99 N. W. 1030; *Chicago, etc. R. Co. v. Bayfield County*, 87 Wis. 188, 58 N. W. 245; *Superior Board of Trade v. G. N. R. Co.* 1 Wis. R. R. Comm. Rep. 619.

3. Both the ore dock and the merchandise dock in the present case come within the definition given in the last paragraph and are an integral part of the appellant's railway system. The fact that a considerable art of the ore-dock structure was made necessary in order to facilitate the transfer of the ore to lake carriers does not logically divest it of its character as a railway terminal. Necessarily it is a terminal facility of a specialized character, but just as truly a terminal facility.

4. The constitutional command that the rule of taxation shall be uniform is violated if a part of the property of a railroad company reasonably necessary to be used and in fact used in the operation of the railroad, like the docks in the present case, be separated



from the balance of the property and subjected to local taxation at a higher rate than that to which the balance of the property is subjected under the *ad valorem* law. *Chicago, etc. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557.

5. The exception in sub. 3, sec. 1212, Stats. 1911 (now sub. (7) of sec. 51.02, ch. 51, Stats. 1913), viz. "grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks," must be held to include only those elevators and docks which are not a part of the railway property, because not necessarily used by the railroad in the performance of its duties as a common carrier, as are the docks in question in the present case.

By THE COURT.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff in accordance with the prayer of the complaint.

#### NOTE.

The reported case in announcing the view that an ore and merchandise dock, which is part of the property of a railroad company, should be valued as an integral part of the railroad system and not as a separate property assessable like that of an individual, while unique, conforms to the general rule with respect to the valuation of railroad property for the purpose of taxation. For a collection of cases passing on that point see the note to *Northern Pacific R. Co. v. State*, reported ante, this volume, at page 1166.

#### ILLINOIS CENTRAL RAILROAD COMPANY

v.

#### ROGERS ET AL.

Kentucky Court of Appeals—February 4,  
1915.

182 Ky. 535; 172 S. W. 948.

#### Carriers of Live Stock — Liability for Injury — Improper Loading by Ship- per.

Where a carrier furnishes a car to a shipper for the purpose of shipping live stock, and the shipper loads the live stock himself and in doing so overcrowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, though the manner of loading is discoverable if it is not actually discovered, by the carrier.

[See note at end of this case.]  
Ann. Cas. 1916E.—76.

Appeal from Circuit Court, Jefferson county; Common Pleas Branch, Third Division.

Action for damages. *Rogers et al.*, plaintiffs, and *Illinois Central Railroad Company*, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Trabue, Doolan & Cox, S. Lyman Barber and R. V. Fletcher* for appellant.

*Thomas C. Mapother* for appellees.

[535] HANNAH, J.—On February 4, 1914, in the Jefferson Circuit Court, *Rogers & Thomas* obtained a verdict and judgment against the *Illinois Central Railroad Company* in the sum of \$219.10 for damages to a shipment of livestock which was delivered by them to and accepted by the railroad company at Leitchfield on April 29, 1913, for transportation to Louisville.

It was shown in evidence by the plaintiffs that they loaded a mixed car of live stock at Leitchfield in three separate compartments; in one end of the car, some calves and sheep; in the other end, eight head of cattle; and in the middle, and separated by partitions at either end, a lot of hogs. It was further shown that on arrival of the car at Louisville two hogs were dead, one cow crippled and three or four others somewhat injured.

The duty of doing the loading was assumed by the shippers; they loaded the car themselves without assistance of any of the carrier's agents; and the agent at Leitchfield did not examine the car after it was loaded.

[536] It was shown by the crew of the train which handled the car that at Kroft's, a station some twenty-five miles from Leitchfield, they discovered that there was something wrong in the car, and made an investigation, which disclosed that one hog was dead and another badly injured; one cow was down and three or four others injured; that about fifteen hogs were in the same compartment with the cattle; that they must have been loaded that way, as the partition between the cattle and the remainder of the hogs was intact. The trainmen knocked this partition out, thus allowing all the hogs to be in the same compartment with the cattle.

1. The court instructed the jury that it was the duty of the railroad agent at Leitchfield to see that the live stock was properly loaded before receiving it for shipment; and that if they believed from the evidence that the railroad company accepted the shipment not properly loaded, but in good condition, and that the live stock was injured or damaged or depreciated in value on delivery at destination, they should find for the plain-

tiff, unless they should further believe from the evidence that such injury or depreciation was caused by the inherent nature or propensities of the animals, or was due to causes beyond defendant's control, in either of which latter events, they should find for defendant.

Appellant complains of this instruction for the reason that its effect is to impose liability upon the carrier for loss or injury due to improper loading of the car by the shipper.

Appellees insist that the instruction is proper, and cite in support of their contention the case of *Louisville, etc. St. L. R. Co. v. Southern Seating, etc. Co.* 157 Ky. 772, 184 S. W. 90. In that case, the court in illustrating what was meant by the rule that a carrier is not liable as an insurer for loss or injury caused by the act or fault of the shipper, said:

"For instance, under the fourth exception, if goods are insufficiently packed and this fact is not known to the carrier or discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence."

But, in stating the illustration quoted, the court had in mind only those instances where the goods are delivered in crates or packages to the carrier at its warehouse, there to be loaded into cars by the carrier, and not by the shipper. In such cases the weight of authority [537] is that if the improper condition is not known to the carrier or discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence. 6 Cyc. 380; 4 R. C. L. Carriers, Sec. 203; 18 Ann. Cas. 234, note; 29 L.R.A.(N.S.) 1214, note. But where the improper condition of the goods is known to the carrier or discoverable in the exercise of reasonable care in the ordinary handling and loading of the goods, and they are accepted by the carrier without qualification or dissent in respect of such condition, the carrier must handle the shipment with reference to such defective condition, and is liable for loss or injury thereto if negligent in respect thereof. *The David & Caroline*, 5 Blatchf. 266, 7 Fed. Cas. No. 3,593; *Union Exp. Co. v. Graham*, 26 Ohio St. 595.

It is well settled by the almost unanimous authorities that where the carrier furnishes a car to the shipper for the purpose of shipping live stock therein, and the latter loads the live stock himself, and in doing so he overcrowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, being caused by his own act, or by his own act in conjunction with the inherent nature, propensities and qualities of the animals themselves, the carrier not being liable for

loss or injury due to either or both of such causes. *Hutchinson on Carriers*, Sec. 333; *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961; *Ficklin v. Wabash R. Co.* 115 Mo. App. 633, 92 S. W. 347 (overcrowded sheep); *Ft. Worth, etc. R. Co. v. Word (Tex.)* 32 S. W. 14; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162 (hogs); *Texas, etc. R. Co. v. Klepper (Tex.)* 24 S. W. 567 (overcrowded horses); *Miltimore v. Chicago, etc. R. Co.* 37 Wis. 190 (wagon not securely loaded on car); *Ross v. Troy, etc. R. Co.* 49 Vt. 364, 24 Am. Rep. 144 (machinery insecurely loaded on car); *Pennsylvania Co. v. Kenwood Bridge Co.* 170 Ill. 645, 49 N. E. 215 (bridge material loaded by shipper); *Ohio, etc. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42; *Missouri, etc. R. Co. v. Belcher (Tex.)* 41 S. W. 706; *Texas, etc. R. Co. v. Edina*, 36 Tex. Civ. App. 639, 83 S. W. 253; see 6 Cyc. 381; 4 R. C. L. Sec. 203, Carriers.

There are a few respectable authorities holding the contrary view. In *Kinnick v. Chicago, etc. R. Co.* 69 Ia. 665, 29 N. W. 772, a shipper loaded a car of hogs, and they were injured because of being over-crowded [538] in the car. The carrier's agent, however, had closed the door of the car, and the court held that as there was nothing to prevent his observing the manner in which the hogs were loaded, the carrier was not relieved from the consequences of the shipper's act or fault in overcrowding the animals in the car.

In *Duncan v. Great Northern R. Co.* 17 N. D. 610, 118 N. W. 826, 19 L.R.A.(N.S.) 952, a car was loaded by a shipper with flax. The shipper closed the inside doors, and the carrier's agent closed the outside doors. While the car was en route some of the flax escaped by reason of the inside door becoming unfastened. The court said that the devices for fastening the inside doors were open to the inspection of the carrier's agent when he closed the outside doors, and were where he could not avoid seeing them if he looked at all, or even made the slightest effort to ascertain whether they were properly fastened; and upon that ground held the carrier not relieved by the act of the shipper in neglecting to fasten securely the inside doors of the car.

The *Duncan* case rests upon the *Kinnick* case, *supra*, and the case of *McCarthy v. Louisville, etc. R. Co.* 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

In the *McCarthy* case the court held that if the improper loading of the cars was apparent, that is, was a fact which addressed itself to the ordinary observation of the carrier's servants, the carrier is not relieved upon the ground that the loss or injury was due to the act or fault of the shipper.

The Duncan case also cites Union Exp. Co. v. Graham, 26 Ohio St. 595; but a fair interpretation of the opinion therein is that if the carrier receives for shipment property insufficiently packed when he might, in the exercise of reasonable care, have discovered such insufficiency, the carrier is still liable for loss or injury thereto due to his negligence.

In Gulf, etc. R. Co. v. Wittnebert, 101 Tex. 368, 108 S. W. 150, 130 Am. St. Rep. 858, 16 Ann. Cas. 1153, 14 L.R.A. (N.S.) 1227, the court said that it had found no dissent from the rule that when a consignor loads freight upon a car, the carrier which receives the car as loaded is not liable for damages which arise from a defect in the loading, but, after reviewing a number of cases, the court said:

[539] "The authorities cited and from which we have made the quotations above establish the proposition that it is not the duty of a railroad company which receives from the owner or from another railroad a loaded car to make an inspection of the manner of the loading when the defect cannot be discovered by an external examination."

However, as has been seen from the authorities cited, the great weight of authority supports the proposition that where the shipper loads the car himself, the carrier is not liable for loss or injury arising from such defective manner of loading, whether the same be discoverable or not, if not actually discovered by the carrier. The carrier has a right to assume that the shipper has loaded the car in proper manner; and it does not lie in the mouth of a shipper whose act or fault in respect to the manner in which he loaded the car has resulted in loss or injury to his property, to say to the carrier that it might have discovered such improper loading by an inspection. The shipper may not thus derive advantage from his own wrong.

For the error in the instruction noted, the appellant is entitled to a new trial, and the judgment of the lower court is, therefore, reversed.

#### NOTE.

#### Liability of Carrier of Live Stock for Injury to Stock Where Shipper Loads Stock Improperly.

General Rule, 1203.

Limitation of Rule, 1204.

Rule in Iowa, 1205.

Rule in South Carolina, 1205.

#### General Rule.

As is held in the reported case, it is established by the weight of authority that a

common carrier is not liable for injury to live stock resulting from the improper loading thereof by a shipper, who has assumed that duty. Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961; St. Louis S. W. R. Co. v. Butler, 82 Ark. 469, 102 S. W. 378; Morse v. Canadian Pac. R. Co. 97 Me. 77, 53 Atl. 874; Hunt v. Chicago, etc. R. Co. 95 Neb. 746, 146 N. W. 986; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42; Missouri Pac. R. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Texas, etc. R. Co. v. Edins, 36 Tex. Civ. App. 639, 83 S. W. 253; Houston, etc. R. Co. v. Hester (Tex.) 7 S. W. 776; Texas, etc. R. Co. v. Klepper (Tex.) 24 S. W. 567; Missouri, etc. R. Co. v. Blecher (Tex.) 41 S. W. 706. See also East Tennessee, etc. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Illinois Cent. R. Co. v. Holt, 92 S. W. 540, 29 Ky. L. Rep. 135; Ft. Worth, etc. R. Co. v. Word (Tex.) 32 S. W. 14; Betts v. Farmers Loan, etc. Co. 21 Wis. 80, 91 Am. Rep. 460. Thus in Fordyce v. McFlynn, supra, it was shown that the plaintiffs, acting under an agreement to load a circus outfit, improperly placed on a flat car a cage containing a lioness. The door thereof struck an obstruction and was torn off, permitting the lioness to escape. It was said: "By the terms of the contract, the plaintiffs undertook to furnish and load the cars for the carriage of their animals; they thereby represented themselves as competent to do the entire work of loading; and if they did it carelessly and thereby caused the injury complained of, the defendants would not be liable, although it appeared that there was a general duty resting upon the conductor to examine trains under his control and see that they were properly loaded. If such duty existed generally, its performance in this case was excused by the plaintiffs. And if the conductor, relying upon their professed competency and the careful performance of their undertaking, refrained from making the examination necessary to detect their incompetency or neglect, the carrier is not liable for injuries occasioned by either." In Missouri Pac. R. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607, the evidence showed that cattle had been loaded promiscuously by the shipper thereof without reference to age, sex, condition or size. The trial court charged the jury in substance that if the injuries to the cattle resulted from any act of the plaintiffs in overloading the cars, or from an inherent vice, etc., in the cattle, the jury should find for the defendant. In criticizing that charge because it failed to inform the jury as to the effect the improper intermingling would have on the shipper's right of recovery the appellate court said: "It is clear, we think, from the evidence above quoted that the well defined issue was raised whether the manner in which plaintiffs loaded the cars with their cattle was the cause at

least of some of the injuries sustained by them, and if so to what extent. The question having been made by the answer and the testimony before the jury, it should have been distinctly submitted to the jury in the charge. The instruction given upon this point restricted the jury in the consideration of the character of the injuries to the cattle which would absolve defendant from liability to those only arising from the 'overloading' of the cars. They might have well concluded from the charge that plaintiffs were entitled to recover for such as resulted from the 'promiscuous loading' of the cattle, as the only contributory negligence which precluded plaintiffs from a recovery tested by the charge was that growing out of the 'overloading' of the cars. This was not the correct rule in this case. Appellees were not entitled to recover for injuries, if any, resulting from the improper and promiscuous intermingling of the cattle, and the jury should have been so instructed, as requested." In *Texas, etc. R. Co. v. Edins*, 36 Tex. Civ. App. 639, 83 S. W. 253, it appeared that a shipper expressly agreed to load the stock and to release the carrier from all liability for overloading. The trial court instructed the jury that the defendant could not base its defense on the contract, because under the law of Texas the contract was invalid and it was the duty of the railroad to load live stock properly and the duty could not be shifted by contract to the shipper. Holding that this was error the appellate court said: "Conceding it to have been the duty of appellant to load the horses and that it could not have imposed this duty on appellee nor stipulated against its liability for overloading them, we yet cannot accept the view, seemingly entertained by the trial court, that appellee could not, by contract or otherwise, have assumed this duty. In prohibiting a common carrier from restricting or limiting its liability the legislature could hardly have intended to deprive the owner of live stock tendered for transportation of the valuable privilege of determining how many he would put in a car. At all events, where it is his fault, in whole or in part, that too many are crowded into one car, he would not be entitled to recover for injuries so produced, contract or no contract." In *Betts v. Farmers Loan, etc. Co.* 21 Wis. 80, 91 Am. Dec. 460, the evidence showed that the loading of certain live stock was done by the agent of the shipper. On closing the car one of the doors was found to be out of repair and this the agent fixed in a manner which he considered would make it safe. On the journey, part of the stock escaped from the car through this door. It was held that no recovery could be had for the loss thereof, for if the shipper had wished to hold the company responsible for any loss

or damage which might arise from that cause he should have notified the station agent of the unsafe condition of the door, so as to have given him an opportunity of securing it.

It has been held that where live stock is loaded under the shipper's direction by the servants of the carrier no recovery can be had for loss resulting from improper loading. *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162. In that case the evidence showed that the agent of the shippers of certain hogs on being notified after a stop on the route that it was his turn to reload directed the railroad's employees to proceed to load. The stock was put in different cars from those in which they were originally shipped and the shipper's agent while noting that they were crowded made no official complaint. It was held that the shippers could not recover for the death of the hogs from suffocation where it had been agreed that the shippers among other things would load the stock.

#### *Limitation of Rule.*

Limiting the general rule, the courts have held that a carrier is liable if by the exercise of due care after the improper loading of live stock by the shipper it could prevent injuries thereto—in other words, that while the negligence in loading excuses the carrier for injuries resulting therefrom, it does not relieve it from liability for injuries which would not occur but for the carrier's subsequent negligent acts. See *Doan v. St. Louis, etc. R. Co.* 38 Mo. App. 408; *Lake Shore, etc. Ry. v. Gibson*, 28 Ohio Cir. Ct. Rep. 538; *International, etc. R. Co. v. Pool*, 24 Tex. Civ. App. 575, 59 S. W. 911. Thus in *Lake Shore, etc. Ry. v. Gibson*, supra, wherein it appeared that a railroad company received for transportation certain hogs which were overpacked and loaded in a car with sheep and thus subjected to injury from heat, it was held that the carrier was liable for lack of care on the part of its agents in failing to sprinkle the hogs, the court saying that it understood the rule to be that when a railroad company received hogs for transportation they were bound to use due care in the transportation thereof although they were overpacked in the cars. And in *International, etc. R. Co. v. Pool*, 24 Tex. Civ. App. 575, 59 S. W. 911, the court said that where stock was overloaded by a shipper he could nevertheless recover damages resulting therefrom where it was shown that on discovering the overcrowded condition at the initial point of shipment he had immediately requested that they should be unloaded and reloaded, and the request was refused. See also in this connection, *Ft. Worth, etc. R. Co. v. Word* (Tex.) 32 S. W. 14.

In *San Antonio, etc. R. Co. v. Dolan* (Tex.) 85 S. W. 302, it was held that an agreement binding the shipper to load stock had no application where the loading was actually done by the carrier's employees. The court said: "A provision in such contract that the shipper should attend to loading and unloading at his own risk might be reasonable and valid, but it would not apply to where the carrier himself in fact assumed control of the matter of loading and unloading."

It has been held that where a shipper uses cars which are smaller or fewer in number than those agreed to be furnished and overloading results the carrier is not responsible for resulting injuries. Thus in *Ohio, etc. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291, wherein it appeared that fewer cars were furnished than were contracted for and the plaintiffs loaded their hogs therein, the court said that the defendant was not liable for damages caused by the method of loading, since that was under the shippers' control, and they were responsible for their want of judgment. *Texas, etc. R. Co. v. Klepper* (Tex.) 24 S. W. 567, it was held to be error not to allow the carrier to show that a car of stock had been overloaded regardless of whether the shipper had been given a car smaller than the one called for. The court said: "Appellant should have been allowed to prove that the car was overcrowded by having too many horses placed therein. The evidence was undisputed that appellee loaded the horses; and if he placed too many in the car, and injury resulted therefrom, he, and not appellant, would be at fault, and must bear the loss caused thereby. . . . It is no answer to say that appellee called for a 34-foot car, and was told he could only be furnished with one 33 feet long. He knew the size of the car before he undertook to load it, and, if he knew he required the longer car to contain his horses, his negligence was the greater for crowding them in the shorter." And in *Ficklin v. Wabash R. Co.* 115 Mo. App. 633, 92 S. W. 347, wherein it appeared that the defendant instead of furnishing double-decked cars as ordered provided single decked cars of shorter length, which were used by the plaintiffs, it was held that recovery of damages caused by overcrowding could not be had. The court said: "Conceding the negligence of defendant in failing to furnish the kind of cars ordered, it was the negligence of plaintiffs in knowingly overloading the cars that was the proximate cause of the killing. Plaintiffs are experienced shippers and knew before they began loading that the cars were too small for the whole shipment. They knowingly and voluntarily took the risk of overcrowding and cannot complain if the result, reasonably to have been anticipated, followed their own

want of due care." But in *Louisville, etc. R. Co. v. Rash*, 141 Ky. 225, 132 S. W. 553, it was held that where a car of a particular kind was ordered for a special purpose and that purpose was known to the carrier, the acceptance by the shipper of a car other than the one ordered and the loading of his stock therein did not prevent him from recovering damages resulting from the insufficiency of the car.

#### *Rule in Iowa.*

In *Kinnick v. Chicago, etc. R. Co.* 69 Ia. 665, 29 N. W. 772, the court held that a carrier was liable for damages resulting from overloading if it had knowledge of the condition of the car when it received it, or if in the exercise of due care it should have known thereof. It having been shown that one of the defendant's agents inspected the car, the carrier was accordingly held to be liable. In *Colsch v. Chicago, etc. R. Co.* 149 Ia. 176, Ann. Cas. 1912C 915, 127 N. W. 198, 34 L.R.A. (N.S.) 1013 *overruling* 117 N. W. 281, recovery was sought for injury to cattle while in transit on account of freezing and the defendant claimed that too many had been loaded in the car. The court said it was not running counter to the *Kinnick* case, *supra*, in holding that evidence with regard thereto should have been admitted since there was no testimony that any of the defendant's agents had inspected the car when loaded, and at most it was a question for the jury to determine under all the testimony whether the defendant knew or should have known the manner in which the stock was loaded and assumed the risks incident thereto. In *Moore v. Chicago, etc. R. Co.* 151 Ia. 353, 131 N. W. 30, the court said that even though a shipper has no cause of action where a car is overloaded or overcrowded by reason of his negligence in respect thereto, still the railroad company is not relieved from liability for its negligence in keeping the car without unloading an unreasonable length of time at a feeding station.

#### *Rule in South Carolina.*

In *Crawford v. Southern R. Co.* 56 S. C. 136, 34 S. E. 80, the rule was laid down that a railroad company cannot exempt itself from liability for injuries to live stock from overloading by executing with the shipper a contract which makes it his duty to load, the court taking the view that such a provision is nothing more than an attempt on the part of the carrier to exempt itself from negligence in the performance of its duty. The court said: "The Circuit Judge, practically, instructed the jury that notwithstanding the clause in the special contract, whereby the owner should assume the duty of loading the

cars with these animals, the defendant would still be liable for any damages occasioned by overloading the cars, because by special statute (Rev. Stat. 1893, sec. 1678), it is declared that: 'No railroad company, in the carrying or transportation of animals, shall overload the cars,' as no railroad company can claim exemption under one of the provisions of a special agreement which 'is in derogation of the mandates of the statute.' To this instruction two errors are assigned. 1st. That it is based upon an improper construction of the statute. . . . As to the first error assigned, we would remark, in the first place, that the rule is well settled that it is the duty of a railroad company, as a common carrier, to load its cars with all freight entrusted to it for transportation. . . . This is a reasonable and proper rule for the protection both of the shipper and carrier, for it must be assumed that the agents and servants of the carrier are much better acquainted with the nature and capacity of its cars, and have more skill in properly loading the cars than the shipper. This being so, it must be assumed that the legislature, in using the language found in the statute, recognizing the well settled general rule, intended to forbid railroad companies from violating this primary duty, and imposed a penalty for such violation. It is contended, however, that by the terms of the special contracts under which these animals were shipped, the plaintiff expressly agreed to assume the duty of loading the cars at his own risk, and released the defendant from any liability occasioned by injuries or losses resulting from over loading the cars. This is true, except that the plaintiff did not exclusively assume this duty, for the terms of the contract are 'that the said owner and shipper is to load, transfer and unload said stock (with the assistance of the company's agent or agents) at his own risk;' and the testimony tends to show that the plaintiff was assisted by the agents of the company in loading the cars. But waiving this, and assuming that the cars were loaded exclusively by the plaintiff, his servants or agents, the practical question presented is whether a common carrier—a railroad company—can relieve itself from liability for damages resulting from injuries to or losses of cattle entrusted to it for transportation, occasioned by overloading the cars in which such cattle was being transported, by such a special contract as that relied upon in this case. It is not and cannot be denied that, in this State at least, a common carrier may, by special contract, limit his common law liability, provided always that he does not thereby undertake to exempt himself from liability for his own negligence. . . . So that the inquiry is narrowed down to the question whether the provisions in

these contracts, exempting the defendant from liability for the consequences of overloading the cars, is not, practically, an attempt to exempt itself from liability for its own negligence. If, as we have seen, it is the primary duty of the carrier to load freight of any kind entrusted to it for transportation; and if, . . . the liability of a common carrier is not affected by the fact that the car is loaded by the owner of the goods entrusted to it for transportation, for upon him rests the duty to see that the packing and conveyance are such as to secure its safety, and the consequences of his negligence in these particulars cannot be transferred to the owner of the property, it would seem to follow, necessarily, that the provision in these contracts exempting the defendant from the consequences of overloading the cars, is an attempt to exempt defendant from liability for negligence in performing its own duty, and cannot, therefore, avail the defendant anything, even if there were no statute forbidding a railroad company from overloading its cars with live stock."

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### MACAULAY

v.

### SCHURMANN ET AL.

Hawaii Supreme Court—May 29, 1914.

22 *Hawaii* 140.

#### Limitation of Actions — Part Payment — Tolling Statute — Payment by One of Several Makers.

A payment of interest on a past due note by one of two makers without the knowledge or consent of the other will start the statute of limitations running anew as to the latter. [See note at end of this case.]

Error to Circuit Court, First Circuit.

Action on promissory note. John Macaulay, plaintiff, and F. Schurmann et al., defendants. Judgment for plaintiff. Defendant named brings error. The facts are stated in the opinion. **AFFIRMED.**

*J. Lightfoot* for plaintiff in error.

*Holmes, Stanley & Olson* for defendant in error.

[141] ROBERTSON, C. J.—In an action of assumpsit upon a promissory note the defendant-in-error, who was the plaintiff below, recovered a judgment which the plaintiff-in-

error, Schurmann, seeks to have reversed. The note, which was for \$500, was the joint and several one of the plaintiff-in-error and one McManus, executed in California on September 18, 1907, and due six months after date. The defense was the statute of limitations. Payments endorsed on the note were as follows: January 15, 1908, interest to December 18, 1907, \$10; April 6, 1909, interest to February 18, 1909, \$52; January 7, 1911, interest to January 3, 1911, \$84.39; January 7, 1911, on account of principal, \$15.61; August 20, 1911, interest to April 3, 1911, \$9.66. The first payment of interest was made by the plaintiff-in-error, who, a few months later, left California and arrived in Hawaii in July 1908. The other payments were made by McManus without the knowledge or authorization of the plaintiff-in-error, though the latter had supposed that McManus had paid the note. The action was commenced on September 23, 1912.

The question to be determined is the much discussed one as to whether a payment made by one joint obligor on account of the principal or interest on a debt will start the statute of limitations to run afresh as to a co-obligor. Our statute provides that actions for the recovery of any debt founded upon any contract, obligation or liability, excepting such as are brought upon the judgment or decree of some court of record, shall be commenced within six years next after the cause of action accrued (R. L. Sec. 1971) but that where the cause of action has arisen in any foreign country action upon it shall be commenced within four years after it accrued (R. L. Sec. 1976). The action against Schurmann, therefore, was barred unless the payments made by McManus served to toll the statute. "Payment of interest is, of course, evidence that the [142] principal is owing up to the date to which the interest is reckoned." *Warren v. Nahea*, 19 *Hawaii* 382, 384.

In *Whitcomb v. Whiting*, 2 *Dougl. (Eng.)* 652, decided in 1781, it was held in the absence of fraud payment of interest by one of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others, Lord Mansfield saying "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." That case was criticized by Lord Ellenborough in *Brandram v. Wharton*, 1 *B. & Ald.* 463, though he admitted its authority, and it remained the accepted rule in England until changed by statute. *Burleigh v. Stott*, 8 *B. & C.* 36, 15 *E. C. L.* 151; *Wyatt v. Hodson*, 8 *Bing.* 309, 21 *E. C. L.* 301. Lord Tenterden's Act,

passed in 1828, limited the effect of written acknowledgments and new promises to the parties making them, and contained the proviso that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The rule as to payments was completely changed however by the Mercantile Law Amendment Act of 1856 (19 and 20 *Vict. c. 97*) which provided that no co-contractor or co-debtor, whether bound jointly only or jointly and severally with others, shall lose the benefit of the statute of limitations so as to be chargeable by reason only of the payment of any principal or interest by another or others of such co-contractors or co-debtors. Of the early decisions in this country some followed the rule laid down in *Whitcomb v. Whiting* while others repudiated it as being unsound. In *Wood on Limitations* (3d ed.) Sec. 285, it is said that "The doctrine of *Whitcomb v. Whiting*, that an acknowledgment, new promise, or payment, made by one of two or more joint contractors, will remove the statute bar as to all, has practically but little force at the present day, as in many of the States the legislature has expressly overridden it by providing that [143] no acknowledgment, promise or part payment made by one joint debtor shall deprive the others of the benefit of the statute; while in others the same result is practically reached by a provision that no acknowledgment or promise shall be sufficient to revive a debt, unless it is made in writing, under the hand of the party to be charged thereby; and in others, the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes. Especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States Supreme Court; while in Connecticut, New Jersey, Rhode Island and Delaware the doctrine of *Whitcomb v. Whiting* is still adhered to. It is not necessary to discuss the accuracy of this doctrine, as it has been attacked and also sustained by some of the ablest judges in this country; and the judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine is best evidenced by the circumstance that it has been nearly obliterated by legislative and judicial action." In a note the author names thirty-two States in which the law has been settled by statutory enactment. The United States Supreme Court case referred to by the author is that of *Bell v. Morrison*, 1 *Pet.* 351, 7 *U. S. (L. ed.)* 174. The case arose in Kentucky and the question was whether the acknowledgment of a debt by one partner, after a dissolution of the co-

partnership, was sufficient to take the case out of the statute of limitations as to the other partners. It was held that it was not. Mr. Justice Story, delivering the opinion, said that Lord Mansfield's reasoning in *Whitcomb v. Whiting* was "certainly not very satisfactory;" he pointed out that the "English cases decided since the American revolution, are, by an express statute of Kentucky, declared not to be of authority in their courts;" that in Kentucky the question was "quite open to be decided upon principle;" that a review of the Kentucky decisions led to "the most serious doubts, whether the state courts of Kentucky [144] would ever adopt the doctrine of *Whitcomb v. Whiting*;" and concluded by saying that "this opinion thus expressed is not unanimous, but of the majority of the court; and as it is apparent, from the preceding reasoning, it has been principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject." In the case at bar, however, we are confronted by section 1 of the Revised Laws providing that "The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." On behalf of the plaintiff-in-error it is contended that the trend of cases heretofore decided by this court is such as to require us to adopt the modern doctrine, but we find no case in our reports which can be regarded as a precedent in the decision of the question involved here. The legislature of this Territory having seen fit not only to pass a statute such as has been acted in England and so many of the States but to expressly enact the common law (with exceptions which do not apply here) we have no option but to apply the rule of the common law. In ascertaining what the common law is we are to consult American as well as English decisions. *Ena Estate v. Ena*, 18 Hawaii 588, 591. And, as pointed out in *Dole v. Gear*, 14 Hawaii 554, 561, the common law consists of principles and not of set rules and admits of different applications under different conditions, but none of the considerations referred to by Chief Justice Frear as reasons for preferring the modern view to the old one on the question there discussed apply here. The English act of 1856 is, of course, too recent to be regarded as a part of the common law. *Matter of Craig*, 20 Hawaii 447, 450. In *Cowhick v. Shingle*, 5 Wyo. 87, 95, 37 Pac. 689, 63 A. S. R. 17, 25 L.R.A. 608, the court said: "As a rule the term 'common law' means both the common law of England

as opposed to statute or written law, and the [145] statutes passed before the emigration of the first settlers of America. And applying this definition to the matter in hand, I am unable to perceive that there is any 'common law' rule upon the subject. At common law there was no limitation as to time upon the right to bring a personal action. Such limitations are and always have been pure creations of the statute, and the rule contended for is a rule which grew up and developed in the construction of the statute of 21st. James 1, and in no other way. It was first announced in 1781 by Lord Mansfield in *Whitcomb v. Whiting*, and, while any statement of the law made by that great judge is entitled to great weight and respect, his declarations even as to the common law are simply persuasive authority." We are unable to take that view of the matter. The decision in *Whitcomb v. Whiting* did not turn upon the construction of the statute of limitations but upon a principle of the law of contracts. That this is so appears from the discussions in case in which Lord Mansfield's reasoning has been disapproved. Thus, in *Bell v. Morrison*, supra, Justice Story said "It assumes that one party who has authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very often constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. . . . A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when acknowledgment was made." 1 Pet. 368, 7 U. S. (L. ed.) 174. See also *Van Keuren v. Parmelee*, 2 N. Y. 523, 527, 51 Am. Dec. 322. And so in the case at bar, although the [146] ultimate question to be decided is whether the defense of the statute of limitations can be sustained, the determination of that question depends entirely upon the preliminary but vital question as to whether in contemplation of law the payments which were made upon this note by McManus amounted to an acknowledgment of or a promise to pay the debt by the plaintiff-in-error, for the law is that a payment by one maker of a promissory note affects his co-maker to such extent then the defense relied on has failed. The latter question is



one of contract—of agency—and obviously does not involve the construction or application of any provision of our statute of limitations. It seems to be generally conceded that *Whitcomb v. Whiting* determined the common law on the subject. In *Brown v. Hayes*, 146 Mich. 474, 476, 109 N. W. 845, the court said "At the common law, according to the weight of authority, a payment by one jointly bound was, unless the statute established a contrary rule, sufficient to prevent the running of the statute. The leading case is *Whitcomb v. Whiting*, 2 Dougl. 652. This was followed in *Wyatt v. Hobson*, 8 Bing. 309, 21 E. C. L. 301, which latter case was cited by Mr. Justice Cooley in *Mainzinger v. Mohr*, 41 Mich. 685, as establishing the common-law rule first enunciated in *Whitcomb v. Whiting*." And in *Cross v. Allen*, 141 U. S. 528, 535, 12 S. Ct. 67, 35 U. S. (L. ed.) 843, the court said "At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute, served to keep the debt alive, both as to himself and the surety. . . . This is the rule in many of the States of this Union—in all, in fact, where it has not been changed by statute."

However much we may prefer the rule prescribed by modern legislation, we hold that the common-law rule must control and that the payments of *McManus* which were made within the period of limitation prevented the statute from running in favor of the plaintiff-in-error.

Judgment affirmed.

[147] *QUARLES, J. (dissenting)*.—Being unable to agree with the reasoning and conclusion of my associates, it is my duty to set forth the reasons which prevent me from so doing. The majority opinion is based upon the idea that one of two joint obligors is the agent of the other for the purpose of all things connected with the obligation common to both, and may, expressly or impliedly make a new contract binding both, renewing or continuing the old obligation; that part payment of one, even though made without the knowledge, consent, or express authorization of the other, is an acknowledgment of the debt, and that from this acknowledgment the law implies a promise on the part of both, to pay the balance of the debt. Much discussion has been had in regard to the cause of action in such cases, but the settled rule is that in assumption upon an obligation upon which an action has not been brought within the statutory period, but upon which the bar has been removed or suspended by a new promise, that the action must be upon the new promise. This new promise is either express, as where the debtor makes a new promise to pay; or it is implied, as where the debtor by unequivocal ac-

knowledge admits the existence of the debt, and his liability therefor, in which case the law implies a promise on his part to pay. Part payment is universally held to be such an acknowledgment as to justify the implication of a new promise, unless it is made under such circumstances as repel the presumption. The English statute adopted early in the seventeenth century (James I, c. 16) limiting the time within which certain personal actions could be brought, was, at first, interpreted and enforced by the English courts in accord with its letter and intent. Later the statute grew in disfavor, and the [148] English courts seized upon every possible pretext to take cases out of the statute and thereby avoid the operation of the statute. Such was the condition in England at the time of the decision in *Whitcomb v. Whiting*. That decision resulted in so much fraud and hardship, that long prior to the adoption of the English common law in Hawaii, Parliament was forced to enact legislation abolishing the rule announced by Lord Mansfield in that case. It has for many years, both prior and subsequent to January 1, 1893, been the settled policy of our courts to give force and effect to the statute, and to regard it as a statute of repose perforce of which a cause of action was destroyed, unless brought within the prescribed time, or unless there has been a new promise within the prescribed time which will support the action. In *Bell v. Morrison*, 1 Pet. 351, 7 U. S. (L. ed.) 174, this policy is well stated, and the American rule which gives force and effect to the statute of limitations, and frowns upon evasions of it on technical grounds, is well illustrated. The decision in *Whitcomb v. Whiting* was condemned, its reasoning shown fallacious, and a rule contrary thereto was announced in the last named case by the Supreme Court of the United States. The court there said, referring to the decision of Lord Mansfield in *Whitcomb v. Whiting*: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes, that one party, who has authority to discharge, has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now this very position constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. If such payment were made, after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint

debt, [149] pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt; and therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all; the one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgment was made." As early as 1865, the supreme court of Hawaii, in *Pustau v. Rixman*, 2 Hawaii 730, said: "The tendency of modern legislation, we believe, in all commercial states, is rather to shorten than to extend the limit as to time, within which actions of any kind may be maintained, with a view to further the speedy settlement of controversies, to give additional facility to transactions affecting the possession and transfer of property, and to promote that repose which is the chief object of all such legislation. That case was an action upon a merchant's account, and the court held that the statute of six years applied, although merchants' accounts were not named in the statute. The court also held that payments by an assignee to whom the debtor had made a deed of conveyance of his property for the purpose of paying his debts, did not remove the bar of the statute, nor take the case out of its operation. The principle, and reasoning of that case, are contrary to the rule announced in the majority opinion, in my view of the same. In *Ahlo v. Tai* [150] *Lung*, 9 Hawaii 272, the same question arose. The debtor had made an assignment for the benefit of his creditors, expressly authorizing the sale of his property and the payment of the proceeds to his creditors, yet the payments made by such assignee were held not to be payments by him, although the grounds for holding that the relation of principal and agent existed are far stronger than in the case of co-obligors or joint contractors, and no new promise was implied. The court quoted with approval from a number of cases, directly in line with my view of the proper rule to be applied, among others that of *Campbell v. Baldwin*,

130 Mass. 200, as follows: "The ground upon which a part-payment is held to take a case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment. In the case at bar the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate and to appropriate the proceeds to the payment of the mortgage debt. But this cannot fairly be construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations." Among other cases cited in *Ahlo v. Tai Lung*, supra, appears that of *Stoddard v. Doane*, 7 Gray (Mass.) 387, where the debtor in a schedule accompanying his assignment mentioned his creditors, and his assignee in accordance with the authority given him, made payments, and it was held that he was not the agent of the assignor, quoting as follows: "To have this effect (of a new promise) it is manifest that the payment must be made by the debtor, or by his order, or by an agent fully authorized for the purpose. It is an act of his mind, from which the implied promise to pay the residue of the debt arises. We are of opinion that a payment by an assignee in insolvency is not a payment by the insolvent or his order, within the [151] meaning of this rule. The assignee is bound by law to pay the dividend which has been declared, he is the debtor to that amount. The original debtor cannot delay or prevent such payment, if he would. It is not a personal or voluntary act of the insolvent." The settled policy of this court and of the United States Supreme Court, and other courts, to give force and effect to the statute of limitations, in line with what has been the settled policy of the courts of England, at different times, without evasion, is well illustrated in the decision in *Harris v. Clark*, 18 Hawaii 569, wherein this court cites *Moore v. Columbia Bank*, 6 Pet. 86, 92, 8 U. S. (L. ed.) 329; *Wetzell v. Bussard*, 11 Wheat. 309, 6 U. S. (L. ed.) 481; *Shepherd v. Thompson*, 122 U. S. 321, 7 S. Ct. 1229, 30 U. S. (L. ed.) 1156, and quotes with approval from *Bell v. Morrison*, supra, where it was held that if there was no express new promise to pay, but one is to be implied from an acknowledgment, the acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is willing to pay. This last decision of this court cited is out of joint with the decision and reasoning in *Whitecomb v. Whiting*. In my opinion there is more reason for holding that

the assignee, under such circumstances, is the agent of the assignor, than to hold that defendant McManus was the agent of Schurmann, under the facts of the case at bar. How can it be reasonably said that payments by McManus, made without the knowledge or consent of Schurmann, were "voluntary payments" made by Schurmann? or that it was an act of his mind? or his assent to such payments? The rule announced in *Whitcomb v. Whiting* was based upon a mere fiction of law, ignored the real relation existing between joint obligors, and presumed knowledge and assent on the part of all for the acts of another, whether known or unknown. This is contrary to the settled policy in this jurisdiction, both prior and subsequent to January 1, 1893, in my opinion. I am also of the opinion that good reasons for not evading the statute in this jurisdiction are set forth and shown in the decisions in *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L.R.A. 608, in [152] *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, and in many other American authorities.

The opinion of the majority rests solely upon the theory that by section 1 of the Revised Laws which became operative January 1, 1893, the rule laid down in *Whitcomb v. Whiting* was adopted. I cannot take that view. The statute makes certain exceptions, those relating to settled policies, as well as precedents, in this jurisdiction. Even in the United States, where the laws of England were inherited, the common law in its entirety, was not adopted. "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them from the mother country its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their needs and suitable to their situation and circumstances." (6 Am. & Eng. Enc. of Law (2d ed.) 286, and numerous decisions cited in note 3.) Analogous questions have been decided in this jurisdiction. Keeping in mind the settled policy of giving force and effect to the statute of limitations in this jurisdiction and throughout the United States; that pretexts for its evasion are not tolerated; that unless an action is commenced within the statutory period for its limitation, there must be a new promise, express or implied, by the debtor, to which his mind has assented, something voluntarily and consciously done by him evincing an intent to recognize and pay the obligation, and we are assisted in determining whether the legislature in adopting section 1 of the Revised Laws intended to overturn this settled policy, by rulings of this court, and its predecessors, upon other questions involving the principle.

In *Henrique v. Paris*, 10 *Hawaii* 408, speaking of certain principles of the common law, and in passing upon their adoption, or non-adoption by said statute, the court said: "There is not now and here the necessity that there was in England in the middle ages for laws against champerty and maintenance to prevent stirring up of suits for purposes of oppression, nor [153] any reason why a landlord should not convey his estate without the consent (attornment) of his tenant. Freedom, rather than restraint of alienation is required under present conditions. The reasons for this rule having ceased, the rule itself should also cease." To the same effect are the decisions in *Mossman v. Hawaiian Government*, 10 *Hawaii* 421, and in *Van Gieson v. Magoon*, 20 *Hawaii* 146.

In *Rooke v. Queen's Hospital*, 12 *Hawaii* 375, the court, at pp. 379, 380, to my mind, gives good reasons why it should now be held that the rule laid down in *Whitcomb v. Whiting* was not adopted, in that the said rule is contrary to our settled policy, out of joint with the times, and not supported by our precedents. The court there, *inter alia*, said: "In England, the country of their origin, rules of property and of construction such as are likely to be involved in cases of this kind, even though they may have grown up under conditions that no longer exist, are adhered to with great rigidity, rules of construction often being given almost the fixity of rules of law. But in the United States the tendency is to reject what are considered rules of property in England if out of joint with the times, and to suffer rules of construction to yield readily to the manifest intention of the testator. . . . Hawaiian legislation, judicial decisions and national usage prior to the taking effect of the statute (Sec. 1. R. L.) in question, January 1, 1893, undoubtedly followed the American tendency towards flexibility and adaptability to present and local conditions, rather than the English example of rigidity. See for example, *Thurston v. Allen*, 8 *Hawaii* 392. There exists even greater reasons for departure from or failure to adopt English technical rules and precedents here than in the United States. And since the enactment of that statute (Sec. 1, R. L.) the previous rejection of certain material parts of a system has been regarded as amounting to a rejection of other parts."

In *Branca v. Makuakane*, 13 *Hawaii* 499, at page 500, is found the following: "The question is whether the technical [154] rule of the common law which usually required the use of the word 'heirs,' and allowed no substitute therefor, however clear the intention might be, to carry an estate in fee simple, should be allowed to override the manifest intention of the parties. . . . The rule

was a relic of the feudal system and grew up under conditions that no longer exist in England and never existed in these islands as it did in England. It is now regarded as purely technical, and its chief effect seems to be to defeat the intention of the parties. Accordingly it has been modified or repealed by statute in England, the home of its origin, and in nearly all of the States and Territories of the United States." Judge the rule announced in *Whitcomb v. Whiting* by the same standard, and it might well be said of it, that it is *technical*, that its chief effect is to defeat the object, purpose and operation of our statute of limitations; and, that it was repealed in England, the home of its birth, more than half a century ago; and, is has been repudiated in nearly all of the States and Territories of the United States.

Section 1 of the Revised Laws was construed in *Dole v. Gear*, 14 Hawaii 554. This court, at page 561, said: "One of the exceptions named in the statute is that the common law shall not apply when it is 'otherwise expressly provided by the Hawaiian . . . laws.' We have just held that the statute that confers jurisdiction 'according to the usage and practice of courts of equity' does not require such usage and practice to be ascertained by reference to decisions at any particular period of time in the past or in England to the exclusion of the United States. Is not this, therefore, a case in which it is 'otherwise expressly provided by Hawaiian Laws' within the meaning of the exception named in the statute adopting the common law? There is much reason to believe that it is. But, assuming that it is not, still we are not bound by the old English rule for the following reasons. The common law consists of principle and not of set rules. It therefore admits of different applications under different conditions. Moreover by the [155] terms of our statute it is to be ascertained by American as well as English decisions. In *Morgan v. King*, 30 Barb. (N. Y.) 9, the court, in construing a somewhat similar statute, said (at p. 13): 'The adoption of the common law, in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules, and without regard to local circumstances, however well settled and generally received those rules might be. Its rules are modified upon its own principles, not in violation of them' and (at p. 14) 'when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England; and we have adopted it as a constantly improving science,

rather than as an *art*; as a system of *legal logic*, rather than as a *code of rules*. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.' See also *Bouvier*, Tit. Com. Law. In *Sayward v. Carson*, 1 Wash. 29, in construing a similar statute the court said (at p. 40): 'But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America they [156] have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore, we have 'common law' as declared by the highest courts of this, that and the other state, and by the courts of the United States, sometimes varying in each. And we understand, by § 1 of the code, that where there are no governing provisions of the written laws, the courts of the late territory, and of this state, are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law: but not that the decisions of the English courts are to be taken blindly and without inquiry as to their reasoning or application to the circumstances.'" This court then proceeds to show that when conditions change that the rules of the common law must give way by modification or abrogation.

In my opinion, the decision in *Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 U. S. (L. ed.) 843, should not be followed, for the reason that it is at variance with "our national usage" and not adapted to our circumstances. Moreover, what is said in that decision in regard to Lord Mansfield's rule, is *obiter dictum*, being unnecessary to a decision of the case. That was a suit in equity to foreclose a mortgage given by Cross and wife upon property, some of which belonged to the husband, and some to the wife. Suit was

brought after the statutory period had elapsed, the wife had died, and it was sought to remove the bar by certain payments made. The wife was not personally bound, not having signed the note. The court held that the mortgage was a mere incident to the debt, and subsisted as long as the debt did, which is, evidently, the correct rule. The case was evidently decided under the Oregon statute, quoted in the opinion, where it is expressly provided that the statute runs only from the date of the last payment, and the United States Supreme Court must have given to the said statute the same interpretation given to it by the Supreme [157] Court of Oregon in *Partlow v. Singer*, 2 Ore. 308, and other Oregon cases.

There is nothing in the record showing that the defendant Schurmann, plaintiff in error, ever acknowledged the existence of the debt, voluntarily made any payment thereon, or promised to pay same, within four years next preceding the commencement of this action. In my opinion the judgment, sought to be reviewed, should be reversed.

#### NOTE.

The reported case holds that a part payment by one of two joint and several debtors starts the statute of limitations running anew as to the other though the payment is not known to or authorized by the latter. The question is one on which the decisions rendered in the absence of a controlling statute are almost equally divided. The cases are reviewed in the note to *Monidah Trust v. Kemper*, Ann. Cas. 1912D 1326.

#### CONNELLSVILLE AND STATE LINE RAILWAY COMPANY

v.

#### MARKLETON HOTEL COMPANY.

Pennsylvania Supreme Court—January 11,  
1915.

247 Pa. St. 556; 93 Atl. 635.

#### Railroads — Implied Powers.

The omission of a particular power from those enumerated in the charter of a railroad is a prohibition against its exercise, unless there is an imperative implication to the contrary.

#### Power to Condemn Water.

A railroad company, chartered under the general railroad laws of the state, cannot, in

the exercise of its right of eminent domain, condemn for corporate purposes the waters of a stream over which it has constructed its roadbed on a right of way acquired by condemnation; such right not being conferred, either by Act Feb. 19, 1849 (P. L. 79), or by Act April 9, 1856 (P. L. 288).

[See note at end of this case.]

Appeal from Court of Common Pleas, Somerset county: RUPPEL, Judge.

Eminent domain proceedings. Connells-ville and State Line Railway Company, petitioner, and Markleton Hotel Company, defendant. From order refusing to approve bond, petitioner appeals. The facts are stated in the opinion. **AFFIRMED.**

*Chas. F. Uhl, Jr.* and *Chas. H. Haly* for appellant.

*Francis J. Kooser, Ernest O. Kooser, James E. Barnett, Richard B. Soandrett* and *T. C. Noble* for appellee.

[566] *MESTREZAT, J.*—The Markleton Hotel Company, the defendant, is the owner of a tract of land containing 158 acres in Somerset County, Pennsylvania, fifty-four acres of which lie [567] adjacent to and on the east side of the Casselman river. The hotel buildings are on the part of the tract lying on the west side of the river. A small stream, known as Iser's run, flows through the fifty-four acre tract and empties into the Casselman river. Some of the water of this stream is conveyed across the river to the hotel by a pipe which enters the stream some distance from its confluence with the river, and is used for domestic purposes by the hotel company. The Connellsville and State Line Railway Company, the plaintiff, was incorporated under the general railroad Acts of Feb. 19, 1849, P. L. 79, and April 9, 1856, P. L. 288, to construct a railroad through the counties of Fayette and Somerset in Pennsylvania. It located and has constructed its road along the east side of the Casselman river through the defendant company's land, the bed of the railroad passing over Iser's run, a short distance from the point where it enters the Casselman river. The right of way was condemned and the damages to the Markleton Hotel Company were ascertained in condemnation proceedings. The railway company then undertook to use some of the waters of the run, claiming to have acquired the right to do so as riparian owner, by virtue of the condemnation proceedings. The hotel company filed a bill in equity to restrain the railway company from using the waters of the run, and the action of the court below in sustaining the bill was affirmed by this court: *Markleton Hotel Co. v. Connellsville, etc. R. Co.* 242 Pa. St. 569,

89 Atl. 703. Thereupon the railway company claiming the right under the Acts of 1849 and 1856, to appropriate "the water of Iser's run as it flows over defendant's property from a point within the limits of its said right of way to the confluence of the run and the Casselman river," tendered a bond to the defendant company to secure the damages which it might sustain by reason of such appropriation, and it being refused by the defendant, the bond was presented for approval to the court below. The defendant objected [568] to the approval of the bond on the ground that the railway company was without right, under the laws of Pennsylvania, to appropriate the waters of the stream. The court below sustained the exception and refused to approve the bond. The railway company has taken this appeal.

The question in the case is whether a railroad company chartered under the general railroad laws of the State, in the exercise of its right of eminent domain has authority to condemn for its corporate purposes the waters of a stream over which it has located and constructed its roadbed on a right of way acquired by condemnation proceedings.

There are certain fundamental principles which should not be overlooked in construing the charter of a corporation. If a particular power is omitted from those enumerated in the charter it is to be taken as a prohibition against its exercise unless there is an imperative implication of its inclusion: *Groff's Appeal*, 128 Pa. St. 621, 18 Atl. 431, 5 L.R.A. 661. What is not given by express words or by necessary implication is withheld. In *Com. v. Erie, etc. R. Co.* 27 Pa. St. 339, 351, 67 Am. Dec. 471, we said more than half a century ago: "That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. . . . If you assert that a corporation has certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful, is decisively certain against the corporation." This has been repeated time and again and it may be regarded as the settled doctrine of this court in the interpretation of charters granted to corporations.

If we understand the position of the railway company, it is that the right to appropriate the water is granted by necessary implication in the Act of February 19, [569] 1849, P. L. 79; but if that act did not grant the power, it was conferred by the Act of April 9, 1856, P. L. 288. We think the position is untenable, and that there is nothing contained in either act which authorizes the

railway company to condemn the waters of a stream for the use of its engine or for any other corporate use.

The Act of 1849 empowers a railway company, chartered under its provisions, to locate such route for its road as may be deemed expedient, not to exceed sixty feet in width except at deep cutting or high embankments, and thereon to construct a railroad with the necessary sidings. It authorizes the company to enter upon the land on which the road may be located and to construct the road thereon, and for that purpose to take stone or other suitable material necessary for the construction of bridges, viaducts or other buildings which may be required for the use, maintenance or repair of the railroad. This is substantially the authority which the Act of 1849 confers upon a railroad company in the location and construction of its road. It empowers the company to enter upon land and appropriate it for the construction and maintenance of the physical road and necessary sidings and appurtenant buildings. It also confers power upon the company to take materials from adjacent lands for the construction of bridges and viaducts. It is apparent, therefore, that in the enactment of the Statute of 1849 the only purpose of the legislature was to confer upon railroads the authority to appropriate land and material for the location and construction of the roadway. There is nothing in the act which, properly construed, indicates an intention on the part of the legislature to confer authority on the railroad company to appropriate water for use in the operation of the road. The act contains no provision which leads to the conclusion that such was the legislative intent. Neither by express words nor by necessary implication is authority given to a railroad company to appropriate anything whatever for use in the operation of the road. [570] If the plaintiff's contention be correct that the act confers authority to appropriate water for corporate purposes, the same rule must be applied as to everything else which may be used in operating the road. The authority could be invoked to appropriate for a like purpose coal, oil and gas which could be utilized in the operation of the road. Some of these are as necessary as water in producing steam, and if water may be condemned for corporate purposes there is no sound reason for denying the right under the Act of 1849 to appropriate coal, oil or gas. In no reported case does it appear that it was ever contended that the act should be so interpreted, although the statute has been in force far beyond half a century.

That the Act of 1849 did not confer authority to condemn water for railroad purposes seems to have been the view entertained by

the legislature as to another and similar act. The authority to condemn is alleged to be contained in the 10th section of the act which is identical with section 11 of the Act of April 13, 1846, P. L. 312, incorporating the Pennsylvania Railroad Company except the latter act also provides that appropriations may be made for maintenance or repair of the road. It is clear that if the Act of 1849 conferred authority on railroad companies to appropriate waters of a stream for use in operating a railroad, that a like authority was invested in the Pennsylvania Railroad Company by the Act of 1846. It has never been contended, however, so far as we are advised that the Pennsylvania Railroad Company ever claimed that its charter conferred upon it the right to condemn waters for use in the operation of its trains. It is not too much to say, that if such right existed, or had ever been suspected to exist, the company would have invoked the authority in securing water for its corporate uses. It neither claimed nor attempted to exercise the authority, and in effect conceded that the power did not exist under the Act of 1846 but had the Act of 1849 passed giving the company the right to appropriate and condemn water for such use.

[571] The Act of 1856 does not aid the plaintiff's contention that it possesses the power to condemn water for the operation of its road. The act purports to be a supplement to the Act of 1849. The first section construes the Act of April 27, 1855, P. L. 365, entitled "An act extending the rights of trial by jury to certain cases." The second and third sections provide the proceedings which shall be taken where the parties cannot agree upon the damages sustained by the exercise of the right of eminent domain, and for the ascertainment of the damages by judicial proceedings. The Act of 1849 provides that before the company shall take possession of the lands or materials it shall make ample compensation or tender adequate security therefor to the owner. It also provides for the appointment of viewers to ascertain the damages, and requires them to make a report to the court of the damages awarded, and if the report is confirmed judgment is to be entered thereon. This judgment is final, and execution is authorized to be issued thereon unless it is paid within thirty days. These provisions were regarded as inadequate to protect the owner of the land in that the security required to be given was insufficient: *Dimmick v. Brodhead*, 75 Pa. St. 464, and that no right to appeal was given to the parties from the award of the viewers and from the judgment entered thereon in the Common Pleas. These supposed defects were remedied by the Act of 1856. The second section requires the railroad company on

refusal of the tender of the bond, to present it to the Common Pleas for approval. The third section of the act permits the parties to appeal from the award within thirty days after it has been filed, and also authorizes a writ of error to the judgment which may be had in the Common Pleas on the issue framed and tried before the court and jury.

It will be observed, therefore, that there are no powers or rights to appropriate water conferred upon the corporation by this act. It is contended, however, that the [572] right to take water is given by the second section which provides for giving security for the damages when no agreement can be made "either for lands, water, water rights, or materials." The words "water, water rights" are not contained in the Act of 1849. There is, however, no rule of construction that will permit this act to confer the right to take water or water rights by the use of these words in this connection in the Act of 1856. The legislature incorrectly assumed that these words were in the Act of 1849 and hence inserted them in the later statute which was enacted to provide a remedy for the exercise of the right of eminent domain conferred by the Act of 1849. There is nothing in the Act of 1856 which by implication even confers authority on the corporation to condemn or appropriate any property whatever. It simply provides a remedy, different from that of the Act of 1849, when the corporation exercises the rights conferred by the latter act. The right to condemn water did not exist prior to the Act of 1856; and hence the grant of a remedy for the exercise of the power to take waters by that act did not constitute a grant of such power: *Howe v. Norman*, 13 R. I. 488.

We are all of the opinion that the order of the court below, declining to approve the bond presented by the railroad company, should be affirmed, and it is so ordered.

#### NOTE.

#### Right of Railroad Company to Condemn Water Over which Right of Way Is Constructed.

##### Generally.

A railroad company has been held to have the right to condemn water over which its right of way is constructed when the same is necessary for its use or maintenance. *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570. See also *Baring v. Erdman*, 14 Haz. Reg. (Pa.) 129, 2 Fed. Cas. No. 981; *Strohecker v. Alabama, etc. R. Co.* 42 Ga. 509; *Smithko v. Pittsburgh, etc. R. Co.* 5 Pa. Dist. 543. Compare *Gulf, etc. R. Co. v. Tacquard*, 3 Wil-

sons Civ. Cas. Ct. App. (Tex.) § 141 and the reported case. In *Bigelow v. Draper*, supra, it was held that the statutes relating to eminent domain authorized a railroad corporation to condemn the riparian rights of the owners of land through which a river flowed. The purpose of the railroad company was to divert from its accustomed channel, for a distance of two miles, the flow of a non-navigable watercourse, restoring the water to its old channel further down the stream, in order so to change the bed of the stream, that the railroad would not be compelled to bridge the river at two points at which the watercourse intersected its right of way. The court said: "It was not necessary to condemn the land through which flows the portion of the river to be diverted from its channel. There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of its owner for a public use should never be permitted to extend beyond such property or such interest in property as is reasonably required to subserve the public interests. It would be unnecessarily burdensome to the company, and inexcusably oppressive against these defendants, to compel or even allow the company to take the fee of the lands involved, when the public use requires merely that they should be damages, and not that they should be taken wholly from their owners. That the company could, under our statute, condemn the riparian rights without also taking the fee of these lands does not admit of doubt. . . . We have carefully analyzed the testimony in the case, and have reached the conclusion that the trial judge was fully warranted in making the finding on the question of necessity which he did. The object to be affected by these condemnation proceedings is to place the railroad company in a position where it can increase the safety of its track by constructing a solid embankment at the two points where the road is carried over the Heart river, by means of two bridges. That in the spring season the safety of these structures is endangered by ice gorges is shown by the testimony of competent civil engineers. Their evidence tended to show that the danger of injury, damages, and destructions to passengers, employees, and freight would be considerably diminished by constructing a solid embankment where the bridges in question now stand; and that, independently of such damage being done to persons or property, there was danger every spring that traffic would be temporarily suspended by a break at this point in the line of the road, through the demolition of one or both of these bridges by the impact of large fields of moving ice in times of high water, resulting from gorges. . . . On a review

of the whole case, we are satisfied that the public interests will be subserved by the condemnation of the property in question, to the end that these two dangerous points in the railroad may be rendered safe; and we are also of the opinion that in no other way can this increase in safety be as effectually accomplished." In *Sandwich v. Great Northern R. Co.* 10 Ch. D. (Eng.) 707, 49 L. J. Ch. 225, 27 W. R. 616, it was held that a railroad company whose line crossed a stream could take, as riparian owners, a reasonable amount of water for use in its steam engines. Bacon, V. C. said: "The Defendants are a railway company. They use steam-engines. Water is necessary for supplying the engines at their stations. It is part of the business they carry on. They sink a well by the side of the stream in the year 1850, and from that time to this they have withdrawn water from that well (there was a second one constructed afterwards in another place not connected with the old well), and they have used it for the purpose of supplying their engines with the necessary water. In doing this they have taken as much as they thought requisite for the purpose. What they did want they used, and what they did not they restored back to the stream. Prima facie, no one will say there is anything unreasonable in that. That is the use which a riparian proprietor may reasonably make. . . . He may take all that is requisite for the purpose of his business, provided only that he does not take so much as injures the other persons whose rights are equal to his own, which injury he can prevent by returning the requisite quantity into the stream. . . . In my opinion the case by the Plaintiff, as it is proved by the Defendants, establishes these facts—that the purpose for which the water is taken is a lawful purpose; that is a reasonable enjoyment of the adjacent property of the Defendants, and the means of carrying on the trade which they may lawfully exercise; that the quantity taken is not in itself excessive, and when the quantity returned to the stream is taken into consideration it is a very small quantity—so small a quantity as that the depth of the stream, taken altogether, is reduced by one-fifth of an inch. Is that a case in which, if there is nothing else in it, the Plaintiff could ask in this Court for an injunction? What injunction is he entitled to? Is there any damages done to him? It is not pretended that there is any damage done to him." But in *Atty.-Gen. v. Great Eastern R. Co.* 23 L. T. N. S. (Eng.) 344, 18 W. R. 1187, affirmed L. R. 6 Ch. 572, 19 W. R. 788, the court restrained the railroad company from abstracting or directing any water from a river for the supply of a station or for other trade purposes. Lord Ha-



therley, L. C. said: "This case does not present any difficulty whatever upon some of the larger questions which have been raised with regard to the riparian proprietors on this river. The natural stream of the Cam was apparently useless for any of the ordinary purposes of commerce. From the reign of Queen Anne down to the date of the last Act, 14 & 15 Vict. c. xcii. persons have been appointed to keep up the navigation of the river, and their powers are now vested in a certain body, who are called the Conservators of the Cam. . . . In the particular part in question there seems to be a considerable stream, called the Paper Mills Brook, which brings down a quantity of water. The quantity is in dispute, but may fairly be taken not to exceed 300,000 gallons per diem, although somewhere near 2,000,000 of gallons may have come down on some particular day. From this important feeder the Defendants were about, until they were restrained by the order of the Master of the Rolls, to withdraw a quantity of water, no less than one-third of the total amount supplied. Now this is not at all the case of an ordinary river, the persons bordering upon which may have, for their ordinary purposes, a right to use the water. We have here persons appointed by an Act of Parliament who, *prima facie*, have the first right to be judges in the matter, being a public body entrusted with powers and duties for a public purpose. I apprehend that the court gives, in the first instance, credit to them as being the best judges of what they want; and I apprehend that no engineer from another river has a right to inform them how much water they want; and any evidence shewing, or tending to shew, that they have quite enough, is, to my mind, of extremely little weight. We know how figures may be manipulated for purposes of this kind, and I have no doubt that it may be shewn that the whole amount of the water drawn off in a day would not, if spread over four and a quarter miles, take off more than one-fourteenth of an inch of water; but how that average withdrawal of water over the whole may at particular moments and times—just when a barge wants to get through a lock—affect the particular spot from which the water is being drawn off, before it had has time to diffuse its operation over the whole extent of the reach, there is no possibility of knowing from a calculation of that kind. It may be true that when these Defendants have done what they threaten to do the Conservators of the River Cam would have a much better river than a great many rivers; but this does not in the least assist us in arriving at any conclusion as to the legal rights of the parties. The Conservators are entitled to have the best river they can, and certainly, on the evidence, it

is clear that it is not a particularly good one when they have done their best. Now there is plenty of evidence to shew that the river is not at all more abundantly supplied with water than is wanted; in fact, at times, they want every available lockful they can obtain, and yet it is proposed to draw off at least two lockful per diem. The lock-keepers tell you they have special orders at some particular seasons not to let any lockful run at all for so many days, and that they are in particular difficulties when there are not three and a half inches over the ledge of the tumbling-bay. Then they give you dates and observations which shew a great many days when there was not that quantity of water. They shew you what quantity of water is wanted to pass over the sill, and what quantity of water the barges draw; that the barges are not unfrequently obliged to wait because they cannot get enough water, and that they are thankful to have assistance rendered by the flushing operations done at the lock above. It appears to me that the Master of the Rolls had not gone at all too far in making this injunction general, for no one can tell at what time these difficulties may happen."

#### *Right to Erect Dam.*

In *Smithko v. Pittsburgh, etc. R. Co.* 5 Pa. Dist. 543, it was held that a railroad company in executing a power given it by the legislature to take waters and water rights under the power of eminent domain, could erect a dam across a stream for the purpose of storing water for its use. It appeared that the defendant prepared to erect a dam across a ravine for a length of about 240 feet. This would back up the water about 960 feet through the plaintiff's property. The place where it was proposed to erect the reservoir was across a stream having a watershed of about 1,000 acres. It had different springs. Dismissing the plaintiff's bill for an injunction the court said: "The defendant claims that, under the 10th section of the Act of Feb. 19, 1849, P. L. 83, giving railroads the right of eminent domain, it has the right to condemn this property for the purposes proposed. The plaintiffs deny that the Act gives any such rights. . . . The Act on which the defendant relies provides that the occupancy of land 'without the consent of the owner, . . . except in the neighborhood of deep cuttings or high embankments, or places selected for sidings, turn-outs, depots, engines or water stations,' shall not exceed '60 feet in width, and thereupon to lay down, erect, construct and establish a railroad, with one or more tracks, with bridges, viaducts, turn-outs, sidings or other devices as they may deem necessary or useful, between the

points named in the special Act incorporating such company,' and so on, and 'by themselves or other persons employed as aforesaid to enter upon and into and occupy all land on which the said railroad or depots, warehouses, coal-houses, engines and water stations, other buildings or appurtenances may be located, or which may be necessary or convenient for the erection of the same, or for any purpose necessary or useful in the construction, maintenance and repairs of said railroad.' The second section of the Act of April 9, 1856, P. L. 288, provides that in all cases where the parties cannot agree upon the amount of damages claimed, or, by reason of the absence of legal incapacity of such owner or owners, no such agreement can be made either for lands, water, water rights or materials, the company shall tender a bond, etc. . . . It is a question of reasonable construction of the statute in the light of the circumstances. Water is a material, in one sense of the word, just as gravel or timber, but the Act of Assembly of 1849, as well as the Act of 1856, quoted, evidently contemplated the use and storage of water by the railroad as a necessary part of the construction of the road for the purpose of running its locomotives. A water station necessarily means a place for the storage of water for use of the railroad. What those stations may be and how far they may extend is not declared in the Act. Often, perhaps generally, the reservoirs for the storage of water for use of the railroad locomotives are wooden or iron tanks, but not necessarily so. Nor does the Act of Assembly provide or intimate how or what they shall be. It must be left, then, to the reasonable discretion of the railroad authorities, governed by the necessities of the case. The pollution of so large a number of streams of water in our state by manufacturing and mines, and by the boring and pumping of oil and gas wells in the vicinity, has, to a considerable extent, changed the circumstances and made it necessary to procure a supply of water in a different way, or to make the water station in a different way from what was the custom in former years. It is a notorious fact that in many parts of the country, during the past year, there was a great scarcity of water for the running of locomotives, and water had to be transported, at large expense, a very considerable distance for the purpose. The Act of 1856, which provides for the tender of a bond as compensation for the taking of land and of water and of water rights or materials, is not conclusive, but it is a legislative construction that, in the right to construct water stations, the legislature meant to include the taking of waters and water rights under

the power of eminent domain. It seems to us that this is a reasonable construction of the Act. It might be well for the legislature to define more clearly the rights of railroad companies in regard to water stations and waters and water rights; but in the case now before us it seems to us that, in making its reservoir—a reservoir being a necessary part of a water station—the defendant company is exercising a reasonable discretion in the manner in which it proposes to erect the works to meet a pressing necessity for the operation of the road."

On the other hand in *Gulf, etc. R. Co. v. Tacquard*, 3 Willson Civ. Cas. Ct. App. (Tex.) § 141, it was held that a railroad company could not condemn a navigable stream in order to enable it to erect and maintain a dam across it, so as to furnish a reservoir of fresh water for its use in operating its engines. The court said: "In the same chapter which provides for the right of way for railroads, and for the condemnation of lands for corporation purposes, it is provided, that nothing in said chapter contained 'shall be so construed as to authorize the erection of any bridge, or any other obstruction, across or over any stream or water navigable by steamboats or sail vessels, at the place where any bridge or other obstruction may be proposed to be placed, so as to prevent the navigation of such stream or water.' [R. S. art. 4172]. If then, Highland Bayou, at the place sought to be condemned, is a navigable stream within the meaning of this provision, it is not subject to condemnation for the purpose designed. It would be unlawful and a penal offense to obstruct the navigation of said stream, by the erection or the maintenance of a dam across it." So in *Baring v. Erdman*, 14 Haz. Reg. (Pa.) 129, 2 Fed. Cas. No. 981, a bill for an injunction, it appeared that the complainants were the owners of a tract of land on the western bank of the Schuylkill, through which a stream of water had been running from time immemorial until its diversion by the respondent, by means of a dam, erected across it, on the land of the complainants, and a trench made to conduct it to the Pennsylvania Railroad for the supply of the engines. It was held, though water for railroad purposes might be diverted from lands within a reasonable vicinity and not necessarily from lands contiguous to the road, that the diversion of the complainants' watercourse was not for the purpose of constructing or repairing the railroad, but for means of transportation on it thereafter, and that such subsequent diversion was not justified under the authority for its use in constructing or repairing.

## BRADLEY

v.

ATLANTIC COAST LINE RAILWAY  
COMPANY.

South Carolina Supreme Court—September  
28, 1914.

99 S. Car. 78; 82 S. E. 1009.

**Carriers of Passengers — Duty to Stop  
at Passenger's Destination — Special  
Contract.**

Where plaintiff boarded a through train which did not stop at his destination, under an alleged special contract made with defendant's ticket agent that the train would stop there to set plaintiff down, plaintiff is not entitled to have the carrier's breach of such alleged contract submitted to the jury as a basis for a recovery, in the absence of any evidence that the agent's statement was relied on and that plaintiff suffered damage as the proximate result thereof.

[See note at end of this case.]

Appeal from Common Pleas Circuit Court,  
Berkeley county: RAMAGE, Judge.

Action for damages. George H. Bradley, plaintiff, and Atlantic Coast Line Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

*Simeon Hyde and Octavius Cohen* for appellant.

*Logan & Grace* and *H. J. Dennis* for respondent.

[80] FRASER, J.—Mr. Bradley was in Jesup, Georgia, on a visit and desired to return to his home at St. Stephens, South Carolina, with his wife and grandson. He presented himself to the ticket agent at Jesup and purchased the ticket for their transportation. The plaintiff claims that he asked for information as to the proper train and the agent pointed out the train that would go to and stop at St. Stephens. That before he got to Charleston the conductor told him that the train he was on did not stop at St. Stephens and he must get off at Charleston and wait for a local that did stop at St. Stephens. This the plaintiff declined to do. That after the train left Charleston the conductor told him that he had warned him to get off at Charleston and unless he paid additional fare from St. Stephens to Lanes, where the train did stop, he would put him off the train. That he could pay the cash fare from St. Stephens to Lanes, then he could return to St. Stephens and return on the local that did stop there. Under these circumstances

and the threat of expulsion, the plaintiff paid the additional fare. The plaintiff had notified his son to meet him at St. Stephens. When the plaintiff returned the conveyance had left St. Stephens and the plaintiff was required to leave his wife and grandchild in St. Stephens for the night and walk to his home for a conveyance to take them home. The plaintiff relied upon his general contract, as evidenced by his ticket from Jesup to St. Stephens, and a special contract with the agent at Jesup, that the train would stop at St. Stephens. His damages alleged were the additional fare from St. Stephens to Lanes and return and consequent illness, and rude and disrespectful treatment on the train, and punitive damages for the wilful invasion of his rights as a passenger.

[81] The defendant admitted the purchase of the ticket from Jesup to St. Stephens, denied the special contract and misrepresentation. Denied the duty to stop at St. Stephens, but said that it had provided a local from Charleston and it was incumbent on plaintiff to get off the through train at Charleston and wait for the local. The trial was had and the verdict and judgment were for the plaintiff. The defendant appealed on several exceptions, but the appellant states two questions.

"Was there a contract made between the railroad company, through its agent at Jesup, Ga., with the passenger, Bradley, plaintiff herein?"

The presiding Judge refused to charge the appellant's fourth request to charge, which was as follows:

"Even if the jury find from the evidence that the agent at Jesup told the plaintiff that this train would carry him to St. Stephens and put him off there, this would not constitute a guarantee that such train would stop at St. Stephens and would not warrant a verdict for the plaintiff."

There seems to have been some confusion in the trial of this case as to the exact questions involved. The plaintiff alleged two sources of responsibility for the defendant—i. e., 1st. A general contract to carry the plaintiff from Jesup to St. Stephens. 2d. A special contract that he should be carried on that train without change of cars.

The first ground was admitted. The second was denied. Over the appellant's objection the second was submitted to the jury. Under the case as made by the record, the special contract should not have been submitted to the jury because there was no evidence of a contract or misinformation that produced injury to the plaintiff. It is not every misstatement in the scope of his duty, made by a railroad official to a passenger, that gives rise to an action for damages, but only those on the faith of which the passenger has acted

to his injury which are actionable. Granting that the agent at Jesup said to the plaintiff, "Take that train; it will stop [82] at St. Stephens and put you off," then the plaintiff would have to show that he had suffered injury by reason of the fact that he had acted on the misinformation. That might be shown in many ways, for instance, that there was a choice of routes or trains, or that the plaintiff would not have taken the journey if it necessitated a change of cars, etc. There was no evidence of any injury that arose from the misinformation or the breach of a special contract, even if it were within the apparent scope of the agent's authority to make a special contract. The appellant had contracted to carry the plaintiff from Jesup to St. Stephens and were bound to make reasonable provision to carry out its contract.

The appellant and respondent are equally confident of success, the one relying on *Carter v. Ry.* in 75 S. C. 355, 55 S. E. 771, and the other on *Richardson v. Atlantic Coast Line R. Co.* 71 S. C. 446, 51 S. E. 261.

In the *Carter* case it affirmatively appeared that the through train that did not stop was followed by a local train that did stop and that reasonably adequate provision was made for local travel.

In the *Richardson* case it affirmatively appeared that the through train was the only train that would enable the passenger to reach his destination that day. Here there was no evidence either way except that there was one local per day. That may have already passed. This Court having found error in submitting the question as to damages from misinformation, as appears from the record, there must be a new trial.

Appellant's second proposition is that there is no evidence from which the jury could have found punitive damages.

If the acts of the defendant were unlawful, then, under the *Richardson* case, supra, punitive damages could be awarded.

Judgment reversed.

Hydrick, J., concurs in the result.

#### NOTE.

#### **Duty of Railroad to Put Passenger Off at Destination Not Stopping Station.**

Introductory, 1220

In Absence of Special Contract, 1221.

Under Special Contract with Carrier, 1222.

When Destination Is Flag Station, 1223.

#### *Introductory.*

In accord with the decision in *Louisville, etc. R. Co. v. Scott*, 141 Ky. 538, Ann. Cas. 1912C 547, it has been said in a number of

recent cases that railroads are not required to stop all their trains at every station in the absence of a contract or a statute limiting their rights in that respect, but they may within reasonable limitations designate the stations at which they will stop certain trains in order to receive and discharge passengers, reasonable facilities for public travel being otherwise provided. *Louisville, etc. R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669; *Southern R. Co. v. Bailey*, 143 Ga. 610, 85 S. E. 847; *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85; *Yazoo, etc. R. Co. v. Walls (Miss.)* 70 So. 349; *Chicago, etc. R. Co. v. Sheets (Okla.)* 154 Pac. 550. In *Southern R. Co. v. Flanigan*, supra, the court stated the rule as follows: "In the absence of statutory regulation of prohibition, a railroad company may adopt regulations that certain passenger trains, running regularly on its roads, shall stop only at designated stations. There can be no doubt that such rules and regulations are reasonable, and are necessary in the proper conduct of the business of the railroad company. . . . But a rule, however reasonable, should be enforced with due regard to the obligation of extraordinary diligence which the law imposes upon carriers of passengers."

It is the duty of an intending passenger to inform himself, before taking passage, whether the train is scheduled to stop at his destination. *Louisville, etc. R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669; *Southern R. Co. v. Bailey*, 143 Ga. 610, 85 S. E. 847; *Yazoo, etc. R. Co. v. Walls (Miss.)* 70 So. 349; *Chicago, etc. R. Co. v. Sheets (Okla.)* 154 Pac. 550. Compare *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85; *Southern R. Co. v. Huckaba*, 14 Ga. App. 311, 80 S. E. 697. Thus in *Southern R. Co. v. Bailey*, supra, the court said that "when one presents himself for transportation on a particular train, the duty is upon him to inquire whether it stops at the place of destination called for by his ticket."

But in *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85, the court refused to follow the rule that one who proposes to become a passenger is bound to inquire, when he purchases his ticket and before he boards the train, whether the train according to its schedule stops at the particular place to which his ticket entitles him to ride. Hill. C. J., in a review of the facts said: "It seems to this court that the sounder rule on the subject is to impose upon the railroad company the duty of giving the information to the purchaser of the ticket over its railroad as to what train stops at the particular station to which it sells the ticket, and not to impose the duty of inquiry upon the proposed passengers. Agents who sell tickets

know the schedules of the company's trains, and it would seem to be more reasonable to require that this information should be given to the passenger, when he proposes to buy his ticket to a particular station, than it would be to require the passenger, before or when he purchases the ticket, to make the inquiry. A ticket over a railroad is not only a receipt for the money paid for the ticket, but constitutes a contract between the passenger and the company for transportation according to its terms; and in the carrying out of the contract the law of this state imposes upon the carrier extraordinary diligence to protect the passenger, and certainly it would be unreasonable to hold that the full measure of the carrier's diligence has been reached unless he gives this information in his possession so important to the exercising by the passenger of the right to which he is entitled under his contract as evidenced by the ticket. When a passenger buys a ticket, he has a right to presume that all necessary information or instructions will be given him for the proper use of that ticket. And when one who proposes to become a passenger buys a ticket from an agent of the carrier to a particular station, he has a right to assume, in the absence of any information, actual or constructive, to the contrary, that he may ride on that ticket to his destination on any train of the company carrying passengers to that place. Certainly this should be the rule, in the absence of any restriction in the ticket itself showing that it is not good for transportation to the particular station to which it had been purchased. When a person goes to a railroad station and buys a ticket from the agent of the company, the reasonable inference from that act is that he intends to become a passenger to his destination on the next train passing the initial point and going to the particular place designated by the ticket; and if the next train is a through train, or one that does not stop at that station, the agent of the company, when he sells the ticket to the proposed passenger, should inform him of the fact. . . . Of course, if the proposed purchaser should ask for the information, it would be the duty of the agent to give it to him, and the company would be held responsible for the correctness of the information. . . . But we think the rule should go further, and make it the duty of the agent, having reason to believe that the purchaser proposes to take passage on a particular train, to inform him that that train will not stop at the station to which he proposes to purchase a ticket, so that he may regulate his conduct as a passenger accordingly. We frankly admit that this opinion is contrary to the views of many judges and text-writers, but we are

nevertheless strong in the faith that it is more in consonance with reason and justice, and more in harmony with the rule of extraordinary diligence which the law imposes upon carriers of passengers."

So in *Elliott v. Norfolk Southern R. Co.* 166 N. C. 481, 82 S. E. 853, the court said: "It is the settled law of this state that where a common carrier receives a passenger upon its train, with a ticket calling for a certain station, it is the duty of the railroad company to stop the train at such station, even though the passenger did not know that this particular train did not stop at such station."

#### *In Absence of Special Contract.*

It has been held recently that in the absence of a special contract or statutory regulation, a passenger who takes a train which does not stop at his destination cannot insist on being put off at that place, if he boards the train without availing himself of the information at hand and without making proper inquiry from the company whether the train will stop there, but he may be put off at the stopping place nearest his destination without subjecting the company to liability. *Louisville, etc. R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669; *Southern R. Co. v. Bailey*, 143 Ga. 610, 85 S. E. 847; *Louisville, etc. R. Co. v. Gaddie*, 162 Ky. 205, 172 S. W. 514, L.R.A.1915D 705; *Yazoo, etc. R. Co. v. Walls (Miss.)* 70 So. 349; *Chicago, etc. R. Co. v. Sheets (Okla.)* 154 Pac. 550. Thus in *Southern R. Co. v. Bailey*, supra, it appeared that a passenger was ejected from a train at the last place where the train was scheduled to stop before passing his destination. The court said: "The defendant was concerned only with its duty to the public of maintaining its public schedule, and the plaintiff's right under her ticket was to be transported in compliance therewith to the last place, before reaching Jenkinsburg, at which this train was scheduled to stop, and the defendant's agent had the right to demand that she leave the train and to eject her at this point." In *Louisville, etc. R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669, it appeared that the plaintiff purchased from the defendant's agent at one of its stations a ticket for transportation to a place called Garden City. The conductor informed the passenger several times that the train was not scheduled to stop at his destination, and that it would be necessary for him to change cars at Birmingham and continue his trip on a local. Shortly after leaving Birmingham the conductor again informed the plaintiff of the defendant's rule concerning the operation of the train, and that he would have to get off at Blount Springs, the stopping place nearest his destination. He also returned to

the plaintiff his ticket with an endorsement which showed his right to finish his journey on the local train. The plaintiff indicated by his language that he preferred a lawsuit and refusing to leave the train he was ejected therefrom at Blount Springs. Reversing a judgment for the plaintiff the court said: "There is nothing to indicate that defendant's rule forbidding the train upon which plaintiff took passage to stop at Garden City, which was tantamount on the facts of this case to a requirement that plaintiff should change cars at Birmingham, is unreasonable. We can perceive nothing unreasonable in it. Its existence was proved, and notice of it was given to plaintiff before the train reached Birmingham. In these circumstances the conductor committed no wrong in requiring plaintiff to leave the train at Blount Springs. . . . Defendant did not thereby deny to plaintiff a complete performance of its contract according to its terms, but imposed upon plaintiff only the necessary consequence of the observance of a certain reasonable rule, according to which, as long as it existed, it had a right to operate its trains."

In *Yazoo, etc. R. Co. v. Hearn* (Miss.) 71 So. 561, it was held that the servants of a railroad company are not relieved of all duty toward a passenger who has mistakenly embarked on a train not scheduled to stop at the place to which he has purchased a ticket, but they should inform him of that fact on their discovery thereof, so that he may disembark at a regular stop, if any, before reaching his destination, and continue his journey on another train. Affirming a judgment for the plaintiff awarding him damages for injuries as the result of a fall from a trestle on the defendant's road after having been wrongly ejected from one of its passenger trains the court said: "If the employees of the company negligently fail to discharge this duty to such a passenger, they have not the right thereafter to deal with him in such a manner as to impose undue inconvenience and discomfort upon him in reaching his destination. It may be that their duty towards him in this connection depends upon the circumstances of each particular case. This, however, we are not now called upon to determine, for they clearly have not the right to eject him from the train between stations, on a dark and rainy night, at a place with which he is not familiar, as was done in the case at bar according to the testimony of appellee."

In *Louisville, etc. R. Co. v. Gaddie*, 162 Ky. 205, 172 S. W. 514, L.R.A.1915D 705, it was held that where a passenger, by reason of incorrect information given by a gatekeeper or trainman in the employ of the carrier, boards a train not scheduled to stop at the station for which he has a ticket, the

carrier has a right to correct the mistake, and to require the passenger to alight at a regular stopping place, which is a suitable place, from which he may take the next regular train that does stop at his declaration. The court said: "We do not mean to be understood, however, as holding that when the passenger, at the time he purchases his ticket, is informed by the ticket agent that the train he proposes to take will stop at his destination to permit him to alight, although it is not a regular scheduled stop for such train, the carrier may correct such error and the passenger be required to alight at an intermediate station, for the carrier in such case has made its contract; and that contract the passenger has a right to enforce. But, where no specific agreement for such stopping of the train is clearly shown to have been effected at the time of the purchase of the ticket, then the mere act of a gateman or brakeman in making no objections to the boarding of the train by the passenger ought not and will not estop the company from a correction of the error by the conductor requiring the passenger to leave the train at a suitable intermediate point, there to wait for and take passage upon a train which does stop at the passenger's destination. Nor do we hold that, where a passenger makes inquiry of the gatekeeper, or those in charge of the train, as to the train he should take, and, acting under their directions, is caused to board the wrong car, that he cannot recover for lost time and increased expenses necessarily incurred by reason of such incorrect information. The question is not before us here."

#### *Under Special Contract with Carrier.*

Where a passenger purchases a ticket for a particular train, or is directed by the ticket agent or employee to take a certain train, or is informed by an agent or employee that the train will stop at his destination, it becomes the duty of the railroad, as a general rule, to stop the train at the passenger's destination in accordance with the special contract thus arising. See *Louisville, etc. R. Co. v. Gaddie*, 162 Ky. 205, 172 S. W. 514, L.R.A.1915D 705; *Chicago, etc. R. Co. v. Sheets* (Okla.) 154 Pac. 550. Compare the reported case. Thus in *Chicago, etc. R. Co. v. Sheets*, supra, the court said that whether under the facts and circumstances of the case the plaintiff was misinformed or misled, through the fault of the defendant's servants, as to the regular stopping places of the particular train he purposed boarding, or was by their acts and declarations induced to believe when he entered the train that it would stop at his destination, were questions of fact which should have been submitted to the jury under a proper charge.

**When Destination Is Flag Station.**

Where the destination of the passenger is a flag station, and the train passes the station without stopping, the passenger's rights vary according to circumstances. In Louisville, etc. R. Co. v. Fugua, 187 Ala. 464, 65 So. 396, 52 L.R.A.(N.S.) 668, it appeared that a passenger was carried by her destination, a flag station, before the conductor entered the coach in which she was riding. It was held that the carrier could not claim exoneration from liability because of the failure or omission of the conductor. The court said: "In the absence of binding (upon a ticket passenger) rule of the carrier, known to such passenger requiring such passengers for a flag station to notify the conductor of the train of their ticket-stipulated destination before arrival thereat, there is no primary obligation on such ticket passenger to notify the conductor of such passenger's destination. In the absence of such rule, so known or promulgated as to bind the passenger, the ticket sold by the carrier to the passenger is conclusive notice to the carrier of the fact of such passenger's destination. . . . The sale of the ticket to plaintiff concluded the defendant from denying or questioning the fact of its knowledge of this plaintiff's destination, by which she was negligently carried." And in Louisiana, etc. R. Co. v. Mason, 122 Ark. 477, 183 S. W. 977, wherein it appeared that a train was a short one, consisting of two coaches, and that there were only two tickets for the conductor to take up, the court said that the jury were warranted in finding that the conductor should have known of the appellee's destination, which was a flag station, and consequently should have stopped the train there. See to the same effect Elliott v. Norfolk Southern R. Co. 166 N. C. 481, 82 S. E. 853. In Ft. Smith, etc. R. Co. v. Ford, 34 Okla. 575, 126 Pac. 745, 41 L.R.A.(N.S.) 745, wherein it appeared that a passenger was carried by his destination, a flag station, it was held that he was entitled to exemplary damages. The court said: "It is as much the duty of a carrier of passengers to afford a passenger an opportunity to alight at such a station and to which it has sold him a ticket as at the station at which stops are regularly scheduled, unless some controlling exigency is shown to have prevented such opportunity."

On the other hand in Southern R. Co. v. Cartledge, 10 Ga. App. 523, 73 S. E. 703, it was held that a railroad company was liable to a passenger for nominal damages only for negligently carrying him by his destination, which was a flag station. The following facts appeared: "The plaintiff bought a ticket from Cannon, in Franklin county, to

Hardcash in Elbert county, a flag station on the line of the defendant's railway. The conductor carried him beyond his station. Upon observing that the train was not slowing down at the flag station, the plaintiff immediately went to the conductor and called his attention to the fact that he was being carried beyond his station. Thereupon the conductor proposed to carry him on to Dewy Rosé, a station about two miles farther on, or to stop at the place the train then was and permit him to disembark. He accepted the latter proposition and got off the train about a mile beyond Hardcash. . . . While on his way from Hardcash to his grandmother's, a sudden rain came up, and he walked along for some time in the rain without seeking shelter at any of the near-by residences. As a result of the wetting which he thus received, he alleged that he was made sick, suffered pain, and lost several weeks from his business." The court said: "The defendant, having carried the plaintiff beyond the point of his destination, was liable to him in damages. But as the evidence showed a mere negligent omission, unaccompanied by any aggravating circumstances, punitive damages were not recoverable. The conduct of the conductor as set forth in the statements of facts was not such as to authorize the jury to find this character of damages against the defendant." To the same effect see Mobile, etc. R. Co. v. Moreland, 104 Miss. 312, 61 So. 424, 46 L.R.A.(N.S.) 52.

**SAULSBERRY**

v.

**SAULSBERRY.**

Kentucky Court of Appeals—February 2, 1915.

162 Ky. 486; 172 S. W. 932.

**Words and Phrases — Distinction between "Rent" and "Royalty."**

Where a deed from a grantor who had owned the land for years and knew of the existence of mines, they having been actually worked in his lifetime, to his sons, provided that, if his wife survived him, she should receive one-half of all rents from the place from all resources whatsoever, she is entitled to share in the income from the mines while operated on a royalty basis, as well as all other income and proceeds from the farm, regardless of the manner and form of payment or the name by which it might be

designated; since, while "royalty" is a more appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from a mine, the terms "rent" and "royalty," as the result of usage and custom, are often used interchangeably, and "all resources whatsoever" necessarily include the mines.

[See note at end of this case.]

**Popular or Technical Meaning.**

While legal terms are ordinarily given their technical meaning, in the absence of anything indicating that they are used in a different sense, where, upon consideration of the whole of an instrument, it appears that they are employed in an entirely different sense, such meaning will be adopted, and they will not be given their strict technical meaning if this will defeat the manifest intention.

Appeal from Circuit Court, Carter county.

Action by Elizabeth Saulsberry, plaintiff, against John M. Saulsberry, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. REVERSED.

*S. S. Willis and R. D. Davis* for appellant.  
*H. R. Dysard* for appellee.

[487] CLAY, C.—William Saulsberry was the owner of about one thousand acres of land surrounding the town of Aden, in Carter county. On December 29, 1896, he conveyed the land to his two sons, Raymond H. Saulsberry and Harry Saulsberry, by a deed which contained the following provision:

"That if Elizabeth Saulsberry, the wife of William Saulsberry, should outlive said William Saulsberry that she has the right to control her house and household goods, and her garden and yard, and Elizabeth Saulsberry is to receive one-half of all rents from off the place, from all resources whatsoever, so long as she remains the widow of William Saulsberry, and has the right to assist the boys in renting and collecting rents on said land."

William Saulsberry died April 29, 1899. On the land in question were certain coal and clay mines, and ten or twelve small houses. In 1905 John M. Saulsberry leased the mines and operated them on a royalty basis until the year 1909, when he purchased the interests of his brothers, Raymond and Harry, in the land in question. Since that time he has been operating the mines.

This action was brought by Elizabeth Saulsberry, widow of William Saulsberry, and mother of John M. Saulsberry, against the defendant, John M. Saulsberry, to recover one-half of the rents, royalties and proceeds of timber sold since John M. Saulsberry acquired title. The case was transferred to equity and tried by the chancellor. The

chancellor held that the deed did not cover royalties or timber, and gave judgment in favor of plaintiff for only one-half of the rents from the houses on the land. From that judgment plaintiff appeals.

The principal question to be determined is, whether or not the words "rents from off the place, from all resources whatsoever," include royalties from mines.

[488] The evidence leaves no doubt that the grantor, William Saulsberry, knew of the existence of the mines, and that these mines were worked prior to his death, though the evidence for defendant tends to show that after he purchased the mines he made new openings on the land.

The word "rent" is variously defined as:

"The profit or return, reserved, payable periodically, but not necessarily immediately, if it issues from period to period, during the whole continuance of the grantee's estate, whether from year to year, or from month to month, etc. This will constitute the reservation a rent." 2 Blackstone 41.

"A certain profit issuing yearly out of lands and tenements corporeal." Black's Law Dictionary, p. 1022.

"The compensation, either in money, profits, chattels or labor, received by the owner of the soil from the occupant thereof." *Shartenberg v. Ellbey*, 27 R. I. 414, 62 Atl. 979; 3 Kent. Com. 460.

"A rent is a right to a certain profit issuing annually, or periodically, out of lands and tenements, corporeal, the use of them, and for furniture, in retribution for the land that passes." 20 Am. & Eng. Enc. of Law, p. 1035.

"The profit out of lands and tenements." 34 Cyc. 1333.

"A sum stipulated to be paid for the use and enjoyment of land." In re Roth, 181 Fed. 667, 104 C. C. A. 649, 31 L.R.A.(N.S.) 270.

"The consideration paid for the use of land." *Brooks v. Cook*, 38 So. 641, 141 Ala. 499.

"Something given by way of compensation to the lessor for the right to make use of the land demised." *National Subway Co. v. St. Louis*, 169 Mo. 319, 69 S. W. 290.

Royalty is a certain percentage or proportion, specifically stated or on a graduated scale, according to the value of the ore, based on either the net proceeds, smelter returns, mill returns or returns evidenced by the certificate of the United States Assay Office, or otherwise as the parties may agree upon. 27 Cyc. 710; *Maloney v. Love*, 11 Colo. App. 288, 52 Pac. 1029.

Counsel for appellee insist that the real difference between rent and royalty is that rent is the price paid for the use of a thing, while royalty is a part of the thing [489]



itself. This distinction, however, can hardly be maintained; for it was held at an early date that if "a man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste." *Coke Littleton*, 54b; *Clegg v. Rowland*, L. R. 2 Eq. (Eng.) 160, 35 L. J. Ch. 396, 14 L. T. N. S. 217; *Saunders's Case*, 5 *Coke* (Eng.) 12a. There the rent paid carried with it something more than the mere use. It was also compensation for the profits of the open mine. And, in *Indiana Natural Gas, etc. Co. v. Stewart*, 45 Ind. App. 554, 90 N. E. 384, it is said that the word "royalty" as used in a gas lease generally refers to "a share of the product or profit reserved by the owner for permitting another to use the property." In *Kissick v. Bolton*, 134 Ia. 650, 112 N. W. 95, it is said that the word "royalty" as employed in a coal mine lease means a share of the profit reserved by the owner for permitting the removal of the coal, and is in the nature of rent. Though it may be conceded that "royalty" is a more appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from a mine, yet it cannot be doubted that the terms "rent" and "royalty," as the result of usage and custom, are often used interchangeably. 27 Cyc. 710; *Raynolds v. Hanna*, 55 Fed. 783. Indeed, mining leases are made every day where the term "rent" is employed, even though it may, as a matter of fact, assume the form of "royalties." Of course, in the ordinary interpretation of legal terms it is customary to give them their technical meaning, in the absence of anything to indicate that the words were used in a different sense. However, it not infrequently happens that a technical legal term is employed in an entirely different sense, and where, upon a consideration of the whole instrument, this fact is made clearly to appear, such meaning will be adopted. Thus, the word "heirs," which is much more comprehensive than the word "children," because it includes all those who are capable of inheriting, is often held to mean children where the context or other parts of the instrument in which it is employed show that it was so intended by the parties. Though [490] not so frequently, perhaps, it sometimes happens that the word "children" is used in the sense of "heirs" and is given that meaning. *Childers v. Logan* (Ky.) 65 S. W. 124; *Moran v. Dillehay*, 8 Bush (Ky.) 434; *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; *Lachland v. Downing*, 11 B. Mon. (Ky.) 32; *Williams v. Duncan*,

92 Ky. 125, 17 S. W. 330; *Harkness v. Lisle*, 132 Ky. 767, 117 S. W. 264.

Indeed, the courts will not give to legal terms their strictly technical meaning when such a construction will defeat the manifest intention of the parties to the instrument. With this rule in mind, let us examine the deed and the circumstances surrounding the parties. The grantor had owned the land for many years. He knew of the existence of the mines. Not only so, but the mines had been actually worked in his lifetime. Elizabeth Saulsberry was his wife. He evidently intended to make for her some suitable provision. Under these circumstances, he provided that she was to receive "one-half of all the rents from off the place, from all resources whatsoever." If the defendant had leased the mines for a periodical rent there can be no doubt that plaintiff would have been entitled to half of such rent; and the purpose of the grantor should not be defeated merely because the defendant leased the mine on a royalty instead of a rental basis. Some effect must be given to the words "from all resources whatsoever," considered in the light of the grantor's knowledge of the existence of the mines, and of the fact that the mines, to say the least, constituted a very valuable part of the farm. It is clear, we think, that "all resources whatsoever" necessarily include the mines, and that the grantor intended that his widow should share equally not only in the income from the mines, but in all other income and proceeds from the farm, regardless of the manner and form of payment, or the name by which it might be designated. We are strengthened in this conclusion by the fact that for a number of years Mrs. Saulsberry was regularly paid her part of the royalties, thus showing that the parties themselves, looking at the matter in the light of the principles of common sense, placed the same construction upon the language of the deed.

We see no reason to disturb the judgment as to the rent of the cottages. On the return of the case, the chancellor will fix the amount of the recovery on the other items, either basing his findings on the proof now in the [491] record, or giving to the parties, if they desire, an opportunity to take additional proof.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Judge Hannah not sitting.

#### NOTE.

#### Distinction between Rent and Royalty.

As is said obiter in the reported case, the words "rent" and "royalty" are sometimes used interchangeably. See *Lacey v. New-*

comb, 95 Ia. 287, 63 N. W. 704; Chase v. Knickerbocker Phosphate Co. 32 App. Div. 400, 53 N. Y. S. 220. But in Western Union Tel. Co. v. American Bell Telephone Co. 125 Fed. 342, 60 C. C. A. 220, *reversing* 105 Fed. 684, the court said: "A large portion of the case as submitted to us concerns the meaning of these words 'rentals' and 'royalties.' The respondent claims that they are used interchangeably, and that neither adds anything to the other. The word 'rentals' would naturally fall into the contract because, as we have said, the business had uniformly gone on the basis of a fixed amount for each year for the use of each telephone, and the word 'royalties' naturally occurs in any contract of the general character of that at bar. The use of words of this character, which so naturally, and almost inevitably, fall into any contract with reference to patented matters, comes short of requiring any inference of special value. These words appear frequently in the contract; the respondent says 33 times, and states that the contract is not uniform in using both expressions. But departures of this character are frequently of the scrivener only, and, in any view, such a fact is too easily accounted for to meet the effect of the positive language with which the contract opens. Royalties are commonly understood as meaning something proportionate to the use of a patented device; in other words, a kind of excise. . . . In its more ordinary meaning, it would not literally include the shares of stock for which an accounting is demanded. In some of its uses it is a broader word than 'rentals,' and yet in other aspects 'rentals' is a broader word than 'royalties.' Rentals in their ordinary signification are not limited as royalties in their ordinary signification; that is, to something proportionate to the use of the patented device. The word 'ordinarily' means specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all

But while the words "rent" and "royalty" may be used interchangeably, "royalty" is the more appropriate word when referring to a payment based on the output of a mine, while "rent" more aptly designates a fixed payment. *Raynolds v. Hanna*, 55 Fed. 783, *reversed* on other grounds 59 Fed. 923, 8 C. C. A. 370. And see the reported case. Thus in *Raynolds v. Hanna*, *supra*, it was held that a monthly payment by a coal company to the executor of an estate, to be made whether coal was mined or not in accord with the terms of an agreement, although called "royalty" was but rental to be paid by the company. The court said: "This contract or agreement is clearly, in its legal effect and meaning, a lease, and the monthly

payment of \$416.67 whether coal is mined or not, although called 'royalty,' is the rental to be paid by the lessee for 'the exclusive right, permission, and license to enter upon the mine, and remove the coal,' together with 'the right to occupy and make use of so much of the surface of said land as will enable the second party to efficiently and properly conduct said mining operations, and to make use of so much of the timber on the surface of the premises as may be necessary in mining.' That the executor 'grant' these rights in no way changes the character of the agreement, which is five times referred to as a 'lease.' No technical words are necessary in a lease, and it is not material that the rental to be paid to the lessee is called 'royalty,' which is perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine. The subject of the contract is frequently referred to in the instrument as the 'demised premises.' The stipulations against subletting without the written consent of the executor, and for forfeiture and a re-entry for the nonpayment of the monthly royalty or rent, or for non-performance of either or all of the covenants on the part of the company, are more appropriate to a lease than to an absolute sale of the coal in place, or as mined. . . . But, aside from all this, the money received under the contract, whether called 'royalty' or 'rent,' is clearly 'income or increase' of the estate collected by the executors. The company has not yet mined a ton of coal under this contract, but it has been making the stipulated monthly payment of the \$416.67 since September 1, 1885. Whether the company will ever exercise its right or license to mine coal rests upon its own volition. Should it fail or decline to mine coal, or for any cause forfeit the right to do so, the money received by the executor could not possibly be considered a part of the realty or 'corpus' of the estate, rather than 'income.'"

The word "rent" includes a "royalty," based on the output of a mine. See *Lacey v. Newcomb*, 95 Ia. 287, 63 N. W. 704; *Kissick v. Bolton*, 134 Ia. 650, 112 N. W. 95; *Meeks v. Clear Jack Min. Co.* 141 Mo. App. 648, 124 S. W. 1084. And see the reported case. Compare *Duff's Appeal* (Pa.) 14 Atl. 364; *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760. Thus in *Lacey v. Newcomb*, *supra*, it was held that a royalty on coal mined under a contract was rent within a statute giving a lien for rent. The court said: "It seems to us these contracts must be held to the leases, creating the relation of landlord and tenant. They confer present rights; they are assignable; they are for a fixed period; they provide for an annual rental

4 *Boyce (Del.)* 38.

independent of the mining of the coal; the right to mine the coal is exclusive in the lessees for the period fixed in the lease; the rent or royalty is by express terms payable for all use of the surface of the land, as well as for other privileges specified, and for coal mined. In principle, the rights granted are not different from those where one leases a stone quarry or sand bed or the like. The fact that in the one case the article taken is on or near the surface and in the other it is beneath the surface is no reason why in the one case privileges granted to take and carry away stone or sand should be held to be leases and in the other the right to mine and carry away the coal and the valuable surface rights granted should be held to constitute a sale of the coal, merely. In either case the sum stipulated to be paid, whether it be called 'rent' or 'royalty,' is a profit issuing out of the use granted, even more so than it would be to use the land for agricultural purposes. In the latter case no perceptible quantity of the soil is taken, though the product is produced at the expense of utilizing the strength of the soil. In the former case a portion on the granted property is itself taken. This is in accord with the character of the grant, the use of the thing granted. The sum agreed to be paid is for the use of the land, upon and under the surface; and such use involves the taking away of the coal. This construction of these contracts is in harmony with their provisions, and in accord with usage touching such property; nor is it in contravention of the provision of the statute." And in *Kissick v. Bolton*, 134 Ia. 650, 112 N. W. 95, the court defined the word "royalty," as employed in a mining lease, as being the share of the profit reserved by the owner for permitting the removal of coal, and as being in the nature of rent. On the other hand in the *Duff's Appeal* (Pa.) 14 Atl. 364, it was held that royalties were a part of the corpus of the estate, and not a profit issuing out of it. It appeared that the royalties from a mine were claimed by both an assignee in bankruptcy and the holder of a mortgage made prior to the leasing of the land for mining purposes. The court said: "The first point to be determined is what does the fund represent? The instrument under whose provisions it has been paid is called a lease, but the royalties to be paid under it have none of the qualities of rent. They certainly are the price of the coal in place. They are not paid for the use of the tract by a tenant, but for the price of the chief article of value in it by a purchase. Every ton of coal mined reduces the tract in value, and when the mines upon it are exhausted, the security for the mortgage debt is also exhausted."

In *Indiana Natural Gas, etc. Co. v. Stewart*, 45 Ind. App. 554, 90 N. E. 384, the court

said that the word "royalty," as used in a gas lease referred to a "share of the product or profit reserved by the owner for permitting another to use the property."

**PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY**

v.

**GATTA.**

Delaware Supreme Court—January 22, 1913.

4 *Boyce (Del.)* 38; 85 *Atl.* 721.

**Appeal and Error—Orders Reviewable—Order on Motion for New Trial.**

A motion for a new trial being addressed to the court's discretion, a writ of error will not lie to review the court's decision on it, in the absence of an abuse of discretion.

**Necessity of Exception.**

In the absence of an exception to the denial of a new trial, such denial could not be reviewed, to determine whether it was an abuse of discretion.

**Limitation of Actions—Effect of Beginning Action—Amendment Stating New Cause.**

Where an action for wrongful death was instituted against a railroad company within the one-year limitation period prescribed by 20 Del. Laws, c. 594, by filing a praecipe, and the declaration filed against that deceased was an employee of the defendant company, the cause of action stated by an amended declaration, filed after the expiration of the year, alleging that he was an employee of the Pullman Company, and charging the defendant company with the duties owed to a stranger, was not barred by such statute; an action at law being commenced in this state, so as to stop the running of limitations, by praecipe, and not by the plaintiff's declaration, as in many states.

[See note at end of this case.]

**Pleading—Joinder of Counts.**

A declaration may contain any number of counts, providing it does not violate the rule against vexatious pleading, and each count presents a separate and distinct cause of action, which is appropriate to the form of action pleaded.

**Answer—To Separate Counts.**

The defendant must make separate answer to each count, where the declaration contains several proper counts.

**Amendment—Power to Permit.**

Under Const. 1897, art. 4, § 24, and Rev. Code 1852, c. 112, § 11, authorizing the Superior Court to allow amendments, the court in its discretion may allow an amendment at any time before judgment, whether limi-

tations would have run against the cause stated in the amendment, if made the subject of a separate action, or not.

**Railroads — Negligence — Injury to Employee of Another Company.**

Where, in an action for the death of a Pullman car employee engaged in repairing cars, from a car being shifted without warning to him by the defendant railroad company, plaintiff's evidence, taken alone, showed that the accident was due to the defendant's negligence while deceased was exercising proper care, the trial court properly refused to direct a verdict for defendant, or to set aside a verdict for plaintiff, though defendant's evidence on the determining issue whether the deceased was warned conflicted with plaintiff's evidence and was of a more positive character.

**Trial — Direction of Verdict.**

The court should direct a verdict, when the evidence is not controverted, and the law as applied to that evidence produces but one legal result; but when a case involves an issue of fact, on which the evidence is conflicting and would support a verdict for either party, such issue should be left to the jury.

**New Trial — Insufficiency of Evidence.**

Where the evidence warrants the submission of issues of fact to the jury, the trial court will not, on motion for new trial, disturb the verdict because against the evidence, though the preponderance is against the verdict.

**Evidence — Relative Weight of Positive and Negative.**

The rule that positive testimony outweighs negative testimony does not conflict with the rule that the weight of conflicting testimony shall be left to the jury, but is merely a rule of measurement for use by the jury.

[See 10 R. C. L. tit. *Evidence*, p. 1010.]

**What Testimony Is Negative.**

Where, in an action against a railroad company for the wrongful death of a Pullman car employee engaged in repairing cars, due to the shifting of a car without warning to him, the witnesses who testified that no warning was given while deceased was where he could have heard it had special opportunities, by reason of their being engaged in the railroad yard in occupations similar in the matter of danger, to hear and remember such warning if it had been given, their testimony was not purely negative in character.

Error to Superior Court, New Castle county.

Action for death by wrongful act. Frances T. Gatta, plaintiff, and Philadelphia, Baltimore and Washington Railroad Company, defendant. Judgment for plaintiff. Defendant brings error. **AFFIRMED.**

[40] On the trial before the Superior Court for New Castle County, in which a verdict

was rendered for the plaintiff, it appears from the testimony, as disclosed by the record, that Charles Gatta, the plaintiff's husband, was, on the day of the injury that caused his death, and for a considerable period theretofore, had been in the employ of the Pullman Company at its car works in the City of Wilmington; that the premises of the Pullman Company were located on the easterly side of and adjoining the elevated tracks of the main line of the defendant railroad company, its buildings and shops were situated some distance southerly therefrom, and between the elevated tracks of the railroad company and the shops of the Pullman Company, there was an inclosed yard; that within this yard placed parallel with the shops of the Pullman Company and the elevated structure of the railroad company were three railroad tracks, which were designated and known as tracks "A," "B" and "C," A being the one nearest the shops, C the one nearest the elevated road and furthest from the shops, and B the one between the other two; that these tracks were connected at or about the entrance to the yard with tracks and sidings belonging to the railroad company which further on were connected with its main line of railway; that tracks A, B and C, as well as the yard within which they were located, were the private property of the Pullman Company, upon which Pullman cars stood while being repaired, and over which the railroad company shifted Pullman cars in delivering or receiving them in its business of transportation.

It appears that between the shops and track A there was a wooden platform or flooring and a like platform or wooden passageway between tracks A and B, and that the distance between the shops and track A was about eight or nine feet, and that a heavy wooden fence, six or seven feet high, divided the end of the yard from Twelfth Street, somewhat obstructing the view beyond the yard. It is further shown that on the morning of the accident, five Pullman coaches were standing on track A, at least three of which were uncoupled and stood at short distances apart from each other, that two or more were on track B and that at least one was on track C; that upon that day, Gatta was working [41] in what was known as the washstand and hopper gang, and a few minutes prior to his death had been making repairs to a hopper in a car on track B; that approximately five minutes before the injury, he left this car for the purpose of seeing his foreman, Cooney, who was in a shop a short distance east of track A; that in going from the car on track B to see his foreman, it was necessary for Gatta to cross track A; that some time on the morning of the accident a shifter had worked on track C, after which it left track C and went out of the yard;

† *Boyce (Del.)* 38.

that while Gatta was in the shop the shifter approached the yard upon or toward track A, preparatory to doing shifting on that track and stopped either outside of the yard or partly without and partly within the yard; that while Gatta was still in the shop, the crew of the shifter, which was owned and operated by the defendant railroad company, caused notice to be given that shifting was about to be done on track A, by ringing the bell and by having one of its crew and one of the Pullman employees pass along each side of track A calling, "Look out on track A;" that this warning was given from two to four minutes before Gatta and Cooney came out of the shop on their way back to track B, but whether it was given before or after Gatta went into the shop is a matter of dispute. By some witnesses it was testified that the warning was repeated down to the time of the injury in such a manner that Gatta could and should have heard it. By others it was testified that no warning was heard after that given at a time when Gatta was in the shops and out of hearing.

It further appears that from the time Gatta left the building until he started between the cars, the cars were still, and while passing between them, Gatta stopped to let some one pass above him from the platform of one of the cars to the platform of the other, and as he afterward proceeded, the shifter caused the cars to come together and he was crushed.

It was shown that upon several of the buildings of the Pullman Company the following notice was posted: "Notice. Employees must not work under cars or on scaffolds or ladders inside of cars or pass between cars while cars are being shifted in the yard. John Cannon, Manager." As to the observance of this rule, [42] witnesses testified in substance that they knew of the existence of the rule, but never paid much attention to it, for while it was a general rule applying to all within the yard, it was likewise generally understood to apply only to those working on or about the track with respect to which warning had been given and that men working on cars on other tracks were expected to keep right on working, in a knowledge that the danger was not on their tracks.

*Ward, Gray & Neary* for plaintiff in error.  
*Horace G. Eastburn and Anthony Higgins* for defendant in error.

WOOLLEY, J. (after stating the facts).—The errors charged to have been committed in the trial of this case by the court below are twenty eight in number, of which errors assigned in specifications No. 21 to No. 28, inclusive, relate to the court's refusal to grant a motion for a new trial.

In the practice and policy of the law of this state relative to new trials, a motion for a new trial is a matter addressed to the legal discretion of the court (*Fitzgibbon v. Kinney*, 3 Har. 72, 73; *State v. Layton*, 3 Har. 469, 480), and to the decision of the court upon such a motion, as to the decisions of the court generally upon rules to show cause, a writ of error will not lie. *Burton v. Philadelphia, etc. R. Co.* 4 Har. 252, 254; *Mitchell v. Woodward*, 2 Marv. 311, 313, 43 Atl. 165; *Valley Paper Co. v. Smalley*, 2 Marv. 289, 294, 295, 43 Atl. 176; *Ridings v. McMenamin*, 1 Penn. 15, 39 Atl. 463; *Whitaker v. Parker*, 2 Har. 413, 416.

To the refusal of the court to grant a new trial, the record discloses no exception noted by the defendant below or allowed by the court below, nor does the defendant below, now the plaintiff in error, charge to the court below any abuse of its discretion or misconduct in rendering its decision against the motion, that might take the case out of the general rule against reviewing as error the decision of a trial court in a matter addressed purely to its legal discretion. Therefore, nothing that is assigned as error in the last eight assignments of error, that is not also embraced in some preceding assignment of error, will be considered in this decision.

Charles Gatta was killed in the twenty-eighth day of June, 1907. This action was instituted by his widow on the [43] ninth day of August, 1907, the original declaration was filed on the eighth day of August, 1908, and the amended declaration on the twenty-first day of January, 1910.

In the original declaration, the plaintiff averred that the deceased was an employee of the defendant company, charged the defendant company with the duties of a master, alleged breaches thereof and sought to recover upon its liability therefor. In the amended declaration, the plaintiff averred that the deceased was an employee of the Pullman Company, charged the defendant company with the duties it owed a stranger, alleged breaches thereof and sought to recover upon its liability for a violation of its duties in that relation.

It thus appears that while each declaration state a cause of action growing out of the same circumstances from which the deceased met his death, the material averments of the two declarations differ, and it also appears that the difference in point of law, consists in the difference in the relations alleged by the two declarations to have existed between the deceased and the defendant, the corresponding difference in duty which the defendant is charged to have owed the deceased and the consequent difference of the defendant's liability for breaches of that duty.

The amended declaration being the one exclusively relied upon at the trial, the defendant moved that the jury be instructed to render a verdict in its favor, upon the ground that the amended declaration presented a cause of action wholly new and wholly different from the one presented by the original declaration, that the amended declaration thus presenting a new cause of action was filed after the expiration of one year from the date upon which the injuries to the deceased were sustained, or at a time when an original action upon the case of action therein stated would have been barred by the statute of limitations, and therefore recovery upon the cause of action stated by the amended declaration was likewise barred.

The act limiting actions for personal injuries relied upon in support of this motion, provides, that "no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which [44] it is claimed that such alleged injuries were sustained." Chapter 594, Volume 20, Laws of Delaware.

The refusal of the trial court to grant this motion is assigned as error and is here submitted for review.

The contention made by the defendant is a novel one in this jurisdiction, and is based upon decisions of the courts of certain other jurisdictions, which plainly hold that when a cause of action set forth in an amended pleading in a pending litigation is new, different or distinct from that originally declared upon, the amended pleading is equivalent to the bringing of a new action, and the statute of limitations is not arrested by the institution of the suit but runs against the new cause of action down to the time it is disclosed by the amended pleading. *Central of Georgia R. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134; *Mahoney v. Park Steel Co.* 217 Pa. St. 20, 66 Atl. 91; *Box v. Chicago*, etc. R. Co. 107 Ia. 660, 78 N. W. 694; *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 U. S. (L. ed.) 983; *Wabash R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879; *Chicago City R. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334; *Fish v. Farwell*, 160 Ill. 230, 43 N. E. 367; *Nelson v. Montgomery First Nat. Bank*, 139 Ala. 578, 36 So. 707, 101 Am. St. Rep. 52; *Fleming v. Anderson*, 39 Ind. App. 343, 76 N. E. 267; *Illinois Cent. R. Co. v. Campbell*, 170 Ill. 163, 49 N. E. 315; *Dobbs v. Pearl*, 118 N. Y. S. 485; *Wasson v. Boland*, 136 Mo. App. 622, 118 S. W. 663; *In re Spuyten Duyvil Road*, 116 N. Y. S. 857; *Freeman v. Central of Georgia R. Co.* 154 Ala. 619, 45 So. 898; *Union Pac. R. Co. v. Sweet*, 78 Kan. 243, 96 Pac. 657; *Lane v. Sayre Water Co.* 220 Pa. St. 509, 69 Atl. 1126; *Lane v. Cayuta Wheel*, etc. Co. 220 Pa. St. C03, 69 Atl. 1127; *Hess*

*v. Birmingham Ry. etc. Co.* 149 Ala. 499, 42 So. 595.

The merit of these decisions and their value as authority for a like ruling in this jurisdiction, depend largely upon the statutes or policies of law of the jurisdictions in which they were rendered and the bearing which such statutes or policies has upon those that maintain in this jurisdiction.

The methods by which actions at law are instituted in those American jurisdictions that derive their jurisprudence from the common law, have as their original the method of commencing [45] actions at common law. The common-law mode of commencing an action at law was originally by petition to the king, and later, to him, through his Court of Chancery, praying for leave to bring an action in one of his courts of law upon a cause of action specifically stated in the petition. When the prayer of the petition was allowed, there issued an original writ, which in form was a mandate issuing out of the Court of Chancery, in the king's name, directed to the sheriff of the county wherein the injury was committed or the wrong was done, containing a statement of the cause of complaint, and requiring him to demand the defendant either to satisfy the claim and do justice to the complainant, or else appear in one of the superior courts of law and answer the accusations made against him.

The principal object of the original writ was to confer jurisdiction upon a court of law to hear the matter in controversy, for at common law no action could be maintained in any superior court without the sanction of the king's original writ. Its other object was to compel the appearance of the defendant. As this writ issued out of one court for the purpose of conferring jurisdiction upon another, obviously the writ could not be amended in the latter court. As the jurisdiction conferred by the writ upon the law court was limited to the trial of the specific cause of action stated in it, any subsequent statement of a cause of action different from the one stated in the writ was in excess of the jurisdiction conferred by the writ, and constituted a departure, and of course would not be allowed by amendment. Amendments of pleadings subsequent to the declaration at common law were liberally allowed both in point of character and time (2 Burr. 756), but an amendment to a declaration was restricted to one that did not depart from the action stated in the writ and then only when asked for before the end of the second term. for after that term the amendment was considered "a new declaration" and would not be allowed, 1 Will. 149, 223; Say. R. 234.

In using the English method of commencing actions at law somewhat as a model,

4 Boyce (Del.) 38.

American jurisdictions rejected such of its features as were inconsistent with American institutions and accepted such of them as were considered adaptable to the particular [46] schemes or policies of the law of the several jurisdictions of which they were made a part. Some jurisdictions were impressed with the feature of the original writ which gave the defendant notice not only of the form of action but of the particular cause of action to which he was summoned to respond and in such jurisdictions actions at law are almost invariably begun by petitions, complaints or notices upon which or after which process issues. In such jurisdictions the cause of action as well as the form of action is disclosed by the petition or complaint, and the process, whatever its form, commands the defendant to appear and respond to that particular cause of action. Such is the law in almost every jurisdiction from which authorities are cited by the defendant in support of its contention. These jurisdictions are Alabama, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, New York and Pennsylvania.

There is an intimate relation between the law that provides methods of commencing actions and the law governing the amendment of actions, for upon the theory upon which actions are commenced depends largely the logic or policy of the theory upon which amendments are allowed. Thus in the states of Georgia, Iowa, Kansas, Kentucky, Missouri, Nebraska and New York, where the cause of action appears in the complaints, petitions or process, the policy of the law is to restrict amendments to the very cause of action so stated, by providing by express statute for the allowance of such amendments only as "do not change substantially the claim or defense" or when they do not "add a new and distinct cause of action." Obviously then in these jurisdictions, any amendment that sets up a cause of action substantially different from the one to which the defendant was expressly summoned to respond, would present a new or a different cause of action from that first sued upon, and would either be refused, or if allowed, would hazard the operation of the statute of limitations.

The case of *Sicard v. Davis*, 6 Pet. 124, 8 U. S. (L. ed.) 342, is seldom omitted in the citation of authorities in support of the contention that a new cause of action presented by amendment after the limitation of a statute is barred by the statute. This was an action in ejectment in which the plaintiff alleged a different [47] demise and a new title by an amendment to the declaration, allowed at a time after the defendant had acquired a possessory title to the premises by operations of the statute of limitations.

In that case, Chief Justice Marshall stated that "limitations might be pleaded to the second allegation (that is, to the amendment to the declaration), though not to the first, because the second count in the declaration, *being a demise from a different party asserting a different title*, was not distinguishable, so far as respects the bar of the act of limitations from a new action," and the court held that the case stated by the amendment was barred by the act of limitations intervening between the commencement of the action and the allowance of the amendment. This decision, however, when considered in connection with the particular form of action in which it was rendered, has little authoritative bearing upon the case under consideration, for an amended declaration in ejectment, setting up a different demise from a different party and therefore asserting a different title, might readily be held bad in Delaware, not simply because the cause of action stated by it would be new but because in our method of procedure in that form of action, the amendment would not be connected with or related to the parties to the suit without a corresponding amendment of parties, which is against the policy of our laws.

In Delaware an action of ejectment is commenced not by original or other writ, and in this respect it is an exception to the general rule, but by filing a declaration showing at large the premises of which the plaintiff alleges he was possessed by demise and from which he alleges to have been ejected. To this extent the commencement of the action resembles the mode generally pursued in some other jurisdictions. Service is made by delivering a copy of the declaration to the defendant and to the case as stated in the declaration the defendant is summoned to respond. The common-law fiction of the action maintains in Delaware and therefore the common-law rule maintains that the lessor of the plaintiff must have had the right of possession at the time of the demise mentioned in the declaration, which means of necessity, at or before the commencement of the action. Obviously, then an amendment to the declaration that sets up a new demise [48] from a different party asserting a different title from that declared upon in the original declaration, states much more than a new cause of action in that it states a cause of action between new persons who are not parties to that suit, the nominal plaintiff in an action of ejectment being a fictitious person and the real plaintiff in the action being a fictitious lessor, and of course cannot be maintained without an amendment of parties.

The case of *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 U. S. (L. ed.)

983, was cited by the defendant as a controlling authority in support of its contention, because of the similarity of the defendant's liability under the pleadings in that case to the defendant's liability in the one under review, and the pronouncement of the law thereupon by the Supreme Court of the United States.

The plaintiff instituted in Missouri an action to recover for personal injuries sustained in Kansas, and after the removal of the case to a federal court, the question of law under consideration was taken to the Supreme Court of the United States for determination. In the original pleading, the plaintiff alleged that his injuries were occasioned by the negligent act of an incompetent fellow-servant of whose incompetence the defendant had knowledge, and charged the defendant with a violation of its duty as a master to supply him with competent servants with whom to work. After the removal of the case to the federal court, the plaintiff amended his petition, wholly omitting the charge of incompetence of his fellow-servant and the defendant's knowledge thereof, and based his cause of action simply upon the negligent act of the same fellow-servant, charging the defendant with liability therefor under a statute of Kansas, where the injury was inflicted, which gave a servant a right of action against a master for the negligence of a fellow-servant, without regard to the element of incompetence.

Between the time of filing the original and amended petitions the statute of limitations of Missouri intervened. There were really presented two questions, first, whether the case as stated in the amended petition constituted a new cause of action, and if so, was it barred by the statute of limitations.

[49] This case is an authority in point upon the question whether the amended petition restated the original cause of action or presented one entirely new, as the amended pleading in that case deprived the defendant as a master of the defense of the servant's assumption of risk and charged it with a new liability under entirely different law, very much as was done by the amended declaration in the case under consideration. The court held that the amended petition stated a cause of action under the statute of Kansas that was in derogation of the general law of master and servant under which the plaintiff had declared in his original petition and therefore constituted a departure and set up a new cause of action. With this conclusion we take no exception. But the court further held that because it was a departure from the original petition and because it set up a new cause of action, the statute of limitations as applied to the new cause of action treated the action as commenced when the amendment was incorporated into the pleadings.

A careful reading of this case discloses that the Supreme Court reached this decision, if not by expressly construing the statutes of Missouri, then certainly by giving to them a consideration that is reflected in the decision, for the decision of the court in this case, like the decisions of the courts under like statutes in other jurisdictions, is in harmony with the policy of the law as declared in the jurisdiction in which the case arose.

In Missouri a civil action is begun by petition upon which a writ issues. Civil Procedure, c. 21, Art. 4, § 1756. To the cause of action presented by the petition, the defendant is summoned to respond, and it appears that to that cause of action alone is he required to answer. The petition presenting the cause of action, however, is susceptible of amendment, but amendment of the original petition is restricted by statute to such things as do "not change substantially the claim or defense" (Civil Procedure, c. 21, Art. 6, § 1848), which obviously means the claim as made by the original petition. The policy of the law of Missouri, therefore, and of a number of jurisdictions cited by the defendant where actions are begun by complaints or petitions, is to restrict the cause of action and the amendments thereof to the one stated in [50] the original petition, and if another cause of action be stated by amendment, to subject the new cause of action to the operation of the statute of limitations.

Like other American jurisdictions, the State of Delaware in providing a method for commencing actions at law adopted some of the features of the original writ at common law and discarded others. When comparison is made with the methods adopted by other American jurisdictions, and particularly with the methods in the jurisdictions mentioned, it will be observed that many of the features of the common law proceeding which were rejected by this jurisdiction are the very ones which other jurisdictions have considered important enough to accept, and upon further examination it will be disclosed that in this and in other jurisdictions the principle and effect of amendments in actions at law are consistent with and controlled by the particular policies of law which were adopted by the several jurisdictions in determining their different methods of instituting actions.

Except in certain summary proceedings, an action at law is commenced in this state, not by petition or complaint, but by *præcipe*, which for such a purpose, is a mandate to the prothonotary directing him to issue process or a writ of a particular character in the action thereby instituted, commanding the sheriff to summon the defendant to appear and answer the plaintiff in a particular form of action. The features of this proceeding that distinguish it from the proceeding at



common law and from proceedings in some of the jurisdictions that have been adverted to, are that the action is thus begun upon the command of the plaintiff and not upon his petition, the process issues of course and not by leave, the form of action is stated in both the *præcipe* and the process while the cause of action is stated in neither, and the purposes of the writ are to disclose to the court its jurisdiction in an action of that form and to compel the appearance and answer of the defendant thereto.

As causes of action of many different characters may be embraced within one form of action, notably in the form of an action of trespass on the case, the defendant in an action at law instituted in Delaware is not informed of the nature of the plaintiff's [51] complaint or of the character of his cause of action until in the course of the proceeding and pursuant to certain rules for pleading, the plaintiff files his declaration. Then and not until then does he know to what he is summoned to respond.

Under the practice of the courts of this state, a plaintiff has a right to insert in his declaration any number of counts, having regard of course to the rule against vexatious pleading, provided that each count presents a separate and distinct cause of action and that each cause of action so presented is appropriate to the form of action in which it is pleaded, and to each count, constituting as its name signifies, a separate "tale" or complaint, the defendant must make separate answer.

In order to remove from the administration of justice the stigma that existed in early history of trying technical questions rather than merits and deciding causes apart from the objects of the suit, our laws relating to amendments pursued a policy of great liberality and placed a large discretion in the court. The Constitution provides that "In civil causes, when pending, the Superior Court shall have the power, before judgment, of directing, upon such terms as it shall deem reasonable, amendments, impleadings and legal proceedings so that by error in any of them, the determination of causes, according to their merits, shall not be hindered." Article 4, § 24, of the Constitution of 1897.

Supplementing this declaration of principle, it is provided by statute that "In any civil cause pending before the Superior Court, the said court shall have power, at any time before judgment, to allow amendments either in form or substance, of any process, pleading or proceeding, in such action, on such terms as shall be just and reasonable." Revised Code, c. 112, § 11.

From this statement of the law, it appears that the only limitation in point of time that is placed upon an amendment in a pending action, within the discretion of the court,

is judgment. Within that limitation, the court in its discretion may allow an amendment whenever it pleases. There is no suggestion of limitation of amendments such as may be imposed by a statute of limitations. In truth, the court in promulgating rules for pleading has wholly ignored the contemplation of such a limitation, [52] by providing that the plaintiff shall file his declaration on the second rule day after the return day of the writ. In an action for personal injuries, instituted just before the expiration of the year limited by the statute for such actions, the rule day for the plaintiff's declaration occurs after the expiration of the year limited by the statute for the action. If the statute runs to the statement of the cause of action and is not arrested once and for all by the institution of the suit, then in such case the action is barred when the cause thereof is first stated by the original declaration just as effectually as by a subsequent statement in an amended declaration, and there would then be the anomaly of an action instituted within the year and therefore not affected by the statute of limitations and the cause of action thereof stated in an original pleading after the year being barred by the statute.

It is therefore held, that in view of the character and purpose of original process in actions at law in the State of Delaware, the operation of statutes limiting actions at law is arrested at the time when the action is brought and does not extend to the time when the cause of action is stated and that a cause of action that would have been good in law if stated in the original declaration will likewise be good if stated by amendment.

The remaining errors assigned by the plaintiff in error may be considered in groups, and when classified relate to the errors charged to the court in defining and in failing properly to define to the jury the duty the defendant owed the deceased to warn him against danger and the duty the deceased owed himself to avoid danger, and in refusing to give the jury binding instructions to render a verdict for the defendant, upon the grounds, *first*, that the deceased was guilty of contributory negligence; *second*, that no act of negligence on the part of the defendant was shown; *third*, that the preponderance of the evidence was with the defendant; and *fourth*, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative.

At the trial of this case there was no dispute as to the character of the place in which the deceased met his death, nor of the [53] lawfulness of the presence and character of work in which the defendant and the deceased were respectively engaged in that place. The deceased was a mechanic employed by the

Pullman Company upon the repair of cars. The defendant was a railroad company engaged in moving and placing cars upon the tracks of the Pullman Company for repair. The place was the yard of the Pullman Company connected with and forming a part of its car works, which was covered by a platform upon which were its private lines of tracks running parallel with and adjacent to its shops. The tracks or lines of railway were not used for traffic or for the transportation of anything except the cars themselves, when being placed in position for the purpose of being altered, repaired or renovated or when being removed therefrom. In this respect the place was an open air workshop, and when considered with reference to the care and caution required of all persons moving about it, differed in no substantial way from an inclosed shop in which the same kind of work is done.

In a preceding review of an earlier trial of this case by the Supreme Court of this state (2 Boyce 356, 80 Atl. 617), this court announced as law, that there was imposed upon a railroad company a duty to give warning of the approach and movement of its engines and trains to all persons put in danger thereby, and to give such a warning as under the varied conditions of their operation, shall be timely and sufficient. With a particular reference to the testimony produced at the first trial, which in the main is the same that was presented in the trial now under review, the court further held that it was the duty of the railroad company in giving a warning that there was about to be danger upon a particular track, to give a warning not only to those who were present when the warning was given, but to those who were present when the danger came. It contemplated a warning to all who were put in peril. It was not limited to those who were at work within, upon and under the cars upon the track, but extended to those who otherwise might lawfully come within the zone of the impending danger in ignorance of its existence and of their peril. Around this statement of the law revolved the controversy in the second trial below, the plaintiff below offering testimony to prove that [54] the deceased could not have heard the first warning, for at the time it was given he was within the shops and out of hearing, that no warning was given subsequent to the first warning, that in the progress of his work and in the exercise of all the care and caution required of him in view of the character and location of his occupation, the deceased came from the shops and walked a distance of about a dozen feet directly to the opening between the two cars by which he was crushed without being then or theretofore warned that shifting was about to be done upon the track he was crossing,

and without knowledge thereof from anything in the situation which he could have seen or in law would have been required to see; that while the engine was at the other end of the line of cars it was outside of the yard across the street, and if the deceased had looked, his vision would have been obstructed to a greater or less extent by the presence of a gate or fence dividing the yard from the street, and that even if he had seen the shifter standing outside of the yard or heard its bell ring, there was nothing from such an observation to suggest it was about to do shifting in the yard and to put him on his guard and cause him to heed the instructions of a posted notice to employees not to "pass between the cars while cars are being shifted in the yard." As to the insufficiency of the warning, the plaintiff below produced witnesses who were working in, on or under cars located upon the track where the injury occurred, who testified that they heard and obeyed the warning given from two to four minutes before the accident, but that after that warning, they heard no further warning, although they remained relatively in the same positions in which they were when they heard the first warning.

The defendant below on the other hand produced testimony, that the first warning was given at a time from which it might be inferred that Gatta was in the yard and before he had gone into the shops, that the warning was given both by the call of trainmen and by ringing the bell of the shifter from the time it was first given down to the time Gatta was killed, and that Gatta could or should have heard these warnings, that the shifter was not standing outside of the yard and beyond the street, as shown upon the defendant's own plot, but it was standing partly [55] within the yard so that Gatta, by looking could have seen it and in law should have been required to see it and to have recognized the purpose and danger of its presence, and that he could have heard the bell and should have recognized it, without confusing it with the sound of other bells, and should have heeded the warning which it gave him.

In this state of the testimony, nearly all of which was conflicting and much of which was irreconcilable, the case was submitted to the jury under the usual instruction by the court relative to conflicting testimony, and out of this testimony, which was considered, and in parts accepted and rejected we assume in the light of such an instruction, the jury evolved a verdict for the plaintiff.

Without reciting the testimony of the case to which the court has given consideration in reaching its conclusion, we consider it sufficient to state that when taken alone, the evidence produced on the part of the plaintiff was sufficient to justify the jury in finding

that the injuries to the deceased were occasioned by the negligence of the defendant at a time when the deceased was in the exercise of a care and caution commensurate with the duties of his position and occupation, and that the charge of the court in those respects disclosed no errors either in what was included or omitted.

Opposed to the testimony for the plaintiff and to the inferences it justifies, however, is the testimony for the defendant, which is claimed to be of a weight so much greater and a quality so superior to that produced for the plaintiff, that in law the trial court was bound to instruct the jury to render a verdict for the defendant. From the refusal of the trial court either to grant a new trial or direct a verdict for the defendant, by assuming to determine for which party the testimony preponderated, spring the important errors charged to the court below, namely, that a new trial should have been ordered or a verdict for the defendant should have been directed on the grounds, "third, that the preponderance of the evidence was with the defendant; and fourth, that the testimony produced for the defendant to disprove negligence was positive, while the testimony for the plaintiff, in proof of negligence, was merely negative."

[56] In that branch of the administration of justice in which the courts are called upon to perform the delicate function of directing, sustaining and disturbing the verdicts of juries, without encroaching upon their separate function, courts have adopted for their governance, so far as practicable, certain well considered principles. In the policy of the law of this state, declared by the courts in numberless decisions, the jury is the sole judge of the facts of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury. While in jury trials the court may not determine issues of fact from the evidence, the court may, for certain purposes, determine the existence of evidence from which issues of fact may be determined by the jury. By inquiry into the evidence the court will not allow a verdict when the evidence is not sufficient in law to support it, nor will the court sustain a verdict when rendered against the evidence or upon insufficient evidence.

When the evidence in a case is admitted or not controverted and when the law as applied to that evidence is productive of but one legal result, it becomes the duty of the court in the administration of justice, to bind the jury to render a verdict accordingly. To do otherwise would simply entail a postponement of the proper decision of the case, by a retrial ordered on a motion for a new trial,

in the event the jury found against the facts. Thus when it appears by a verdict that admitted facts were ignored by the jury, or the instructions upon the law were disregarded, or a clear error of calculation was made, the court will set aside the verdict, or to avoid this, when possible, the court will direct the jury to render the only verdict that could legally be sustained. *Prettyman v. Waples*, 4 Har. (Del.) 299, 302; *State v. Layton*, 3 Har. (Del.) 469, 480, 481; *Beeson v. Elliott*, 1 Del. Ch. 368; *Waples v. Waples*, 1 Har. (Del.) 394, note a; *Allen v. Miles*, 4 Har. (Del.) 234; *Bailey v. England*, 1 Penn. (Del.) 12, 39 Atl. 455; *Kinney v. Adams*, 2 Har. (Del.) 357; *Taylor v. Moore*, 3 Har. (Del.) 6, 7.

But when the case involves a controverted question of fact in which the evidence is conflicting and out of the conflict may be gathered sufficient evidence to support a verdict for either [57] party, the issue of fact will be left severely to the jury, and the court will neither direct nor disturb the verdict upon the ground that it is against the evidence, though it would have drawn from the testimony a conclusion different from that drawn by the jury. *Burton v. Philadelphia, etc. R. Co.* 4 Har. (Del.) 252, 254; *State v. Brelawski*, 3 Boyce (Del.) 416, 84 Atl. 950. The absence or presence of conflicting testimony in a case is therefore a controlling consideration by which courts are governed in directing, sustaining, or overturning the verdicts of juries.

It is contended, however, that as the jury is instructed to find for the party with whom, in the maintenance of the issues, rests the preponderance of evidence, it is likewise the duty of the court, when that preponderance is disclosed at the trial, either to direct a verdict in accordance with it, or after trial, to set the verdict aside, if the verdict be found against it. This in the last analysis would make the court the judge of the facts, and if the judgment of the jury upon the issue of fact were to be anticipated or reviewed by the judgment of the court upon the facts, then the function of the jury in determining issues of fact would cease to be exclusive and would become merely preliminary.

It is the province of the jury in the trial of civil cases to consider the whole volume of testimony, estimate and weigh its value, accept, reject, reconcile and adjust its conflicting parts and be controlled in the result by that part of the testimony which it finds to be of greater weight. As the jury is the exclusive judge of the evidence, it must in reason be the exclusive judge of what constitutes the preponderance of the evidence, and when that judgment is reached upon evidence sufficient to support a verdict, it should not be disturbed by the court. *Smithers v*

Wilmington City R. Co. 6 Penn. (Del.) 422, 425, 67 Atl. 167; *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778; *Waller v. Wilmington City R. Co.* 5 Penn. (Del.) 374, 61 Atl. 874; *Reed v. Continental Ins. Co.* 6 Penn. (Del.) 204, 65 Atl. 569; *Cecchi v. Lindsay*, 1 Boyce (Del.) 185, 75 Atl. 376; *Lenkewicz v. Wilmington City R. Co.* 7 Penn. (Del.) 64, 74 Atl. 11.

As in the trial of this case there was sufficient evidence to justify the verdict rendered, the court finds no error committed by the trial court either in refusing to direct a different verdict or in refusing to disturb the one rendered.

[58] Being required to estimate and weigh all the testimony in a case in order to determine where the preponderance lies, juries are frequently required to consider testimony known as positive and negative testimony, and to give to it the peculiar weight and value accorded it by the law. At the trial of this case the court instructed the jury that "the jury in determining the value of testimony may, and often should, give the greater weight to positive than to negative testimony, but all the testimony should be considered by the jury, and given such weight as in their judgment it is entitled." To this instruction the defendant below excepted and for error contends, that in view of the negative character of the testimony in proof of negligence and the positive character of the testimony offered to disprove negligence, the trial court should either have directed a verdict in its favor or set aside the verdict rendered against it, and should not have submitted the case to the jury upon the instruction given.

In the case of *Queen Anne's R. Co. v. Reed*, 5 Penn. (Del.) 226, 236, 59 Atl. 860, 119 Am. St. Rep. 301, this court recognized the general rule that positive or affirmative testimony is of greater weight than testimony merely negative, that is, the testimony of a credible witness that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place. 1 Whart. Ev. § 415; Stark. Ev. 867; Jones, Ev. § 901. The reason for the rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible for the witness who testifies affirmatively to remember what never existed. *Stitt v. Huidekoper*, 17 Wall. 384, 21 U. S. (L. ed.) 644. Negative testimony may be attributed to lack of attention, inert mental operations, imperfect senses as well as to the faulty recollection of the witness, while on the contrary, given under circumstances that disclose the witness to have been mentally alert, of perfect senses and excellent memory,

and showing the opportunities of the witness for knowing and the attention he had given the matter concerning which he testifies, negative testimony may lose its negligible quality and outweigh positive testimony. *Greany v. [59] Long Island R. Co.* 101 N. Y. 419, 5 N. E. 425; *Lighthouse v. Chicago, etc. R. Co.* 3 S. D. 518, 54 N. W. 320; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Stoddard v. Kelly*, 50 Ala. 452; *State v. Gates*, 20 Mo. 400; *Van Salvellergh v. Green Bay Traction Co.* 132 Wis. 166, 111 N. W. 1120; *Stotler v. Chicago, etc. R. Co.* 200 Mo. 107, 98 S. W. 509; *Pence v. Chicago, etc. R. Co.* 79 Ia. 389, 44 N. W. 686; *Davis v. New York, etc. R. Co.* 159 Mass. 532, 34 N. E. 1070; *Eilert v. Green Bay, etc. R. Co.* 48 Wis. 606, 4 N. W. 769; *Elkins v. Kenyon*, 34 Wis. 93; *Purnell v. Raleigh, etc. R. Co.* 122 N. C. 832, 29 S. E. 953; *Chicago, etc. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559.

The courts in different jurisdictions have frequently recognized a qualification of the general rule that positive testimony is of greater weight than negative testimony. *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Innis v. State*, 42 Ga. 482; *Marshall Dental Mfg. Co. v. Harkenson*, 84 Ia. 117, 50 N. W. 559; *Burnham v. Sherwood*, 56 Conn. 229, 14 Atl. 715; *Cotton v. Willmar, etc. R. Co.* 99 Minn. 366, 109 N. W. 835, 8 L.R.A. (N.S.) 643, 1116 Am. St. Rep. 422, 9 Ann. Cas. 935; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *Le Cointe v. U. S.* 7 App. Cas. (D. C.) 16; *McMahon v. McHale*, 174 Mass. 320, 54 N. E. 854; *State v. Lattin*, 19 Wash. 57, 52 Pac. 314.

The varying qualities of negative testimony under different conditions were recognized by this court in the case of *Queen Anne's R. Co. v. Reed*, in which the opinion of the court in *Menard v. Boston, etc. R. Co.* 150 Mass. 386, 23 N. E. 214, was cited to illustrate its meaning. In that case the court said: "Ordinarily all that a witness can say, in such a case, when called to prove that a bell was rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown, which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."

[60] The rule of law that positive testimony is of greater weight than negative testimony, considered, of course, in connection

with its exceptions and qualifications, is undisputed. We are now asked however, to enlarge the rule and hold in substance that because a jury should ordinarily give to positive testimony greater weight than to negative testimony, the court, on motion for binding instructions or for a new trial, should see that the rule is enforced, and should examine into the character of the testimony of the two classes, judge their relative values, determine whether the positive testimony outweighs and destroys the probative force of the negative testimony, and direct or overturn a verdict accordingly. In support of this contention these authorities are cited: *Seibert v. Erie R. Co.* 49 Barb. (N. Y.) 583; *Lomer v. Meeker*, 25 N. Y. 363; *Culhane v. New York Cent. etc. R. Co.* 60 N. Y. 134; *Foley v. New York Cent. etc. R. Co.* 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631; *Keiser v. Lehigh Val. R. Co.* 212 Pa. St. 409, 61 Atl. 903, 108 Am. St. Rep. 872; *Lonzer v. Lehigh Val. R. Co.* 196 Pa. St. 610, 46 Atl. 937; *Horandt v. Central R. Co.* 78 N. J. L. 190, 73 Atl. 94; *Holmes v. Pennsylvania R. Co.* 74 N. J. L. 469, 66 Atl. 412, 12 Ann. Cas. 1031; *Hubbard v. Boston, etc. R. Co.* 159 Mass. 320, 34 N. E. 459; *Menard v. Boston, etc. R. Co.* 150 Mass. 387, 23 N. E. 214; *Bohan v. Milwaukee, etc. R. Co.* 61 Wis. 391, 21 N. W. 241; *Horn v. Baltimore, etc. R. Co.* 54 Fed. 301, 6 U. S. App. 381, 4 C. C. A. 346; *Baltimore, etc. R. Co. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211.

A close analysis of these authorities will disclose, that in those cases in which there was negative testimony and verdicts were either directed or set aside, it was done not because the testimony was negative in quality nor because the negative testimony was opposed by positive testimony, but because the negative testimony was in itself without probative force sufficient to support the verdicts.

Considering the rule in the light of these and other decisions, it is apparent that in a case where the issue on one side is supported solely by negative testimony, but by negative testimony of sufficient probative force, in the estimation of the court, to prove the issue, and there is opposed to it no testimony at all, no court would prevent or disturb a verdict based upon such testimony [61] merely because of its negative character. And if the same negative testimony of the same probative force was opposed by positive testimony, a court would not take a case from the jury or overthrow its verdict simply because of the rule in favor of positive testimony, for the effect of that would be to deprive the rule of its recognized exceptions and to hold that positive testimony outweighs negative testimony in every case. But when negative testimony is opposed by

positive testimony and the negative testimony, if unopposed, would in itself be insufficient to support the issue it is offered to prove, the court will direct or overturn a verdict, not by encroaching upon the exclusive function of the jury and weighing each class of testimony, one against the other, but by performing its own exclusive function of determining, as in all cases, whether the evidence introduced in proof of the issue was sufficient to support a verdict.

Considered in this light, the rule that positive testimony outweighs negative testimony was not intended to come in conflict with the rule that the weight of the testimony, when conflicting, should be left to the jury (*Jones, Ev.* 901), but was designed as a rule of measurement for use by the jury, and when testimony, negative in quality, is submitted to the jury with the circumstances surrounding and corroborating it, to be weighed and valued according to this and other rules of evidence, and when in itself, it is of sufficient probative force to support a verdict, though opposed by positive testimony to which the jury may give a lesser weight, a verdict will neither be directed nor disturbed.

The opportunities of the witnesses who gave negative testimony in this case, to hear, comprehend and remember a warning if one had been given when Gatta was within sound of such a warning, considered with relation to their positions, occupations, surroundings and knowledge of the character of the impending danger, were such as to take their testimony entirely out of the class that is purely negative and to justify the jury in giving it a weight upon which to predicate the verdict it rendered. The trial court therefore committed no error in refusing to direct a verdict or to disturb the verdict rendered because of the negative character of the testimony for the plaintiff.

[62] The judgment and proceedings of the court below are in all respects affirmed.

# NOTE.

The reported case involves an application to somewhat novel facts of the doctrine that an amendment which does not change materially the cause of action may be made after the statute of limitations has run if the action was begun within the time limited. In that case the original declaration in an action against a railroad company for death by wrongful act alleged that the deceased was at the time of his death in the employ of the defendant. An amendment made after the statute of limitations had run averred that the deceased was at the time of his death in the employment of a third person, and sought to recover for a violation by the defendant

of a duty owed to the deceased as a stranger. It is held that the bringing of the action saved from the bar of the statute the cause of action alleged by the amendment. In so holding the court lays down a very liberal rule based on the fact that an action is begun by praecipe and not by the filing of a declaration. In jurisdictions wherein the contrary is true, a stricter view would doubtless be taken. As to whether an amendment setting forth an additional ground of negligence states a new cause of action, see the note to *Chobanian v. Washburn Wire Co.* Ann. Cas. 1913D 730. Whether a new cause of action is introduced by an amendment changing the description of the place of the accident on which the action is based, is discussed in the note to *Carlin v. Chicago*, Ann. Cas. 1915B 213; and a similar question with respect to an amendment curing defects which render the original complaint demurrable, is considered in the note to *Hagenauer v. Detroit Copper Min. Co.* Ann. Cas. 1914C 1016. As to the right to amend by adding new parties plaintiff, see the note to *Noziska v. Aten*, Ann. Cas. 1916C 589, and as to the right of a plaintiff to amend by changing the capacity in which he sues from a representative to an individual one or vice versa, see the note to *Hardy v. Woods*, Ann. Cas. 1916C 398.

## DONOUGH ET AL.

v.

## GARLAND ET AL.

Illinois Supreme Court—October 27, 1915.

269 Ill. 565; 109 N. E. 1015.

### Descent and Distribution — Release of Expectancy to Ancestor.

Where, as he may, the prospective heir of a living person releases his expectancy to the ancestor, a court of equity will enforce the contract for the benefit of the other heirs. [See Ann. Cas. 1913B 446.]

### Assignment of Expectancy to Stranger.

Where the prospective heir of a living person assigns or transfers his expectancy, the transaction operates as a contract by the assignor to convey the legal estate or interest when it vests in him, which will be enforced in equity when the expectancy has become a vested interest.

[See note at end of this case.]

### Release to Ancestor.

The release to a living ancestor by his prospective heir of such heir's expectancy is not within the terms of the statute of descent (Hurd's Rev. St. 1913, c. 39, §§ 4, 8), relating to advancements received by a child or lineal descendant toward his share of the estate.

### Same.

Where an heir presumptive releases his expectancy as such to his ancestor, the release operates to extinguish his right of inheritance; the line of inheritance is ended by the release, which is binding not only upon the heir, but upon those taking as heirs in his place.

### Assignment of Expectancy to Stranger.

Where an heir presumptive assigns his expectancy as such to a third person, instead of releasing it to his ancestor, his right of inheritance is not extinguished, but the assignment will be enforced as a contract to convey the legal interest when it ceases to be an expectancy and becomes a vested estate, and the assignee acquires a right to the estate only if it ever vests in the heir.

[See note at end of this case.]

Appeal from Circuit Court, La Salle county: ELDREDGE, Judge.

Action for partition. John Donough et al., plaintiffs, and Edward Garland et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

*Browne & Wiley, John Garland and L. B. Olmstead* for appellants.

*H. M. Kelly* for appellees.

[565] CARTWRIGHT, J.—The appellees, who are the seven children and heirs-at-law of Margaret Donough, a deceased daughter of Thomas Garland and Mary Garland, filed their bill in this case in the circuit court of LaSalle county against the appellants, Katherine Garland and Edward Garland (the latter in his own right and as administrator of the estate of Mary Garland), for a partition of real estate owned [566] by the said Thomas Garland and Mary Garland. The bill was answered and the alleged title of the complainants to a share of the real estate which Mary Garland owned on October 26, 1892, in the real estate of Thomas Garland was disputed, on the ground that Margaret Donough had conveyed her interest in the same to the defendants, Edward Garland and Katherine Garland. The chancellor found against the defendants and entered a decree for partition of all the real estate described in the bill. From that decree this appeal was prosecuted.

Thomas Garland, father of the defendants and grandfather of the complainants, died

intestate in 1869, leaving Mary Garland his widow, and Edward Garland, Katherine Garland, Lizzie Garland, Mary Jane Garland and Margaret Garland (afterward Margaret Donough), his children and heirs-at-law. He owned three tracts of land, containing about seventy acres. After his death Lizzie Garland died intestate, leaving her mother, brother and sisters her heirs-at-law. Afterward Mary Jane Garland died intestate, leaving her mother, brother and sisters her heirs-at-law. On October 26, 1892, Margaret Donough and John Donough, her husband, executed their quit-claim deed to Edward Garland and Katherine Garland, conveying all interest in the real estate in question, and the deed contained this clause: "Intending to convey all interest that I now have or may hereafter acquire except through the grantees, in and to any lands or real estate of which Thomas Garland died seized or in which said decedent had any interest at the time of his death, and also all lands and real estate the title to which is now in Mary Garland, widow of said decedent, or in which said Mary Garland may have any interest or supposed interest or title in trust for said estate of Thomas Garland, deceased." After the execution of the deed Mary Garland acquired other real estate, but the quit-claim deed was limited to lands which she owned at the time it was made, and it is not [567] claimed that the deed was effective to release or convey any interest in such real estate. On the other hand, there is no dispute of the claim that Margaret Donough by her quit-claim deed conveyed all interest that she had in the property of which her father, Thomas Garland, was the owner at his death, the title of which had vested in her as his heir or the heir of her sisters, Lizzie Garland and Mary Jane Garland. The question is whether, in addition to the title Margaret Donough then had, she conveyed her expectancy as heir of her mother to the extent of her mother's interest in lands that had descended to her as heir of her deceased daughters, Lizzie Garland and Mary Jane Garland, which on the death of her mother might by operation of law vest in the grandchildren as heirs-at-law of their grandmother.

The expectancy of a prospective heir of a living person may be released to the ancestor or assigned to a stranger. In the case of a release to the ancestor a court of equity will enforce the contract for the benefit of the other heirs, and an assignment or transfer of an expectancy operates in equity as a contract by the assignor to convey the legal estate or interest when it vests in him, which will be enforced in equity when the expectancy has changed into a vested interest. (3 Pomeroy's Eq. Jur. sec. 1287.)

The questions of the right to release or assign an expectancy, and the effect of the

release and assignment, have been before the court at different times. In *Bishop v. Dav-enport*, 58 Ill. 105, a bill was filed for partition, assignment of dower and distribution of the personal estate of Joel Gunter, deceased. There were children of two marriages, and the children of the first marriage had each received \$100 in money or property, except Joel Gunter, Jr., who received \$800, and each gave a receipt in full of his or her share of the father's estate. The complainants offered to bring their advancements into hotchpot, and alleged that Joel Gunter, Jr., was not entitled to any share [568] of the estate. The court held that the various sums received by the children were not received by way of advancements but were received in full payment and satisfaction of the expectancies of those children who were competent to contract. In *Galbraith v. McLain*, 84 Ill. 379, a bill was filed to enforce the specific performance of a contract made by John Galbraith with his son, Jarrot N. Galbraith, by which the father conveyed to the son fifty acres of land as the son's share of his father's estate. The agreement was by parol but the court enforced the performance of the contract. In *Kershaw v. Kershaw*, 102 Ill. 307, Joseph Kershaw had conveyed lands to his son, John W. Kershaw, and the deed contained a statement that the land was deeded as an advancement out of the estate of the grantor and the deed was accepted by the son as his full and entire share of his father's estate. The circuit court decreed that the land should be brought into hotchpot and valued as unimproved land as of the date of the death of the father. This court reversed the decree, and held that the conveyance was not made as an advancement although it was so stated in the deed, but the property was received as the son's full share of the estate and was binding upon him in favor of the other heirs. In *Longshore v. Longshare*, 200 Ill. 470, 65 N. E. 1081, the son had accepted a warranty deed from his father of eighty acres of land, and the deed contained an agreement that it was made by the grantor and accepted by the grantee as his full share of the estate of the grantor. It was held to constitute a release of the expectancy of the son as an heir of his father. In *Bolin v. Bolin*, 245 Ill. 613, 92 N. E. 530, Nathan W. Bolin accepted a deed from his father in full settlement of his share in the father's estate, and it was held that the contract was sufficient to bar the son from participating in a division of the property.

There have been other cases involving the same principle. In *Parsons v. Ely*, 45 Ill. 232, there was a marriage [569] settlement in which the intended husband, James A. Parsons, released all his interest in expectancy in the property, real and personal, of

his prospective wife, Sarah A. Ely. The wife died leaving one child, and afterward the child died. The husband, James A. Parsons, filed his bill to recover, as the only heir-at-law of the child, the legal title to premises of which his wife was the equitable owner. The court held that the expectancy, although contingent, was a proper subject of contract, and the decree of the court dismissing the bill was affirmed. In *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956, there was a marriage contract wherein John W. Crum had released to his wife all interest in her estate in the event he should survive her. The wife died, leaving her husband and two uncles her heirs-at-law. The husband filed his bill for partition of the lands between himself and the two uncles, but the court said it was well settled that an assignment or release of the expectancy of an heir would be enforced in equity, after the death of the ancestor, as a right of contract, and that an assignment operates by way of present contract to take effect after, and attach to the things assigned when and as soon as they come into existence. In *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124, 48 L.R.A. 557, there was a controversy over an ante-nuptial agreement by which the wife had agreed upon a sum in lieu of her rights in the husband's estate, and the court said that contingent interests and expectancies, and things having no present existence but resting only in possibility, may be assigned so as to be binding in equity, and the assignment will be enforced by a court of equity after the subject matter of it has come into existence.

In all of these cases the agreement was between the heir presumptive and the person from whom he would inherit, and the contract was in each case held to constitute a release of the interest of the heir, which was enforced for the benefit of the other heirs. In other cases the expectancy of an heir presumptive has been assigned or conveyed [570] to some other person, and in those cases the assignment has been regarded as a contract enforceable in equity against the assignor. In *Hudson v. Hudson*, 222 Ill. 527, 78 N. E. 917, John W. Hudson in the lifetime of his father conveyed to his brother, Andrew I. Hudson, his expectancy as an heir of his father, Joel L. Hudson, who executed a will, in which he gave to John W. Hudson and two other sons five dollars each and divided the remainder of his estate among other children. It was held that the conveyance amounted to a sale of the expectancy of John W. Hudson in his father's estate to Andrew I. Hudson. The suit was between the two brothers after the death of the father and the agreement was enforced. There was a different situation in *Thomas v. Miller*, 161

Ill. 60, 43 N. E. 848, where the grantor of the expectancy, at the time she made the deed and at her death, had no title. The bill was filed by the widow and administratrix of John A. Thomas, deceased, for the assignment of dower and partition. John A. Thomas was the youngest son of Gideon Thomas, who died leaving a will, in which John A. Thomas was named as the residuary legatee, and in case of his death without leaving heirs of his own the whole was to revert to the heirs of the testator. Lucy Jessop, a daughter of the testator, in 1862 executed a deed to John A. Thomas, in which she and her husband undertook to convey her interest in the lands of which Gideon A. Thomas died seized, to John A. Thomas. Lucy Jessop, the grantor in the deed, died in 1886, and upon the death of John A. Thomas, in 1894, the title to the land became vested, by virtue of the will, in the heirs of Gideon A. Thomas. Lucy Jessop was not living and was not an heir, but her children were, and the title passed to them. As she had no title to the land up to the time of her death nothing passed by the deed. In *Golladay v. Knock*, 235 Ill. 412, 85 N. E. 649, 126 Am. St. Rep. 224, William Golladay had made a warranty deed purporting to convey his contingent interest in certain premises. He died before the life tenant and no [571] title ever vested in him. The court said that a contingent remainder may be conveyed by a warranty deed so as to vest title in the grantee, but where the grantor of such an interest dies before the contingency happens upon which the estate is to vest, nothing passes by such a deed. The court said that had William Golladay survived the life tenant the appellants would have succeeded to his share of the estate and the deed would have been binding upon him and his heirs after his death.

There are some things in the opinion in the case of *Simpson v. Simpson*, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287, which without a full consideration of the opinion might lead to a wrong conclusion. John Simpson, Sr., had conveyed to his son, Amos P. Simpson, certain lands, and the son had given his father a receipt acknowledging the lands received by him to be in full of all his interest in his father's estate. The son died prior to the death of his father, leaving three children, who claimed an interest in the estate. The superior court of Cook county held the release valid against the heirs of Amos P. Simpson and the Appellate Court reversed the decree. This court held that the release was good against the heirs and the judgment of the Appellate Court was reversed. The court called attention to the statute concerning advancements, which provided that on partition or distribution of an estate the advancement should be brought



into hotchpot, and that there was no offer of the grandchildren to return the advancement. While, however, the court treated the conveyance as an advancement, it was said that it was an advancement in full, and the advancement being regarded as one in full, the property conveyed could not come into hotchpot and appellees could not share in the distribution of the estate. Mr. Chief Justice Mulkey filed a separate opinion, saying the grandchildren must take, if at all, *per stirpes*, and consequently their supposed rights were not superior to those of the father if he were living, and that the statute concerning [572] advancements was merely declaratory of the common law, by which he doubtless meant the law in the absence of a statute, since an expectancy was not transferable at the common law. In *Kershaw v. Kershaw*, *supra*, the court had held that the deed made as a release of the expectancy of the grantee in the grantor's estate was not an advancement although the deed expressly stated that it was, and it is quite evident that a release of an expectancy as heir is not within the terms of sections 4 and 8 of the Statute of Descent, which relate to advancements received by a child or lineal descendant toward his share of the estate. Notwithstanding what was said in *Simpson v. Simpson*, *supra*, concerning the statute and the release as an advancement, the agreement was enforced as a release.

From this review of the decisions it will be apparent that a release by an heir presumptive of his expectancy operates as an extinguishment of the right of inheritance, cutting it off at its source. The line of inheritance is ended by the release made by the one having the expectancy at the time, and the release is binding not only upon him but upon those who take as heirs in his place, otherwise a release would often be ineffective. That would always be the case where the one executing the release does not survive the one to whom the release is made although he has himself received the consideration for the expectancy. If, however, the expectancy is assigned to another, the right of inheritance is not extinguished but still exists, and the assignment is enforced as a contract to convey the legal estate or interest when it ceases to be an expectancy and becomes a vested estate. The assignee is regarded as bargaining for a legal interest depending on a future, uncertain and contingent event. The assignee acquires a right to the legal estate if it ever vests in the assignor, but if it does not, he acquires nothing. In this case Edward Garland and Katherine Garland by the conveyance to them became entitled to enforce in equity a right to an interest in lands [573] in case the interest should ever rest in Margaret Donough. The estate or interest

did not vest in the grantor and the chancellor did not err in his findings and decree.

The decree is affirmed.

Decree affirmed.

#### NOTE.

#### Validity of Transfer of Expectancy in Estate Made by Heir or Beneficiary to Stranger.

##### I. Introductory, 1241.

##### II. Validity at Law:

###### 1. At Common Law:

###### a. General Rule, 1242.

###### b. Rule in Massachusetts, 1243.

###### 2. Under Statute, 1244.

##### III. Validity in Equity:

###### 1. Generally, 1244.

###### 2. Requisites of Validity:

###### a. Parties, 1245.

###### b. Consideration; Good Faith between Parties, 1246.

###### c. Good Faith toward Third Persons, 1247.

###### d. Consent of Ancestor, 1248.

###### e. Form of Transfer, 1249.

###### 3. Burden of Proof, 1250.

###### 4. Enforcement:

###### a. Generally, 1251.

###### b. Person against Whom Transfer Can Be Asserted, 1252.

###### c. Extent of Enforcement, 1254.

###### 5. Rule in Kentucky, 1255.

#### I. Introductory.

This note considers the validity of the transfer of an expectancy made by a prospective heir or beneficiary to a person other than the one from whom the interest is expected to be derived. It is intended to cover the question arising where a person, having the possibility of receiving property by will, distribution, or descent, assigns or charges that possibility, during the life of the ancestor or testator, to some person other than the ancestor or testator. The discussion does not include assignments of contingent remainders or reversionary interests or any transfer made after the death of the ancestor or testator; nor does it include transactions in which the thing dealt with is not the grantor's expectancy but is specific property which the grantor does not possess; nor does it extend to releases executed by an heir to his ancestor.

For cases concerning the validity of a release of an expectancy made by an heir to his ancestor, see the note to *In re Thompson*, Ann. Cas. 1913B 446.

## II. *Validity at Law.*

### 1. AT COMMON LAW.

#### a. *General Rule.*

The general common-law rule is that any transfer by an heir or beneficiary of his expectation of receiving property, made during the life of the ancestor or testator, is void. *Jones v. Roe*, 3 T. R. 88, 100 Eng. Rep. (Reprint) 470; *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, 17 Ky. L. Rep. 713, 56 Am. St. Rep. 335, 33 L.R.A. 266; *Spears v. Spaw* (Ky.) 118 S. W. 275; *McDowell v. Neal*, 5 Ky. L. Rep. (Abstract) 331; *Stevens v. Stevens*, 181 Mich. 438, 148 N. W. 225; *Jackson v. Bradford*, 4 Wend. (N. Y.) 619; *Mastin v. Marlow*, 65 N. C. 695; *Hart v. Gregg*, 32 Ohio St. 502; *Bayler v. Com.* 40 Pa. St. 37, 80 Am. Dec. 551; *In re Lennig*, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L.R.A. 378. See also *In re Mericlo*, 63 How. Pr. (N. Y.) 62; *Fortescue v. Satterthwaite*, 23 N. C. 566; *Beacom v. Amos*, 161 N. C. 357, 77 S. E. 407; *Gilpin v. Williams*, 25 Ohio St. 233; *D'Wolf v. Gardiner*, 9 R. I. 145; *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L.R.A. 122. Compare *Godfray v. Godfray*, 12 Jur. N. S. (Eng.) 397, 35 L. J. P. C. 39, 14 W. R. 522 (applying local law of Island of Jersey and citing *Le Feuvre v. Le Feuvre*, a la cour Royale de l'Île de Jersey, 8 Mai 1795); *Cook v. Field*, 15 Q. B. 460, 69 E. C. L. 459; *M'Clure v. M'Clure*, 1 Phila. (Pa.) 117, 7 Leg. Int. 195 (wherein the court said: "Though a mere possibility cannot be directly granted at law, yet it may be by release, devise or estoppel, and is directly assignable in equity, and therefore at law in Pennsylvania"); *Blackwell v. Harrelson*, reported in full post, this volume, at page 1263.

Thus in *Jackson v. Bradford*, 4 Wend. (N. Y.) 619, the court said: "When these deeds were executed, Price had no title or claim to the premises, and could therefore convey no right to them. Qui non habet, ille non dat. A grant by a person who has no estate, as an heir in the life time of his ancestor, will not pass any estate (3 Preston on Abstracts of Title 25, 6). This position is well warranted by Sir Marmaduke Wivel's case (Hob. 46). In that case a tenant in tail of an advowson, and his son and heir, joined in a grant of the next avoidance. The tenant in tail died, and it was held that the grant was utterly void against the son and heir who had joined in the grant, because he had nothing in the advowson, neither in possession nor right, nor in actual possibility, at the time of the grant. It is said in the Touchstone (349), that a bare possibility of an interest which is uncertain is not grant-

able. The expectancy of an heir at law in the life of the ancestor (and such was the defendant's grantor in this case), is less than a possibility (*Wright v. Wright*, 1 Ves. (Eng.) 409)." In that case, however, the court recognized that if the deed had been by warranty the warranty would estop the grantor and those claiming under him.

The rule was applied in *Spears v. Spaw* (Ky.) 118 S. W. 275, wherein it was said: "It appears, without contradiction, that this conveyance was made and executed in the lifetime of their mother, who held the fee-simple title to the land, and that she verbally consented to the sale and purchase. The only question to be determined is: Was this conveyance valid for any purpose? The following language occurs in the deed, to wit: 'The parties of the first part (meaning appellants) hereby convey their interest, being two-thirds of the said Fanny Spaw estate, subject to her lifetime estate, and at the death of said Fanny Spaw to be in full force and effect . . . to have and to hold the same, together with all the appurtenances thereunto belonging, unto the party of the second part, his heirs and assigns, forever; and the said parties of the first part hereby covenant with the said party of the second part that they will warrant the title to the property hereby conveyed unto the said party of the second part, and their heirs and assigns, forever.' It is certain that this conveyance passed nothing to appellee but appellants' expectancy in the land. They had no interest in the land at that time. The mother's verbal consent to the sale of the land did not prevent her from afterwards disposing of it by will or descent. It remained within her power to prevent any of her children from receiving any part of this land or her estate. The result was that appellants had nothing to sell, and, therefore, appellee received nothing by reason of his deed. The rule is that it is essential to the legal validity of a contract that the thing sold have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of a sale or assignment. In the case of *Wheeler v. Wheeler*, 2 Metc. 474, 74 Am. Dec. 421, the court held that a son, who had executed a deed purporting to convey his interest in his father's estate, the father then being alive, to his brother, was notwithstanding that fact entitled to recover the interest in the estate which his deed purported to convey. At common law such contracts were declared to be void; and this court in several cases, and many other courts have also, declared them to be void. . . . Appellee contends that as the deed contains a general warranty of title, and that as appellants have become

possessed of the property by descent, their mother having died, the warranty of title is binding upon them, and that the title to the land is in him by reason thereof. The contract and conveyance being void, the warranty is also. As stated, the conveyance of a thing not in being—i. e., an expectancy—is invalid, and the whole contract with reference thereto is void."

*b. Rule in Massachusetts.*

In Massachusetts it has been held at law that an agreement by an heir apparent to convey an estate which may come to him by descent is valid, when entered into fairly, on an adequate consideration, with the knowledge and assent of the ancestor. *Jenkins v. Stetson*, 9 Allen (Mass.) 128 (family agreement). Compare *Davis v. Hayden*, 9 Mass. 514. And where a prospective heir conveys by deed to a member of his family his interest in the expectancy, with the consent of the ancestor, it has been held that the covenant in the deed is valid and binding. *Fitch v. Fitch*, 8 Pick. (Mass.) 480; *Trull v. Eastman*, 3 Mete. (Mass.) 121, 37 Am. Dec. 126. In the case last cited the court said: "The question upon the whole matter is, whether the demandant is by law entitled to recover. It has been contended for him, that no estate passed from him by his deed to his brother: That it was a mere expectancy, and that the deed could operate on the realty only to convey the present right; and that the covenant should be restrained or limited in such manner, as that the grantor, and those under him, should not claim any part of the estate thereafter, which he then had; but that he should be permitted to acquire, by grant or devise, any right to the estate thereafterwards, to his own use. And if that were the true construction of the deed, the consequences would follow. It may be conceded that the covenant should be limited to the premises—the subject matter of the conveyance. And it is perfectly clear, that the premises in that deed embraced what right the grantor should thereafterwards acquire, as well as what present right he had. . . . Now the covenant, in the case before us, was in effect a covenant real. The law does not require any particular form of words to constitute such a covenant, which shall run with the land. In *Fairbanks v. Williamson*, 7 Greenl. (Me.) 96, it was held, that a covenant that neither the grantor nor his heirs should make any claim to the land conveyed, was a covenant real, which ran with the land. In effect it is a warranty, that the grantor will not, and that his heirs and assigns shall not, thereafterwards claim the premises granted or released, or any part of the same. And although the grantor or re-

lessor had not then a present right, yet the subsequent acquisition of it shall enure to the use of the grantee: or, in the better words of Lord Coke, the grantor shall be rebutted and barred, when he afterwards shall so claim against his own warranty."

The limitations of the rule were set forth in *Boynton v. Hubbard*, 7 Mass. 112, as follows: "The covenant declared on, in the case at bar, is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survive them, or either of them, he will convey to a stranger one third part of all the estate, real and personal, which shall come to him from those ancestors, or either of them, by descent, distribution, or devise. And it is found by the jury, that this contract was not obtained from the heir by the fraud of the purchaser. If, therefore, this covenant is void, it must be on the principle, that it is a fraud, not on either of the parties,—for that the jury have negatived,—but on third persons, not parties to it, productive of public mischief, and against sound public policy. If the contract has this effect, it is apparent to the Court from the record; the whole contract being a part of the record. And that a contract of this nature has this effect, we cannot doubt. The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him as a co-heir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and consequently without any such intention. This Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens. But when it is considered that a contract of this kind is a mere wager, in a case where there are no principles, by which the value of the chances may be estimated, so as to ascertain whether it be unconscionable or reasonable; and, therefore, if

valid in any case, it may be valid in all cases; public policy has additional inducements to discountenance it, as dangerous to good faith and fair dealing. That such is the nature of this contract, is manifest by considering the terms of it. It is true the comparative value of the lives of the uncle and nephew may be estimated. But there is no rule for estimating the estate which the uncle may leave. After the contract he may be unfortunate and lose his property; or he may acquire a much larger estate. But if the estate, of which he should die seised and possessed, could be known, what is the rule for calculating whether he will die intestate or not? or if he should make a will, what estate he would devise to the nephew? the nephew, when the contract is made, may be a co-heir; and afterwards the other co-heirs may die, leaving him the sole heir. Without pursuing the nature of the contract further, it is most manifest, that it must be a desperate wager on one side or the other; and, as such, ought not to be countenanced, as the foundation of an action."

## 2. UNDER STATUTE.

The rule that transfers of an expectant estate by a prospective heir are void at law has been affirmed by statutes in some jurisdictions. In *re Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437. See also *Winslow v. Dundom*, 46 Mont. 71, 125 Pac. 136.

In *Louisiana*, the Civil Code (art 1887) declares that "one cannot renounce the succession of an estate not yet devolved, nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question." *Jacobs' Succession*, 104 La. 447, 29 So. 241. See also *Reed v. Crocker*, 12 La. Ann. 436. But compare *Grayson v. Sanford*, 12 La. Ann. 646 (sale of "inheritance" valid).

The *New Jersey* statute, referred to in *Bouvier v. Baltimore*, etc. R. Co. 67 N. J. L. 281, 51 Atl. 781, 60 L.R.A. 750, as "an act to authorize the transfer of estates in expectancy," provided as follows: "No person shall be empowered by this act to dispose of any expectancy which he may have as heir of a living person . . . nor any estate, right, or interest to which he may become entitled under any deed to be thereafter executed, or under the will of any living person."

## III. Validity in Equity.

### 1. GENERALLY.

It is well established that a person expecting to receive property by will, distribution, or descent, may make a transfer of the expectancy to a third person which will be valid and enforceable in equity.

*England*.—*Beckley v. Newland*, 2 P. Wms. 182, 24 Eng. Rep. (Reprint) 691 (family agreement); *Hobson v. Trevor*, 2 P. Wms. 191; *Bennett v. Cooper*, 9 Beav. 252, 50 Eng. Rep. (Reprint) 340; *Flower v. Buller*, 15 Ch. D. 665; In *re Clarke*, 35 Ch. D. 109; *Harwood v. Tooke*, 2 Sim. 192; *Lyde v. Mynn*, 1 Myl. & K. 683, 39 Eng. Rep. (Reprint) 844; *Wethered v. Wethered*, 2 Sim. 183, 57 Eng. Rep. (Reprint) 757. See also *Warmstrey v. Tanfield*, 1 Ch. Rep. 29, 21 Eng. Rep. (Reprint) 498 (assignment of possibility of testamentary trust); *Hinde v. Blake*, 3 Beav. 234, 49 Eng. Rep. (Reprint) 91; *Carleton v. Leighton*, 3 Meriv. 667, 36 Eng. Rep. (Reprint) 255; *Smith v. Baker*, 1 Y. & C. Ch. 223.

*United States*.—*Field v. Camp*, 201 Fed. 682, 120 C. C. A. 140, *modifying* 193 Fed. 160 (family agreement).

*California*.—In *re Wickersham*, 153 Cal. 603, 96 Pac. 311 (family agreement); *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A. (N.S.) 404. See also In *re Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437.

*Connecticut*.—*Brown v. Brown*, 66 Conn. 493, 34 Atl. 490.

*Illinois*.—*Parsons v. Ely*, 45 Ill. 232 (marriage agreement); *Hudson v. Hudson*, 223 Ill. 527, 78 N. E. 917; *Simmons v. Ross*, reported in full post, this volume, at page 1256. See also *Ridgeway v. Underwood*, 67 Ill. 419; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956. And see the reported case.

*Iowa*.—*Mally v. Mally*, 121 Ia. 169, 96 N. W. 735; *Richey v. Rowland*, 130 Ia. 523, 107 N. W. 423; *Betts v. Harding*, 133 Ia. 7, 109 N. W. 1074; *Edler v. Frazier*, 156 N. W. 182.

*Kansas*.—*Clendening v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L.R.A. 278.

*Maine*.—*Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651 (family agreement).

*New Hampshire*.—*Peterborough Sav. Bank v. Hartshorn*, 67 N. H. 156, 33 Atl. 729.

*New Jersey*.—*Bacon v. Bonham*, 33 N. J. Eq. 614, *affirming* 27 N. J. Eq. 209.

*New York*.—*Stover v. Eycleshimer*, 3 Keyes 620, *affirming* 46 Barb. 84; In *re Stephens*, 64 N. Y. S. 990.

*North Carolina*.—*McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 434; *Mastin v. Marlow*, 65 N. C. 695; *Boles v. Candle*, 133 N. C. 528, 45 S. E. 835. See also *Kornegay v. Miller*, 137 N. C. 659, 50 S. E. 315, 107 Am. St. Rep. 505.

*Pennsylvania*.—In *re Wils'n*, 2 Pa. St. 325; *Bayler v. Com.* 40 Pa. St. 37, 80 Am. Dec. 551; *Walker v. Walker*, 67 Pa. St. 185 (family agreement); In *re Fritz*, 160 Pa. St. 156, 28 Atl. 642, 34 W. N. C. 105; In *re Kuhns*, 163 Pa. St. 438, 30 Atl. 215, 35 W. N. C. 155; In *re Lennig*, 182 Pa. St. 485, 38

Atl. 466, 61 Am. St. Rep. 725, 38 L.R.A. 378, affirming 6 Pa. Dist. 249, 19 Pa. Co. Ct. 289; *McClure v. McClure*, 1 Phila. 117, 7 Leg. Int. 195. See also *Patterson v. Caldwell*, 124 Pa. St. 455, 17 Atl. 18, 10 Am. St. Rep. 598.

*South Carolina*.—*Blackwell v. Harrelson*, reported in full, post, this volume, at page 1263.

*Tennessee*.—*Fitzgerald v. Vestal*, 4 Sneed 258; *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 649. See also *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L.R.A. 122; *Taylor v. Swafford*, 122 Tenn. 303, 123 S. W. 350, 25 L.R.A. (N.S.) 442.

*Texas*.—*Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L.R.A. 75, affirming 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288; *Searcy v. Gwaltney*, 36 Tex. Civ. App. 158, 81 S. W. 576.

*Vermont*.—*Hoyt v. Hoyt*, 61 Vt. 413, 18 Atl. 313 (family agreement).

*Virginia*.—*Lewis v. Madison*, 1 Munf. 303 (family agreement).

Thus in *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 649, the court said: "What ever may be the rule at law concerning the validity of the sale or assignment of an interest or right not in existence, there can be no doubt that courts of equity will give effect to such assignments fairly made, in behalf of innocent purchasers. 'Contingent interests and expectancies may not only be assigned in equity, but may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which courts of equity, after the event has happened, will enforce.' . . . 'So even the naked possibility or expectancy of an heir to his ancestor's estate, may become the subject of a contract of sale or settlement, and in such case, if made bona fide for a valuable consideration, it will be enforced in equity after the death of the ancestor, not, indeed, as a trust attaching to the estate, but as a right of contract.' Story Eq. Juris. Section 1040b." And in *Wethered v. Wethered*, 2 Sim. 183, 57 Eng. Rep. (Reprint) 757, the Vice Chancellor, considering an agreement between two sons to divide equally whatever property they should receive from their father, is reported to have said: "That the notion that agreements similar to the one in question, were contrary to the policy of the law, was not supported by the principles of law applicable to such cases; because it was quite clear that, if a testator (192) meant that his devisee should have the personal enjoyment of his bounty, he might so devise as to stint the enjoyment of the devisee, and restrain him from aliening the subject of his gift; but that if the testator did not so devise, it must be intended that he meant that his devisee should not be so stinted, but should have the full enjoyment of the prop-

erty, and that it should be liable to all his antecedent debts, and all his antecedent contracts; and, therefore, that where there was a general devise it gave the devisee the property liable to be incumbered in any way that the devisee might think proper, either before or after he took it."

In *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835, it was said: "Contracts for the sale of expectancies and drafts upon the future are not favorites of courts of equity, and will be sustained only when shown by those claiming under them that they are entirely fair and free from any vitiating element. Children should not be encouraged to spend their inheritance in advance, or to speculate upon the death of their fathers. It may be that in these days the evil effects of living upon the future demand a stricter investigation by the courts of contracts of this character. In addition to the evil effect upon the habits and mode of life of the people, such contracts are calculated to weaken the bonds of affection and degrade the most sacred relations of life to a mere pecuniary basis. We sustain this judgment upon the finding of the jury and the facts in this case, without intending to depart in the slightest degree from the principles by which courts of equity have always been guided in such cases." In *Chesterfield v. Janssen*, 2 Ves. (Eng.) 125, 1 Atk. 339, the court remarked: "It may be thought too rigid to say, that an heir shall not borrow upon an expectancy; as some persons are so niggardly and sparing to their children, that a poor heir may starve in the desert, with the land of Canaan in his view, if he could not relieve himself in this way."

## 2. REQUISITES OF VALIDITY.

### a. Parties.

It is essential to the validity of the transfer of an expectancy that the person making the transfer should have the legal capacity to enter into the agreement. *Taylor v. Swafford*, 122 Tenn. 303, 123 S. W. 350, 25 L.R.A. (N.S.) 442. In that case the court, after referring to the rule that a contract of sale by an expectant heir will, if fair and honest, be sustained in equity, said: "These cases, however, involved the contracts of expectants, who at the time of making them were sui juris, while here we are dealing with one who, at the time of joining in the trust deed in question, was laboring under the disability of coverture. . . . It is a matter of common learning that the deed of a married woman was absolutely void at common law. The only way open to her by which she could convey her title to land was by joining her husband in a fine. But it was equally the general rule of that law that a feme covert

was incapable of binding herself by contract. This rule has been so often recognized and applied in our courts that it needs no citation of authorities in its support. What ever power of contract a feme covert has, save in the matter of her separate estate, or in the transfer of her choses in action, or in transfers of a somewhat like nature, is purely statutory. Wherever an effort is made to bind her, or her property, with the exceptions just mentioned, the party seeking to do this must find his remedy in a statute."

For an example of the execution by a married woman of a valid charge on her expectancy, see *Flower v. Buller*, 15 Ch. D. (Eng.) 665.

A valid transfer may be made to one who has no previous interest or possibility of interest in the property, that is, to an entire stranger both to the family and to the estate. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404. This holding finds support in many of the cases cited throughout this note wherein the particular point was not expressly decided.

#### b. *Consideration; Good Faith between Parties.*

At the basis of equitable recognition is the fact that a consideration has passed between the parties. In practically all of the cases supporting the rule, it is stated that equity will uphold the transfer of an expectancy if made in good faith and for a sufficient consideration. And it has been expressly held that the assignment of an expectancy in an estate is invalid unless fairly made for an adequate consideration. *Freeman v. Bishop*, 2 Atk. (Eng.) 39, Barn. Ch. 16; *Benyon v. Fitch*, 35 Beav. (Eng.) 570; *In re Ellenborough* [1903] 1 Ch. (Eng.) 697 [1903] W. N. 18; *Meek v. Kettlewell*, 1 Phil. 342, 41 Eng. Rep. (Reprint) 662, *affirming* 1 Hare 464; *In re Wickersham*, 153 Cal. 603, 96 Pac. 311; *Butler v. Haskell*, 4 Desaus. (S. C.) 651. See also *Greenwood v. Greenwood*, 2 De G. J. & S. (Eng.) 28; *Edler v. Frazier* (Ia.) 156 N. W. 182; *Clendening v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L.R.A. 278; *In re Fritz*, 160 Pa. St. 156, 28 Atl. 642, 34 W. N. C. 105; *McKinney v. Pinckard*, 2 Leigh (Va.) 149, 21 Am. Dec. 601. The equitable principle was laid down in the case of *In re Ellenborough*, supra, as follows: "The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of

or not. An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which ex hypothesi he has not yet effectually done. Future property possibilities, and expectancies are all assignable in equity for value: *Talby v. Official Receiver* [13 App. Cas. 523, 543]. But when the assurance is not for value, a court of equity will not assist a volunteer."

It has been held that the assignment must be founded on a valuable, not merely a good, consideration. *Bayler v. Com.* 40 Pa. St. 37, 80 Am. Dec. 551; *In re Lennig*, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L.R.A. 378 (holding that a stipulation not to worry the ancestor for a codicil is not a valuable consideration). The necessity for a valuable consideration was pointed out in *Bayler v. Com.* supra, as follows: "Regarding then the mortgage made by Mrs. Jay of the estate which she expected thereafter to inherit from her father, as inoperative at law, and valid only in equity, if valid, at all, it is next to be seen whether a chancellor would enforce it. That he would not, unless it was made for a valuable consideration, will not be claimed. The equity of the mortgage, if any, springs out of the consideration, and, if that is wanting, he will vainly ask the aid of a chancellor."

On the other hand, it has been held that a good consideration is sufficient. *Flower v. Buller*, 15 Ch. D. (Eng.) 665 (wife charged expectancy to pay husband's debt and household encumbrance).

The service of an attorney in looking after the interests of prospective heirs is not an inadequate consideration for a lien on the expectancy to the extent of a contingent fee. *Edler v. Frazier* (Ia.) 156 N. W. 182, (stated at length infra in subdivision III. 3. *Burden of Proof*).

It has been held that exorbitant interest on a loan will not render invalid the transfer of an expectancy made to secure the loan, but that the court will enforce the performance of the contract in so far as it is just and fair. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404, wherein the court said: "The suggestion that the plaintiff cannot prevail because equity will not enforce unfair or inequitable contracts, is answered by the fact that, by the refusal to allow the stipulated rate of interest, the court has eliminated the unfair and inequitable elements of the transaction. In doing this it did not make a new contract for the parties; it merely enforced the performance of the contract so far as it was just and fair. An examination of the cases in which the assignments of expectancies have been upheld and enforced, discloses that the court has almost invariably deducted exorbi-

tant interest to other unconscionable charges imposed on the necessitous heir at law, and has enforced the charge only to the extent that it was just, fair, and reasonable. The existence of inequitable or unconscionable features does not prevent the enforcement of the grant or assignment so far as it is just and reasonable."

Where a debt which was the consideration for the transfer has been discharged, the transfer cannot be enforced. *Dunham v. Bentley*, 103 Ia. 136, 72 N. W. 437.

It has been held that the adequacy of the consideration must appear from the facts stated, and that a direct averment that the consideration was adequate is useless as a mere conclusion of the pleader. In *re Wick-ersham*, 153 Cal. 603, 96 Pac. 311. In *McClure v. Raben*, 125 Ind. 139, 25 N. E. 179, 9 L.R.A. 477, the court said: "It must, at least, be necessary in such a pleading to allege the facts showing the amount and value of the estate purchased, and the amount of the purchase-money paid, and that such purchase-money was the full and fair market value of the property at the time of the purchase."

#### c. *Good Faith toward Third Persons.*

Under the maxim "he that comes into equity must do so with clean hands," the validity of a contract concerning an expectancy will not be enforced at the suit of one who has by entering into the contract perpetrated a fraud on third persons. *Brown v. Brown*, 66 Conn. 493, 34 Atl. 490; *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694. In the case last cited the court said: "This contract between complainant and her brother had for its declared object the repudiation of a parent's advice and authority, so that both might be set aside during his life, and a guaranty of impunity to the son for any disobedience or want of filial loyalty on his part. How different was the spirit and intent of this contract from what Judge Story says is the reason why the agreements in the cases cited have been sustained. In referring to these decisions, he says, 'such agreements are generally made to suppress fraud and undue influence, and cannot be truly said to disappoint the testator's intention:' Story's Eq. sec. 265."

The transfer of an expectancy which would operate as a fraud on the creditors of the heir will not be recognized as valid in a court of equity. *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L.R.A. 122. In that case the court disapproved dicta in *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258, and said: "The question is whether this conveyance of a bare expectancy by an heir presumptive is operative, when made upon no other consid-

eration than love and affection, to vest such title and interest in the grantee as will defeat creditors of the conveyance who were creditors both when the deed was made and when by descent cast their debtor became seized of the legal title. For the wife it has been argued by the learned counsel who have appeared for her that the expectancy, when conveyed, was not liable to creditors, and that therefore the grant is not fraudulent within the meaning of the statute of frauds. The general rule is that, in order to invalidate a gift or other voluntary conveyance under the statute of frauds, the property must be of a kind to which the creditor can resort for payment, for otherwise he is not prejudiced by the conveyance. *Leslie v. Joyner*, 2 Head 515; *Wagner v. Smith*, 13 Lea 560; *Adams' Equity*, 147; *Story's Equity Jurisprudence*, 361. No argument is necessary to establish the proposition that the expectancy of a son in the estate of his parent is not such a property interest as is the subject of attachment by a creditor during the life of the parent, and complainants do not put their case upon any such absurd ground. In such a case the son has no property right whatever in the estate of the living parent. His hope of an interest upon his death can be denominated by no designation importing any personal interest, and hence is called an expectancy. But if this hope or expectancy imparts no such present interest as can be resorted to by creditors, can it be the subject of such a sale, grant, or assignment during the life of the parent as will operate to vest the title in the assignee when the hope has ripened into an actual interest by descent cast? . . . In any view of it, the right acquired by the assignee of such an expectancy is one only cognizable and enforceable in equity. 3 Pom. Eq. Jur. Sec. 1288. Nor will a court of equity protect or enforce such a contract unless it be altogether such a one as appeals to the equitable consideration of a court. The consideration upon which it rests ought to be rigidly scrutinized, and all the purposes and circumstances of its execution inspected and considered. . . . The assignment, under which Mrs. Mosby claims, was made by an insolvent debtor, and whether so intended or not, it operates in law as a fraud upon his creditors. It was not made for a valuable consideration, and is nothing but a settlement made upon the wife by a husband unable, with justice to his creditors to make such a conveyance. Under these circumstances a court of equity cannot protect or enforce such a grant as against creditors whose debts were in existence, either at the date of the deed or at the time the grantor, by descent, became seized of the title to the property sought to be conveyed."

d. *Consent of Ancestor.*

In some jurisdictions the rule obtains that the transfer of an expectant interest in the estate of an ancestor, when made without the knowledge and consent of the ancestor, is void at law as against public policy and will not be enforced in equity. *McClure v. Raben*, 125 Ind. 139, 25 N. E. 179, 9 L.R.A. 477; *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558; *Hight v. Carr* (Ind.) 112 N. E. 881; *Stevens v. Stevens*, reported in full, post, this volume, at page 1259. And see the Massachusetts cases cited, in subdivision II, 1, b. *Rule in Massachusetts*. The reason of the rule was set forth as follows in *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558: "Many reasons are given for this rule, among which is that in a case where the ancestor has no knowledge of the contract, he may permit his property to go under the law of descents, believing that his son, or next of kin, will receive the benefit, when, in truth, it goes to an entire stranger, if the contract is to be enforced. This he might not be willing to do if he was informed of the facts. By keeping him ignorant of the facts he is induced to leave his property to a stranger, without his knowledge or consent. This is a fraud upon him. As to the manner in which such contracts may affect the public, we adopt the language of Chief Justice Parsons, in the case of *Boynton v. Hubbard*, 7 Mass. 112, in which he said: 'Heirs who ought to be under the reasonable advice and directors of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously and prudently, are, within the aid of money speculators, let loose from this statutory control, and may indulge in prodigality, idleness and vice, and taking care by hypocritically preserving appearances not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of its citizens.' Much more might be said as to the objectionable character of the class of contracts now under consideration, but we think it sufficient to say that where such a contract is not made known to the ancestor it is illegal as being contrary to public policy. The ancient rule of the courts of chancery, to the effect that a man may bind himself to do anything which is not in itself impossible, and that he ought to perform his obligations, is subject to many exceptions, among which is that he should not be compelled to perform a contract which is against public policy."

In the application of the rule that the consent of the ancestor is necessary, the fact that the ancestor was of unsound mind and could not consent has been held not to be material. *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558; *Hight v. Carr* (Ind.) 112 N. E. 881; *Stevens v. Stevens*, reported in full, post, this volume, at page 1259. Compare *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 36 L.R.A. 75, 59 Am. St. Rep. 819.

In *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, wherein the transfer of an expectancy by a prospective heir to his brother with the approval of the ancestor was held to be valid, the court explained the importance of the ancestor's assent as follows: "There are two reasons why sales of expectant estates by heirs should be discountenanced; one that it opens the door to taking undue advantage of an heir in distressed and necessitous circumstances; the other is founded on public policy, on order to prevent an heir from shaking off his father's authority, and feeding his extravagance by disposing of the family estate. . . . The whole doctrine of courts of equity with respect to expectant heirs and reversers, and others in like predicament, assumes that one party is defenceless, and exposed to the demands of the other under the pressure of necessity. It assumes also that there is a direct or implied fraud upon the parent or other ancestor, who from ignorance of the transaction is misled into a false confidence in the disposition of his property. Hence it should seem that one material qualification of the doctrine is the existence of such ignorance. If, therefore, the transaction has been fully made known, at the time, to the parent or other person standing in loco parentis, and is not objected to by him, the extraordinary protection generally afforded in cases of this sort by courts of equity, will be withdrawn. A fortiori it will be withdrawn if the transaction is expressly sanctioned and adopted by such parent, or person in loco parentis."

However, in other jurisdictions transfers have been upheld though they were not known to or acquiesced in by the ancestor. *Betts v. Harding*, 133 Ia. 7, 109 N. W. 1074; *Bacon v. Bonham*, 33 N. J. Eq. 614; *Walker v. Walker*, 67 Pa. St. 185 (agreement among brothers for benefit of ancestor); *Hoyt v. Hoyt*, 61 Vt. 413, 18 Atl. 313.

And the rule has been laid down, that the consent or want of consent by the ancestor is a material fact bearing on the question of fraud or inadequacy of consideration, but that the fact is merely evidence and is not conclusive. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404. See also *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L.R.A. 75.



In a case wherein it appeared that the ancestor was all her life *non compos mentis* the court held that her consent was not necessary to validate the transfer by an heir of his expectancy. *Hale v. Hallon*, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L.R.A. 75. See also *Searcy v. Gwaltney*, 36 Tex. Civ. App. 158, 81 S. W. 576. In *Hale v. Hollon*, *supra*, the court disapproved the rule that the consent of the ancestor is required, saying: "It seems clear that, while courts of equity in England have always considered concealment from, or nonassent of, the ancestor as cogent evidence of fraud, when connected with an equity more strictly and directly personal to the plaintiff in each particular case, they have never deemed it sufficient of itself to authorize relief against the contract, where the person dealing with the expectant has shown in rebuttal of the presumption above discussed, that the transaction was otherwise free from fraud, unfairness and inadequacy of consideration. . . . They appear to have proceeded upon the logical idea that, having recognized the right of an expectant to contract with reference to such expectancies, such contract, when shown under the strict scrutiny of a court of equity to be otherwise unobjectionable, cannot be set aside for mere want of the assent of one not a party thereto. . . . Following the principles laid down in the English cases above discussed, such contracts have been upheld, when shown to be fair and equitable, though the assent of the ancestors did not appear, but, on the contrary, the inference from the circumstances stated is that the transactions were without their knowledge, in the following cases: In *re Fritz*, 160 Pa. St. 156; *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620; *Steele v. Frierson*, 85 Tenn. 430; *McDonald v. McDonald*, 58 N. C. 211." The court, however, decided the case at bar on the ground that an exception existed where the ancestor was incapable of giving assent, although the rule was generally that the assent is necessary. The court said: "In such a case the reason of the rule fails; for she having no capacity, either to exercise any influence or control over the expectant, or to change by will or otherwise the course of descent of her property, no moral or legal right of hers was invaded by the transaction between her brothers, and hence it could be no fraud upon her."

In *Fuller v. Parmenter*, 72 Vt. 362, 47 Atl. 1079, the court said: "It would seem, . . . that assent is not necessary, but that notice and not objecting is enough, if even that is required; and this is the reason of the thing, for with notice the ancestor can defeat the assignment if he will, and thus

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prevent the fraud upon him that the books talk about."

#### e. Form of Transfer.

The various kinds of transfer that have been sustained are illustrated by the following cases: In *re Clarke*, 35 Ch. D. (Eng.) 109 (mortgage); *Edler v. Frazier* (Ia.) 156 N. W. 182 (contingent fee contract); *Jenkins v. Stetson*, 9 Allen (Mass.) 128 (bond conditioned on performance of agreement to transfer); *Peterborough Sav. Bank v. Hartshorn*, 67 N. H. 156, 33 Atl. 729 (order on bank); *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620, *affirming* 46 Barb. 84 (transfer as security); In *re Wilson*, 2 Pa. St. 325 (marriage settlement).

In at least one jurisdiction, an expectancy may be transferred by a quitclaim deed intended for that purpose. *Clendening v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L.R.A. 278. Compare *Avery v. Akins*, 74 Ind. 283; *Bryan v. Uland*, 101 Ind. 477, 1 N. E. 52; *McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 124 Am. St. Rep. 240, 13 L.R.A. (N.S.) 1003; *Tooley v. Dibble*, 2 Hill (N. Y.) 641. In *Clendening v. Wyatt*, *supra*, the court said: "It is insisted that this contract is in form a quitclaim deed, under which only the present existing interest of John Clendening in his mother's estate would pass. It is true that, ordinarily, the grantee in a quitclaim deed gets nothing except what his grantor in fact owned at the time of the execution of the deed. (*Johnson v. Williams*, 37 Kan. 179.) And if the contract in question was to be treated as a quitclaim deed, which did not purport to do more than to convey an existing interest, it could not be sustained. It is manifest, however, from the language used that Clendening was bargaining about a future interest which he did not possess at the time, and which he expected to acquire at the death of his mother. In the latter part of the contract it is recited, that 'the said John Clendening and Kate, his wife, do hereby (in consideration as above) release, remise and forever quitclaim to his undivided portion that he may be entitled to of his mother's estate to the said Augustus Wyatt, his heirs and assigns.' He had no interest in the land at the time the contract was made. His mother was then alive, and from the face of the contract it distinctly appears that he was contracting away the undivided and future interest which he expected to acquire from his mother's estate at the time of her death. There is a specific description of the land in controversy in the contract, showing that the property now sought to be recovered was within the contemplation of the parties when

the contract was made. Such a contract, based upon ample consideration, honestly and fairly made, with one who is capable to contract, may be enforced in equity."

In *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620, wherein an irrevocable power of attorney, coupled with an interest, was held to constitute a valid transfer, the court said: "The instrument under which the respondent claims was evidently intended to be, and by its terms was, more than a mere power of attorney. It was intended to vest in Miss Sherman an interest in the property as a security for the payment of J. L. D. Eycleshimer's debt to her. With other rights conferred on her thereby, she was to receive the proceeds and avails of the property 'and of all my interest and estate therein, and all my estate, property and effects aforesaid, and apply the same respectively to the payment and discharge of the' debt which he therein declared he justly owed her. Now here was a clear appropriation by J. L. D. E. of his expectation as heir at law in his father's estate, in effect a transfer thereof as security, equivalent in all essentials to a mortgage in exact and legal phrase."

In the case of *In re Clarke*, 35 Ch. D. (Eng.) 109, it was said: "Where the consideration has been given, Courts of Equity will give effect to the agreement if it be in any way possible, and will not yield to the dishonest plea on the part of the covenantor that the covenant is too vague for specific performance, unless it is impossible to ascertain its meaning or to give it any reasonable effect."

But a promise by a prospective heir to turn over whatever is received from the ancestor does not amount to a transfer of the expectancy. *Mally v. Mally*, 121 Ia. 169, 96 N. W. 735. See also *Wylie's Appeal*, 92 Pa. St. 196. In *Mally v. Mally*, supra, the court said: "The evidence fails to show a present assignment. True, plaintiff testified as a conclusion that his brother W. E. Mally 'made a verbal assignment to me of any interest he might have in his mother's estate.' But the language from which this conclusion was drawn was detailed by two other witnesses. Trent testified he heard 'William say to Paul that he had no property, but that whatever interest would come to him from his mother's estate should be Paul's if he had to pay the sixteen hundred dollars. He stated that whatever interest he had in the estate of his mother should be Paul's.' W. E. Mally testified: 'I told him in the presence of Mr. Trent, "I cannot pay you a penny, because I have not got a cent to pay you with, but, if mother ever leaves me anything, you shall have it, and I won't have anything to do with it in case you have to pay the judgment." . . . I made the

statement to Paul that he should have what I might have in my mother's estate in the summer of 1892.' From this it is manifest that William had no thought of then transferring his expectancy in his mother's estate. All that was said amounted to no more than a promise to turn over whatever his mother might leave him in event plaintiff should be compelled to pay the judgment. This promise he has never carried out, and for this reason no transfer was ever made to plaintiff."

### 3. BURDEN OF PROOF.

It has been said that the one seeking to enforce the assignment of an expectancy must allege and prove that the consideration was full and adequate and that the assignment was fairly obtained. In *re Wickersham*, 153 Cal. 603, 96 Pac. 311; *Bacon v. Bonham*, 33 N. J. Eq. 614. It would seem however that this rule does not apply to every case of the transfer of an expectancy, but only where the conditions of the parties and the circumstances of the case raise a presumption of the unconscientious use of power. See *O'Rourke v. Bolingbroke*, 2 App. Cas. (Eng.) 814.

Where the execution of the contract is admitted or proven, the burden of proving fraud or undue advantage in its procurement is on the person seeking to avoid the assignment. *Edler v. Frazier* (Ia.) 156 N. W. 182; In *re Fritz*, 160 Pa. St. 156, 28 Atl. 642, 34 W. N. C. 105. In the case last cited the court said: "Fraud is not to be presumed but proved."

Where it does not clearly appear that the contract is unconscionable or was obtained by unfair means, no presumption of fraud arises from the fact that by the contract the relation of attorney and client was created between the parties, and on the proof or admission of the execution of a written contract of employment, by which the interest of the expectant heir is charged with a lien in favor of the attorney recovering that interest, the burden of proving fraud or undue advantage in the procurement of the contract is on the client seeking to avoid the lien. *Edler v. Frazier* (Ia.) 156 N. W. 182, wherein the court said: "If the relation of attorney and client had been established before this agreement was entered into, it may be admitted that interveners would be required to make clear showing of their good faith in the transaction; but, generally speaking, this rule does not apply with the same stringency to contracts by which that relation is inaugurated. . . . The lawyer has the same right as any other man to prescribe the conditions on which he will undertake to perform any given service."

If the client thinks the terms unreasonable or oppressive, he is under no compulsion to employ him. The country is full of lawyers, and, among them, he doubtless can find those who may be retained on terms satisfactory to him. If, however, he accepts the terms and agrees to pay them, under all ordinary conditions he is bound by every principle of law and good morals to make payment accordingly, and it would be an unjust reflection upon the profession to lay down the rule that such an agreement comes into court bearing the brand of presumptive fraud, and that before it can be enforced the plaintiff must put it through a process of legal fumigation by showing affirmatively that it was entered into without deceit or undue advantage. This is not to say that a contract which bears upon its face the evidence of undue advantage over the client will be held any more sacred in the hands of a lawyer than when sought to be enforced by any other person, and when it clearly appears that the contract is unconscionable or manifestly oppressive, or that an agreement for extraordinary compensation has been obtained by the solicitations of an 'ambulance chaser' or the use of other unprofessional arts to entrap the ignorant or unwary, no court will hesitate to protect both the honest client and the reputable lawyer by compelling him who asks the benefit of such agreement to purge it of its apparent inequity."

The court said further in *Edler v. Frazier*, supra: "If it were clear that the compensation provided for in the contract was so unreasonable or extravagant as to suggest the thought of fraud in its procurement, the court would be justified in viewing the entire deal with suspicion; but in our judgment such is not the case. In the first place, no practicing lawyer has undertaken to testify that the compensation contracted for was unreasonable or unusual. The question is, moreover, to be viewed from the standpoint of the facts as they then existed. It is shown in evidence without dispute that the value of this tract of land at the date of this contract was not to exceed about \$4,000. Under the contract, if the contingent fee had then been presently payable, it would have been one-fifth of six-sevenths of \$4,000, or about \$670. But it was not presently payable. The widow continued to live seven years or more after the service was performed, and had her lease of life then been known, and interveners had desired to discount their claim at 6 per cent., they would have realized therefrom about \$470—certainly not a very extravagant fee. The fact that increase in the value of the land has operated to substantially increase such compensation ought not to cast any taint of

suspicion upon the good faith of the interveners. Had the market value of the property decreased, they would have been compelled to accept a proportionally decreased figure."

Where an expectancy is sold to an agent of the prospective heir, the burden is on the agent to prove the absence of fraud. *Butler v. Haskell*, 4 Desaus. (S. C.) 651, wherein the court said: "There is also another ground of very great importance in this cause, on which I rely in forming my judgment. The defendant was, at the very time of his purchase of the rights and interests of the complainants, their agent and trustee, to take care of those very interests, and support those rights, for which he was to receive a very large compensation. It is quite unnecessary to multiply authorities to prove that his agency made him a trustee. It is laid down as an universal maxim in *Legard & Hodges*, 1 Vesey, jun. 478, by Lord chancellor Thurlow, that wherever persons agree concerning any particular subject, that, in a Court of Equity, raises a trust, as against the party himself, and any claiming under him voluntarily or without notice. But whether his agency precluded the defendant from becoming the purchaser from the Butlers, under any circumstances however fair, is a question of considerable difficulty. . . . I am bound then to say, that if the agent in the case under consideration was at liberty to become a purchaser from his cestui que use, under any circumstances, however fair, it is incumbent on him to shew demonstratively that he had not abused the trust reposed in him; that he had given all possible information to his employers; that he had enlightened them as to their interests; and had advised them as he would have done against a third person, offering to become the purchaser at such an enormously inadequate price; and some of the authorities say the connection should have been entirely dissolved; and that he had given a fair price for the property. Instead of this the contract was made whilst the agency subsisted. It is not made out in proof that the agency was at an end at the time of the contract; or that he advised the principals as he would have done against a stranger; or that he gave anything like a full price for the property in question. It does appear to me therefore, that the contracts cannot be sustained."

#### 4. ENFORCEMENT.

##### a. Generally.

In general, it may be stated that equity regards the assignment of an expectancy as a present contract to convey a future interest, a contract which creates a present equi-

table charge on the property to the extent of the consideration, and which as soon as the expectancy falls into possession gives the assignee a right to the legal interest. See *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404; *Bacon v. Bonham*, 33 N. J. Eq. 614; *In re Kuhns*, 163 Pa. St. 438, 30 Atl. 215, 35 W. N. C. 155. And see the reported case. The grounds on which the transfer of an expectancy is enforced were set forth in *Taylor v. Swafford*, 122 Tenn. 303, 123 S. W. 350, 25 L.R.A.(N.S.) 442, as follows: "Both in English and American courts of equity, where it is found that the contract of an expectant has been fairly made and upon a valuable consideration, it will be enforced, as against the grantor and his privies, whenever the property covered by it comes into possession. This is done, however, by these courts, not upon the ground that the grant is one of a present interest, but rather upon that stated by *Gibson, C. J.*, in *Chew v. Barnett*, 11 Serg. & R. (Pa.) 389, to wit: 'That a conveyance, before the grantor has acquired the title, operates as an agreement to convey, which may be enforced in chancery between the parties and against purchasers with notice.' This seems to be the theory upon which these courts have acted with regard to such contracts. 'Such an assignment,' said Lord Chancellor Hardwicke in *Squib v. Wyn*, 1 P. Wms. 381, 'always operates by way of agreement or contract, amounting in the consideration of the court to this: That one agrees with another to transfer or make good that right or interest (*Wright v. Wright*, 1 Ves. 412); and like any other agreement will cause it to be specifically performed . . . when the assignor is in a condition to transfer the property, or to cause it to be transferred, to his assignee.' . . . As supporting the proposition that such a contract is treated in equity simply as a covenant to convey, see *Philadelphia, etc. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596; *Page v. Gardner*, 20 Mo. 507; *Seymour v. Canandaigua R. Co.* 25 Barb. (N. Y.) 285. It is true that Mr. Pomeroy, in his work on *Equity Jurisprudence* (volume 3, sec. 1288), expresses dissatisfaction with the view of such a conveyance announced by these high authorities, as to the ground upon which equity takes jurisdiction of, and enforces, performance of a conveyance of an expectancy when it falls in, but rather is disposed to regard the contract 'as an equitable assignment of a present possibility, which changes into an assignment of the equitable ownership as soon as the property is acquired by the vendor, or mortgagor;' the rights of these latter to be enforced in a court of equity."

In *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 434, the court said: "It is very

clear that, at the time when the instrument was executed, it could not operate as a conveyance or assignment of what it purported to transfer. Margaret McDonald, the defendant's intestate, was then living and the plaintiff had but a mere possibility or expectancy of an interest in her estate. He was at the time one of her nearest blood relations, and had a chance by out-living her, to become entitled to a part or to the whole of her estate as heir at law and next of kin, but he had no interest, or possibility coupled with an interest in it. It follows as a matter of course, that he did not have anything which he could assign or transfer to another either at law or in equity. But he had a right to make a contract to convey whatever interest he might in future have in his cousin's property, and such a contract, when fairly made upon a valuable consideration, the court of chancery will enforce whenever the property shall come into his possession. Thus it is said, and the assertion is well sustained by the authorities both in England and in this country, that 'Chancery will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance, as soon as the assignor has acquired the power to perform it.'"

Where the assignment is made to the co-heirs of the assignor, the assignor is estopped on the death of the ancestor from asserting the interest that he would have had in the estate. In *re Wickersham*, 153 Cal. 603, 96 Pac. 311; *Parsons v. Ely*, 45 Ill. 232; *Walker v. Walker*, 67 Pa. St. 185.

A court of equity will specifically enforce a contract to sell and convey an expectancy. *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835. See also *McDonald v. McDonald*, 58 N. C. 211, 75 Am. Dec. 434.

The contract is not enforceable until the death of the ancestor. *Clendening v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L.R.A. 278.

#### *b. Person against Whom Transfer Can Be Asserted.*

The transfer of an expectancy may be enforced as against a subsequent judgment creditor of the person making the transfer. *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620, affirming 46 Barb. 84; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258; *Searcy v. Gwaltney*, 36 Tex. Civ. App. 158, 81 S. W. 576. In *Stover v. Eycleshimer*, supra, the court said: "The instrument could undoubtedly have been enforced against J. L. D. E., on his father's decease, according to its plain import and purpose. He could not have resisted its just effect as a claim or lien on the property. If not, it follows of course that his creditor could not acquire a superior right either by

attachment or other proceeding. A creditor could only obtain his position and rights."

The transfer of an expectancy made in good faith and for value is valid as against a judgment creditor who obtained judgment against the heir before the death of the ancestor and before the transfer of the expectancy. *Richey v. Rowland*, 130 Ia. 523, 107 N. W. 423; *Bacon v. Bonham*, 33 N. J. Eq. 614; *In re Fritz*, 160 Pa. St. 156, 28 Atl. 642, 34 W. N. C. 105; *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L.R.A. 75, *affirming* 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288. In *Richey v. Rowland*, *supra*, it appeared that the plaintiff (assignee) petitioned for an injunction to prevent the sale of certain property under an execution against the assignor. The defendant (a sheriff, representing the judgment creditor) in his answer alleged that the judgment was entered in March, 1903; that the assignment was made in October, 1904; that the ancestor died in January, 1905, the assignor surviving; that the assignor at once became vested with the estate on which the judgment became a lien; and that the assignee took nothing by the assignment which could be asserted against the judgment lien. To that answer the plaintiff demurred. The court said: "The demurrer by which the answer was attached was put upon the following grounds: (1) The answer admits the assignment to plaintiff before the judgment became a lien, and there is no claim that the same was not for a valid consideration, or that the same was in fraud of creditors, or in any other way void or voidable; (2) the answer makes it appear that plaintiff is now and has been, ever since the death of Newton B. Richey, the owner of any interest in the estate of said Richey which, but for the assignment to plaintiff, would have gone to Lucy R. Porter. It will be observed that the petition goes no farther than to assert title in plaintiff without specification as to the source thereof. The answer undertakes to describe and measure the right or interest which plaintiff claims in the property. Now the effect of the demurrer is to admit that the sole source of plaintiff's right and interest is as stated in the answer. We have then as the question in the case, and in its last analysis it is one of pleadings, is a complete defense presented by an answer the averments of which go no farther than to assert that the perfect title pleaded in the petition is based solely upon the transfer or assignment of the expectancy of an heir apparent in the estate of his ancestor. . . . It is to be remembered that the controversy presently before us is not between the assignor and assignee—the question arises between the assignee and a creditor of the assignor. Now, without doubt, and pursuant to a rule

well settled in equity, a contract of assignment of the sort in question in common with all other transfers of property rights or interests may be made the subject of challenge at the suit of a creditor on the ground of insolvency on the part of the assignor coupled with an intent to hinder and delay or defraud. But as such contracts in equity are voidable only, it would seem to follow that one who, pleading affirmatively as to the existence of a particular contract, predicates a right upon the invalidity thereof should be held to the requirement of including in his pleading all the facts upon which invalidity depends. The case is then within the rule that 'A defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead them.' 1 Ency. Pleading & Practice, 844, and cases in note. The foregoing considerations lead to the conclusion that the demurrer to the answer should have been sustained."

Creditors of the assignor, resisting the enforcement of the transfer, can avail themselves of any defense which might be urged by the assignor. *Dunham v. Bentley*, 103 Ia. 136, 72 N. W. 437.

A valid transfer of an expectancy is valid as against the administrator of the ancestor, seeking to have the heir's interest subjected to the payment of debts due the ancestor's estate. *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 649.

The transfer can be enforced against the one making it although he has obtained a discharge in bankruptcy between the time of the transfer and the death of his ancestor. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L.R.A. (N.S.) 404. In that case the court said: "In the case of a loan, . . . there is created by the assignment a present equitable charge on the property, which equity recognizes as vested, although it is neither vested nor valid at law, and which, when the descent in case at once ripens into a lien upon the property for the security of the money loaned. This being the nature of the equitable right created by the assignment, it would follow, in analogy to the rule concerning ordinary liens, that the discharge in bankruptcy did not divest Bridge of his then existing equitable right to Kedon's prospective inheritance. . . . The assignment is treated in equity as a present contract to convey the future interest, a contract which creates a trust as soon as the interest becomes absolute, and this a present existing right by contract which the discharge in bankruptcy does not avoid or terminate. The continued existence of the debt as a personal obligation to pay money, is unnecessary to the enforcement of an equitable charge or lien upon specific property." And in *Lyde v. Mynn*, 1 Myl. & K. 683, 39 Eng. Rep. (Reprint) 844,

a covenant to charge a claim on all the property received at the death of a certain person was held to be not discharged by a certificate in bankruptcy. In that case the court said: "That the claim to the annuity is barred by the Bankrupt Act cannot be denied; for the annuity was an interest of which the value was capable of calculation, and for which proof might have been made under the commission. But the covenant to secure that annuity gave the annuitant a right which could not in any way be made the subject either of calculation or of proof; and it seems impossible to understand how such a right could be barred. Consider the nature of the interest which the covenantor had, which alone at the execution of the covenant he could pass, and which, therefore, must be the measure of the covenantee's proof under the commission; and it will appear that all proof was out of the question in such a matter, and that, consequently, there was nothing upon which the discharging power of the certificate, with its co-relative, the power of proving, could operate. At the execution of the covenant the bankrupt's wife was alive; and the only interest which the bankrupt possessed, and over which he covenanted to give a security, was the possibility of benefits which might choose to leave him by her will. He bound himself, in case he should eventually take anything under that will, to give his creditor a security over it. It is impossible to treat this covenant as a contingent debt—it is, in truth, no debt at all; it is a mere personal obligation to do a certain thing in a most uncertain event. If the covenantee attempted to prove in respect of it, how was it possible for the commissioners to ascertain the value thereof, and admit him to prove the amount so ascertained, as the fifty-sixth section of the Bankrupt Act directs? But it is plainly not at all like a debt payable upon a contingency, which forms the subject of that section. The court of King's Bench, in *Taylor v. Young*, 3 B. & Ald. 521 [5 E. C. L. 364] held it too clear to admit of argument, that no value could be put upon a covenant to perform covenants; and that the covenantor's bankruptcy, therefore, could not be pleaded in bar to an action upon such a covenant. But the difficulty of valuing such a covenant as the one now before the Court would be infinitely greater."

A transfer of an expectancy by a legatee is, in the absence of fraud, good as against the assignee in insolvency of the legatee. *Peterborough Sav. Bank v. Hartshorn*, 67 N. H. 156, 33 Atl. 729, wherein the court said: "It is . . . immaterial whether the order operated as a legal assignment or not. It is enough that it gave Hartshorn an equitable right to the money. 2 Sto. Eq. Jur. supra.

Being good as against Keyes, it is, in the absence of fraud, equally good against his assignee. Assignees in bankruptcy take only such rights and interests as the bankrupt had, and could himself claim and assert, at the time of bankruptcy; and they are affected with all the equities that would affect a bankrupt himself if he were asserting those interests."

An agreement by a married woman to charge her separate estate which she expects to derive under the will or as the next of kin of a living person, can be enforced after the death of that person against the separate estate bequeathed to the married woman. *Flower v. Buller*, 15 Ch. D. (Eng.) 665.

Where the one making the transfer dies before his ancestor, the transfer is not valid as against his heirs. *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182. And see the reported case.

#### *c. Extent of Enforcement.*

Within the limits of the heir's interest, the extent of the estate transferred by the assignment of an expectancy depends of course on the agreement of the parties. Thus in *McDonald v. Donald*, 58 N. C. 211, 75 Am. Dec. 434, the court said: "Having decided that the instrument in question is binding upon the plaintiff, it only remains for us to enquire what is the extent of the interest upon which it operates? It is contended by the plaintiff's counsel that at most it can bind only the apparent expectant interest which the plaintiff had in his cousin's estate at the time it was executed, which, as his brother Neil was then alive, was only one-half. The language of the instrument is as broad and extensive as it could well have been made, and embraces every thing which, in any possible contingency, could accrue to the grantor from the estate to which it relates. It is quite probable that neither party fully considered what might eventually come within its operations, but they agree to take the chances and they must now abide by the result. Had the plaintiff died before his brother in the life-time of the intestate, or had they both died before her, then the defendant would have taken nothing by his contract. Had both brothers out-lived their cousin, the defendant could have claimed, under the assignment, only one-half of the estate, but as the events occurred which were most favorable to him he gets all." And in *Flower v. Buller*, 15 Ch. D. (Eng.) 665, the court in determining the extent of the charge said: "When it was said that the plaintiffs must fail, because the property actually left to the defendant by the will of Cookson, except to a very small amount, did not consist of moneys, and the charge, it was

said, is limited by the recitals to moneys. For this purpose it is necessary to look at the document itself, for on it of course everything turns. [His Lordship referred to the recitals and the operative part of the agreement, and continued:—] It is said that the recital limits the operative part. I do not think it does. I am of opinion that the agreement cannot be limited in that way. The operative words are 'All the interest to which the said Louisa Catherine Buller may become entitled as aforesaid expectant on the decease of the said W. S. Cookson.' It appears to me that the words 'as aforesaid' refer only to the words in the recital, 'Under the will, or as one of the next of kin' of Cookson. I cannot limit them to any particular form of property. It appears to me that they are intended to operate on her whole interest, and that the recital, although a loose one, does not limit the active operative words, and that therefore the agreement operates on the whole of the property coming to her under the will."

In *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. 649, the court said: "So far as P. C. Steele had made advancements to his son, they must be accounted for in diminution of the interest assigned—that is, the interest assigned is clearly subject to be charged with legal advancements. No assignment by an heir either before or after the interest has vested in him, and no attachment or levy by a creditor of such heir will defeat an account of advancements. *Johnson v. Hoyle*, 3 Head 56; *Nashville v. Potomac Ins. Co.* 2 Baxt. 303. But on the other hand the indebtedness of an heir to the intestate is not a lien upon the interest of the heir in the estate, and such share is therefore subject to the creditors of the heir, or to sale or assignment by the heir."

##### 5. RULE IN KENTUCKY.

In Kentucky, the transfer of an expectancy by a prospective heir is invalid and is not enforceable in equity. *Wheeler v. Wheeler*, 2 Metc. 474, 74 Am. Dec. 421; *Beard v. Griggs*, 1 J. J. Marsh. 22; *Lowry v. Spear*, 7 Bush 451; *Alves v. Schlesinger*, 81 Ky. 290; *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, 17 Ky. L. Rep. 56 Am. St. Rep. 335, 33 L.R.A. 266; *Hall v. Hall*, 153 Ky. 379, 155 S. W. 755; *Spears v. Spaw*, 118 S. W. 275; *Furnish v. Lilly*, 84 S. W. 734, 27 Ky. L. Rep. 226; *McDowell v. Neal*, 5 Ky. L. Rep. (abstract) 331. See also *Grayson v. Tyler*, 80 Ky. 358; *Elliott v. Leslie*, 124 Ky. 553, 99 S. W. 619, 30 Ky. L. Rep. 743, 124 Am. St. Rep. 418 (wherein the court said that *Lee v. Lee*, 2 Duv. 134, and *McBee v. Myers*, 4 Bush 356, holding that equity would enforce the assignment of an expectancy when made

with the consent of the ancestor, had been overruled. Compare *Bohon v. Bohon*, 78 Ky. 408. Thus in *Beard v. Griggs*, 1 J. J. Marsh. 22, an early chancery case, the court said: "Now, what does the instrument executed by *Jemimah Griggs* purport to convey, so far as it affects this controversy? Does it purport to convey any property in existence owned by her at the time she gave her interest in her deceased husband's estate? It does not. It merely contemplates to make over and transfer two-thirds of what she may inherit from her father and other relatives. *Nemo est haeres viventis*. It was uncertain when *Jemimah Griggs* executed the instrument, whether she would even inherit any thing from any one. She might have died before her father or any from whom she could inherit. The instrument seems to have been intended to operate upon property which she hoped or expected to inherit. Such property we think cannot be affected by the contracts of heirs before descent. Descents are regulated by the rules of law, and cannot be changed by the contracts of parties; and we conceive that the heir can only convey or grant the estate after descent, there being nothing to grant before. A hope of inheritance neither lies in livery or in grant, and this is the first case that we have any knowledge of, where a person has undertaken to transfer by deed, two-thirds of the property which might be cast on her by operation of law upon the death of relations. We think it cannot be done for want of a thing to be granted at the time of executing the instrument." In *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, 17 Ky. L. Rep. 713, 56 Am. St. Rep. 335, 33 L.R.A. 266, the following line of reasoning was adopted: "It is axiomatic that in every valid grant there must be a grantor, grantee and a thing to be granted. When there is no subject matter—nothing in esse about which a contract can be made—the essential thing to the validity of a contract is absent, hence such contract is declared by the law to be void. If it be void then no party to it can maintain an action upon it. A wise public policy produced the law which fixed the status of parties to such a contract. If it is wholesome to declare such contract valid, why should courts of equity enforce such contracts in defiance of the law and a wise public policy. If this is to be the practice of courts of equity, then the common law on this subject is a dead letter and inoperative. Why should the common law declare such contracts invalid and void if courts of equity have the power to vivify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void and yet say

that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity any more than at law, and we agree with such courts upon the question. It seems at this late day it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, save free and untrammelled the actions of the possessors of estates in their distribution. If there were no other reasons for adhering to the rule, those just suggested would be all sufficient, in our opinion, for doing so."

Moreover, in *McCall v. Hampton*, supra, the general rule heretofore set forth was criticised as follows: "Some text-writers say, and some courts have held, that a mere possibility or expectancy is assignable in equity for a valuable consideration, and equity will enforce the contract when the possibility or expectancy has changed into a vested interest or possession. The explanation is sometimes that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract by decreeing a conveyance. *East Lewisburg Lumber, etc. Co. v. Marsh*, 91 Pa. St. 96, is cited by counsel for appellee and the court assigned this as the reason for its decision, viz: 'Equity will support assignments of contingent interests and expectancies, things which have no present actual existence, but rest in mere possibility, not indeed as a present positive transfer operating in praesenti, for that can only be a thing in esse, but as a present contract to take effect and attach as soon as the thing comes in esse.' This case is cited to sustain the text (*Pomeroy's Equity Jurisprudence*), wherein it is stated that equity will enforce contracts of sale of bare possibilities and expectancies. In the note to the text it is said: 'In my opinion this theory of agreement is hardly adequate to explain the full doctrine.' The learned author (close of note 1, section 1287, *Pomeroy's Equity Jurisprudence*) feeling that the courts which held that such contracts could be enforced in equity after the death of the ancestor were failing to give an adequate reason for these decisions on the 'theory of agreement,' and that it would not do to admit that the right to the expectancy did not attach until the death of the ancestor, presented as the rationale of the equitable doctrine (section 1271) that the assignee of the expectancy acquired at once a present equitable right over the future proceeds of the expectancy, which was of such certain and

fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the expectancy into an interest in possession; that there was an equitable ownership or property in obedience to be changed to an absolute property upon the happening of the future event. The learned author was conscious of the fact that when a court said that the assignee or vendee did not take a present interest in the thing contracted for it was illogical that such interest would attach as soon as the thing came in esse. His conclusions were correct. But when he endeavors to give the correct theory upon which courts of equity proceeded he gives one more indefensible than the one which he criticises. He states a matter which does not exist in fact or law; that a bare possibility or expectancy is 'sure to ripen into an ordinary equitable property right.' On the contrary it is absolutely uncertain that it will ripen into a property right at all. Notwithstanding the thing is not in esse the learned author says that there is acquired at once a present equitable right over the future proceeds of the expectancy. Here we have the assignee of vendee taking a present right in a thing not in existence and in the proceeds of an expectancy which may never materialize. To reach his conclusion he utterly disregards the legal significance of the words 'naked possibility or expectancy.' They import a hope of succession but not a certainty, as implied by the statement that they were sure to ripen into a property right. His premises are false and conclusions erroneous."

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## SIMMONS

v.

## ROSS.

Illinois Supreme Court—October 27, 1915.

270 Ill. 372; 110 N. E. 507.

### Assignments — Property Subject — Expectancy.

A child having an expectancy in the residue of an estate may for valuable consideration release such expectancy to other children.

[See note at end of this case.]

### Frauds, Statute of — Verbal Agreement to Divide Estate — Part Performance.

Where plaintiff's father before his death made an agreement with his children for the distribution of his property, giving equal shares to all except to the plaintiff, who was



a cripple and in ill health, and who continued to live with her father, and where he executed deeds to the other children for the property which they were to receive under the agreement, but failed to execute a deed to plaintiff for the 75 acres of the home place which she was to receive, and thereafter, by acts of the defendant, the father was led to deed a portion of the 75 acres orally given to plaintiff to the defendant, plaintiff was entitled to a decree setting aside the deed to the defendant and vesting title in her, in spite of the statute of frauds.

Appeal from Circuit Court, Warren county: GRIER, Judge.

Action to determine title and to set aside deed. Rose Simmons, plaintiff, and Margery Ross, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

*Safford & Graham* and *J. W. Clendenin* for appellant.

*E. P. Williams, J. D. Welsh* and *Williams, Lawrence, Welsh & Green* for appellee.

*Ralph Cowden*, guardian *ad litem*, for Lillian Simmons.

[373] **FARMER, C. J.**—This litigation involves the rightful ownership and title to fifty acres of land in Warren county. Appellee, Rose Simmons, filed her bill in the circuit court claiming she was the equitable owner of the land but that the legal title was in appellant, Margery Ross. The bill prayed a decree declaring title in appellee and setting aside the deed by which appellant claimed to own the land. The chancellor granted the relief prayed, and defendant below, Margery Ross, has prosecuted this appeal from that decree.

The facts and circumstances giving rise to this litigation are as follows: Alfred W. Simmons was the father of both appellant and appellee and five other children. Prior to the transactions out of which this litigation grows, six of said children had married and were living in homes of their own. Appellee, Rose Simmons, was living at home with her father and mother on the land involved in this litigation. She was born a cripple, being partially paralyzed on one side, and has remained in this unfortunate condition since her birth. Her mental activities were also hardly up to the normal. Alfred W. Simmons, the father, owned, besides the 75 acres of land here in controversy, 366 acres of other land. In 1911 he was eighty-one years of age, and he, his wife (quite an old lady) and appellee lived together on the land in controversy. The father desired to dispose of his land to his children during his lifetime. For that purpose he had the

366 acres divided into six parts by three neighbor-men selected for that purpose, who placed a valuation upon the total number of acres at \$26,662.50. It was the desire of the father to divide that land among his six married children, reserving the 75 acres for a home for himself, wife and appellee, which was to [374] become the appellee's at the death of her parents. For the purpose of making this settlement and distribution of land to his children Simmons called the six married children to meet at his home January 14, 1901, when the matter was fully discussed and plats examined of the division of the land into tracts and the valuation put upon them by the three men who had been selected for that purpose. The share of each of the six children in the 366 acres was \$4,443.75. The proposed distribution of the land was agreed to by the children after full discussion. The wife of Simmons was also present and agreed to the distribution on condition that appellee was to have the 75 acres at the death of the husband and herself, and upon this condition she agreed to sign the deeds to the other six children, releasing her right of dower in the 366 acres. Inquiry was made of the children by Simmons whether there was any objection to the proposed distribution, and no objection was made. Appellant preferred to take her share in money, and one of her sisters took the land appellant would have received by the distribution and paid her the money therefor, \$4,443.75. Deeds were then executed by Simmons and wife to the other five married children for the 366 acres. No deed was executed for the 75 acres to appellee. Mrs. Simmons died in about one year after this transaction, and Simmons and appellee continued to live on the land in controversy until March, 1911, during which time the appellee, with the assistance of an uncle, (her mother's brother, who lived with them most of the time), did the housework for the family. The proof shows that notwithstanding her crippled condition appellee did the cooking, housekeeping, milking, churning, raising poultry, and other duties of a housekeeper, very well, being assisted, in part, by her uncle. No other help was kept to assist her. Appellant appears not to have been successful in the investment and management of the money she received for her interest in the land. She and appellee were not as congenial toward each other [375] as is ordinarily the case with sisters. From time to time the father made appellant small gifts of personal property, to which appellee objected and which caused some feeling between her and the appellant. In March, 1911, Simmons went to the house of the appellant and remained there until some time in June following. It is quite apparent appellant exercised

considerable influence over her father at that time. He was then ninety years old and very feeble. Appellee was left at the home place with the uncle when her father went to appellant's house. Shortly afterwards appellant called her brother J. H. Simmons by telephone and told him appellee and her uncle ought to be taken away from the home place, and stated that her father wanted that done. J. H. Simmons went to his sister's house and saw his father, who requested the son to sell off the personal property on the farm and take appellee some place to board. This the son did against the objections of appellee. Along in May, Alfred W. Simmons concluded he wanted to go back to the farm, and so stated to his son J. H. Simmons. The son proposed to him, if he wanted to do that, the children would hire a family to live with and take care of him. The father said he wanted appellant to live on the farm with him; that she did not have anything and he wanted to help her and leave her something when he died. The son reminded his father of the agreement that appellee was to have the 75 acres and that it would be objectionable to the other children for him to fail to keep the agreement, and proposed that if he wanted appellant to live on the farm with and care for him the other children would pay her whatever it was worth. This proposition was not accepted. Appellant said she would not undertake the care of her father unless her pay for doing so was secured. A few days before they moved back to the farm Alfred W. Simmons executed a deed to appellant conveying her 50 acres of the 75 acres, reserving to himself a life estate therein. At the same time he executed a deed to appellee [376] for 25 acres. On December 1, 1911, he executed a will, giving appellee \$3,000 and his sons Henry, David B., William M. and his daughter Mary Link each \$20. To appellant he gave one-half of the residue of his estate and to the children of his deceased son the remainder of his estate. In June, 1911, the appellant's family and her father moved back to the home place, where they resided until the father's death, August 8, 1912.

The bill in this case was filed by appellee to set aside the deed to appellant and to invest the title in appellee and for an accounting of rents and profits. Before the bill was filed one of the sons of Alfred W. Simmons died, leaving a widow and two children, one of whom was a minor. They, together with the surviving children, were made parties defendant to the bill. The surviving children other than appellant answered the bill, admitting its allegations and that the appellee was entitled to the relief prayed. The widow and adult daughter of the deceased son were defaulted. The minor child of the deceased son answered by guardian *ad litem*.

Appellant answered, denying the material allegations of the bill and setting up and relying upon the Statute of Frauds. The minor defendant, by her guardian *ad litem*, filed a cross-bill, admitting the agreement between Alfred W. Simmons and his children as to the distribution of the land, the receipt by the six married children of their shares, and that appellee was to have the 75 acres for her share at the death of her parents. The cross-bill alleges appellant took the value of her interest in money as her distributive share under an express agreement that it was to be in full of her share in the real estate of her father; that no transfer was ever made to the appellee, and that in fraud and violation of the agreement Alfred W. Simmons, after the death of his wife, conveyed 50 acres of the land to appellant. The cross-bill further alleges that the agreement whereby appellee was to get the 75 acres of land was not in writing and was void under the Statute of Frauds and [377] could not be enforced. The cross-bill prays the deed to appellant be set aside as fraudulent and that the 50 acres of land be distributed under the residuary clause of the will of Alfred W. Simmons. Upon a hearing a decree was entered setting aside the deed to appellant and vesting the title in appellee. The question of accounting was reserved for future determination.

The claim of the original bill is, that at the time of the distribution of the land, in 1901, it was agreed between Alfred W. Simmons and wife and their seven children that the share received at that time by each of the six children to whom the deeds were made or who received money in lieu of their share of land was to be, and was, accepted in lieu of any right or claim either of said children should have in expectancy in the real estate of their father; that while the deed was not then made to appellee, appellant and each of the other five children by said agreement released to the appellee all right and interest in and to the 75 acres. Appellant denies any such agreement was made, but the proof, in our opinion, overwhelmingly shows that it was made. The mother expressly stated at the time that she would not consent to the arrangement and execute the deeds to the 366 acres except upon the condition that appellee was to have the 75 acres upon the death of herself and husband. Her solicitude about the provision for appellee was because of her unfortunate crippled condition. While there is no direct proof of any express statement that the six married children agreed to these terms and conditions, they were the terms proposed by the parents to the children, and their father asked them if there was any objection, and none was made, but they accepted their respective shares without remonstrance or objection.

It is competent for a child to release to other children his claim in expectancy to the residue of an estate, and such agreement, when based upon a valuable consideration, is enforceable in equity. (*Galbraith v. McLain*, 84 Ill. 379; [378] *Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081; *Hudson v. Hudson*, 222 Ill. 527, 78 N. E. 917; *Bolin v. Bolin*, 245 Ill. 613, 92 N. E. 530.) It is very clear, under the law and the evidence, that appellant accepted the provision made for her by her parents with the agreement and understanding that it was to be in full of her share in all of her father's real estate, and that appellee was to have the 75 acres at her parents' death free and clear from all right or claim of any of her brothers and sisters therein. Appellee lived on the place with her father and mother until the latter's death, about a year after the distribution was made, and continued to live with and care for her father for nine years after her mother's death, and until, apparently upon the advice of appellant, she was put off the place against her will and not allowed again to return to it. If appellant was not directly responsible for this being done she at least consented to and approved of it, and as soon as her father had conveyed to her 50 acres of the land in which she had agreed and consented to release all interest to her unfortunate sister, she took her father back to the farm, where they lived together until the father's death.

Under the authority of *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, 135 Am. St. Rep. 312, and *Willis v. Zorger*, 258 Ill. 574, 101 N. E. 963, and cases cited therein, the defense of the Statute of Frauds cannot be permitted to enable appellant to deprive appellee of what she is justly entitled to; and we do not think the minor cross-complainant is in any better position to raise the question of the Statute of Frauds.

The decree of the circuit court is affirmed. Decree affirmed.

Craig, J., took no part in the decision of this case.

Rehearing denied December 14, 1915.

#### NOTE.

The reported case holds that a family agreement, whereby one child transfers to another his claim in expectancy to an estate, when based on a valuable consideration, is enforceable in equity. The cases discussing the validity of such agreements are exhaustively reviewed in the note to *Donough v. Garland*, reported ante, this volume, at page 1238.

#### STEVENS

v.

#### STEVENS.

Michigan Supreme Court—July 24, 1914.

181 Mich. 438; 148 N. W. 225.

#### Mortgages — Consideration — Evidence Sufficient.

In a suit by a wife against her insane husband to foreclose a mortgage, evidence held to support a finding that the mortgage was given for money loaned the husband by the wife, which had never been paid.

#### Trusts — Accounting — Evidence of Disbursement Sufficient.

In a suit by a wife against her insane husband to foreclose a mortgage, in which the husband's guardian asked for an accounting as to money received by the wife while managing the mortgaged property during the husband's absence in Canada, evidence held to show that after supporting herself and her children she accumulated no reserve fund beyond what was sent the husband.

#### Assignments — Property Subject — Expectancy.

A contract to purchase the prospective interests of the heirs apparent of an owner of land is not enforceable at law or in equity, where the owner has not consented to the sale and is insane and cannot consent.

[See note at end of this case.]

Appeal from Circuit Court, Cass county:  
DES VOIGNES, Judge.

Action to foreclosure mortgages. Agnes Stevens, plaintiff, and Daniel W. Stevens, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion.

AFFIRMED.

Clarence M. Lyle and Marshall L. Howell  
for appellee.

Stewart & Sabin and Stewart & Jacobs  
for appellant.

[440] STEERE, J.—This bill was filed on November 7, 1912, for the purpose of foreclosing two mortgages given by defendant on his farm of 288 acres located in Cass county, Mich., one for \$5,000, given directly to complainant, and the other for \$2,001.22, given to the Jones Exchange Bank, of Marcellus, Mich., but subsequently assigned to her. Owing to the fact that the principal was not yet due on the latter mortgage, and the amount of interest in default was small, it was withdrawn from consideration by permission of the court, and on motion of complainant's solicitor the bill was dismissed as to it without prejudice. Upon the hearing a decree

was rendered foreclosing the \$5,000 mortgage, given complainant, for the sum of \$6,587.12, being found due for principal and interest accrued since said mortgage was given on April 20, 1909.

At the time of these proceedings defendant was mentally incompetent. An answer with cross-bill was filed by Samuel Stevens, his son and general guardian, admitting the execution of said mortgage, but denying its validity and asserting it was without consideration, alleging that complainant had contracted to purchase the interests of defendant's heirs in said farm, had been in possession of and realized profits from the same, praying that said mortgage be declared null and void, and asking affirmative relief by an accounting, decree for specific performance of contract, and an injunction to restrain certain proceedings at law which had been commenced by her.

Defendant and complainant were husband and wife, having been married in the State of New York in [441] 1904. He was a Michigan farmer, a widower well along in years, and had six children by his former wife, all living and of age when this suit was heard. She was then about 40 years of age, had not been previously married, was a resident of Canada where she owned some inherited property both real and personal, and had followed no occupation beyond helping in the household of her parents when they were living. She had little knowledge of business matters, her interests being cared for by an attorney and agent. She first met defendant at her sister's home in New York, where she was visiting and where they were married a few months later. While their courtship was in progress defendant tested her sincerity by borrowing \$1,500 from her. Immediately following their marriage she accompanied him to his farm in Cass county, where they thereafter made their home and lived as husband and wife until shortly before this suit was begun, excepting when he was absent in the Northwest at intervals as hereafter related. Complainant was without previous experience in farm life, but appears to have adapted herself to it and been a faithful helpmate to defendant, not only caring for his household but interested and helpful in farm matters. She testifies:

"When I went up there on the place with him, I had to do a little of everything. I had to milk, and I often fed the stock. I had never done that before. It seems I had to learn."

Two children were born of the marriage, a boy and a girl, respectively 8 and 6 years old when this suit was heard.

Though defendant had a large farm with a full complement of stock, tools, etc., and was apparently operating on a rather large

scale, his methods were such that he was not successful financially. His farm was mortgaged and he was in debt when married to complainant. [442] This condition continued and his indebtedness increased. It is clearly shown that he continued to apply from time to time the test of loyalty he found so satisfactory during their courtship and frequently borrowed money from complainant. She not only helped him financially at different times by direct loans, but by paying items of his indebtedness and expenses of the farm. She is shown to have mortgaged her Canadian property at one time to raise money for her purposes in Michigan; the mortgage being yet unpaid.

There are four mortgages upon defendant's farm, the one for \$5,000 to complainant being the third, and the one for \$2,001.22 which she holds by assignment being the fourth. Two earlier mortgages aggregate \$6,000 principal, with considerable accrued interest.

As his obligations increased and creditors were pressing him, and about the time he gave his wife this third mortgage, defendant conceived the project of retrieving his fortunes by journeying to and locating upon land in the Canadian Northwest. To that end, in May, 1909, he took from his farm and loaded a car with supplies, farming implements, tools, stock, etc., including two spans of horses, and started for Alberta, leaving complainant at home to run the farm with what was left as best she could; the parting though not final test of her loyalty being the requisite money to pay freight on his car to Alberta. Defendant located 320 acres of wild land in Alberta and proceeded to subdue and improve the same, devoting most of his time and all the money he was able to secure to that purpose until 1911. He was back home from time to time and gave directions as to the management of the Cass county farm, but left substantially all the burden of it on complainant, and was constantly importuning her by mail for more money, in an interesting series of letters, freighted with accounts of the [443] country and the hardships he experienced, prayers, profanity, and great expectations. Her style of correspondence was somewhat similar and responsive from her viewpoint, telling of her efforts and the troubles which beset her in trying to run the farm, complaining of his having notes "all over —'s creation," at one time inquiring, in answer to an appeal from him for more money, "what was the use of your leaving me here, knowing you was in debt to everybody?" In a letter written by him on February 28, 1910, to Mr. Jones, of the Jones Exchange Bank, where he had borrowed money, he throws some light on his reason for going West and his financial embarrassments. It is, in part, as follows:

"I suppose you think I never intend to sign your note and answer your letter. I tell you — I don't live in Michigan now. . . . It is almost 40 miles to town and the last three weeks it has stormed and blowed so bad and the most of the time it has been down to 38 and 40 degrees below zero and for 20 miles there ain't a house on the road. . . . I told her (complainant) in the fall to go and see you. She wrote me she had been and seen you and fixed it up all right and I supposed it was satisfactory. . . . I am willing to give you a mortgage, but I would like it to run 6 years because I will not get the deed of the last 160 for six years. Then will sell out here or back in Michigan and pay up. . . . I came out here so as to save the home place. . . . If you will draw up or have one drawn up running six years, so whenever I can pay you \$300 a year . . . that will give me a chance for my life and I will get the old lady to discharge her mortgage on the farm and take one out here. . . . Now I think between God and man I have agreed to do what is right. If you will send me such a mortgage I will sign it and send it back as quick as I can and if she won't do so, then I will come back and you may jump on the farm and take it."

He was home three times in 1909 and once in the latter part of 1910, remaining during a portion of the [444] winter, until March, 1911, and was back two weeks in August, 1911, and finally returned on December 4, 1911. During his absence complainant, at his request, undertook to keep an account of her receipts and expenditures in connection with the farm. This consisted of items jotted down in a book at irregular intervals, as she testified, to show "that I didn't waste any of the produce of the farm or anything like that," and for defendant to look over when he came home. He is shown to have examined and approved them at different times when home, with the exception of the last year. In that connection it is urged that defendant is entitled to an accounting, because complainant is shown by her own books to have received several thousand dollars from the proceeds of the farm for which she has not accounted. That question is also involved in an action on the law side of the court, brought by her to recover for money loaned defendant during the time he was in the West, subsequent to the date of the \$5,000 mortgage here involved. It is sufficient for the purposes of this case to state we are well satisfied nothing is shown in that connection for which she should be called upon to account in the foreclosure of this mortgage. It appears from the record that complainant, a woman with limited knowledge of farming and little experience in business, had been trying for nearly three years to maintain

and run this farm, after it had been partly stripped of stock and tools by defendant, at the same time, and while supporting herself and children, sending him money in response to his urgent importunities frequently and in considerable amounts as his written acknowledgments and other written evidence shows. We are convinced, under the facts proven, that she could not and did not accumulate any reserve fund, at least beyond that she sent defendant, out of the proceeds of this farm, which he writes he went West to save from his creditors [445] and which he apparently had been unable to run profitably when in charge.

We fully agree with the conclusions of the learned circuit judge that this mortgage represented money loaned by complainant prior to its date and which was never paid, either principal or interest; and that defendant is not in this suit entitled to any accounting in relation to her management of the farm.

The only remaining question urged by defendant is the alleged contract between complainant and defendant's heirs.

Shortly after defendant's return home in the fall of 1911, he suffered a stroke of paralysis, as a result of which he became incompetent and sank into a helpless condition both physically and mentally, his mind and memory so impaired that he was incapable of transacting any business or even caring for himself. Complainant was desirous of having him sent to an asylum, but his son Samuel Stevens, who lived in Battle Creek, objected to this course, and being appointed guardian by the probate court took his father home with him, and as guardian proceeded to take charge of his estate. He assumed to have control of, and direct operations upon, the farm during the summer of 1912, though residing in Battle Creek. Complainant continued to live upon the farm as before and participated more or less in what was done there, boarding the hired help without pay and furnishing much of the family supplies, though it appears to have been recognized that he was in authority as guardian. The heavy indebtedness of the estate and unsettled condition of affairs were a general source of anxiety, uncertainty, and dissatisfaction. In the early part of the summer she conferred with the guardian, Samuel Stevens, another stepson named James Stevens, and a son-in-law of her husband named Frank James, as to the debts and difficulties which surrounded the [446] estate and the surplus, if any, which might be realized above the growing indebtedness. A proposal was broached to her by one or more of them that she buy out her husband's heirs and take the assets for whatever equities there might be. She at first favored their proposal, and after listening to their appraisal and plan of procedure agreed that she would buy out the

six stepchildren for \$3,000, or \$500 each, they to make her a proper transfer of their interest as heirs of defendant's estate in Cass county, but subsequently decided not to do so and refused to consummate the deal. The subject was, however, broached occasionally and discussed persuasively by the son-in-law until she again, in September, concluded to buy the heirs out. James undertook to procure their consent to take \$500 apiece, and stated to her he had been told by the guardian that he would have nothing to do with it unless she put up something to show she meant business. She agreed to give notes for the amount; and he drew up five notes for \$500 each. Having some time before loaned over \$500 to the guardian, she signed no note for him. It is claimed and denied that the guardian thereupon surrendered control and possession of the property to her. There is evidence that some steps were taken to that end, though to what extent is uncertain, as she had been living upon the farm and participating in its affairs all the time, and the guardian had been away, except for occasional visits, attending to his own business affairs in Battle Creek. A contract was prepared providing for the sale and purchase of the prospective interests of the six stepchildren and signed by them; but, when it was presented to complainant, she claimed to have learned in the meantime that she had been deceived and misled as to their rights and conditions generally. She refused to sign the contract and, on October 22, 1912, demanded back her notes from James to whom she [447] had delivered them, and he refused to comply. She thereafter, on November 7, 1912, filed this foreclosure bill and began an action in attachment against her husband. Of this contract the learned circuit judge said and found:

"It is plain to me also that the complainant, the wife of the defendant, is a woman not versed in the affairs of the business world and has had but very little experience in that respect in former years; that she was ignorant of the law and of her rights in this case. I further find that while she was appointed guardian for her two minor children, the issue of her marriage with the defendant in this case, which children are five and six years of age, that the proceedings had in the sale of the land in this case did not contemplate or secure to these children the rights which they are entitled to under the statute. I think that the notes which were given and held by Frank James, who by the way is a son-in-law of the defendant, were given without consideration, and that the contract which was therefore to be made and executed and the giving of which these notes were based upon, although not signed or even executed was in fact not in accord with the oral arrangements in either the first or second

so-called contract of agreement. . . . Defendants have failed in their cross-bill to maintain any right to compel the performance of this oral contract and agreement."

While it might be contended with some force under certain circumstances that this contract had progressed to a point of performance which relieved it from the statute of frauds, the facts in this case fully sustain, in our view, the final conclusion reached by the trial court. None of the heirs of defendant are parties to this suit. His guardian asks for him specific performance of an alleged contract to which he was not a party, to which he did not and could not consent; its purpose being to dispose of prospective interests in his estate before he was dead. Even were it an enforceable contract, it was not made with any party to this suit.

[448] This contract contemplated a sale of a prospective interest by heirs apparent, a sale void as a rule under the common law, sometimes enforced in courts of equity and more rarely, under the doctrine of estoppel, in courts of law. Such sales, as a rule of public policy, are not regarded with favor, and are rarely, if ever, sustained without the consent of the ancestor where that question is raised; the reason being that the ancestor is entitled to know the situation of his heirs with reference to each other, to himself, and his property, and by keeping him ignorant of the sale he is unwittingly led to leave his property to a stranger without his knowledge or consent, which operates as a fraud on the ancestor.

This question is fully discussed, with many authorities cited in the annotations to *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, where reported in 33 L.R.A. 266, 56 Am. St. Rep. 335, and need not be elaborated here.

Under the general rules upon this subject to be drawn from the leading authorities, we conclude the contract under consideration is not enforceable either at law or in equity. The principles applicable here are concisely stated in the syllabus (which is borne out by the text) of *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 556, as follows:

"Where a person conveys his expectant interest in his ancestor's estate, such contracts being regarded with disfavor by the law, and as against public policy, before such contract can be enforced it must be alleged and proven that there was neither fraud nor oppression, and that the ancestor had knowledge of such contract, and acquiesced therein, and the fact that the ancestor is insane, and incapable of consenting to the contract, constitutes no exception to the rule."

The decree is affirmed, with costs.

McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

**NOTE.**

In the reported case it is held that a sale of the interest of an heir apparent is void unless made with the consent of the ancestor from whom the interest is expected to be derived, and that no exception is made to this rule where the ancestor is incapable of giving his consent. For a complete discussion of this subject, see the note to *Donough v. Garland*, reported ante, this volume, at page 1238.

**BLACKWELL**

v.

**HARRELSON.**

South Carolina Supreme Court—September 24, 1914.

99 S. Car. 264; 84 S. E. 238.

**Assignments — Property Subject — Expectancy.**

A sale by an expectant heir of an interest in land which he expects to inherit from a person then living is not against public policy, and the fact that a grantor is an expectant heir of the owner of land, an interest in which his deed purported to convey, does not prevent the title subsequently acquired by him by descent passing thereunder, under the rule of estoppel.

[See note at end of this case.]

**Estoppel — By Partition Agreement.**

Where C., one of the children of an owner of land, conveyed to E., another child, all of his interest in the real estate of his mother, and after the mother's death all of the children executed a partition agreement allotting to each of the other children a parcel of land and allotting a parcel to C. and E. together, though E. was estopped by the partition agreement from claiming any interest in the parcels allotted to the other children, she is not estopped from claiming all of the tract allotted to her and C., and the partition agreement did not reinvest C. with the title which passed, when acquired, under his deed.

**Deeds — Quitclaim — After Acquired Title.**

A deed by an expectant heir conveying with general warranty all of his interest in the real estate of his mother, though in effect a quitclaim deed, is sufficient to estop the grantor with respect to a title subsequently acquired by descent, as a quitclaim deed is sufficient to convey an absolute fee-simple title.

**Recording Acts — Persons Protected — Purchaser at Execution Sale.**

Under Civ. Code 1912, § 3542, providing that all deeds, etc., shall be valid so as to

affect from the time of delivery or execution the rights of subsequent creditors whether lien creditors or simple contract creditors, or purchasers for a valuable consideration without notice only when recorded within 10 days from the time of such delivery or execution, where a creditor had no notice of a conveyance when he extended credit to the grantor, a purchaser of the land conveyed under an execution on a judgment obtained by the creditor acquired a good title notwithstanding actual notice to him, at the time of the sale, of the conveyance, as the rights of the purchaser under an execution are the same as those of the creditor upon whose suit the property is sold.

**Record as Notice — Deed Ineffective When Made.**

Under Civ. Code 1912, § 3542, where a grantor had no title to land when his deed was executed or recorded, but subsequently acquired title, the record of the deed is not constructive notice to creditors subsequently extending credit to him, and as against such creditors the deed is not effective.

Appeal from Common Pleas Circuit Court, Marion county: SPAIN, Judge.

Action for partition. R. J. Blackwell, plaintiff, and Ella J. Harrelson, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

**OPINION OF COURT BELOW.**

[266] SPAIN, J.—This is an action for partition, and was heard by me upon an agreed statement of facts at the regular November (1913) term of the Court of Common Pleas for Marion county. Plaintiff alleges by his complaint that he and the defendant are tenants in common, share and share alike, of the land described in the complaint, and prays to have his part of the land set apart to him in severalty. The answer of the defendant denies all the allegations of the complaint, alleging that plaintiff has no interest in the land in question, and prays that the complaint be dismissed. By consent all the issues involved were submitted to me for decision upon the agreed statement of fact, a trial by jury of the issue of title having been waived.

The essential facts of the case are as follows: During the year 1898 Susan Z. Harrelson, the mother of defendant, was the owner of the lands involved in this action, and during April of that year she made a will and a day or two later added a codicil thereto. Under this will and the codicil thereto she devised certain lands, of which the lands here involved were a part, to her children, Charles H. Harrelson, Ella Jane Harrelson, Altha Gertrude Harrelson (now Bryan), and Elmira Josephine Harrelson (now McLellan).

Susan Z. Harrelson continued the owner of the land until her death, late in December, 1901, leaving the above mentioned will in force, and the will and codicil were admitted to probate in Marion county on February 4, 1902. On November 24, 1898, Charles H. Harrelson, by his deed, dated on that day and recorded in the office of the clerk of Court of Marion county on February 15, 1899, conveyed with general warranty to Ella J. Harrelson, her heirs and assigns, "all my right, title and interest in all the real estate of my mother and father, the same being situate in said [267] county and State, whereon my said mother now resides, on Back Swamp and the Old Stage Road." On December 12, 1905, Addie C. Platt, Gertrude A. Bryan, being the same person mentioned in the will of Susan Z. Harrelson as Altha Gertrude Harrelson, Ella J. Harrelson, Charles H. Harrelson, and Josephine E. Harrelson, being the same person mentioned in the will of Susan Z. Harrelson as Elmira Josephine Harrelson, entered into a certain written agreement relative to the land devised under the will of Susan Z. Harrelson. This agreement recited that the land had been surveyed and divided into parcels, and in this instrument, which allotted one of the divisions to each of the other children, it was provided that division B should be the portion of Charles H. Harrelson and Ella J. Harrelson together, this division B being the tract of land sought to be partitioned in this action. After making the various allotments the agreement then provided as follows: "And we agree that the division now made in the manner aforesaid shall be forever binding and conclusive upon us and our heirs and assigns forever. And each to the other doth hereby release and quitclaim all interest to the several portions of each according to said division and to the heirs, executors, administrators and assigns of each other forever." This agreement was duly recorded in the office of the clerk of Court of Marion county on February 17, 1906. During the year 1907 R. J. Blackwell & Company extended credit to Charles H. Harrelson on open account to the amount of \$604.52, and on May 6, 1908, this account was reduced to judgment by R. J. Blackwell & Company, which judgment was duly entered in the office of the clerk of Court of Marion county. An execution was issued on this judgment, and the sheriff levied upon a half interest in tract B of the land above mentioned as the property of Charles H. Harrelson. After compliance with all the requirements of law the one-half interest in tract B was sold by the sheriff of Marion county on sales day in February, 1909, to R. J. Blackwell, the plaintiff, who [268] complied with his bid and received title from the sheriff. When this land was called for sale

by the sheriff, F. D. Bryant announced for Ella J. Harrelson that the land belonged to her, and that Charles H. Harrelson, the execution debtor, had no interest. This announcement was heard by the attorney of R. J. Blackwell, who bid in the property for him. It is conceded, however, that when the credit, upon which the judgment and execution were based, was extended in 1907, and when the judgment was entered thereon in 1908, R. J. Blackwell & Company, the creditors, had no actual notice or knowledge of the deed of Charles H. Harrelson to Ella J. Harrelson, executed in 1898 and recorded in 1899. It is further conceded that when that deed was executed and recorded, Charles H. Harrelson had no title whatever to the land which he purported to deal with, but that it was then owned and continued to be owned by his mother, Susan Z. Harrelson, until her death in December, 1901, and that whatever title Charles H. Harrelson has had at any time, or whatever title Ella J. Harrelson acquired by her deed from Charles H. Harrelson, did not vest until the death of Susan Z. Harrelson. Under this state of facts R. J. Blackwell, the plaintiff, claims to be the owner of one-half of the land described in the complaint by virtue of his deed from the sheriff, and Ella J. Harrelson, the defendant, claims to be the owner of the entire tract by virtue of her deed from Charles H. Harrelson, executed in 1898 and recorded in 1899.

The defendant, Ella J. Harrelson, admits that Charles H. Harrelson had no title at the time he made his deed to her, and that she acquired no title at that time, but that when Susan Z. Harrelson died, Charles H. Harrelson acquired title under the will, which title immediately vested in her by way of estoppel. The general principle of law contained in this proposition is well established in this State. *Reeder v. Craig*, 14 S. C. L. 3 McC. 411; *Robertson v. Sharpton*, 17 S. C. 592; *Gaffney v. Peeler*, 21 S. C. 55.

[269] However, on the other hand, it is urged that under the peculiar facts of this case Ella J. Harrelson cannot avail herself of the rule of estoppel for the reasons (1) that when the deed was made by Charles H. Harrelson to Ella J. Harrelson he was an expectant heir of Susan Z. Harrelson, and a deed made by him purporting to convey an interest in the land of a person of whom he was an expectant heir would be contrary to public policy and void; (2) that the partition agreement of December 12, 1905, reinvested Charles H. Harrelson with his interest in the land; (3) that the deed of Charles H. Harrelson to Ella J. Harrelson, only purporting to convey his right, title and interest, was in effect nothing more than a quitclaim deed, which would not estop him to claim an interest subsequently acquired, and (4) that



the plaintiff was a purchaser at a sale under an execution founded upon a judgment for credit extended without notice of the deed of Charles H. Harrelson to Ella J. Harrelson, and consequently was a purchaser for valuable consideration without notice of the rights of Ella J. Harrelson. The decision of this case, therefore, depends upon the proper determination of these four objections to the application of the rule of estoppel.

It is, no doubt, true that authority may be found for the proposition that a sale by an expectant heir of an interest in land which he expects to inherit from a person then living is void as against public policy. *McCall v. Hampton*, 56 Am. St. Rep. 335 (Ky.)—but no decision to that effect in this State has been called to my attention, and I think the weight of numerical authority as well as the better reasoning support the contrary view. See authorities discussed in note to *Trull v. Eastman*, 37 Am. Dec. 126 (Mass.) 4 Cyc. 15, and authorities cited. I am, therefore, of the opinion that the fact that Charles H. Harrelson at the date of his deed to Ella J. Harrelson was an expectant heir of the person in whose land [270] he was purporting to convey an interest would not be sufficient to prevent the application of the rule of estoppel.

I also think the second objection urged against the application of the rule of estoppel without merit, namely, that the partition agreement of December 12, 1905, reinvested Charles H. Harrelson with title. Plaintiff has cited the cases of *Senterfeit v. Shealey*, 71 S. C. 259, 51 S. E. 142, and *Gibson v. Fuller*, 74 S. C. 535, 54 S. E. 778, as authority for the position that Ella J. Harrelson is estopped by the partition agreement to claim that Charles H. Harrelson did not thereby become reinvested with title. Those cases, however, are materially different from the case at bar. There was no necessity for Charles H. Harrelson to sign the partition agreement, as he was already estopped to claim any interest in the land in so far as the signers of the agreement were concerned, and the purposes of the parties only could have been to give additional force to the deed already made by Charles H. Harrelson to Ella J. Harrelson. It is quite true that the partition agreement will estop Ella J. Harrelson from claiming any interest in tracts A, C, and D, but it cannot estop her from claiming all of tract B.

I think it is true, as contended by plaintiff, that the deed of Charles H. Harrelson to Ella J. Harrelson is of no more effect than a quitclaim deed, but that is not sufficient to prevent the application of the rule of estoppel. Under the law of this State a quitclaim deed is sufficient to convey an absolute fee simple title, and, though the deed in ques-

tion was in effect a quitclaim deed, yet it is sufficient to estop the grantor. *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671.

The position of plaintiff that he is a purchaser for value without notice is well taken. It is undisputed that R. J. Blackwell & Company had no actual notice of the deed of Charles H. Harrelson when they extended credit to Charles H. Harrelson in 1907. The recording act, vol. I, Code 1912, sec. 3542, extends its protection to [271] simple contract creditors as well as lien creditors, and the rights of R. J. Blackwell & Company as subsequent creditors for value without notice accrued when the credit was extended in 1907. The fact that actual notice was extended to R. J. Blackwell, the purchaser, at the time of the sale by the sheriff under the execution cannot suffice to charge him with actual notice of the rights of Ella J. Harrelson, because the rights of the purchaser under an execution are the same as those of the creditor upon whose suit the property is sold. The case of *Herring v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661, is precisely in point, and thus states the rule: "The purchase at the sheriff's sale for the benefit of suing creditors, admitted to be subsequent creditors without notice, gave to the purchaser that protection which is extended to the class to which the creditor in execution belonged, whether he, the purchaser, had actual notice or not." Defendant cites the case of *Armour v. Ross*, 78 S. C. 294, 58 S. E. 941, 1135, as authority for the position that the recording act only extends its protection to lien creditors. An examination of that case, however, will show that it had under consideration the statute relating to bailments and conditional sales of personal property, and has no application to the question at issue in this case. I think it clear, therefore, that plaintiff is a purchaser for valuable consideration without actual notice, and the only constructive notice by which it is sought to charge him is the record of the deed of Charles H. Harrelson to Ella J. Harrelson. That deed was executed November 24, 1898, and recorded February 15, 1899. At both of these dates the land was the admitted property of Suzan Z. Harrelson, and Charles H. Harrelson had no title whatever to the land. The title of Charles H. Harrelson was not acquired until December, 1901, nearly three years subsequent to the date of the record of his deed to Ella J. Harrelson, so, therefore, the question is simply whether the record of that deed was constructive notice. This question is quite explicitly and conclusively answered in the negative [272] by the case of *Richardson v. Lumber Corp.* 93 S. C. 254, 75 S. E. 371, and that case is conclusive of this. R. J. Blackwell, the plaintiff, being a purchaser for valuable consideration without notice, either

actual or constructive, of the deed of Charles H. Harrelson, the rule of estoppel cannot be asserted against him.

It is, therefore, ordered, adjudged and decreed that the plaintiff and defendant are tenants in common of the tract of land described in the complaint in equal proportions, to wit: one-half each, and that plaintiff is entitled to partition.

It is further ordered, adjudged and decreed that a writ of partition in the usual form do issue as provided by law.

The defendant appealed on the following exceptions:

I. Because his Honor erred in saying that Ella J. Harrelson admitted that C. H. Harrelson had no title at the time he made his deed to her. On the contrary, it is earnestly contended that as a known devisee under the will of Suzan Z. Harrelson, and as a prospective heir at law, he had some right, interest or thing of value contingent, but capable of being sold, and that upon the death of testatrix his title became absolute, and under covenants of his deed passed to his grantee, Ella J. Harrelson.

II. Because his Honor erred in holding that the deed from C. H. Harrelson to Ella J. Harrelson was of no more effect than a quitclaim deed, whereas, he should have held that it is in form a deed of bargain and sale, as prescribed by statute, and carries with it all the effect and binding sanctions of a fee simple deed.

III. Because his Honor erred in holding that R. J. Blackwell & Company were subsequent creditors without notice within the purview of the statute, and that R. J. Blackwell, the purchaser at the execution sale, was entitled to any protection which R. J. Blackwell & Company might have claimed, and in further holding that R. J. Blackwell, the [273] purchaser at the execution sale, was not affected by the constructive notice arising from the record of the deed of C. H. Harrelson to Ella J. Harrelson, and was not affected by the actual notice of the rights of the defendant given at the time the sheriff's sale was had, whereas, he should have held:

(1) That the deed made by C. H. Harrelson to Ella J. Harrelson estopped C. H. Harrelson from setting up any claim to the land in controversy herein.

(2) That the estoppel operated not only against C. H. Harrelson, but his creditors, including R. J. Blackwell & Company, and all in privity with the said C. H. Harrelson, including R. J. Blackwell, the purchaser at the execution sale.

(3) That the purchaser at the sheriff's sale can acquire no higher title than the judgment debtor had, and hence, if at the time of the entry of the judgment and sale, C. H. Harrelson did not have title, and was

estopped from setting up title to the premises, the estoppel of C. H. Harrelson operated against the purchaser, and his Honor should have held that the original record of the conveyance made by C. H. Harrelson to Ella J. Harrelson was a sufficient record of her title to protect her rights and give constructive notice to R. J. Blackwell & Company and the other creditors of the said C. H. Harrelson, but that at any rate, the actual notice of the defendant's rights given to R. J. Blackwell, purchaser at the execution sale, at the time of the sale, and before he purchased, took the place of constructive notice, and this of itself would have been sufficient to protect the defendant, whether her deed had been recorded or not.

IV. Because his Honor erred in holding that R. J. Blackwell & Company extended credit to C. H. Harrelson on the faith of his being the owner of the land in dispute, but even if such construction can be placed upon the agreed statement of facts, still his Honor erred in holding that under such circumstances C. H. Harrelson could not have [274] sold the land in question and passed a good title at any time before the judgment was entered, whereas, he should have held that a simple contract creditor acquires no such interest in the property of his debtor as would preclude his debtor in good faith from selling and disposing of his property at any time before the judgment was entered; and he should have further held that said R. J. Blackwell & Company were not innocent creditors without notice, for the reason that the deed from C. H. Harrelson to Ella J. Harrelson was on record before the said R. J. Blackwell & Company extended credit to C. H. Harrelson; and he should have further held that no misrepresentation made by the said C. H. Harrelson as to the ownership of the land could relieve R. J. Blackwell & Company from the effect of constructive notice arising from the record of the deed, or prejudice the rights of Ella J. Harrelson; and he should have further held that at the time that R. J. Blackwell & Company extended credit to C. H. Harrelson, the defendant's title to the property in dispute had been made perfect by operation of law, in that the deed for C. H. Harrelson's contingent interest, made in 1898, and duly recorded, attempting to convey the fee, had been made perfect by the death of Suzan Z. Harrelson, and the probate of her will, wherein the property in question had been devised to C. H. Harrelson and others, and that the personal notice of the defendant's rights before R. J. Blackwell purchased at the execution sale fully protected her rights.

V. Because his Honor erred in holding that R. J. Blackwell was a purchaser for valuable consideration without notice, either actual

or constructive, of the deed of C. H. Harrelson to Ella J. Harrelson, and that the rule of estoppel cannot be asserted against him, whereas, it is admitted, and his Honor so stated in his decree, not only that the deed of C. H. Harrelson to Ella J. Harrelson was duly recorded, but that actual notice also was given at the time of the execution sale before R. J. Blackwell purchased, and his [275] Honor erred, not only as to his undisputed question of fact, but as a matter of law, in holding that the said R. J. Blackwell was not estopped by the notice so given.

*Robt. B. Scarborough and W. F. Stackhouse* for appellant.

*Henry Buck and A. F. Woods* for respondent.

WATTS, J.—For the reasons stated by his Honor, T. H. Spain, in his Circuit decree, it is the judgment of this Court that the judgment of the Circuit Court be affirmed.

#### NOTE.

The reported case is one of the few cases that have upheld the validity of a sale of an expectancy by a prospective heir without a reference to the jurisdiction of equity. In view of the combination of law and equity in many jurisdictions it is only natural that the distinction between the validity of such a sale at law and its validity in equity, although clearly drawn in the older cases, should be passed unnoticed in the reported case. The question of the validity of the transfer of an expectancy by a prospective heir or beneficiary will be found fully discussed in the note to *Donough v. Garland*, reported ante, this volume, at page 1238.

HENRY

v.

SPITLER.

Florida Supreme Court—March 3, 1914.

67 Fla. 146; 64 So. 745.

#### Appearance — Waiver of Special Appearance — Pleading to Merits.

In an action of replevin, where the defendant enters a special appearance "for the purpose of moving to quash the return to the writ of replevin," and files his motion to that effect, which is denied, and the defendant then proceeds to defend the action on the merits, he will be considered to have waived

any defect which may exist in the service of the writ.

[See note at end of this case.]

#### Same.

A defendant, in an action at law, who has appeared specially for the purpose of contesting the validity of the service of the summons upon him, and such matter has been determined adversely to him, in order to preserve his status as not having been properly served with the summons, so as to give the court jurisdiction over his person, must refrain from taking any subsequent steps to defend the action upon the merits. In the event he proceeds to a trial upon the merits, he cannot thereafter in an appellate court be permitted to raise such question of jurisdiction, but will be held to have entered a general appearance.

[See note at end of this case.]

#### Writ of Error as General Appearance.

A writ of error to what purports to be a final judgment of a circuit court operates as a general appearance in the case of the party taking such writ.

[See Ann. Cas. 1912D 411.]

#### Appeal and Error — Presumptions — Duty to Show Error.

It is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist, every presumption being in favor of the correctness of the respective rulings of the trial court.

[See 2 R. C. L. tit. *Appeal and Error*, p. 222.]

#### Pleading — Formal Objections — Waiver by Failure to Demur.

If a defendant in an action of replevin conceives that the declaration filed therein is defective in failing to specify the county in which the property which forms the subject-matter of the controversy is detained, he should test the sufficiency of the declaration by demurring thereto.

#### Averment of Venue Sufficient.

Venue laid in the margin, not repeated in the body of the declaration, is sufficient, though the action be local.

#### Appeal and Error — Necessity for Exceptions — Denial of New Trial.

An assignment based upon the denial of the motion for a new trial cannot be considered by an appellate court, in the absence of an exception to such ruling.

(Syllabus by court.)

Error to Circuit Court, Pinellas county:  
ROBLES, Judge.

Action of replevin. Walter L. Spitler, plaintiff, and Harry E. Henry, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion.  
AFFIRMED.

*Davis & Sellers and W. H. Surrency* for plaintiff in error.

*Wall & McKay* for defendant in error.

[147] SHACKLEFORD, C. J.—Walter L. Spitzer instituted an action of replevin against Harry E. Henry to recover the possession of certain described mules. The property was re-delivered to the defendant upon the filing of a forthcoming bond in accordance with the statutory provisions. On the 7th day of April, 1913, the return day of the writ, the defendant entered his special appearance "for the purpose of moving to quash the return to the writ of replevin" and filed the following motion:

[148] "The defendant, Harry E. Henry, by his attorneys for the purpose hereinabove stated, and under his special appearance herein filed, respectfully moves the court to quash the return of the sheriff to the writ of replevin issued in the above-stated cause, upon the following grounds and for the following reasons:

(1) It affirmatively appears from said return to the writ of replevin that no effectual and valid service of the same has been made.

(2) It affirmatively appears from said return that this defendant has not been summoned to appear in said cause by proper and effectual service of process in the manner required by law.

(3) It affirmatively appears from said return that this court has never acquired jurisdiction of the person of this defendant.

(4) And for other good and sufficient reasons apparent upon the face of the return to the said writ of replevin.

Wherefore the defendant prays that the said return may be quashed."

This motion was denied and the defendant allowed until the August Rule day in which to plead, on which day he filed his plea of not guilty. A trial was had before a jury, which resulted in a verdict in favor of the plaintiff. Upon this verdict a judgment was rendered and entered against the defendant and the sureties upon his forthcoming bond, which judgment the defendant has brought here for review.

The first and second assignments are based upon the denial of the motion "to quash and set aside the sheriff's return to the writ and summons in replevin issued in said cause." It is contended by the plaintiff that these assignments have been waived by the defendant both [149] by the filing of his forthcoming bond and by subsequently pleading and going to trial upon the merits, so that they are not open to consideration by us. While there is much conflict in the authorities upon this point, we are of the opinion that this contention must be sustained. In fact, we are committed to the doctrine that, after the denial of a motion to set aside the service of the process by which the suit was commenced because there was no legal service upon the defendant, the defendant waives this point

by pleading issuably to the declaration and going to trial upon the merits. *Florida R. Co. v. Gensler*, 14 Fla. 122. It is true that subsequent to this decision the point was again before this court and was left undetermined because only two members thereof participated therein. Mr. Chief Justice Maxwell held, as is set forth in the first headnote in *Stephens v. Bradley*, 24 Fla. 201, 3 So. 415: "If after special appearance to set aside service of summons, the court refusing to set it aside, the defendant appears to defend the action, he will be considered to have waived the defect of service." Mr. Justice Raney refused to concur therein for the reasons stated in his opinion. We think that Mr. Chief Justice Maxwell was right, and hereby copy with approval the following excerpt from his opinion:

"The first error assigned is against the action of the court in overruling the motion 'to quash the writ and in sustaining the service.' We find in the record no motion to quash the writ, but only to 'quash the service of the writ,' and as to that it is needless to specify the grounds of the motion, as the error, if there was one, was cured under the rule adopted in this State, by the conduct of the defendants in afterwards appearing to demur and file pleas. *Florida R. Co. v. Gensler*, [150] 14 Fla. 123. The statute which authorizes a party to plead over after his demurrer has been overruled, without being deemed to have waived the benefit of his demurrer on appeal to this court, has no application to a case where a party, notwithstanding defective process of defective service of process, waives his objections, whether overruled by the court or not, by appearing generally to defend the suit."

We are strengthened in the correctness of this conclusion by the vigorous and well reasoned opinion rendered by Mr. Justice Marshall in *Corbett v. Physicians' Casualty Assn.* 135 Wis. 505, 115 N. W. 365, 16 L.R.A. (N.S.) 177. The authorities upon each side of the question will be found collected in the case note to this opinion on page 177 of 16 L.R.A. One of the latest and most strongly reasoned opinions on the other side of the question is that of Mr. Justice Poffenbarger in *Fisher v. Crowley*, 57 W. Va. 312, 50 S. E. 422, 4 Ann. Cas. 282, the effect of which is weakened, however, by the forcible dissenting opinion rendered by Mr. Justice Sanders. A valuable case note will also be found on page 290 of 4 Ann. Cas. Even if we should hold that the court erred in the denial of the motion, as to which we express no opinion, and should for that reason reverse the judgment, the defendant would then be in court. See *Busard v. Houston*, 65 Fla. 479, 62 So. 483, following prior decisions in holding that "A writ of error from what purports to be a

final judgment of a Circuit Court operates as a general appearance in the case of the parties taking the writ." Having reached this conclusion, it becomes unnecessary to determine whether or not the filing of a forthcoming bond by the defendant in an action of replevin constitutes a general appearance. Upon this point also the authorities are in [151] conflict. See *Fowler v. Fowler*, 15 Okla. 529, 82 Pac. 923; *Cheatham v. Morrison*, 37 S. C. 187, 15 S. E. 924; *Morrow v. Nowell-Shapleigh Hardware Co.* 165 Ala. 331, 51 So. 766.

The third and fourth assignments are as follows:

"(3) The court erred in denying the defendant's motion made during the progress of the trial in said cause, to strike from the testimony in said cause the question propounded to, and the answer of the witness, Walter L. Spitler, relating to the place where the property in litigation was located at the time of the commencement of this suit.

"(4) The court erred in refusing to strike from the testimony in said cause the fact testified to by the witness Walter L. Spitler, that the property in litigation was within the county of Pinellas at the time of the commencement of this suit, and within said county was levied upon by the sheriff under the writ of replevin issued in said cause."

The bill of exceptions discloses the following proceedings relative to these assignments:

"On the 12th day of September, A. D., 1913, during a term of said court, the issue joined between the parties came on to be tried before a jury, and thereupon the plaintiff, being sworn in his own behalf, in answer to an interrogatory thereto, testified in substance: That the property described in the writ of replevin was located in the county of Pinellas, State of Florida, at the time of the commencement of his suit, and within said county was levied upon by the sheriff under the said writ.

But to the said matter so offered to be proved by the said witness, the said Walter L. Spitler, the defendant did then and there object by moving the court to strike from the testimony in said cause the said interrogatory [152] and the said matter just stated as in answer thereto, upon the following grounds:

(1) Because the testimony offered to be proved by the said witness was with reference to a fact not properly in issue under the pleadings.

(2) Because the declaration contained no allegation of the place in which the said property sought to be replevied was supposed to be detained.

(3) Because the declaration filed by the plaintiff contained no statement as to the locality of the action.

But the said Judge did then and there overrule the said objections by denying the said motion of the defendant; and admitted the said testimony. To which ruling the defendant then and there excepted."

As will be seen, it does not clearly appear whether the defendant interposed an objection to the question propounded prior to the answer of the witness thereto or waited until after the witness had given his answer and then moved to strike both the question and the answer. As we have repeatedly held, it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist, every presumption being in favor of the correctness of the respective rulings of the trial court. *McKinnon v. Lewis*, 60 Fla. 125, 53 So. 940, and prior decisions therein cited. See also *Cross v. Aby*, 55 Fla. 311, 45 So. 820; *Seaboard Air Line Ry. v. Harby*, 55 Fla. 565, 46 So. 590; *Covington v. Clemmons*, 61 Fla. 151, 55 So. 81, in all of which cases we were confronted with a similar difficulty to the one encountered here. We would also refer to our discussion as to the proper course to pursue in objecting to proffered testimony and in moving to strike out improper testimony in *McMillan v. Reese*, 61 Fla. 360, 55 So. [153] 388. In either event, we are of the opinion that no error has been made to appear to us. The defendant did not see fit to test the sufficiency of the declaration by demurring thereto, as he might have done if he had conceived that it was defective in failing to specify the county in which the property which formed the subject-matter of the controversy was detained, but pleaded to the declaration and went to trial on the merits. The testimony complained of would seem to be perfectly relevant and proper. See *Temple v. Florida Land, etc. Co.* 23 Fla. 400, 2 So. 773, wherein it was held that venue laid in the margin, as was done in the instant case, though not repeated in the body of the declaration, is sufficient though the action be local. What we have said also sufficiently disposes of the fifth assignment, which is to the effect that the declaration fails to state a cause of action. We cannot consider the sixth assignment, which is based upon the denial of the motion for a new trial, for the reason that such ruling was not excepted to. *Johnson v. State*, 53 Fla. 42, 43 So. 430; *Phillips v. State*, 62 Fla. 77, 57 So. 341; *Andrews v. State*, 65 Fla. 377, 61 So. 975. The remaining assignment that the judgment was contrary to law has been disposed of in our discussion of the other assignments. Having found no reversible error, the judgment must be affirmed.

Taylor, Cockrell, Hocker and Whitfield, JJ., concur.

**NOTE.****Waiver of Special Appearance by Pleading to Merits.*****View That Special Appearance Is Not Waived.***

The holding in *Fisher v. Crowley*, 57 W. Va. 312, 4 Ann. Cas. 282, that a plea to the merits by a defendant who has appeared specially for the purpose of objecting to the jurisdiction of the court does not waive the special appearance, finds support in a number of recent cases. *St. Louis, etc. R. Co. v. Loughmiller*, 193 Fed. 639; *Foster Milburn Co. v. Chinn*, 202 Fed. 175, 122 C. C. A. 577; *Kuzma v. Witherbee*, 232 Fed. 286; *State v. District Ct.* 51 Mont. 503, 154 Pac. 200; *Woodard v. Tri-State Milling Co.* 142 N. C. 100, 55 S. E. 70; *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629; *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17; *American Electrical Works v. Devaney*, 32 R. I. 292, 79 Atl. 678. See also *Austin Mfg. Co. v. Hunter*, 16 Okla. 86, 86 Pac. 293; *St. Louis, etc. R. Co. v. Clark*, 17 Okla. 562, 87 Pac. 430; *Cameron v. Consolidated School Dist. No. 1*, 44 Okla. 67, 143 Pac. 182. Compare *Sanderson v. Bishop*, 171 Fed. 769. Thus in *Foster Milburn Co. v. Chinn*, supra, the court said: "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial." In *Kuzma v. Witherbee*, supra, it appeared that the defendant had, by filing an affidavit of merits, obtained an extension of time to answer pending the determination of certain motions to quash the service of a summons and to dismiss for want of jurisdiction. He had appeared specially, to make the motion and the order of extension recited that fact, and stated that the extension was without prejudice to the motions. The court said that the affidavit of merits under those circumstances was not a waiver of jurisdiction over the person, and did not make the special appearance void. So in *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17, wherein the objections made on a special appearance were overruled and the defendant then defended on the merits, the court said that in doing so he waived all objections except those set out in the special appearance.

A plea to the merits by a defendant who has appeared specially for the purpose of objecting to the jurisdiction of the court does not waive the special appearance if he preserves his objection in all the subsequent proceedings. *Spratley v. Louisiana, etc. R. Co.* 77 Ark. 412, 95 S. W. 776; *Adams Mach. Co. v. Castleberry*, 84 Ark. 573, 106 S. W. 940; *Beal-Doyle Dry Goods Co. v. Odd Fellows Bldg. Co.* 109 Ark. 77, 158 S. W. 955;

*Bell v. New Orleans, etc. R. Co.* 2 Ga. App. 812, 59 S. E. 102; *Stephens v. Molloy*, 50 Misc. 518, 99 N. Y. S. 385; See also *Georgia Medical College v. Rushing*, 124 Ga. 239, 52 S. E. 333; *Whitfield v. Whitfield*, 127 Ga. 419, 56 S. E. 490, 9 L.R.A.(N.S.) 593; *Stallings v. Stallings*, 127 Ga. 46, 56 S. E. 469. Thus in *Spratley v. Louisiana, etc. R. Co.* supra, the court said: "There is no doubt but that where a party, who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal, or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he cannot be said to have waived his objection to the jurisdiction of his person." And in *Bell v. New Orleans, etc. R. Co.* 2 Ga. App. 812, 59 S. E. 102, the court said that it was the privilege of a defendant to file a demurrer, thereby pleading to the merits, without waiving the right to object to the service, on expressly stating that it was filed subject to the action of the court on the preliminary question.

A plea to the merits by a defendant who has appeared specially for the purpose of objecting to the jurisdiction of the court does not waive the special appearance if he takes an exception to the ruling of the court. *Bes Line Constr. Co. v. Schmidt*, 16 Okla. 429, 85 Pac. 711; *St. Louis, etc. R. Co. v. Clark*, 17 Okla. 562, 87 Pac. 430. Thus in the case last cited, it was held that where a court has no jurisdiction of the person of a defendant, and the defendant appears specially for the purpose of calling the attention of the court to the want of jurisdiction and the court thereupon overrules his objection to the jurisdiction, he may save his exception, file his answer and proceed to trial without waiving the error. In *Iddle v. Hamler Boiler, etc. Co.* 132 La. 476, 61 So. 532, the court held that a defendant who had appeared specially for the purpose of objecting to the jurisdiction of the court, by thereafter appearing generally, waived the special appearance by failing to secure a ruling on his objection and take exception thereto. See to the same effect *City Nat. Bank v. Walker*, 130 La. 810, 58 So. 580.

But though a plea to the merits after the overruling of an objection to the jurisdiction made on a special appearance does not waive the appearance, a demand for affirmative relief on the part of the defendant will do so. *Woodhouse v. Nelson Land, etc. Co.* 91 Kan. 823, 139 Pac. 356; *Austin Mfg. Co. v. Hunter*, 16 Okla. 86, 86 Pac. 293; *Cameron v. Con-*

solidated School Dist. No. 1, 44 Okla. 67, 143 Pac. 182; Southwestern Broom, etc. Co. v. City Nat. Bank (Okla.) 153 Pac. 204; Hamra v. Fitzpatrick (Okla.) 154 Pac. 665. In the case last cited, the court stated the rule as follows: "Whatever error there may have been in the overruling of this special appearance has been waived by the defendants. The action of injunction being a transitory action, defendants could not object to the court's jurisdiction of the subject-matter of the action and their special appearance could only go to the jurisdiction of the trial court over their persons. When the defendants sought to counterclaim against the plaintiffs for damages because of the issuing of a temporary injunction, as they did in their answer, they submitted themselves to the jurisdiction of the court, and waived any error the court may have committed in overruling their special appearance." And in Woodhouse v. Nelson Land, etc. Co. 91 Kan. 823, 139 Pac. 356, the court said: "The defendant abandoned its attitude of protest and appealed to the general jurisdiction of the court for an affirmative order beneficial to itself. This constituted a general appearance and rendered the character of the original service immaterial."

#### *View that Special Appearance Is Waived.*

In some jurisdictions it has been held recently that a plea to the merits after the overruling of an objection to the jurisdiction by a defendant, who has appeared specially, waives the special appearance.

*Alabama.*—De Jarnette v. Dreyfus, 166 Ala. 138, 51 So. 932.

*California.*—See Sheldon v. Landwehr, 159 Cal. 778, 116 Pac. 44.

*Florida.*—Putnam Lumber Co. v. Ellis-Young Co. 50 Fla. 251, 39 So. 193. And see the reported case.

*Illinois.*—People v. Smythe, 232 Ill. 242, 83 N. E. 821. See also Supreme Hive Ladies, etc. v. Harrington, 227 Ill. 511, 81 N. E. 533.

*Massachusetts.*—Gahm v. Wallace, 206 Mass. 39, 91 N. E. 1002. Compare Cheshire Nat. Bank v. Jaynes, 112 N. E. 500; Reynolds v. Misosuri, etc. R. Co. 113 N. E. 413.

*Missouri.*—Thomasson v. Mercantile Town Mut. Ins. Co. 217 Mo. 485, 116 S. W. 1092; Allen v. Welch, 125 Mo. App. 278, 102 S. W. 665; Lisan Advertising Co. v. Castleman, 165 Mo. App. 575, 148 S. W. 433. See also Walsh v. Pulitzer Pub. Co. 183 S. W. 587.

*Nebraska.*—Lowe v. Riley, 57 Neb. 252, 77 N. W. 758; Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Plano Mfg. Co. v. Nordstrom, 63 Neb. 123, 88 N. W. 164; Stelling v. Peddicord, 78 Neb. 779, 111 N. W. 793; Herpolsheimer v. Acme Harvester Co. 83 Neb. 53, 119 N. W. 30; Sampson v. Northwestern

Nat. L. Ins Co. 85 Neb. 319, 123 N. W. 302. See also Montague v. Marunda, 71 Neb. 805, 99 N. W. 653.

*North Dakota.*—Heard v. Holbrook, 21 N. D. 348, 131 N. W. 251.

*Pennsylvania.*—Kane, etc., R. Co. v. Pittsburgh, etc. R. Co. 241 Pa. St. 608, 88 Atl. 793.

*South Carolina.*—Garrett v. Herring Furniture Co. 69 S. C. 278, 48 S. E. 254; Elms v. Southern Power Co. 79 S. C. 502, 60 S. E. 1110.

*Texas.*—Missouri, etc. R. Co. v. Scoggin, 57 Tex. Civ. App. 349, 123 S. W. 229; Boles v. Adams, 173 S. W. 561.

*Washington.*—In re Martin's Estate, 82 Wash. 226, 144 Pac. 42.

*Wisconsin.*—Corbett v. Physicians' Casualty Assoc. 135 Wis. 505, 115 N. W. 365, 16 L.R.A.(N.S.) 177. See also State v. Hilgendorf, 136 Wis. 21, 116 N. W. 848.

Thus in Allen v. Welch, 125 Mo. App. 278, 102 S. W. 665, after holding that the service of a notice of the day on which a petition would be presented in a proceeding for the opening of a private road was insufficient and that the county court would have had no jurisdiction to entertain the proceedings had the defendant refrained from making a general appearance, the court said: "But, after his plea to the jurisdiction was overruled, he contested the merits of the application, agreed to a continuance in the county court and, when finally defeated in that court, appealed to the circuit court from the judgment entered. These acts constituted a general appearance and unless we should sanction the contention that the service of notice in the exact manner prescribed by the statute was a condition precedent to the conferring of jurisdiction over the subject-matter of the cause, we must hold that the general appearance of defendant dispensed with the service of legal notice and gave the court jurisdiction over his person." In Stelling v. Peddicord, 78 Neb. 779, 111 N. W. 793, the defendant appeared specially and objected to the sufficiency of the service of process. After the overruling of that objection he filed an answer, wherein after pleading to the jurisdiction he averred a defense on the merits. The court said: "Nothing was gained by including this objection with a plea to the merits, because it is well settled that, where an objection of this kind is brought to the attention of the court by special appearance, and the defendant goes further and enters a general appearance, or invokes the powers of the court for any other purpose, such defects in the service are waived. . . . This rule is reasonable. The only object of the service of original process is to give the defendant an opportunity to make a defense,

and after a defendant has appeared in a cause, and made his defense on the merits, it would be absurd to withhold an adjudication on the ground that the notice giving him an opportunity to make his defense, and of which he had availed himself, had been irregularly served." So in *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44, wherein it was contended that the defendant's attorney had appeared specially to move for a continuance the court said that he waived that appearance "by remaining during the trial, cross-examining witnesses, making objections, and otherwise taking part in the proceedings on behalf of his client." Likewise in *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251, the court said: "By moving for a change of venue, and by answering and going to trial on the merits, it is entirely clear under the statute, as it has existed since January, 1896, that defendant waived the benefit of her special appearance, and forever foreclosed her right to urge a lack of jurisdiction of the justice."

On the other hand in *Cheshire Nat. Bank v. Jaynes* (Mass.) 112 N. E. 500, wherein the defendant, after the entry of an order of the superior court to the effect that he could not appear specially but must submit to the jurisdiction generally if he desired to make any contest, answered generally attempting to continue his special appearance and also filed cross interrogations for the taking of a deposition without questioning the jurisdiction, it was held that he had not waived his special appearance or submitted himself generally to the jurisdiction of the court. The court said. "After having raised the point seasonably, he did not waive it by proceeding in accordance with the rulings of the court, which until reversed were the law of the trial." And in *Reynolds v. Missouri, etc. R. Co.* (Mass.) 113 N. E. 413, the court said: "There has been no waiver of the plea to the jurisdiction which seasonably was filed by the railway company. The argument of the question whether a preliminary injunction ought to issue was made with reservation of all rights under the plea to the jurisdiction. The argument was invited by the judge. He made a finding to the effect that counsel plainly relied on the jurisdictional point and did not waive it, and by permission argued other points only in case the court should be against him on the question of jurisdiction. This finding was right. The conduct of the defendant's attorney constituted no waiver of the plea to the jurisdiction and was far from being in substance a general appearance."

## MALONE

v.

## TOPFER.

Maryland Court of Appeals—January 20, 1915.

125 Md. 157; 93 Atl. 397.

### Parent and Child — Action for Seduction — Right of Mother.

A divorced wife, who has the custody of and has supported a minor daughter of the marriage, although the court has not granted her the exclusive custody, may maintain an action for seduction of the daughter.

[See note at end of this case.]

### Same.

A divorced wife held to have the custody of a minor daughter of the marriage, so as to entitle her to sue for seduction of the daughter.

[See note at end of this case.]

### Judgments — Vacation.

A judgment will not be stricken without reasonable proof of circumstances which make it inequitable.

### Vacation for Fraud — Evidence.

A judgment will not be stricken on the ground that it was obtained through fraud, in the absence of proof of plaintiff's fraud and deceit.

### Action by Another for Same Cause.

A judgment awarding a divorced mother damages for seduction of a minor daughter in her custody will not be set aside because the father, who was without right, had also instituted suit for the seduction.

### Existence of Defense — Failure to Present.

A judgment will not be vacated on the theory that defendant had a meritorious defense, where he did not claim to have been surprised and at trial made no effort to present it.

Appeal from Circuit Court, Dorchester County.

Action for damages. Annie R. Topfer, plaintiff, and Avery Todd Malone, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Alonzo L. Miles and E. Stanley Toderin for appellant.

Alexander M. Jackson for appellee.

[158] STOCKBRIDGE, J.—The record in this case involves two appeals; one an appeal from a judgment rendered against the appellant in a suit for damages for the seduction of the minor daughter of the plaintiff; the



other, an appeal from the action of the Circuit Court for Dorchester County in refusing a motion to strike out the judgment which had been entered. These appeals will be considered in order.

In the first appeal seven exceptions were reserved; six relating to evidence, and the seventh to the action of the trial Court upon the prayers; but they all present one and the same question, and need not be discussed in detail.

The material issue in the case is, whether the mother of a girl who has been seduced can maintain an action for damages for the seduction, the father being still alive, but the [159] mother having been divorced from the father by a decree of a Court of competent jurisdiction. No question is involved in this case of the right of a father to sustain such an action, but the contention of the appellant is that the mother has no such right. Whether the mother, after the death of the father has a right of action for the seduction of a minor daughter, there being in fact no relation of master and servant between them, has been a matter of some discussion. The English Courts have held positively that no such right exists, and the Courts in this country are divided. In *Logan v. Murray*, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422, and in *South v. Denniston*, 2 Watts (Pa.) 477, the right to maintain such action was expressly denied, it being said by Gibson, C. J., in the latter case, that "nothing is more sure than that a mother is not entitled to the service of her child by the common law." So in *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, Bronson, J., says that in his opinion the mother has no such right; while in *Matter of Ryder*, 11 Paige (N. Y.) 185, Chancellor Woolworth is equally emphatic that the mother has the right. In *Gray v. Durland*, 50 Barb. (N. Y.) 100, the question is ably examined and the decisions on both sides of the question presented, and the Court comes to the conclusion, that a mother has the same right to the services of a minor child that the father would have, if living. This is also the view of the Courts in Massachusetts (*Dedham v. Natick*, 16 Mass. 135); New Hampshire (*Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 238); Connecticut (*Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339); New Jersey (*Coon v. Moffet*, 3 N. J. L. 583, 4 Am. Dec. 392), and Tennessee (*Parker v. Meek*, 3 Sneed 29). The lower Courts in New York favored the right of action by the mother, but the subject did not come before the Court of Appeals until *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441, when the Court passed on the question for the first time, and sustained the right of action by the mother, holding affirmatively

a right to the service of the minor children by the mother, and thus overruling so much of the dicta of *Bartley v. Richtmyer*, as denied it. This case was subsequently approved in Massachusetts in *Blanchard v. [160] Ilsey*, 120 Mass. 487, 21 Am. Rep. 535. So it may be concluded on the whole, that as a general proposition the right to maintain such an action on behalf of the mother is sustained.

The case of *Parker v. Meek*, supra, goes further than any of the other cases, and it is doubtful whether Courts in other jurisdictions would be prepared to go to the length the Court did in that case, as there a recovery was allowed on the suit of the mother for the seduction of a daughter who was an adult.

If we turn from the decisions elsewhere to those in this State, the important case is that of *Keller v. Donnelly*, 5 Md. 217, in which Justice Le Grand, after quoting from the case of *Mercer v. Walmsley*, 5 Har. & J. 27, 9 Am. Dec. 486, says, "But whatever may be the true character of the guardianship which the common law casts upon the mother, one thing is certain, that during the minority of the child *any one standing in loco parentis*, and she being in her service, may maintain an action."

None of the cases referred to, however, are cases in which the parents had been legally separated by a divorce, but both were still living at the time of the suit. They have all arisen where the father had died, either after the seduction, or in any case before the suit was brought. So far as the industry of counsel has been able to bring to the attention of the Court, or the examination which the Court has made, has extended, there has been no case in which the element, now presented of the parents being divorced has entered into it, and to this extent the case must be one of first impression. If the decree of divorce had in terms conferred the guardianship and control of the minor child upon either parent, it needs no argument to demonstrate that the parent to whom such guardianship had been committed would be entitled to bring and maintain the suit; but in this case the decree was entirely silent upon that point.

Whether either parent has by his or her act forfeited the parental rights with respect to their child, has several times [161] been considered. If such be the case the parent so forfeiting his or her right, would thereby be debarred from maintaining such an action as the present one. That a parent may destroy the relation by abandonment, neglect or cruelty seems well established, but "in what manner and by what acts this can be done must depend upon the special circumstances in each case." *Greenwood v. Greenwood*, 28 Md. 381.

This makes necessary a summary of the facts brought out by the testimony. At the time when the divorce was granted, Mr. Topfer was in Philadelphia, Mrs. Topfer in Pittsburgh on a visit, and the daughter, Hazel, in Salisbury with her grandmother, whom she helped in the performance of various household duties. The divorce was granted in January, 1912, and in the fall Mrs. Topfer returned to Salisbury. At that time Hazel had left her grandmother's home and was boarding with a Mrs. Coulbourn, her mother paying the board. While it is not directly so testified, the apparent occasion for this change was that Hazel had secured employment with the Telephone Company. Upon Mrs. Topfer's return to Salisbury, Hazel left Mrs. Coulbourn's, and thereafter made her home with her mother. The pay she received from the Telephone Company was small, and except upon one occasion, it was turned over to her mother, who used it in her home and in providing clothing for Hazel. In March, 1913, Hazel had to give up her position because of her condition, and from that time until her child was born in July she helped about her mother's house, cooking, washing, ironing and caring for two little girls. During all of this time, from January, 1912, to July, 1913, Mr. Topfer made no demand whatever upon her for any service, and so far as the evidence for the plaintiff discloses contributed nothing towards her support. When she was about to be confined her mother purchased some underclothing for her, a few infant's clothes, and took her to Baltimore to the University Hospital. After her confinement and the death of the child, she returned to Salisbury for a time, just how long does not clearly appear.

[162] The defendant offered no testimony in contradiction of any of this evidence, but contented himself with the introduction of two letters written by Hazel, which showed nothing more than that the relations between mother and daughter were far from pleasant, that the latter was very unwilling to injure the defendant in any way, and that Mrs. Topfer made her daughter's life very unhappy.

Upon this evidence there is no room for argument that the mother was the parent who assumed sole control over the daughter, and that the rights of the father at common law were forfeited, if not abrogated. Upon the motion to strike out the judgment, the father was placed upon the stand, but he did not contradict any of the material allegations of the plaintiff. His testimony showed that from Philadelphia he had gone to Indianapolis, and then returned to Baltimore. That an irregular correspondence had been maintained between him and his daughter also appears. He claims to have sent her five dollars upon one occasion; on another to have

bought her a dress, and to have paid her board for two weeks in Baltimore during the three months she spent there in the fall after her child was born. When she paid that visit, he told her, "You can stay here as long as you want to work and pay your board; the rest of the money you can keep for your clothes." He does not claim that she rendered him any service, or that he ever demanded any of her. Various letters from her to her father were offered, and even if these were admissible in evidence, which they clearly were not, they would show nothing more than the unhappy relations between the mother and daughter.

If this evidence of the father, which was not offered until the hearing of the motion to strike out the judgment, had been produced at the hearing of the case, it would not have established any right of service, due to him, which he had not forfeited by his abandonment and neglect. The action of the Circuit Court must, therefore, be sustained upon the main branch of the case.

[163] At the same term at which the judgment was entered a motion was made to strike it out, and six grounds were assigned. These can be briefly disposed of. The fifth was purely formal and calls for no comment. The law governing such applications is clearly and concisely stated by Mr. Poe (II Poe, sec. 392) when he says: "In passing upon applications to strike out judgments, when such applications are made during the same term at which the judgments were entered, our Courts usually act liberally; and upon reasonable proof of merit, and other equitable circumstances, strike out the judgments and let the defendant in to be heard." This does not mean that a judgment will be stricken out whenever asked to be, or as a mere act of favor or caprice, but that there must be reasonable proof of circumstances which make it inequitable that the judgment should be allowed to stand.

The first ground assigned is fraud and deceit in the obtention of the judgment, but no fact is alleged as constituting the fraud, nowhere in the proof offered under the motion is any fraud or deceit disclosed in support of the allegation.

The second ground is that the judgment was obtained as the result of false testimony and fraudulent misrepresentations made by the plaintiff in her testimony. This allegation appears to be based on the language of the plaintiff, that she did not know whether she had a husband living, that she had never seen him since they were divorced. In this she is to some extent corroborated by her husband, who testified that his first visit to Salisbury after the divorce was to attend the funeral of his daughter, which took place after the trial of the case. This cause assigned in the motion is not borne out by the proof.

The third ground was the legal question of the relative rights of the father and mother to maintain the action, and alleges as a fact that the father exercised control over and contributed to the support of his daughter from the time of the divorce until the time of her seduction. Both of these have already been considered as fully as seems necessary in discussing the main branch of the case.

[164] The fourth cause assigned is that John Topfer, the father, had instituted a suit in Wicomico County on the same cause of action. But it is no ground for striking down a judgment which has been validly entered, that some other person has brought a suit, which cannot be maintained upon the evidence adduced in this case, or in support of the motion upon the same claim.

And lastly the defendant avers that he has a good and meritorious defense to the action, but of what nature is not disclosed, either in the motion or evidence. If he had such defense he had ample opportunity to present it, but made no attempt to do so. He does not claim to have been taken by surprise, and he made no offer to contradict a single material fact adduced by the plaintiff in support of her case. It is clear that nothing was presented which would have justified the Court in striking out the judgment.

Both appeals will accordingly be affirmed.

Judgment and order appealed from affirmed, appellant to pay costs.

#### NOTE.

#### Right of Mother to Maintain Action for Daughter's Seduction.

Introductory, 1275.

In Absence of Statute:

Generally, 1275.

During Life of Father, 1277.

Under Statute, 1279.

Rule in Canada, 1279.

#### Introductory.

It is the purpose of the present note to discuss the cases wherein the courts have passed on the right of a mother to maintain an action for damages for the seduction of her daughter. The decisions as to the right of a person standing in loco parentis to maintain a civil action for seduction are collated in the note to *Tittlebaum v. Boehmcke*, Ann. Cas. 1912D 298.

#### In Absence of Statute.

##### GENERALLY.

While the right to command or control the services of the daughter if it exists is suffi-

cient to establish the relation of mistress and servant, and therefore to give the right to sue quod servitium amisit for her seduction, the mother has not that right by the rules of the common law. *Badgley v. Decker*, 44 Barb. (N. Y.) 577; *South v. Denniston*, 2 Watts (Pa.) 474. And see *Roberts v. Connelly*, 14 Ala. 235. Accordingly, an action by a mother as such, the father being dead, for the seduction of her daughter, cannot be based on the relation of parent and child, except as allowed by statute; but must rest on facts creating the relation of mistress and servant, either actual or constructive, the gist of the action being the loss of the daughter's services and the expenses incurred in consequence of the wrong done by the defendant. *Roberts v. Connelly*, 14 Ala. 235; *Heaps v. Dunham*, 95 Ill. 583; *Hobson v. Fullerton*, 4 Ill. App. 282; *Keller v. Donnelly*, 5 Md. 211; *Coon v. Moffet*, 3 N. J. L. 583, 4 Am. Dec. 392; *Damon v. Moore*, 5 Lans. (N. Y.) 454; *Lampman v. Hammond*, 3 Thomp. & C. (N. Y.) 293; *Moran v. Dawes*, 4 Cow. (N. Y.) 412; *Sargent v. —*, 5 Cow. (N. Y.) 106; *George v. Van Horn*, 9 Barb. (N. Y.) 523; *Gray v. Durland*, 51 N. Y. 424, *affirming* 50 Barb. 100; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Villepigue v. Shular*, 3 Strob. L. (S. C.) 462; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767. And see *Andrews v. Askey*, 8 C. & P. 7, 34 E. C. L. 270. Thus, in *Lampman v. Hammond*, *supra*, the court said: "While a minor daughter is living with her mother, after the decease of her father and while her mother is acting as her guardian, in fact is taking care of her, controlling her time, nurture and education, and the daughter is yielding to her the obedience and service of a child to her parent, the mother must be entitled to maintain this action, for loss of services and through that species of fiction for the greater injury done to her by the seduction and ruin of her daughter, and the disgrace brought upon her and her family. . . . The fact that the plaintiff, since the decease of the father of the seduced daughter, has intermarried again and has a second husband living, does not, I think, under the circumstances of this case, affect the question or change the rule. The proof in the case shows, that though the plaintiff has nominally a second husband living, she is really the head and support of the family; that she in fact owns and is possessed of a farm, which she carries on and cultivates as her own, and as her own separate business and estate; and that the daughter seduced was but sixteen years of age, and was at work for the defendant, upon a contract for wages made with him by the plaintiff at \$2.50 a week, which wages were payable and paid to the plaintiff, and the contract of service was to continue during her pleasure. The daughter, while thus at

work for the defendant, at the time of her seduction was really in law and in fact in the service of her mother, in respect to the wages she was earning, and which, by contract, the defendant was bound to pay to her."

As there is no ground for implying the relation of mistress and servant between a mother and her daughter, the existence of the relation must be proven as a fact, in order that the mother may recover. *Satterthwaite v. Dewhurst*, 4 Dougl. 315, 5 East 47 note, 7 Rev. Rep. 654 note, 99 Eng. Rep. (Reprint) 899; *Davies v. Williams*, 10 Q. B. 725, 59 E. C. L. 725; *Logan v. Murray*, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422; *South v. Denniston*, 2 Watts (Pa.) 474; *Matthews v. Koch*, 20 Pa. Co. Ct. 363. And see *Coon v. Moffet*, 3 N. J. L. 583, 4 Am. Dec. 392; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Fernsler v. Moyer*, 3 Watts & S. (Pa.) 416, 39 Am. Dec. 33; *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. 819. But the "per quod servitium amisit" feature of the action is now but little more than a legal fiction, giving a technical right to sue. Hence it has been held that the relation of mistress and servant is sufficiently established to enable a mother to maintain an action for her daughter's seduction, if it appears that the mother, at the time of the seduction, had the legal right to control or command the services of the daughter. *Roberts v. Connelly*, 14 Ala. 235; *Hobson v. Fullerton*, 4 Ill. App. 282; *Keller v. Donnelly*, 5 Md. 211; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441. And see *Taylor v. Daniel*, 98 S. W. 986, 30 Ky. L. Rep. 377; *Lampman v. Hammond*, 3 Thomp. & C. (N. Y.) 293. It is not necessary that the mother should prove actual services rendered by the daughter, in order to maintain the action, as the slightest acts of service are sufficient evidence to prove the relation of servant, where the daughter is of age; while proof that she is under age, raises the presumption that she is the servant of the mother, sufficient to sustain the action by the latter. *Roberts v. Connelly*, 14 Ala. 235; *Keller v. Donnelly*, 5 Md. 211; *Ellington v. Ellington*, 47 Miss. 329; *Vossell v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Moran v. Dawes*, 4 Cow. (N. Y.) 412; *George v. Van Horn*, 9 Barb. (N. Y.) 523; *Badgley v. Decker*, 44 Barb. (N. Y.) 577; *Elder v. Warner*, 129 N. Y. S. 816; *Logan v. Murray*, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422; *Villepigue v. Shular*, 3 Strob. L. (S. C.) 462; *Parker v. Meek*, 3 Sneed (Tenn.) 29; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767. In *Elder v. Warner*, supra, it appeared that the plaintiff and her daughter had been living for a number of years in Philadelphia, where they kept house together, the plaintiff being engaged in the insurance business, while the

daughter did the housework. Later, for business reasons, the plaintiff removed to New York, and, pending the re-establishment of their home, the daughter spent a few weeks in a boarding house, during which time the seduction complained of took place. It was held that the daughter's temporary absence did not deprive the parent of the right to maintain the action, and that enough was shown in the way of loss of service to support the action.

But where there is no proof of the relation of mistress and servant as actually existing between the mother and her daughter, there must be some proof that the mother was entitled to or had the right to command her daughter's services to her own use, in order to enable her to sue for her daughter's seduction. *Hobson v. Fullerton*, 4 Ill. App. 282. So, the mother cannot recover, when the daughter is seduced while in the employment of another. *Thompson v. Ross*, 5 H. & N. (Eng.) 15; 5 Jur. N. S. 1133, 29 L. J. Exch. 1, 1 L. T. N. S. 43, 8 W. R. 44; *Davies v. Williams*, 11 Jur. (Eng.) 750, 16 L. J. Q. B. 369; *Hedges v. Tagg*, L. R. 7 Exch. (Eng.) 283, 41 L. J. Exch. 169, 20 W. R. 976. *Compare Sargent v. —*, 5 Cow. (N. Y.) 106, wherein it appeared that the daughter was by her seduction rendered unable to fulfil her contract of service and returned to her mother's home. Proof that the daughter lived with her mother and actually assisted about the household duties, has, in some instances, been held to be insufficient to prove the relation of mistress and servant. *Logan v. Murray*, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422; *Matthews v. Koch*, 20 Pa. Co. Ct. 363. In *Keller v. Donnelly*, 5 Md. 211, it was held that the mother, where she was the natural guardian, was entitled to her daughter's services until she was eighteen years of age, unless she was apprenticed to some trade, and so, where the daughter was under that age and in the service of the mother, the latter might maintain an action for the seduction of the former; but since the mother was not considered as entitled to command the services of her daughter after the latter was eighteen years of age, she could not maintain the action if the seduction took place after the daughter had reached that age. In *Badgley v. Decker*, 44 Barb. (N. Y.) 577, it was held that there was no necessity, where the daughter was of full age, and was living with her parents, to show a contract of service.

If the daughter resides permanently apart from her mother, without any intention of returning, and is seduced, the mother cannot maintain an action for the seduction. *Roberts v. Connelly*, 14 Ala. 235, wherein the question was whether the mother had the legal right to command the services of her

daughter, the father being dead, under the following circumstances: The daughter, at the age of eight or nine years, left the residence of her mother, at the suggestion of some friends of the family; to avoid the influence of the example of the mother, who was a common prostitute. The daughter at that age, with the approbation of the mother, went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by the defendant, and left the state with him, and went to Louisiana, where she was delivered of a child, and still resided there. From the time the daughter left the residence of the mother until the time of the suit there had been no communication between mother and daughter, nor did it appear that it was intended by either the daughter or the mother, that the daughter should ever return. The court held that it was evident that the relation of mistress and servant did not exist in fact or in law, between the mother and her daughter, either at the time the suit was brought or at the time of the seduction, and that in consequence, the mother could not maintain the action.

In *Damon v. Moore*, 5 Lans. (N. Y.) 454, it was held that the plaintiff had the right to maintain the action by reason of her relation to her minor daughter, the father being dead and the daughter being the servant of and living with her mother, on showing a loss of service, although it appeared that the seduction was accompanied by force and against the consent of the daughter.

In *Peters v. Jones* [1914] 2 K. B. (Eng.) 781, 83 L. J. K. B. 1115, 110 L. T. N. S. 937 [1914] W. N. 149, 30 Times L. Rep. 421, an action was brought by a wife living with her husband, for the seduction of an adopted daughter, the court held that inasmuch as the foundation of the action was the relationship of master and servant and not of parent and child, the wife could not maintain the action; for the husband was to be deemed the master.

In *Abrahams v. Kidney*, 104 Mass. 222, 6 Am. Rep. 220, an action by a mother for damages by reason of the seduction of her daughter, it was held that a ruling of the trial court to the effect that an action for seduction could not be maintained unless it was followed by pregnancy or sexual disease, was erroneous, as the action would lie where the proximate effect was any incapacity to labor.

In *Harrison v. Newkirk*, 20 N. J. L. 176, the declaration contained three counts, all charging the trespass (the seduction of the daughter) to have been committed before the intermarriage of the plaintiffs. The two first counts claimed damages for the loss of

service sustained by the mother before her marriage; and by the last count, damages were claimed for loss of service by the husband, and expenses incurred by him in her lying-in after his marriage. It was held that while the claim for damages in the last count by the husband in his own right, would have rendered the declaration bad on demurrer, it did not follow that it would not be sustained after verdict, and so a verdict in favor of the plaintiffs was held good and effectual in law. In *Anderson v. Rigg*, 64 N. J. L. 407, 45 Atl. 782, a declaration by a husband and wife in an action for the seduction of a daughter of the wife by a previous marriage, wherein there was an express averment that the daughter was the servant of the wife and that the latter lost her services by reason of the alleged seduction by the defendant, was held to be good, as showing the right of action to be in the wife and not in the husband, though he was properly joined with her.

However, in an action by a mother for her daughter's seduction, she cannot recover compensation for taking care of her daughter's illegitimate child. *Sargent v. —*, 5 Cow. (N. Y.) 106; *Hitchman v. Whitney*, 9 Hun (N. Y.) 512.

#### DURING LIFE OF FATHER.

It has been held that the right of a mother to the custody of her minor child, and therefore her right to maintain an action for its seduction do not exist during the lifetime of the father, since the right of action is in him. *Hobson v. Fullerton*, 4 Ill. App. 282. But it has been held that where it appears that the father is living without the state, the mother may maintain an action for her daughter's seduction in lieu of him. *Badgley v. Decker*, 44 Barb. (N. Y.) 577; *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268. Likewise, she has been held to be entitled to sue where it appeared that the father had abandoned the family and had been absent for more than thirty years, and had not been heard from for fifteen years. *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767. And it has been held that a mother may maintain an action for her daughter's seduction where she sues individually and as next friend, of her husband, who is insane and is living out of the state. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268.

The reported case is a case of first impression as to the right of the mother of a minor daughter who has been seduced, to maintain an action for damages for the seduction, the father being still alive, but the mother having been divorced from the father by a decree of a court of competent jurisdiction. The divorce decree was silent on the question of the custody of the child, but it

appeared that she lived with and was supported by her mother. It is held that the mother is entitled to sue.

But the mother cannot recover for the seduction of her daughter, where it appears that the father was living at the time of the seduction but died before the action was brought, notwithstanding the fact that the daughter continued to reside with her mother, the reason assigned being that the cause of action, a tort for personal injury, is in the father and dies with the person, and therefore does not pass to the mother. *Hamilton v. Long* [1905] 2 Ir. R. 552, *affirming* [1903] 2 Ir. R. 407; *Vossel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Heinrichs v. Kerchner*, 35 Mo. 378; *George v. Van Horn*, 9 Barb. (N. Y.) 523; *Logan v. Murray*, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422. *Compare Coon v. Moffet*, 3 N. J. L. 583, 4 Am. Dec. 392; *Parker v. Meek*, 3 Sneed (Tenn.) 29. In *Heinrichs v. Kerchner*, *supra*, the court said: "The injury done by the seduction was done at the time of the seduction, and the defendant's liability was to the person or persons then injured. The action by a parent for the seduction of a daughter being based upon the supposed loss of the services of the daughter, can only be maintained by the person to whom the services were due, and during the life of the father, he as the head of the family was entitled to her services, and consequently was the person injured. The mother could not have sued during the lifetime of the husband, and the birth of the child afterwards did not give her a right of action." In *George v. Van Horn*, 9 Barb. (N. Y.) 523, it appeared that at the time of the seduction, the daughter was over thirty years of age, and in the actual service of another person and the father was then alive. It was held that under these circumstances the father could not maintain an action for the seduction, nor could the mother, as she could not maintain the action under circumstances which would not permit of the father's doing so. The court said: "If in this case it had appeared that in consequence of the defendant's conduct a charge had been brought upon the plaintiff as the mother of Eliza, under the provisions of the act obliging parents of sufficient ability to support their indigent offspring (1 R. S. 623, sec. 1), an action might perhaps be sustained, although the seduction took place in the life of the father, and while the daughter was in the actual service of another, and was also of full age. Then the surviving mother would have the charge brought upon her in consequence of her parental relation; and the damage consequent upon the defendant's illegal act would constitute a good cause of action. But it does not appear that the plaintiff was liable, under the act above referred to, or that the

overseers of the poor of the town attempted to charge her with the daughter's support; but on the contrary it does appear that they proceeded against the defendant for the support of the child, and the expenses of the mother, which were paid by him. Admitting that when the seduction takes place in the life of the father, the mother can maintain the action, in case of his death before the birth of the child, yet it must be under such circumstances as would have enabled the father to maintain the action, if he had survived. In this case we have seen the father could not. But I have great doubts whether the mother can in any case maintain the action, when the seduction was accomplished during the lifetime of the father, unless a charge has been brought upon her, in consequence of her parental relation under the provisions of the act above cited." But in *Coon v. Moffet*, 3 N. J. L. 583, 4 Am. Dec. 392, it was said: "In the present case, the daughter was seduced in the lifetime of the father, but no loss of service happened in his lifetime nor was he put to any expense on that account. He then could not have maintained an action. On his death, every parental right, and every parental duty, immediately devolved on the [mother]; she justly claimed all the benefit of her daughter's services, and was, if able, obliged to maintain her. She actually suffered all the loss of service, and the expenses of lying-in, and she only can sustain an action to recover the damages. It does not appear to me, that it alters the case, that the daughter was seduced in the lifetime of the father, for that could not have brought an action; it must be for the loss of services and expenses, real and personal injuries, arising from the act. The wound given to the reputation of the family, is as deeply fixed in the bosom of a mother, as in that of a father; the loss of service and expense are equal, and the obligation to support, as strong; deprive her of the right of action, and a personal wrong will subsist in society without a remedy, and thus a fundamental principle of our law be violated, and injustice be made to triumph." And in *Parker v. Meek*, 3 Sneed (Tenn.) 29, the court said: "We hold, that the present action may be maintained by the mother, although by reason of the fact, that the father was living at the time of the seduction, and the seduced was at the time a member of his family and rendering service to him; the mother was not then, nor could she be, in law, entitled to the services of the daughter; but the latter having remained with the mother, after the father's death, in the presumed relation of servant; and the trouble and expenses of lying-in having fallen upon her, the action is maintainable upon this ground."

It has been held that the mother of a daughter who was of age, if the relation of mistress and servant actually existed between them, could sue and maintain an action for the seduction of the latter, while her husband was living. *Badgley v. Decker*, 44 Barb. (N. Y.) 577, wherein it appeared that the mother had for more than nine years lived apart from her husband, he being absent from the state, the evidence showing that he had abandoned his family altogether, and that she was engaged in the business of keeping a boarding house on her sole account. It was held that under the statute (Act 1860, sec. 2) which provided that a married woman might carry on trade or business on her own account, and as amended (Laws 1862, c. 172, sec. 7) provided that any married woman might sue in all matters having relation to her sole and separate property etc., in the same manner as if she were sole, she might sue for the seduction of a servant employed by her, and that therefore she might sue for her daughter's seduction if the relation of mistress and servant existed between them.

#### *Under Statute.*

In a few jurisdictions, statutes have been enacted which authorize the maintenance of an action for seduction without any allegation or proof of the loss of the services of the female seduced, thus modifying the common-law rule that the relation of master and servant, or parent and child, must appear. *Felkner v. Scarlet*, 29 Ind. 154; *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L.R.A. 757. Compare *Taylor v. Daniel*, 98 S. W. 986, 30 Ky. L. Rep. 377. Thus in Indiana, the statute (2 G. & H. § 25, p. 55) expressly confers a right of action on the mother, in case of the death of the father, for the seduction of a minor daughter, though she "be not living with, or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service." Thereunder, an instruction has been held to be correct, which directed the jury that if the seduction was proved, they could find for the plaintiff, though it appeared that the daughter, at the time, was neither living with the plaintiff nor in her service, and that no loss of service was sustained by the plaintiff. *Felkner v. Scarlet*, 29 Ind. 154, wherein the court said: "In such case, there could be no other ground for an award of damages than the wounded feelings and the dishonor and disgrace cast upon the parent and family by the injury, and such damages were evidently contemplated by the legislature in adopting the provision referred to."

Under the Kansas Code (§§ 6, 7, 85, 87, 116) which abolishes fictions and requires the parties to an action to state the actual facts in controversy, it has been held that a

parent may maintain an action for the seduction of an adult daughter without the averment or proof of loss of services or expenses of sickness. *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L.R.A. 757. The court said that the common-law rule or fiction was that the parent must sue in the guise of master and servant for her daughter's seduction, but that, under the Code such a suit was not in fact founded on the idea of service lost, but on the idea of parental affection wounded, parental anguish endured, and parental liability for care and nurture increased.

But in *Taylor v. Daniel*, 98 S. W. 986, 30 Ky. L. Rep. 377, a similar statute was held not to modify the common-law rule inasmuch as it was silent on the question as to who might bring the action, and it was therefore held that the common-law rule was still in force and that the relation of master and servant, or parent and child, must still appear in the pleading. And so, in that case, a petition in an action by a mother to recover damages for the seduction of her illegitimate daughter was held to be defective in that it failed to allege that the plaintiff's daughter was under twenty-one years of age, or was in her service, or that she was entitled to her services.

#### *Rule in Canada.*

In Canada it has been held that a mother may maintain an action at common-law for the seduction of her daughter, in the absence of the father from the province. *Gould v. Erskine*, 20 Ont. 347, 11 Can. L. T. 47. The gist of the action is loss of services, and therefore the actual or implied relation of mistress and servant must subsist between the plaintiff and her daughter at the time of the seduction. *Gould v. Erskine*, 20 Ont. 347, 11 Can. L. T. 47; *Entner v. Benneweis*, 24 Ont. 407; *Hebb v. Lawrence*, 7 Manitoba 222; And see, *O'Brien v. Ellis*, 2 Ont. W. Rep. 685. The service must be a real, genuine service, such as a parent or mistress may command, but any acts of service, however slight they may be, rendered by the person seduced to the plaintiff, will be evidence of service sufficient to support the action. *Hebb v. Lawrence*, 7 Manitoba 222. So, in a case wherein it appeared that the mother alleged in her statement of claim that she was a farmer, and that her daughter was at the time of the seduction her servant, and that the latter, as such servant, assisted the plaintiff in the conduct of her business, and in the management of her household affairs, and that, by reason of her seduction, the plaintiff was deprived of her services, etc., it was held that this was sufficient to show a right in the mother, qua mistress, to maintain the action in the absence from the province of

the father. *Gould v. Erskine*, 20 Ont. 347, 11 Can. L. T. 47. In *Entner v. Benneweis*, 24 Ont. 407, it appeared that the daughter and mother supported the invalid father, and that the daughter was seduced while he was living. After his death, the mother brought an action for the seduction of the daughter, but the court held that it was not maintainable, for the reason that the service of the daughter was in law attributable to the father and not to the mother; that the common-law right to service was given to the man who was deemed to be the head of the family, and that the relation was not changed because of his personal infirmity or decrepitude, as it was a legal result flowing from the family status; and that that being so, the right of action had vested on him during his life, and did not pass to his widow as such on his death. In *Hebb v. Lawrence*, 7 Manitoba 222, wherein it appeared that the time for which the daughter was hired to the defendant was not up until the evening of the day on which she was seduced, so that when the seduction took place the daughter was actually in the defendant's service, and no one else had any right to command her services, it was held that the mother could not maintain the action, as, with respect to her, it was a case of *damnum absque injuria*.

In Upper Canada, prior to its division into provinces in 1883, there were a number of adjudications with respect to the right of a mother to sue for her daughter's seduction, under the statute known as the Seduction Act (Consol. Stat. U. C. ch. 77). The first section provided as follows: "The father, or in case of his death, the mother of any unmarried female who has been seduced, and for whose seduction the father or mother could sustain an action in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise." The second section was as follows: "That upon the trial of any action for seduction brought by the father or the mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary." It was held that the object of the statute was to afford redress to parents whose daughters had been seduced, in cases where the existing law failed to give such redress; and that the effect of the enactment, was to give the father, and, in the event of his death, the mother, the right to bring an action for the seduction of their daughter, though resid-

ing with another (or any other, as in the original act), in all those cases where the father or mother could have brought the action if the daughter, when seduced, had been dwelling under the protection of the father or mother. *Whitfield v. Todd*, 1 U. C. Q. B. 223; *Hogan v. Aikman*, 30 U. C. Q. B. 14. Under the whole statute, taken together, the mother of the female seduced, when the father was dead, had a statutory right to bring the action, and any service or loss of service necessary to maintain it was presumed to be hers in her quasi representative capacity as mother, when the action was brought for the seduction of her daughter while the latter was residing with another person. *James v. Hawkins*, 25 U. C. C. P. 346; *Hogan v. Aikman*, 30 U. C. Q. B. 14. But compare *Smart v. Hay*, 12 U. C. C. P. 528. The mother was not deprived of the right to sue for the injury which she had sustained by reason of the seduction of her daughter, merely because she had married a second husband, irrespective of whether the daughter was seduced before or after the second marriage. *Hogan v. Aikman*, 30 U. C. Q. B. 14. And see *Lake v. Bemiss*, 4 U. C. C. P. 430. Compare, as to a seduction after the second marriage. *Smith v. Crooker*, 23 U. C. Q. B. 84; *McIntosh v. Tyhurst*, 24 U. C. Q. B. 443; *Waters v. Powers*, 29 U. C. Q. B. 336. But following a case wherein it was held that the first section of the statute did not apply to the case of a father suing for the seduction of an illegitimate child (*Biggs v. Burnham*, 1 U. C. Q. B. 106) it was held that it did not give to a mother the right to maintain an action for the seduction of her illegitimate daughter. *Hicks v. Ross*, 25 U. C. Q. B. 50, wherein the court said: "It would be an anomaly to create a distinction as to the legal rights of father and mother of an illegitimate daughter, who could never claim as heiress or next of kin to either parent, or to hold that under the statute the 'father' of an illegitimate unmarried female is not entitled to the statutory remedy, and that the mother is." But see *Muckleroy v. Burnham*, 1 U. C. Q. B. 351, wherein it was held that the mother of an illegitimate daughter might maintain such an action, not under the statute, but on the principles of the common law, as standing in *loco parentis*. In *Lake v. Bemiss*, 4 U. C. C. P. 430, a declaration by a mother for the seduction of her daughter was held bad, it not being alleged that the father of the female seduced, was dead. In *James v. Hawkins*, 25 U. C. C. P. 346, it was held that while the abandonment of the daughter by the mother might affect the amount of damage, it did not bar the action.



**HEISKELL**

v.

**KNOX COUNTY ET AL.**

Tennessee Supreme Court—June 5, 1915.

132 Tenn. 180; 177 S. W. 483.

**Judicial Notice — Legislative Journals.**

The court takes judicial notice of the journals of the legislature, showing the steps taken in the enactment of statutes.

[See note at end of this case.]

**Same.**

Judicial notice of legislative journals, showing the proper enactment of a statute, may be taken on demurrer to a bill, charging that a statute was not regularly enacted; a demurrer not admitting allegations contrary to facts judicially known to the court.

[See note at end of this case.]

**Same.**

Judicial notice will be taken of journals of the legislature before they are published.

[See note at end of this case.]

**Statutes — Evidence of Enactment — Conclusiveness of Journals.**

Journals of the legislature cannot be impeached even for fraud or mistake, but any errors therein can be corrected only by the legislature.

[See 47 Am. St. Rep. 816.]

**Formalities of Enactment — Three Readings in Each House.**

Const. art. 2, § 18, requiring a bill to be read and passed in each house on three separate days, is satisfied, where it is introduced in duplicate in the two houses, and the Senate bill, after passing its third reading and being enrolled, is on the third reading in the house substituted for the house bill and passed.

**Counties — Powers — Donation to State Education.**

Priv. Acts 1915, c. 1, authorizing Knox county to issue bonds and therewith buy lands, title to be conveyed to the state for the use of the state university, for educational, experimental, and agricultural purposes, does not contravene Const. art. 2, § 29, prohibiting a county or municipality, unless authorized by its electors, from giving or loaning its credit to or in aid of any person, company, association, or corporation, or from becoming a stockholder with others in any company, association, or corporation; the mischief sought to be prevented being a business partnership between a municipality or county and individuals or private corporations or associations.

**Taxpayer's Suit — Enjoining Purchase of Property — Excessive Price.**

The averment of the unverified bill to enjoin a county from buying land that too much is being paid for it, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the

Ann. Cas. 1916E.—81.

land is worth, this going as a profit to promoters, is insufficient as an attack on the purchase, authorized by the legislature at the price attacked.

Appeal from Chancery Court, Knox county: SANSOM, Chancellor.

Action for injunction. S. G. Heiskell, plaintiff, and Knox County et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

*Noble Smithson* for appellant.

*Shields & Cates* and *Johnson & Cox* for appellee Knox County.

*Maynard & Lee* and *Webb & Baker* for appellee University of Tennessee.

[182] FANCHER, J.—It appearing to the court that the public interest requires it, this case was advanced for hearing and was heard at Jackson on May 31, 1915, as provided by law, upon the transcript of the record from Knox county chancery court, the assignments of error by appellant, reply brief thereto, and the oral argument.

It appears that defendants T. A. Wright and others were the owners of a tract of land near Knoxville, known as the Cherokee tract, and the quarterly court of Knox county on the first Monday in January, 1915, adopted a resolution upon a proposition made to it by the owners to buy said land, and that the title thereto should be conveyed to the State of Tennessee for the use of the University of Tennessee.

It further appears that the legislature of this State passed an act at its recent session, being chapter 1, authorizing Knox county to purchase said property for agricultural, experimental, and educational purposes, to be held by the State for the use of the University of Tennessee at Knoxville, and to authorize the county court of said county to issue and sell coupon bonds in an amount not to exceed \$125,000 to pay for same, and to provide for the redemption of said bonds.

On March 23, 1915, this bill was filed by S. G. Heiskell on behalf of himself and all other taxpayers of [183] Knox county, praying an injunction against the sale of said bonds, to which bill Knox county, and R. A. Brown, as county judge thereof, together with the owners of said Cherokee tract of land, were made defendants.

The bill of complainant contains a number of allegations, in which the act of the legislature authorizing the sale of this property is attacked on various grounds, and questions are also made as to the right of the county to purchase property of this nature for the purposes proposed, and also averring that

the said land is not worth the price proposed to be paid for it; that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is really worth, this sum being added to the real value of the land as a bonus or profit to some of the promoters. The questions raised as to the act of the legislature authorizing the sale relate to the constitutionality of the act.

Demurrers were interposed to the bill by the defendants. They also answered the bill on March 29, 1915. On April 7, 1915, the chancellor sustained all the demurrers and dismissed the bill, and complainant, Heiskell, appealed in error to this court. Only three of the questions raised in the original bill are now insisted upon in the assignments of error. We will now take up these three propositions.

The first assignment of error is upon the question raised in the bill in section 5 thereof, and is based on article 2, section 18, of the constitution of Tennessee. This section of the bill alleges that the act authorizing [184] the purchase of the property and providing for the issuance of bonds for that purpose was not read once on three different days and passed each time in the house, where it originated, before it was transmitted to the other house, and that the bill was never read and passed on three different days in each house of the legislature; that said act did not receive the assent of the majority of all the members to which each house was entitled under the constitution, as required by section 18, article 2.

This part of the bill was demurred to by Knox county, R. A. Brown, county judge, and Jesse L. Henson, county court clerk, specially on the ground that the journals of the senate and house of representatives (of which the court will take judicial notice) show that said act was duly, legally, and constitutionally passed.

Certified copies of the journals of the senate and house of representatives were exhibited with the demurrer on the trial of the cause, and certified copies are filed with this court as a part of the brief.

It is said by complainant that the demurrer admitted the truth of this allegation, and the position is taken that the averments of the bill cannot be put in question upon the demurrer.

Article 2, section 21, of our constitution provides that each house shall keep a journal of its proceedings; the ayes and nocs shall be taken in each house upon the final passage of each bill of a general character and bills making appropriations of public moneys.

[185] It is provided by section 5584, Shannon's Code of Tennessee, that the proceedings of the legislature are proved by the journals.

This court has held in *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75, that the court

will take judicial notice of the journals of the general assembly showing the various steps taken in the enactment of statutes, and that these need not be specially pleaded or proved if a statute is attacked for want of formalities in its enactment required by the constitution. It was held that every reasonable presumption will be made in favor of the regularity and validity of the proceedings of the general assembly as a co-ordinate branch of the government.

It was unnecessary to file copies of these entries from the journals of the house and senate except to call the court's attention thereto. Can the court take notice of these proceedings upon ademurrer, in the face of a direct charge in the bill that such proceedings were not regular as required by the constitution? Or is it required that litigants and the courts must wait until an answer is filed and an issue of fact raised upon the question before the court may judicially note these proceedings? We think not. It seems clear that there is no necessity that pleadings make an issue in order for the court to take notice of these journal entries, but the court will take notice of such proceedings, as it always takes notice of any statute of the general assembly.

[186] It is true that the demurrer admits the truth of facts charged in the bill. But this confession for the purpose of hearing the demurrer is strictly confined to the facts. The demurrer does not admit matters of law suggested in the bill or inferred from the facts stated, nor does it admit the arguments, deductions, inferences, or conclusions set forth in the bill. It does not admit allegations contrary to the facts judicially known to the court. *Gibson's Suits in Chancery* (2 ed.) section 304; 1 *Daniel's Chancery Practice*, 545, 546. It is said by Mr. Daniel, on page 546 of said volume:

"When facts are averred in the bill which are contrary to any fact of which the court takes judicial notice, the court will not pay any attention to the averment. Thus where in order to prevent a demurrer it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent State, Sir Lancelot Shadwell, V. C., upon the argument of a demurrer to the bill, held that the fact averred was one which the court was bound to take notice of as being false, and that he must therefore take it just as if there had been no such averment in the record."

We hold therefore that the court may take judicial notice of these journal entries for the purpose of determining whether the bill was constitutionally passed.

The journal had not been published when this case was tried before the chancellor, but it had been made out, and it is the journal, and not its publication, of which the court

takes notice. If the journal could be [187] disputed or contradicted, then an issue might be presented upon this charge in the bill, but it is the consensus of authority that the recitals in the journals of the legislature are conclusive. They are entitled to absolute verity, and cannot be impeached on the ground of mistake or fraud. If there are errors, the house itself is the only tribunal authorized to correct them. 38 Cyc. 958; Cohn v. Kingsley, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 78; White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L.R.A. 66.

The journals of the senate and house show that this bill was constitutionally passed. The bill was introduced concurrently in the house and in the senate. After having been passed by the senate, as required by the constitution, having passed the first and second readings on two separate days, it was passed on its third and final reading on another day by a vote of twenty-six ayes, which was unanimous. It was thereupon enrolled and transmitted to the house. In the meantime the house bill upon the same subject and for the same identical purpose had been likewise passed upon its first and second readings on two separate days, and recommended for passage by the Committee on Agriculture, and on another and later day the senate bill, having been transmitted to the house, was substituted for the house bill, and thereupon passed its third and final reading in the house by a vote of seventy-one ayes, being unanimous. The house bill and senate bill were the same in tenor and substance in their caption and body, and when the senate bill was substituted for [188] the house bill and read and finally passed in the house as above indicated, the law was constitutionally enacted, and the constitutional requirements of article 2, section 18, that a bill shall be read and passed in each house on three separate days, complied with. Archibald v. Clark, 112 Tenn. 532, 82 S. W. 310.

The second assignment of error is upon the question raised by section 7 of the bill, based on article 2, section 29, of the constitution, to the effect that the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation except upon an election to be first held by the qualified voters of such county, city, or town and the assent of three-fourths of the votes cast in said election; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation except upon a like election and the assent of a like majority.

The bill charged that the effect of the action of the county court and the act of the legislature was to give or loan the credit of Knox county to the University of Tennessee without such an election, and therefore was in violation of the constitution.

The defendants demurred to this portion of the bill because the State of Tennessee is not a person, company, association, or corporation within the meaning of said constitutional provision, and that the county was not required, under the constitution, to submit the issuance of said bonds to an election of the qualified voters of the county, and that their issuance by the [189] county court under the provisions of the act in question was not unconstitutional.

The property sought to be acquired, known as the Cherokee tract, is a large body of land composed of 569 acres adjacent to the present experiment station farm of the University of Tennessee at Knoxville, and lying near the city of Knoxville, as recited in the Enabling Act, chapter 1, Private Acts of 1915.

The said act recites that the tract contains a diversity of soil which will enable Knox county to exhibit and advertise to the world the great diversity of crops which can be produced on its varied soils, as well as demonstrating to the citizens the methods by which the productiveness of this soil and farming lands can be increased, thereby developing the agricultural resources of said county.

The act further recites that the enlargement of the agricultural and experimental station by reason of the acquisition of the additional lands will develop the farming, stock raising, dairying, and other resources of said county, and will enable the said university to educate a larger number of its citizens, and will greatly enhance the value of taxable property in said county, and benefit each and every citizen thereof.

But we may assume that the acquisition of this land by the county court is more especially for the benefit of the State, and yet under our authorities this proposed bond issue may be made by the county and the property purchased with the bonds and transferred to the State of Tennessee for the use of the University of [190] Tennessee for educational, experimental, and agricultural purposes.

This question was before the court in the case of Ransom v. Rutherford County, 123 Tenn. 1, 130 S. W. 1057, Ann. Cas. 1912B 1356. That case arose out of a contribution of \$100,000 by Rutherford county, Tennessee, \$80,000 being also given by the municipality of Murfreesboro, for the purpose of having established in said county by the State of Tennessee one of its three normal schools, located in the State. The said county also donated a site for the location of said school. The bonds were issued by the county court and the municipality without submission of the same to the vote of the people. The bond issue was attacked on the same ground as in this case. It was held that the letter

and spirit of this provision in the constitution is that the county shall not be a stockholder or joint owner with any company, association, or corporation in any enterprise or improvement; that the mischief it seeks to prevent is a business partnership between a municipality or subdivisions of the State and individuals or private corporations or associations; that it forbids the union of public and private capital in any enterprise whatever. It was observed in that case that the State is a sovereign, and is in no sense a person, company, association, or corporation in the meaning of this constitutional inhibition.

This question was also decided against the contention of complainant in the case of *East Tennessee University v. Knoxville*, 6 Baxt. 176.

[191] The third and last assignment of error is based upon the question raised by section 8 of complainant's bill that the land is not worth the amount paid for it, the allegation being as follows:

"Sec. 8. Plaintiff avers that the Cherokee land is not worth exceeding \$75,000. He believes and alleges that the county is being burdened with \$50,000 more than said land is really worth, this sum being added to the value of the land as a bonus or profit to some of the promoters."

The defendant demurred to this portion of the bill because the bill shows that the county court exercised its legislative powers and discretion in purchasing the property complained of, and that this legislative power and discretion could not be reviewed by the court upon the complaint of a citizen or taxpayer whose judgment might differ, or who might disagree with the members of the county court.

The bill is not sworn to. It does not charge that the county court has acted in bad faith, or that it has committed, or is about to commit, any unauthorized act. It mildly avers that too much is being paid for the property, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is worth, this going as a profit to the promoters.

This is not sufficient as an attack upon this purchase in view of the fact that the legislature grants full authority to purchase the lands at the price and for the purpose as previously agreed upon by the county court. [192] The act of the legislature is very full, and covers the entire proposition. It recites the contract and grants full authority to carry out the purchase. We are of opinion, and so hold, that the bill is entirely insufficient to enjoin and prevent this enterprise agreed upon by the county court of Knox county and approved by the State through its legislature.

The result is we find no error in the decree of the chancellor in dismissing the bill, and this decree must be affirmed.

#### NOTE.

#### Judicial Notice of Contents of Legislative Journals on Issue as to Enactment of Statute.

The holding in *People v. Braun*, 246 Ill. 428, 20 Ann. Cas. 448, 92 N. E. 917, that on an issue whether a statute was validly enacted judicial notice would not be taken of the contents of the legislative journals, finds support in a recent case from the same jurisdiction. *Worthy v. Bush*, 262 Ill. 560, 104 N. E. 904, wherein the court said: "The plaintiff in error has attached copies of the house and senate journals of 1907 and the senate journal of 1909 to the record, and has appended to his abstract, as 'Exhibit A' and 'Exhibit B,' excerpts from said journals which he claims sustain his contentions. It will thus be seen that plaintiff in error is attempting to incorporate into the record and have considered by this court questions of fact not properly in the record. In order to decide the questions raised by plaintiff in error it would be necessary for this court to hold that it will take judicial notice of the contents of the journals of the legislature. To do this it would be necessary for this court to reverse a long line of decisions, beginning with *Spangler v. Jacoby*, 14 Ill. 297, and coming down to *Devine v. L. Fish Furniture Co.* 258 Ill. 389, which establish the rule that whether a statute was passed by the General Assembly in compliance with the constitutional requirements is a matter of fact which must be proved by the party attacking the validity of the act, and that for this purpose the journals of the General Assembly may be introduced in evidence. It has never been the doctrine of this court that judicial notice will be taken of the contents of these legislative journals. If we cannot take judicial notice of the contents of the house and senate journals, then the question which plaintiff in error attempts to raise is not properly presented and cannot be determined."

However, the weight of recent authority is in favor of the rule that judicial cognizance will be taken of legislative journals. *Connole v. Norfolk*, etc. R. Co. 216 Fed. 823; *State v. Joseph*, 175 Ala. 579, Ann. Cas. 1914D 248, 57 So. 942; *Jackson v. State*, 101 Ark. 473, 142 S. W. 1153; *Grant v. Hardage*, 106 Ark. 506, 153 S. W. 826; *State v. Goff*, 135 La. 335, 65 So. 481; *Todthausen v. Knox County*, 132 Tenn. 169, 177 S. W. 487. See also *State v. Carter*, 174

Ala. 266, 56 So. 974. And see the reported case. "It is a fixed rule of this court of long duration, and well established, that in construing the legality of acts of the legislature this court will take judicial knowledge of the recitals and records of the journals of both branches of the General Assembly to aid the court in determining the validity of any act." *Jobe v. Urquhart*, 102 Ark. 470, Ann. Cas. 1914A 351, 143 S. W. 121.

In *People v. Ramer* (Colo.) 158 Pac. 146, it was held that in the absence of pleadings raising the question of the proper enactment of a statute it was not necessary for a court to notice judicially the legislative journals with respect thereto.

In the reported case it is held that legislative journals will be judicially noticed before they are published. In *Earnest v. Sargent*, 20 N. M. 427, 150 Pac. 1018, it was held that judicial notice would be taken of the journals though they were not on file with the secretary of state. The court said: "There is no argument between counsel as to the proposition that the court will take judicial notice of the journals of the houses of the legislature. The controversy in this case, however, arises out of the fact that the alleged journal is not found in the proper custody and on file in the proper office. It is argued in behalf of relator that the filing of the journal in the office of the secretary of state makes the same a public document, and that thereupon, and by reason thereof, the court takes judicial notice of the same. The Attorney General, on the other hand, in behalf of the defendant, argues that the filing of the journal in the office of the secretary of state adds nothing whatever to its dignity as a public document; that it is a public document from day to day during the session of the legislature, and continues to be such for all time; and that the filing of the same in the office of the secretary of state gives it no greater efficacy than it had before. No case is cited by counsel on either side touching the proposition, and we must decide the same according to the general principles of law relating to such matters. The rule of evidence in regard to ancient documents that they must come from the proper custody has no application in this case. In those cases the documents are allowed to prove themselves, because they are ancient documents and come from the proper custody. In this case this document depends upon no such principle for its evidentiary character. The document is identified by the officer under whose direction the same was prepared, and it is declared by him to be the senate journal. The principle of judicial notice, it seems to us, is broad enough to compel us to inform ourselves from any authentic source as to what the senate journal shows. If this case

had arisen during the session of the legislature, and before the time had arrived to file the journal with the secretary of state, we assume that no one would question the proposition that we should take judicial notice of the journal up to that time. Now that the secretary of state has refused to receive and file the same, the situation is unchanged. We have taken the testimony of the chief clerk of the senate, which is undisputed, and are satisfied therefrom that this journal is the senate journal. We may therefore look to it for any fact therein contained which is material or germane to this investigation."

## STATE EX REL. BOTSFORD LUMBER COMPANY

v.

TAYLOR.

South Dakota Supreme Court—April 27, 1914.

34 S. Dak. 13; 147 N. W. 72.

### Corporations — Criminal Prosecution — How Originated.

Under Pen. Code, § 15, providing that all persons who commit in whole or in part any crime within the state are liable to punishment, section 822 defining "person" as including corporations, Code Cr. Proc. § 183, empowering and requiring the grand jury to inquire into all public offenses and present them by presentment, indictment, or accusation in writing, and section 560 et seq. providing for a hearing before a magistrate upon a presentment against a corporation or the filing of a complaint or information against it, and providing that if the magistrate return a certificate that there is sufficient cause to believe the corporation guilty, the state's attorney shall file an information, or the grand jury may proceed as in the case of a natural person held to answer, a criminal proceeding against a corporation may originate by indictment by the grand jury in the first instance, by the return of a presentment by the grand jury and a hearing before a magistrate, or by an information filed before a magistrate and a preliminary examination.

[See 133 Am. St. Rep. 775; 6 R. C. L. tit. Corporations, p. 771.]

### Mode of Acquiring Jurisdiction of Corporation.

Under Code Cr. Proc. § 643, providing that the procedure, practice, and pleadings in criminal actions, or in matters of a criminal nature not specifically provided for in that Code, shall be in accordance with the pro-

cedure, practice, and pleadings of the common law, though there is no special statutory provision for process against a corporation upon an indictment either with or without preliminary examination, nor upon an information filed by the state's attorney, a summons issued by the trial court is a valid and appropriate process, and gives that court jurisdiction of the defendant, especially in view of section 561, providing for the issuance of a summons to require a corporation to answer a criminal charge upon a preliminary hearing before a magistrate.

[See note at end of this case.]

Original prohibition proceeding. Botsford Lumber Company, relator, and Alva E. Taylor, Circuit Judge, defendant. The facts are stated in the opinion. WRIT DENIED.

*Brown, Abbott & Somsen and Warren & Warren* for relator.

*D. A. Crawford and M. Harry O'Brien* for defendant.

[16] SMITH, P. J.—At the December, 1913, term of the circuit court of Kingsbury county, the grand jury returned an indictment against the Botsford Lumber Company, a corporation, charging unfair discrimination in violation of chapter 131, Laws of 1907. Certain proceedings were had to bring the defendant corporation before the court to answer said charge, which the court held to be unauthorized, but which are not material to any question presented at this time. Thereafter, the circuit court directed the issuance of a summons which was duly served on an officer of the corporation, and which required the defendant to appear before the circuit court on the 2d of March, 1914, at 10 o'clock A.M., to answer the indictment. The summons recited the impaneling of the grand jury, the return of the indictment, and a full statement of its contents.

On the return day, the defendant corporation appeared [17] specially by counsel, and objected to further proceedings, on the ground that the service of a summons did not give the court jurisdiction of the defendant, for the reason that the statutes of this state do not authorize the issuance of a summons upon an indictment. The objection was overruled, and the defendant failing further to appear or plead, a plea of not guilty was entered by direction of the court, pursuant to section 566, Code of Criminal Procedure. On motion of the state's attorney, the cause was set for trial at the regular April, 1914, term of the circuit court. Thereupon, the plaintiff, the Botsford Lumber Co. filed in this court, its verified application for a writ of prohibition, alleging that the circuit court was attempting to act without jurisdiction of the person of plaintiff, and demanding that

it be enjoined from further proceedings in said cause.

The record discloses that no preliminary examination was had either upon a presentment by a grand jury, or on an information filed before a magistrate, nor any certificate returned of sufficient cause to believe the corporation guilty of the offense charged, prior to the finding of the indictment. Plaintiff's contention is that the trial court was without jurisdiction or authority to issue a summons or other process requiring the corporation to appear and answer a criminal charge, except upon an indictment after proceedings prescribed by chapter 6 of the Code of Criminal Procedure, as amended by chapter 87 of the Laws of 1905.

This chapter, as amended, provides for a preliminary examination upon a presentment by a grand jury, or on an information filed before a magistrate, a hearing thereon, and a certificate of probable cause, the submission of the matter to a grand jury and the return of an indictment.

Sec. 7 of the Penal Code provides: "This code specifies the classes of persons who are deemed capable of crimes and liable to punishment therefor; and defines the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each; the manner of prosecuting and convicting criminals is regulated by the Code of Criminal Procedure." Sec. 15 provides: "The following persons are liable to punishment under the laws of this state: 1. All persons who commit in whole or in part, any crime within this state." Sec. 822 Penal [18] Code. "The word 'person' includes corporations as well as natural persons." Section 183 of the Code of Criminal Procedure provides that: "The grand jury has power and it is their duty, to inquire into all public offenses committed or triable in the county or subdivision, and to present them to the court, either by presentment or indictment or accusation in writing." Under these provisions of the Code, this court held in *State v. Security Bank*, 2 S. D. 538, 51 N. W. 337; that: "The Code of Criminal Procedure is applicable to all persons natural or artificial, in respect to the manner of commencing criminal actions. Sec. 7211 makes it the duty of the grand jury 'to inquire into all public offenses committed or triable in the county, and to present them to the court, either by presentment or indictment or accusation in writing.' There is no distinction as to their duty to investigate between natural persons and corporations, and whatever evidence will justify either an indictment or presentment against an individual will justify an indictment or a presentment against a corporation." And "The grand jury may indict a corporation in the first

instance as they may indict an individual." We adhere to the view announced in that case. *U. S. v. Alaska Packers' Assoc.* 1 Alaska 217; *Bishop's New Crim. Proc.* § 417; *People v. Rochester Ry. etc. Co.* 195 N. Y. 102, 16 Ann. Cas. 837, 88 N. E. 22, 133 Am. St. Rep. 770, 21 L.R.A.(N.S.) 998, note; *People v. Equitable Gas Light Co.* 6 N. Y. Crim. 189, 5 N. Y. S. 19.

Under the statutes of this state, there are three modes in which a criminal proceeding against a corporation may originate. First. By indictment by a grand jury, in the first instance. Second. Through the return of a presentment by a grand jury, and a hearing before a magistrate. Third. By an information filed before a magistrate, and a preliminary examination. When the proceeding is by presentment or information before a magistrate, a summons may issue, as provided by section 560, Code Crim. Proc. requiring the corporation to appear before the magistrate, at a specified time and place, to answer the charge. When the proceeding is begun in either of the modes last named, the state's attorney may himself, file an information in the circuit court, or he may submit the matter to a grand jury and have an indictment returned. A corporation is incapable of arrest or physical restraint, and cannot be compelled to appear and answer to a criminal charge. [19] It is, however, a well settled principle of law, that courts may acquire jurisdiction over a corporation by notice or writ constituting due process of law, so far as to pronounce legal judgment against it upon its failure or refusal to appear. Plaintiff's contention is that no process exists in this state which may issue after the filing of the indictment or information.

A careful examination of chapter 6 of the Code of Crim. Proc. as amended by chapter 87, Laws of 1905, and the Code of Crim. Proc. reveals the fact that the statutes contain no special provision for process against a corporation upon any indictment, either with or without preliminary examination, nor upon an information filed by the state's attorney. Sections 560 and 561 of the Code of Criminal Procedure as amended, providing for the issuance of summons, have application only to the preliminary hearing before the magistrate.

Plaintiff's contention is, in effect, that while a corporation may be criminally liable under the laws of this state, and an indictment may be returned by a grand jury, or an information may be filed by the state's attorney, yet the accused corporation can never be brought to trial in a circuit court because, in the absence of an express statute authorizing it, the trial court is powerless to issue summons or process, service of which will confer personal jurisdiction of the corporation. If plaintiff's contention must be sus-

tained, it follows that the courts of this state are powerless to try corporations for any violation of the criminal laws of the state. It is perfectly clear that corporations may be guilty of crime, under the laws of this state. It is likewise clear, that the courts are given jurisdiction over such crimes, and that a corporation may be charged therewith, either by indictment or information. The specific question is whether there exists any legal mode by which such corporation may be brought before the court to answer the indictment or information. Sec. 643 of the Code of Criminal Procedure provides: "The procedure, practice and pleadings in the circuit courts of this state in criminal actions or in matters of a criminal nature not specifically provided for in this Code, shall be in accordance with the procedure, practice and pleadings of the common law." In the case of *People v. Jordan*, 65 Cal. 644, 4 Pac. 983; the court said: "It may be conceded for our present purposes, that where machinery has been supplied for [20] the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the Legislature to provide a mode for its exercise. In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this state to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases, except that criminal actions of a certain class must be prosecuted by indictment or information.

. . . If *casus omissus* in the procedure established by law and written rules, is called to our attention in advance, we may by rule provide for it; if not, when the case is presented, we must adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases, until altered by statute or rule. The power of courts to establish a system of procedure by means of which parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent. *A fortiori* must this be so in California, where the judicial is a separate department of the government under our written Constitution." The court held that where the right of appeal is given and the Legislature has failed to provide the mode of taking an appeal in a criminal case, the court possesses the inherent power incident to its appellate jurisdiction, to adopt any mode of procedure already recognized as appropriate to bring a cause before the court on appeal.

This summons provided by section 561 of the Code of Criminal Procedure is recognized by our Legislature as an appropriate process

to require a corporation to answer a criminal charge, upon a preliminary hearing, before a magistrate. We think a summons such as was issued and served in this case, is equally appropriate and sufficient. Similar process has been many times recognized as sufficient by the courts of other states, and the Federal courts. *State v. Ohio*, etc. R. Co. 23 Ind. 362; *State v. Western North Carolina R. Co.* 89 N. C. 584; *State v. Norfolk*, etc. R. Co. 152 N. C. 785, 67 S. E. 42, 26 L.R.A. (N.S.) 710, 21 Ann. Cas. 692; *Boston*, etc. R. Co. v. *State*, 32 N. H. 215; *U. S. v. John Kelso Co.* 86 Fed. 304; *U. S. v. Standard Oil Co.* 154 Fed. 728; *U. S. v. Union Supply Co.* 215 U. [21] S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87; *Com. v. Lehigh Valley R. Co.* 165 Pa. St. 162, 30 Atl. 836, 27 L.R.A. 231.

In *Com. v. New York Cent. etc. R. Co.* 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766, the court says: "It is a general rule that, where there is power in the court to hear and determine a case, there is also a power to issue proper process to enforce its orders. *Riggs v. Johnson County*, 6 Wall 166, 187, 18 U. S. (L. ed.) 768; *Collin County Nat. Bank v. Hughes*, 152 Fed. 414, 81 C. C. A. 556. And the power of the court to obtain control over a corporation in either a civil or a criminal case by any appropriate process has been maintained. *U. S. v. John Kelso Co.* 86 Fed. 304; *U. S. v. Standard Oil Co.* 154 Fed. 728. See further upon this subject *U. S. v. Union Supply Co.* 215 U. S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87; *Boston*, etc. R. Co. v. *State*, 32 N. H. 215; *Com. v. Lehigh Valley R. Co.* 165 Pa. St. 162, 30 Atl. 836, 27 L.R.A. 231; *State v. Western North Carolina R. Co.* 89 N. C. 584; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683. The general principle of these cases is that a grant of jurisdiction carries with it by implication power to use the necessary means to exercise and enforce that jurisdiction. What are the limits of that principle in such cases as the one now before us, it is not necessary here to consider. There is at least no question, either on principle or on authority, that a summons served upon its proper officers is the correct process to bring a corporation into court either upon complaint or indictment."

Plaintiff contends that the Legislature of this state has directed how a corporation shall be brought into court to answer a criminal charge, and that the courts are forbidden to devise or adopt other or different means, under the maxim "*Expressio unius, exclusio alterius*." The maxim can have no application in this case, for the reason that the Legislature has wholly failed to provide any method or process by which a corporation may be required to appear before the Circuit Court for trial upon an indictment or information. The situation is precisely that discussed by the recorder of the Court of General Session

of New York County, in *People v. Equitable Gas Light Co.* 6 N. Y. Crim. 189, 5 N. Y. S. 19, where the recorder said: "I have been unable to find any statutory provision compelling the appearance of a corporation after indictment. [22] . . . No provision whatever, is made in the Code of Criminal Procedure for notice to the corporation of the finding of the indictment, and no opportunity is given it of availing itself of the benefit of the motion to set it aside, demur, or to plead specially thereto, which rights are provided for by the Code upon an arraignment. . . . After a careful examination of the provisions of the Code of Criminal Procedure, I am unable to find any provision therein contained, empowering the court to compel the appearance of a corporation." This decision is the only one cited, or which we have been able to find, sustaining plaintiff's contention. We cannot agree with the conclusion reached by the recorder in that case. We think the principle that "a grant of jurisdiction carries with it by implication, power to use the necessary means to exercise and enforce that jurisdiction," is applicable, and that the court may obtain jurisdiction of a corporation in a criminal case by summons or other appropriate process or notice.

Section 643 of our Code of Criminal Procedure, declares that in criminal actions, any matter of procedure not specifically provided for in the Code, shall be in accordance with the procedure of the common law.

The doctrine of common law process against corporations in criminal actions is learnedly and exhaustively discussed in *Com. v. Lehigh Valley R. Co.* 165 Pa. St. 162, 30 Atl. 836, 276 R. A. 231, where it is held that summons is proper process, upon which default may be entered against a corporation in a criminal action.

In *State v. Western North Carolina R. Co.* 89 N. C. 584, it was held that "A corporation, having existence only as a legal conception, and incapable of being present in court except as represented by an attorney, would seem from its nature, [to] be subject to the same process in civil and criminal actions." In *Boston*, etc. R. Co. v. *State*, 32 N. H. 215, the same view is expressed. The common law process by *distringas* being held obsolete, or repealed, the provision of the Code of Civil Procedure as to service of summons on corporations, was held applicable in *Com. v. New York Cent. etc. R. Co.* 206 Mass. 417, 92 N. E. 766, 19 Ann. Cas. 529.

We are of the opinion the summons issued by the trial court, was a valid and appropriate process to require the defendant corporation [23] to answer the indictment, and that by service of such process, the court acquired jurisdiction of the defendant. It follows that the writ must be denied and the proceeding dismissed. It is so ordered.



## NOTE.

**Method or Process by Which Court May Acquire Jurisdiction of Defendant Corporation in Criminal Case.***Process.*

In accord with the reported case, the general rule is that a summons is the appropriate process for obtaining jurisdiction over a defendant corporation in a criminal case. U. S. v. John Kelso Co. 86 Fed. 304; U. S. v. Standard Oil Co. 154 Fed. 728 (corporation of another state having no agent in district); John Gund Brewing Co. v. U. S. 204 Fed. 17, 122 C. C. A. 331 (corporation domiciled in another state and having no agent in district where crime was committed) U. S. Board, etc. Co. v. State, 174 Ind. 460, 91 N. E. 953; Illinois Cent. R. Co. v. Com. 104 Ky. 362, 47 S. W. 255, 20 Ky. L. Rep. 748; Good Roads Machinery Co. v. Com. 146 Ky. 690, 143 S. W. 18; International Harvester Co. v. Com. 147 Ky. 655, 145 S. W. 393; Louisville, etc. R. Co. v. Lebanon, 8 Ky. L. Rep. (Abstract) 59; Com. v. New York Cent. etc. R. Co. 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; Boston, etc. R. Co. v. State, 32 N. H. 215; State v. Western North Carolina R. Co. 89 N. C. 584; State v. Norfolk, etc. R. Co. 152 N. C. 785, 21 Ann. Cas. 692, 67 S. E. 42, 26 L.R.A.(N.S.) 710; Com. v. Lehigh Valley R. Co. 165 Pa. St. 162, 30 Atl. 836, 27 L.R.A. 231 (venire facias); State v. Security Bank, 2 S. D. 538, 51 N. W. 337. Compare State v. Ohio, etc. R. Co. 23 Ind. 362.

"It was necessary in the pending case that jurisdiction over the defendant should be acquired, and, as Congress has made no specific provision as to the manner in which this should be done, the court had the right to resort to any appropriate method for that purpose. The course adopted by the court was to follow the practice prescribed by the Penal Code of this state, and there was served upon its president a summons, giving full information of the offense charged against the defendant corporation, and naming the day for the defendant to appear in court, and answer such charge. This is the usual mode in which notice is given to a corporation of the pendency of any action against it in a court, and it is certainly conformable to natural justice, as it affords to the defendant full opportunity to interpose any defense which it may desire to make. The defendant had thus been properly notified of the offense charged against it, and when and where it is required to appear and make its defense, and this is all that is required to give the court jurisdiction to proceed with the trial of the case." U. S. v. John Kelso Co. 86 Fed. 304.

The history of the process was reviewed as follows in Boston, etc. R. Co. v. State, 32 N.

H. 215: "Our examinations lead us to the conclusion that a summons is the proper and usual process in England to corporations. Sometimes the process there is called a venire, but it is always spoken of as in the nature of a summons; so that we are of the opinion that the process adopted in this case was proper and suitable, no less at common law than by the practice of this state. If there were a doubt upon its strict propriety at common law, yet our examinations satisfy us that from the early period when the course of proceedings can be traced here, a summons was the uniform course in the case of towns, which were for a long period the only corporations known. We find on the files such a summons to the town of Portsmouth, in 1668, and to Portsmouth and Dover in 1718 and 1719, an order that a summons issue to Portsmouth in 1698, to Dover in 1733, to Exeter in 1735, and to Greenland in 1736. Our search was necessarily very limited, but the cases we found were quite sufficient to satisfy us that a summons has been the usual process to towns from our earliest records. But it is said that a distringas should have issued at the return term, and that no judgment could be entered until the defendant corporation had first appeared; and it may perhaps be so at common law, since the course, as it is suggested, was to distrain the whole property of the corporation, including the franchise; and if they would not appear, there was the end of the case and of the corporation. But we have failed to find any evidence that any such process as a distringas has ever been in use in New England. The nearest approach to it is the process of attachment, which, perhaps, was at first a process to compel an appearance, but was almost at once converted by the colonial legislature of Massachusetts to its present use; a seizure of the property of the defendant, 'as security to satisfy the judgment which may be recovered.' The distringas was in the case of individuals the regular step to an outlawry; and we suppose it too clear to be questioned, that no process of outlawry was ever used or known in this government. The summons and *capias* were, so far as we have been able to trace, the only processes known here in criminal cases; and the *capias* did not lie in the case of a corporation. There being no other process against towns than a summons, it necessarily followed that if the town did not appear, it must have been taken, as was uniformly done in all civil cases, as a confession of the action, and judgment rendered against the town upon their default of appearance."

A bench warrant has been held to be a sufficient process. U. S. v. Yakutat, etc. R. Co. 2 Alaska 628, wherein the court said: "There is no doubt in my mind but that the process served upon the defendant was sufficient, un-

der section 723, c. 71, p. 4, of the Alaska Code of Civil Procedure. This chapter makes miscellaneous provisions respecting the courts and judicial officers, and I think may be construed to apply as well to the criminal as to the civil side of the court. That section provides: 'When jurisdiction is by any law of the United States conferred upon a court or judicial officer, all the means to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specially pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.'

In *State v. Charles M. Scott Packing Co. 4 Boyce* (Del.) 517, 89 Atl. 369, it was ordered that a *capias* should be issued for the corporation, to be served on it in the same manner as a writ of summons is served under the General Corporation Act.

In *Georgia*, the statute (Penal Code, § 963) provides that "whenever an indictment or special presentment against a corporation doing business in this state is returned, or filed in any court in this state having jurisdiction of the offense, the clerk of said court shall issue an original and copy notice to the defendant corporation of the filing of such indictment or special presentment, which copy notice shall be served by a sheriff, etc." This statute has been construed not to authorize the issuance of a notice in pursuance of an accusation. *Progress Club v. State*, 12 Ga. App. 174, 76 S. E. 1020.

In *New York*, a statute (Code Crim. Pro. § 681) now provides that when a corporation is indicted the court acquires jurisdiction by issuing a summons. Compare *People v. Equitable Gas-Light Co.* 6 N. Y. Crim. 189, 5 N. Y. S. 19, wherein it was said that no provision was made for acquiring jurisdiction of a corporation in a criminal case.

According to an early English case, "distress infinite" was the proper mode of compelling the appearance of an indicted corporation. *Reg. v. Birmingham, etc.* R. Co. 3 Q. B. 223, 43 E. C. L. 708.

It has been held that a subpoena duces tecum will issue to compel a corporation to bring its books and papers before a grand jury. In *re American Sugar Refining Co.* 178 Fed. 109; In *re Borrn Hat Co.* 184 Fed. 506, affirmed 223 U. S. 713, 32 S. Ct. 521, 56 U. S. (L. ed.) 626.

#### **Voluntary Appearance.**

The court acquires jurisdiction over a corporation in a criminal case when the corporation by attorney voluntarily appears and submits to the jurisdiction. *U. S. v. Yakutat, etc.* R. Co. 2 Alaska 628; *Southern R. Co. v. State*, 125 Ga. 287, 5 Ann. Cas. 411, 54 S. E. 160, 114 Am. St. Rep. 203; *State v. Grier*

*Land, etc. Co.* 154 Mo. App. 389, 134 S. W. 1087 (action to recover penalty); *State v. Passaic County Agricultural Soc.* 54 N. J. L. 260, 23 Atl. 680. In *Southern R. Co. v. State*, supra, the court said: "If the corporation voluntarily appears in court by attorney and demurs to the indictment, the corporation is before the court, and further proceedings may be had without reference to the regularity of the service. Its appearance and pleading by demurrer may be analogized to the voluntary action of a natural person who, hearing of an indictment against him, comes into court without waiting for process to be issued against him, and demurs or otherwise pleads to the indictment. After demurrer or plea, it is of no consequence whether a warrant issued for his arrest or not; by his voluntary act the court acquires control over his person for all purposes of the particular trial. Likewise, when the defendant corporation demurred to the sufficiency of the indictment, it submitted itself to the jurisdiction of the court in the particular case, and it then became immaterial whether the service was regular or irregular."

#### **STATE EX REL. DE BURG**

v.

#### **WATER SUPPLY COMPANY OF ALBUQUERQUE.**

New Mexico Supreme Court—April 28, 1914.

19 N. Mex. 36; 140 Pac. 1059.

#### **Public Service Corporations — Rules — Reasonableness.**

Public utility companies have a right to adopt and enforce reasonable rules and regulations, for their security and convenience and enforce compliance therewith by refusing or discontinuing the service; but such rules must be reasonable, just, lawful and not discriminatory.

#### **Contracts for Public Utility — Practical Construction.**

Where a contract is entered into between a city and a water supply company, for the benefit of the people of the city, and under which the people are entitled to certain rights, benefits and privileges, a construction of the meaning of ambiguous and doubtful provisions of the contract by one consumer or beneficiary is not binding upon other consumers, or beneficiaries, not shown to have acquiesced in or assented to such construction.

#### **Construction by Municipality.**

Where a franchise granted to a water company provides that the company shall have

the right "to make rules and regulations, to be approved by the city council," and the company contends that it has adopted and enforced a rule which required the consumer to pay the cost of making connection with its mains, before the question can arise as to whether the rule in question amounted to a construction of the contract by the city, it is incumbent upon the company to show that the city council gave its approval to the same.

**Power to Shift Burden Imposed by Franchise.**

Where a franchise, under which a public utility company operates, imposes a burden upon the company, any rule or regulation adopted by the company, by which it attempts to shift the burden upon the consumer, is unreasonable and unjust, and will not be enforced.

**Construction of Franchise — Public Rights Favored.**

Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public.

**Waterworks and Water Companies — Public Supply — Right to Charge Consumer with Cost of Service Pipe.**

Where a franchise, under which a water supply company operates, requires it to furnish water to private consumers at fixed rates, it must provide the necessary service pipe from the main line in an abutting street to the consumer's property line, at its own expense, unless the franchise imposes this burden upon the consumer.

[See note at end of this case.]

**Same.**

Where a municipality operates its own water supply system, it is not under contractual obligations to lay the service pipes from the curb to its main, hence a rule which requires the consumer to assume the burden is reasonable. But where, under a contract and franchise, this duty devolves upon the holder of the franchise, such a rule is unreasonable.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Bernalillo county: RAYNOLDS, Judge.

Action for mandamus. Dolores Otero de Burg, relator, and Water Supply Company of Albuquerque, defendant. Judgment for defendant. Relator appeals. The facts are stated in the opinion. REVERSED.

John C. Lewis for appellant.

A. B. McMillen for appellee.

[38] ROBERTS, C. J.—The material facts in this case are as follows: The relator is the owner of a lot abutting on North Thirteenth Street in the City of Albuquerque, New Mexico. The respondent is a public service corporation, owning and operating a water system in the City of Albuquerque, under a

franchise granted it by the city council of said city, pursuant to a vote of the qualified electors, and, under a contract entered into between said city and respondent, as authorized and directed by said franchise. A main of respondent's water works system is laid along North Thirteenth Street in front of relator's lot.

The relator erected a dwelling on her said lot and equipped the same with all the fixtures necessary for water service and laid a pipe from said dwelling to the [39] property line of said lot at its junction with North Thirteenth Street; thereupon she made a demand upon respondent to connect its water main with the pipe laid by her to the property line of said lot. This respondent refused to do, unless relator would pay the expense of making such connection. Upon respondent's refusal, relator filed a petition for a writ of mandamus to compel it to make said connection. Upon issue joined, the cause was heard by the court, and the writ was denied, from which judgment relator appeals.

The sole question presented by this appeal is whether the property owner or the water company must defray the expense of laying the service pipe from the main to the property line and making the necessary connection with the main. The answer to the question necessarily depends upon the construction to be placed upon the franchise and contract under which the water company operates, for it is clear that the contracting parties might legally stipulate that this burden should be borne by the consumer, or, on the other hand, that the public service corporation should assume it. In its answer to the alternative writ the respondent alleged that it had, during the whole of its present franchise, adopted and enforced as one of its rules and regulations, and has, at all times required as a condition precedent to being supplied with water, that the consumer should lay his service pipes to the mains of respondent and pay the reasonable expense of connecting the same therewith; but, if the contract and franchise under which respondent operates, imposes this duty and expense upon it, it must be apparent that the rule in question would be unreasonable and void and without any vitality whatever. Public utility companies, it is true, have a right to adopt and enforce reasonable rules and regulations for their security and convenience, and enforce compliance therewith by refusing or discontinuing the service. But the rules must be reasonable, just, lawful, and not discriminatory. If they be not so, their enforcement will be enjoined. If a privately owned water company, organized for profit, in which the citizens of a municipality do not participate, undertakes [40] and agrees with the city that it will, at its own expense, carry the water

to the lot line of its consumers and there delivers the same, manifestly it cannot escape this burden by adopting a rule which would impose the expense upon the consumer. Such a rule would be unreasonable, unlawful and unjust and no consumer would be required to comply with it in order to secure the service.

Respondent contends, however, that all its consumers, numbering some twenty-five hundred or more, have complied with the rule and have construed the contract as imposing the burden upon the consumer. If such be the case, however, it would not affect the rights of the relator herein, because there is no showing that she has ever so construed the contract, or acquiesced in the rule. Where a contract is entered into between a city and a water company, for the benefit of the people of the city and under which the people are entitled to certain rights, benefits and privileges, a construction of the meaning of ambiguous and doubtful provisions of the contract by one customer or beneficiary would not be binding upon other consumers, or beneficiaries not shown to have acquiesced in or assented to such construction. And the fact that certain consumers have complied with, or failed to object to a rule of the water company, which was invalid and unenforceable, would not be binding upon other consumers or patrons.

It is further contended by respondent that the city and the company have placed a construction upon the contract, adverse to relator's contention, and, such being the case, the court should give effect to such interpretation of the provision in question. It is well settled that the construction given a contract by the parties interested, especially where it has covered a long period of years, will be controlling unless the contract is so plain against such construction that there could be no reasonable doubt upon the question. *Lowber v. Bangs*, 2 Wall. 728, 17 U. S. (L. ed.) 768; *Cavazos v. Trevino*, 6 Wall. 773, 18 U. S. (L. ed.) 813; *Bronson v. Rodes*, 7 Wall. 229, 19 U. S. (L. ed.) 141; *Chicago v. Sheldon*, 9 Wall. 50, 19 U. S. (L. ed.) 594; *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 273, 24 U. S. (L. ed.) 269; *Fraser v. State Sav. Bank*, 137 Pac. 592, 18 N. M. 340. But respondent has failed to point out [41] wherein the city has construed this provision of the contract, unless it be upon the assumption (a) that the water company has, at all times during the existence of the franchise enforced a rule which required the consumer to pay the cost of making the connection with respondent's water mains and laying the pipe from the curb to the main, as alleged in its answer, or (b) because the city itself has paid such expense, where it required water for city purposes.

It is sufficient answer to the first contention to state that neither the answer, nor the proof, show that the rule in question was approved by the city council. The franchise gives to the company the right "to make rules and regulations, to be approved by the city council." "A material fact, if not alleged, is presumed not to exist." 31 Cyc. 86. Before the question could arise as to whether the rule in question amounted to a construction of the contract by the city, it would be incumbent upon respondent to show that the city council gave its approval to the same. The fact that the company had adopted and enforced such a rule, without the concurrence and acquiescence of the city council, would not be tantamount to a construction of the contract by the city. Had the proof supplied the defect in the answer in this regard, the omission would doubtless have been cured by the judgment; (31 Cyc. 763) but there was no proof whatever upon the question, as shown by the bill of exceptions, and such being the case, the omission in the answer would not be cured by the judgment. (*Holmes v. Preston*, 70 Miss. 152, 12 So. 202; *St. Louis International Bank v. Franklin County*, 65 Mo. 105, 27 Am. Rep. 261.) Until the rule or regulation was, in some manner brought before the council for consideration, it could not well be argued that mere inaction by the city would amount to an affirmative approval of the practice of the water company, or constitute a construction of the contract.

Nor is there any merit in the second proposition stated, because Section 9 of the franchise specifically provides that the city shall, at its own expense, erect all necessary stand pipes, or other appliances necessary for the drawing [42] off of water for city purposes, and, if it be true, as stated, that the city has in some thirty or more instances laid the pipe between the curb and the main and paid the expense of making the connection, it did so doubtless under the above provision, applicable only to the city; and any construction it might have placed upon this provision in the franchise or contract would not be binding upon consumers, claiming rights under other and different provisions of the franchise, if it be admitted, for the sake of argument only, that the consumer would, in any event, be bound by a construction placed upon the contract by the city.

The rights of the relator therefore, not having been prejudiced or influenced by the acts or conduct of either the city or other consumers, it becomes necessary to examine the franchise under which the respondent operates, and the contract existing between the city and the company in order to determine the reasonableness and justness of the rule and regulation under which respondent re-

fuses to make the connection in question, unless first compensated therefor by the relator, for, as stated, if this burden rests upon the company, a rule or regulation by which it attempts to shift the same upon the relator would be unreasonable, and would afford respondent no justification for its refusal to make the desired connection with its mains. Section 1 of the franchise reads as follows:

"There is hereby given and granted to the Water Supply Company of Albuquerque, or its assigns, the right and privilege to supply the City of Albuquerque, and the citizens thereof with good water for domestic and manufacturing purposes, for the period of twenty-five years from and after the date of the approval of this franchise by the people, and no longer, subject to the terms and conditions herein set forth."

Section 2, after giving the company the right to erect, maintain and operate its plant, and to lay pipes, continues:

"And to extend aqueducts and pipes through any and [43] all of the streets, avenues, and alleys and across any bridge or stream in said city or grant."

Section 3, in part, reads as follows:

"The mains and distributing pipes . . . shall not be less than five-eighths of an inch in diameter, and as much larger as the necessities of the business requires, and made of the best quality," etc.

Section 5, after providing that the company must furnish a good and sufficient supply of water, continues:

"As the same may be needed and demanded for domestic and manufacturing purposes, so that it may be drawn off through the pipes connecting with the mains of said water works in all parts of said city where such pipes may be, at a minimum pressure," etc.

Section 7 begins:

"The water rate to customers during the continuance of this franchise shall not exceed the following monthly schedule rates."

This is followed by a specific enumeration of the monthly flat rate which may be charged consumers for water, and the section contains provisions for meter rates. No mention is made in this section, or in any other provision of the ordinance or contract as to the service pipes from the water main to the curb, except as above set forth. Pursuant to the franchise a contract was entered into between the city and the water company, by which the city agreed to pay a stipulated sum for fire hydrants, the number of which were stated, and by said contract, as a part of the consideration moving to the city, the company agreed to comply with all the provisions of the franchise granted it by the city and its inhabitants.

From the excerpts quoted above, from the franchise, it will be seen that no specific pro-

visions were made, imposing the duty of laying service pipes between the main and the curb, and within the franchise limits, upon either the company or the consumer. On behalf of the respondent, it is argued, that by Section 5, above quoted, this duty is impliedly cast upon the consumer. While this section requires the company to furnish water, "as the same may be needed for domestic and manufacturing purposes, [44] so that it may be drawn off through the pipes connecting with the mains of said water works in all parts of the city where such pipes may be," etc., it will be noted that no provision is made as to who shall lay the pipes within the franchise limits of respondent. All that can be said, from the wording of the franchise is, that it is silent on the question. But it does grant to the company the right to lay its pipes and mains "through any and all of the streets, avenues and alleys" in said city, in order to enable it to supply water to the city and its consumers. The right continues and exists during the whole term of the franchise, and no further permit or license is necessary. Such right exists only in the company (Pond on Public Utilities, Sec. 537) and the consumer, without special permission from the municipal authorities, would have no right to tear up the street and lay pipes therein. Again, the franchise requires the company to restore the street to its former condition, after all excavations are made by it.

After all, the most that can be said, as to the terms and requirements of the franchise in this regard, is that it is silent on the question. This fact was found by the trial court, on its eighth finding of fact, which reads as follows:

"That there is no provision of respondent's franchise or contract with the City of Albuquerque requiring it at its own expense to lay service pipes for private consumers, or to connect the same up with its mains, without the consumer paying the reasonable expense thereof. There is no provision in respondent's franchise or contract with the City of Albuquerque requiring private consumers to lay service pipes from their lot lines to respondent's mains or to connect same with respondent's mains."

Such being true, the question naturally arises as to the proper construction of the franchise, for, by the terms of the contract the respondent undertook and agreed to perform all the conditions imposed upon it by the franchise. It would seem that the rule announced by the territorial court in the case of Colorado Telephone Co. v. Fields, 15 N. M. 431, 110 Pac. 571, 30 L.R.A.(N.S.) 1088, is controlling. In that case the franchise granted the [45] telephone company authorized it to charge telephone rental rates not

to exceed \$36.00 per annum for one party residence. The company sought to enforce a rule, that on all contracts for less than one year's rental, a charge of \$2.50 would be made for installation and a charge of \$2.00 for removal of instruments. Its right to do so was denied. The court say:

"On the other hand, appellee cites *Omaha Water Works Co. v. Omaha*, 147 Fed. 1 [8 Ann. Cas. 614, 77 C. C. A. 267, 12 L.R.A. (N.S.) 736], a case in the Circuit Court of Appeals for the Eighth Circuit, in which the court, after examining numerous cases, extracts from them the following rule, which we adopt, viz.: 'Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain, it will be protected and enforced.'

"It thus appears that the true rule is that both the grant and the contract, in case of ambiguity or doubt, are to be construed favorably to the rights of the public, and we so hold."

For further illustrations of the rule see the following cases: *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 S. Ct. 224, 50 U. S. (L. ed.) 353; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 24 U. S. (L. ed.) 651; *Stourbridge Canal v. Wheeley*, 2 B. & Ad. (Eng.) 793; *Perrine v. Chesapeake, etc. Canal Co.* 9 How. 172, 13 U. S. (L. ed.) 92; 1 Cook on Corporations (6th ed. 8).

There is undoubtedly sound reasoning back of the authorities on this question. Public service corporations are allowed to charge the public a certain sum for service. This sum is the compensation for the expense of the corporation in installing and operating the plant for the convenience of the public and it is supposed to bear all the expenses which are not specifically charged against the public. If the legislature or the city council sees fit to provide that the property owner shall bear the expense of laying service pipes and making connections, then it is to be presumed that a lower rate will be fixed for service. If, as in the present case, no provision is made for laying service pipes and making connections, the rate [46] allowed is presumed to be high enough to compensate the company for this expense.

Counsel for the appellee argues that, if the company was compelled to lay service pipes in the street, it could also be forced to lay them through the consumer's lot and into his house. The fallacy and unsoundness of this reasoning is apparent at a glance. Everything within the franchise limit is under the control of the company unless otherwise expressly provided by statute or ordi-

nance, and the franchise limit is definitely fixed at the line between the lot and the street or alley. The franchise cannot convey any right to or impose any duty upon the corporation outside the franchise limit. It is limited in its scope to the domain of the municipality and cannot invade the territory of private citizens.

Our conclusion, therefore, is, that, under the franchise, as thus construed, it was the duty of the water company to lay all necessary pipes, for supplying its customers with water, within the limits of its franchise, and this construction is fully supported by the adjudicated cases.

In the State of Idaho there is no statute imposing the duty of laying laterals and making connections in streets and alleys and the franchise granted by the City of Pocatello to the Pocatello Water Company was silent as to who should bear the expense of this work, so that the conditions are exactly the same as in the present case, and the Supreme Court of Idaho uses this language:

"Under the said franchise the respondent has been granted the right to lay its mains and pipes 'over, along, and under' the streets, alleys and highways of said city for the purpose of supplying said city and its inhabitants with a sufficiency of pure water. It had the authority to lay all of the mains and pipes in said streets and alleys necessary to accomplish the purposes for which said franchise was granted. It is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits. The respondent has been granted a valuable right—that of laying its mains and laterals in the [47] streets and alleys of the city—in consideration that it will furnish water to said city and its inhabitants. The company is under obligation to lay its pipes in the streets and alleys so as to make the water accessible to the citizen for his private use. It is given the right, within its franchise limits, to lay all pipes and make all connections with its mains and laterals. Beyond those limits it has no authority to enter upon the private premises of a citizen and lay its pipes. Neither has the citizen any right to enter within the franchise limits of the company, and in any manner interfere with its mains and pipes." *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518.

In the case of *Bothwell v. Consumers' Co.* 24 L.R.A. (N.S.) 485, 13 Idaho 568, 92 Pac. 533, the court say:

"The only further point to be considered in this case is whether the water company can require the consumer to pay for the tap

and for making the connection with its main. It seems that this point ought to be disposed of without much difficulty. The franchise for laying pipes in the streets and alleys and maintaining and operating a water system is granted by the municipality to the water company. The property owner has no right or franchise to dig in the streets and alleys and lay pipes, and, if he should do so, he would acquire no property right therein. The main and all laterals, fixtures, and connections within the franchise limit, belong to the company, and altogether constitute the water system. It is not the business of the citizen or consumer to construct any part of the company's system, nor is it the company's business to place the pipes and fixtures on the consumer's premises. There is a clear and well-defined boundary line existing between the property of the water company and the property of the lot owner—that line is the one existing between the lot and the street or alley. The citizen owns his pipes and fixtures to that line, and beyond it is the company's property and water system. The rights, duties, and obligations of each go to this extent, and no further."

In Texas at the time the case was decided the same conditions existed as regards the City of El Paso, but in this case the franchise contained the provision that the [48] company should furnish water to "consumers having pipe connections" at a specified rate. The civil court of appeals held that, primarily the duty of a company bound to furnish water to property owners on streets containing mains carried with it the duty to perform the work necessary to enable the company to furnish the owners with water, and the company could only be relieved from the obligation to construct, at its own cost, the necessary connections by some provision in the franchise or contract which unmistakably, or by fair implication, so operated. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

The Supreme Court of Idaho a second time handed down a decision upon the subject upon a statement of facts on all fours with the present case. The court say:

"Under the franchise granted by the City of Coeur d'Alene to the Consumers' Company to occupy the streets and alleys of the city for the purpose of supplying the city and inhabitants thereof with fresh water, the right and authority to dig in the streets and alleys and lay pipes therein for supplying consumers with water is conferred upon the company alone, and no such right is conferred upon the individual or consumer, and the consumer acquires no right to lay pipes or acquire property in the streets and alleys, but, on the contrary, the duty to do so and the rights acquired thereby belong to

the water company. It is consequently the duty of the water company to supply and lay the laterals from its main to the line of a consumer's property abutting on such street, and such laterals are the property of the water company."

"A public service corporation organized for the purpose of supplying the inhabitants of a municipality with water is not justified in assuming that the people it is to serve are dishonest, and that they will demand and pay for a month's water supply merely for the purpose of entailing upon the company the expense of putting in laterals and service connections, and that they will thereafter refuse to take water and thereby discommode themselves and depreciate their own property, and the courts will not base decisions upon such an assumption." *Hatch* [49] v. *Consumers' Co.* 17 Idaho 204, 104 Pac. 670, 40 L.R.A. (N.S.) 263.

Appellee attempts to meet this decision with the statement that property owners had the right to dig into the streets and alleys upon complying with certain regulations. This is undoubtedly true, as it is true in all cities of the country, but the point in the reasoning in the *Hatch* case is that the property owner has no right under the franchise to dig in the streets and alleys and lay pipes, but must get a special permit for which a fee is charged, while the water company is granted general permission under the franchise. The court in this case also answers the argument of appellee that dishonest consumers might pay water rent for one month and thereafter discontinue use of the water, inflicting a loss upon the company.

In the Supreme Court of Arkansas, in 1910, this question was raised upon a franchise, the terms of which were almost identical with those of the present appellee. The court say:

"Is it the duty of appellant to construct and maintain the service pipes at its own expense, free of charge?

"By Section 1 of its contract it assumed the duty of supplying the city and the inhabitants thereof with water and acquired the right 'to use the streets, alleys, sidewalks, and public grounds of the City of Pine Bluff, within its present and future corporate limits, for placing and taking up and repairing mains, hydrants and other structures and devices requisite for the service of water.' The duty to furnish the city and inhabitants with water carried with it the duty to do and perform what was necessary to be done to place the company in a position where it could furnish the water. To do that, the contract, Section 1, expressly authorizes it 'to use the streets, alleys, sidewalks . . . of the City of Pine Bluff

... for placing and taking up and repairing mains, hydrants and other structures and devices requisite for the service of water, that is to say, the delivery of water to the inhabitants of city. The duty is assumed, and the power is given, by the contract to perform it. The property owner, the inhabitant, or consumer has no right to lay the service pipes in the streets and connect them with the water company's [50] mains, but this power is expressly given to the water company, in connection with the duty it assumes, and to no one else, which implies that it shall lay the service pipes, at its own expense, for all of which the consumer is required to pay for the water furnished at certain rates specified in the contract. If it was not the intention of the contract that the water company should lay the service pipes, why did the city council give it the power to do so, and withhold it from the inhabitant? It evidently intended that the water company should do so, free of charge, because it fixes the compensation to be paid by the consumer for services rendered him, and says nothing about compensation for service pipes. How was it to render the services it undertakes without laying the service pipes, and where is the authority to collect from the consumer more than he is required by the contract to pay? There is none. *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518; *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 820; *Bothwell v. Consumers' Co.* 13 Idaho 568, 92 Pac. 533, 24 L.R.A.(N.S.) 487; *Pine Bluff Corp. v. Toney*, 96 Ark. 345, Ann. Cas. 1912B 554, 131 S. W. 680.

In the case of *Bothwell v. Consumers' Co.* 13 Idaho 568, 24 L.R.A.(N.S.) 485, the syllabus by the court is as follows:

"All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense, and connect with the pipes of the property owner at the line of his property and the limit of its franchise.

"Where a lot owner constructs a building on his property, and places water pipes and fixtures therein, and extends the same to the street adjoining, and thereupon tenders to the water company the monthly rent charged by it, it becomes the duty of the company to make the necessary tap and connections, and furnish the property owner with water as demanded."

In the case of *Hatch v. Consumers' Co.* supra, the court further says:

[51] "We are aware that some courts have held that the consumer may be required to pay the expenses of 'service connections,' as it is sometimes called, or, rather for laterals extending from the curb line to the main.

So far as we have been able to examine, however, these decisions are based upon express statutes."

The Supreme Court of Washington, in a recent decision (*Cleveland v. Malden Water Works Co.* 69 Wash. 541, 125 Pac. 769), followed the rule announced in the foregoing cases. The court say:

"But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates; and we are of opinion that it is not so furnished, within the meaning of the ordinance, unless it is delivered to the consumer at his property line."

Respondent has cited some cases to the contrary, but we think the great weight of authority is in accord with the view we have expressed. *McQuillin*, in his work on *Municipal Corporations*, Sec. 1696, in discussing the question, says:

"While it has been held in some cases that the consumer may be required to pay the expense of laterals extending from the curb line to the main, these decisions are for the most part based upon express statutes, and where there is no such statute it is generally held that it is the duty of the company, at its own expense, to supply and lay the laterals from its main to the line of a consumer's property abutting on the street." See also *Pond on Public Utilities*, Secs. 536 and 537.

A great many of the cases cited by respondent, are cases where the water works were owned and operated by the municipality, and it had adopted a rule which required the consumer to bear the expense of laying the service pipe from the main to the property line. These cases are not in point. Where the city owns and operates the utility no contractual rights exist in favor of the consumer. The city has the right to adopt and enforce reasonable rules and regulations, as likewise has a privately owned company. But a rule which is reasonable [52] and enforceable under a municipality owned utility may not be where it is owned by private parties. In the former case, whatever profit arises from the venture, inures to the benefit of the citizens generally, while in the latter it finds its way into the pockets of its stockholders. Again, the rights of the privately owned company are measured by its contract with the city; and, where, under such contract it assumes certain obligations, it cannot escape compliance therewith by any rule which it may adopt. Where a municipality operates its own water supply system, it is not under contractual obligations to lay the service pipes for its customers from the curb to its water main, hence, a rule which requires the consumer to assume the burden is reasonable and just. On the other hand,



here we have a corporation which, under the rule of construction which must be applied, assumed the burden of so doing, consequently the rule adopted by it, is unreasonable and unjust.

Appellee contends, however, that such a construction will result in bankruptcy and ruin to it, and all other privately owned companies doing business in New Mexico, because, customers living in the suburbs and remote and thinly populated portions of the city will compel it to conduct water to their property line. If the argument were proper, and entitled to consideration by the court, a sufficient answer would be that no such result will be attained, for, under its franchise it cannot be compelled to extend its mains, by order of the city or otherwise, "unless the gross income from such extension, exclusive of hydrant rentals (by the city) shall equal six per cent of the cost thereof." Such being the case, and the company, before it can be required to extend its mains, always being insured of six per cent gross income upon the cost of the extension, will be in no danger of becoming impoverished.

For the reasons stated, the cause will be reversed, with directions to the district court to grant the relief prayed for by the relator, and it is so ordered.

#### NOTE.

##### **Duty of Water Company to Lay Service Pipe without Charge to Consumer.**

This note, supplementing the note to *Pine Bluff Corp. v. Toney*, Ann. Cas. 1912B 544, reviews the recent cases concerning the duty of a water company to lay service pipes without charge to consumers.

The conflict of authority on this question, appearing in the earlier cases, is continued by the recent decisions. In support of the rule that the duty is imposed by law on a water company to lay at its own expense service pipes connecting the water main with a consumer's premises, some courts base their holding on the ground that a franchise which requires the company to supply water at a certain rate obligates it to deliver the water to the consumer at his property line. *Cleveland v. Malden Water Works Co.* 69 Wash. 541, 125 Pac. 769; *State v. Hoquiam Water Co.* 70 Wash. 682, 127 Pac. 304. And see the reported case. (Other decisions in support of the same rule interpret the franchise right to furnish water and to use the streets for the laying of the necessary pipes as imposing on the company the duty of laying the service pipes. *Title Guarantee, etc. Co. v. California Railroad* Ann. Cas. 1916E.—82.

*Commission*, 168 Cal. 295, Ann. Cas. 1916A 738, 142 Pac. 878; *Bartlesville Water Co. v. Bartlesville (Okla.)* 150 Pac. 118. See also *Consumers' Co. v. Hatch*, 224 U. S. 148, 32 S. Ct. 465, 56 U. S. (L. ed.) 703 (Idaho statute) *affirming* *Hatch v. Consumers' Co.* 17 Idaho 204, 104 Pac. 670, 40 L.R.A. (N.S.) 263. In *Bartlesville Water Co. v. Bartlesville*, supra, the court said: "The respondent company in this case accepted the franchise, and thereby assumed all the duties toward the public therein imposed. By the express terms of the ordinance it is empowered to put in place and maintain in the streets, alleys, and public places of the city water pipes, hydrants, and all appurtenances necessary to supply water to consumers. No individual citizen is authorized to make excavations or lay pipes in the streets or other public places to connect with the mains of the company. As a general rule, it is the duty of a property owner or consumer of water to properly equip his premises to receive the water service. The franchise granted the water company in this instance is 'to construct, maintain and operate in the city of Bartlesville, I. T., for the purpose of supplying the city and its citizens with water, a system of waterworks.' It is obvious from the language of the entire ordinance that it was the purpose and intention of the parties that the waterworks system to be constructed should embrace all things necessary to supply the city and its citizens with water, and that such system should be owned and controlled by the company. It seems equally clear that the service or connecting pipes required to be laid in the streets are as much a necessary part of the system used to convey water as are the large mains. That they are the property of the water company appears to be conceded here, as such pipes are owned by the company and furnished at its expense. But it is contended that the cost of labor in making and filling the excavations required for the laying of such pipes should be borne by the consumer. To this we cannot assent. The ordinance fails in terms to require, and it cannot fairly be inferred from the words employed, that the citizen should construct, or pay for the construction of, any part of the system owned and controlled by the company; but, on the contrary, the valuable right of using the city's streets and alleys was granted the respondent in which to construct its waterworks system, and the duty to provide and maintain at its own cost all parts of such system necessary to the performance of its primary duty of supplying the city and its citizens with water was assumed by the company in accepting the franchise. It would require a strained construction of the terms of the grant to hold that it was intended to

provide thereby that the city or its citizens should pay for property owned by the company and over which in no event could they have or exercise control."

But on the other hand it has been held that in the absence of a special franchise or charter provision, the law imposes no duty on a water company to lay at its own expense service pipes connecting the water main with a consumer's premises. *Wichita v. Wichita Water Co.* 222 Fed. 789, 138 C. C. A. 337 (Kansas statute); *Birmingham Waterworks Co. v. Hernandez* (Ala.) 71 So. 443; *Joplin v. Wheeler*, 173 Mo. App. 590, 158 S. W. 924. See also *State v. Birmingham Water Works Co.* 185 Ala. 388, Ann. Cas. 1916B 166, 64 So. 23. Thus in *Wichita v. Wichita Water Co.* supra, the court said: "May the water company rightly charge the consumer for the reasonable cost of connecting the service pipes with its water mains and extending them to the curb line or property abutting upon the streets in which the mains are laid? The answer to this question must also be found in the terms of the ordinance contract. The ordinance does not require the water company to connect the service pipes with its mains free of charge to consumers, and the schedule of rates only fixes the maximum price that the company may charge for water actually furnished to consumers, and so long as such maximum rate is not exceeded, and the charge for connecting the service pipes with the mains is reasonable, the ordinance is not violated. Whether or not the water company shall furnish water to a consumer, or the consumer shall receive water from the water company, is purely a matter of contract between them. The city cites and relies upon *Hatch v. Consumers' Co.* 17 Idaho 204, 104 Pac. 670, 40 L.R.A.(N.S.) 283, and cases there cited, as sustaining its contention that the obligation rests upon the water company to make the connections at its own expense. The case apparently so holds, but upon the ground, as we read the opinion, that in its prior decisions the court held that the statutes of Idaho, under which the city granted the franchise to the water company, either expressly or by necessary implication imposed upon the water company the duty of making such connections at its own expense. This being true, the acceptance by the water company of its charter would obligate it to make the connections free of charge. . . . Municipalities, in granting franchises to or making contracts with private persons or corporations to furnish water to the city and its inhabitants, may require the water company, when the statute so authorizes, to connect the service pipes with the water mains as a part of the consideration they shall pay for the privilege of furnishing the

water; but, in the absence of a charter or contract that so provides, the matter is left to the agreement of the parties." In *Birmingham Waterworks Co. v. Hernandez* (Ala.) 71 So. 443, the court disposed of the reason of the contrary rule as follows: "The idea which seems to underlie all the cases holding with relator, except as they are affected by statute or ordinance, may be fairly stated as follows: Since the franchise to furnish water is affected with a public use, requiring all consumers to be served on equal terms, and since water companies have the right to excavate the streets, while private persons have not, the duty to lay service pipes, which involves excavations, and so the duty to deliver water on the consumer's premises, must devolve upon the water companies. We do not feel that we are constrained to adopt the relator's view of this case by the theory suggested nor by the cases which seem to adopt it as the reasonable foundation of their decisions. *Mobile v. Bienville Water Supply Co.* 130 Ala. 384, 30 So. 445, in common with a multitude of cases, holds that the same public service must be extended to all in like circumstances and without discrimination. We fully recognize the obligation of that rule; but we are unable to see that it sheds any particular light upon the question whether, in the absence of contract or controlling statute or ordinance, the water company owes the consumer the public duty to furnish at its expense connections between its main and his premises. Respondent's charter operated, no doubt, as a general permit to excavate the streets in order to lay its mains and prepare its plant for the discharge of its public duty. But so far as the laying of pipes and the excavation necessary thereto is concerned, in the beginning of its operations in any street, its whole right and duty was to lay its mains. It could not compel the owner of any abutting property to take water, and, as for anything to be found in respondent's charter and its contract with the city, respondent was left free to contract with consumers, subjects, of course, to the general principle that all consumers in like circumstances should be treated alike and reasonably, and subject, also, to the stipulation for maximum rates. Either party may dig trenches for the laying of service pipe, subject always to reasonable municipal regulations. If it be said that to accord such right to the consumer is to permit a private use of the street, still the right to such use is but part and parcel of the right of access which cannot be taken, injured, or destroyed without compensation. To employ substantially the language of Judge Dillon, the abutting owner has a right of passage, and also other rights not shared in by the public

at large, special and peculiar to himself, and arising out of the very relation of his lot to the street in front of it. These are rights of property. The private rights of abutters are not limited to the easement of light, air, and access. They are coextensive with the use to which the street may be by law devoted, and become integral parts of the estate of the abutting owner. In cities and towns the streets are commonly devoted to the conveyance of water, gas, and sewage, and the abutting owner's property is essentially dependent upon the use of the streets for connections with the appropriate means of conveyance. 3 Dillon Mun. Corp. (5th ed.) §§ 1224-1227."

**FLORIDA EAST COAST RAILWAY  
COMPANY**

v.

**CARTER ET AL.**

Florida Supreme Court—April 7, 1914.

67 Fla. 335; 65 So. 254.

**Pleading — Declaration for Personal Injury — Requisites.**

In judging of the sufficiency of a declaration in a suit for damages for personal injuries, the essentials of such a declaration set forth in the case of German-American Lumber Co. v. Brock, 55 Fla. 577, 46 South. Rep. 740, are approved and applied.

**Carriers of Passengers — Power to Make Rules.**

Railroad companies have the power to make reasonable regulations for the management of their trains, and one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of the trains upon which he proposes to travel. He should inform himself when about to take passage on a railroad train when, where and how he can go, or stop, according to the regulations of the railroad company.

**Degree of Care.**

Carriers are held to the highest degree of care for the safety of passengers, and passengers should use ordinary care to protect themselves in getting on or off trains, when safe and suitable means of boarding or alighting from trains are provided. They must take the responsibility of the ordinary incidents of travel, including the stoppage of cars required by statute at railway junctions, and must govern themselves accordingly.

**Contributory Negligence — Violation of Rule Not Enforced.**

By failing to enforce a rule, a railroad company may allow it to become a dead

letter, and in effect waive, abandon or abrogate it.

[See note at end of this case.]

**Same.**

Where a railroad company fails to enforce one of its rules and a passenger is injured in neglecting to observe it, under our statutes the mere contributory negligence of the passenger is not an absolute bar to recovery.

[See note at end of this case.]

**Alighting at Place Not Regular Station.**

Where passengers habitually get off the trains at a point where they are not invited to get off, and no effectual means are attempted to be used to prevent them from doing so, there is a duty on the company to see that they have a safe opportunity to alight.

[See Ann. Cas. 1913C 1383.]

**Evidence — Ante Mortem Statement.**

An ante mortem statement of a witness purporting to give what the plaintiff in a suit for damages for a personal injury said to him as to how she was injured, tending to contradict her testimony on the stand in the trial, is not competent evidence.

[See Ann. Cas. 1915D 215.]

**Witnesses — Cross-examination — Railroad Claim Agent.**

When the claim adjuster of the railroad company visited the plaintiff the day after she was injured in alighting from the defendant's train, she being then in bed, and when he stated in his testimony, among other things, that his purpose in calling on her was to see if he could help her, a rigid cross-examination of this witness was proper.

**Instructions — Limitation to Evidence.**

The charges to the jury should be confined to the evidence in the case.

**Damages — Evidence — Physician's Fees — Value of Lost Time.**

A jury should be given some substantial evidence upon questions that are not matters of common knowledge, and physicians' charges and the value of lost time are not such matters.

**Trial — Direction of Verdict — Weight of Evidence.**

Chapter 6220, Laws of 1911, amending section 1496, Gen. St. of 1906, does not authorize a trial judge to pass upon the preponderance of evidence, except where the evidence of all the parties shall have been submitted, and it is apparent to the judge that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct a verdict for the opposite party.

**Negligence — Burden of Proof — Effect of Statute.**

In a suit for damages for personal injuries against a railroad company, the effect of section 3148, Gen. St. of 1906, injury having been shown, is to require the defendant company to show by a preponderance of the evidence that its servants and agents exercised all ordinary and reasonable care and diligence, the presumption being against the defendant company.

**Instructions — Comment on Weight of Evidence.**

Under our law a trial judge is not permitted to comment on the evidence, or to give to the jury his views of its weight.

**Appeal — Necessity of Bill of Exceptions.**

Facts which occur in the trial of a case can only be brought to this court for review by a bill of exceptions certified by the trial judge.

**Errors Held Ground for Reversal.**

In this action [against] a railroad company to recover damages for personal injuries, the evidence tends to show that the plaintiff was guilty of contributory negligence, and there is no evidence of money paid out or of indebtedness incurred in endeavoring to have the injured party cured, and no evidence of the extent and value of the loss of service or time, and the amount of the verdict indicates harmful error in the charge that the jury "are entitled to take into consideration any money paid out by the plaintiff in endeavoring to have the plaintiff, Dartha Carter, healed or cured; and loss of time," therefore the judgment should be reversed.

(Syllabus by court.)

Error to Circuit Court, Duval county:  
SIMMONS, Judge.

Action for damages. Dartha Carter et al., plaintiffs, and Florida East Coast Railway Company, defendant. Judgment for plaintiffs. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

*Alex. St. Clair-Abrams* for plaintiff in error.

*Bisbee & Bedell* and *A. H. King* for defendants in error.

[337] HOCKER, J.—The defendants in error, who will be referred to as the plaintiffs, brought an action at law [338] against the plaintiff in error, in the opinion referred to as the defendant, in the Circuit Court of Duval County, Florida, in September, 1910. The declaration contains two counts. The first count is as follows:

"Comes now Dartha Carter and Ezekiel M. Carter, her husband, plaintiffs in the above case, by their attorney, A. H. King, and sues the defendant, Florida East Coast Railway Company, a corporation under the laws of the State of Florida, in an action of trespass for this, to wit:

That during the time herein set forth and for a long time theretofore, the defendant, Florida East Coast Railway Company, was and still is a corporation doing business in the State of Florida, and owning, maintaining and operating for the transportation of freight and passengers by the use of cars and

steam locomotives operated thereon a line of railway and system of railroads in the State of Florida, a portion of which extends from the town of Pablo therein to the City of Jacksonville therein; that on or about the 10th day of July, A. D. 1910, at or about 4:45 P. M., the plaintiff, Dartha Carter, having procured transportation in due course on the passenger train of defendant from the said town of Pablo to the said City of Jacksonville, boarded and took passage on the passenger train of the defendant then and there provided for her passage and proceeded to her destination, the said City of Jacksonville: that upon the arrival of said train of defendant's at the station of defendant in said City of Jacksonville, and after said train of defendant had come to a standstill, said plaintiff, Dartha Carter, prepared and undertook to leave said train of defendant and had proceeded for said purpose as far as, to wit, the lower or bottom step of the platform of the passenger coach of defendant attached to defendant's said train, upon which said plaintiff had been riding as [339] aforesaid, whereupon said train of defendant was started and run forward whereby said plaintiff was then and there precipitated to the ground with great force and violence; and plaintiff alleges that defendant was guilty of carelessness and negligence in the premises in this, to wit, that it caused said train to be started and run forward as aforesaid, while said plaintiff was in the act of alighting, as aforesaid, from said train and before said plaintiff had time to alight; that by reason of said carelessness and negligence of defendant in so allowing said train to be started and run forward, as aforesaid, before said plaintiff had time to alight, as aforesaid, said plaintiff was precipitated to the ground whereby said plaintiff was painfully, seriously and permanently injured in and throughout her body and by reason whereof there was caused an impacted fracture of the neck of the femur of said plaintiff on the right side, and whereby her right leg was shortened, to wit, two inches, thereby rendering said plaintiff a cripple for life; and did thereby expose and did subject the said plaintiff to great shame and mortification, by reason whereof said plaintiff, Dartha Carter, has suffered great pain and anguish at all times between said date and the date thereof, and is still suffering the same, and by reason of such hurting, wounding and injuring said plaintiff, Dartha Carter, then and there became lame, sick and disordered and has suffered great pain and anguish and has so continued and suffered for a long time, to wit, from then to this time, and the said plaintiff was thereby permanently injured and will continue permanently to suffer pain and anguish; and plaintiff, Dartha Carter, was then and thereby

during that time and still is rendered incapable of performing her duties and services by her to be done and performed; and the plaintiff, Ezekiel M. Carter, was at the time of [340] said hurting, wounding and bruising, and has ever since been and is still the husband of the said Dartha Carter, and was then and thereby and has since been deprived of the services, companionship and wifely attention, society and aid of the consortment with said plaintiff, Dartha Carter, and that plaintiffs were obliged to and did necessarily lay out divers sums of money in and about endeavoring to have the plaintiff, Dartha Carter, cured of her wounds, sickness and disorder, as aforesaid, to the damage of the plaintiffs of Twenty-five Thousand (\$25,000.00) Dollars; and therefore plaintiff brings their suit and claim Twenty-five Thousand (\$25,000.00) Dollars damages."

The second count is like the first, except that it alleges defendant caused the train after stopping at Jacksonville, to be suddenly started forward, without notice to the plaintiff, and while she was in the act of alighting, and before she had time to alight, causing the injuries described in the first count.

Each count of the declaration was demurred to on fifteen grounds, among others that no cause of action is shown. These demurrers were overruled, and these rulings are challenged in the first and second assignments of error.

We have examined the authorities cited to sustain the several grounds of demurrer, and we do not think they are based on declarations like those at bar. It is held in the case of *German American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740, that a declaration in an action at law should by direct allegation, or by fair inference from its direct allegation, contain all the essentials of a cause of action, and when negligence is the basis of the recovery, the declaration should contain allegations of the negligent act or omission complained of, [341] and also allegations of the injury sustained, and of facts showing that such injury was a proximate result of the negligence alleged. It seems to us that applying this test, each of the counts of the declaration states a cause of action, and the demurrers were properly overruled.

Pleas of not guilty, and several pleas were filed, upon which issue was joined and a trial had. Among these pleas was one alleging that the defendant in error was injured entirely by reason of her own negligence, and another that the plaintiff in error gave notice in the newspapers published in Jacksonville, and by a notice printed in large letters on the viaduct hereinafter referred to, that no trains would be stopped to receive or deliver passengers on Sunday at a viaduct in the City of

Jacksonville; that the trains were obliged to stop at the switch near the viaduct to receive the signal to enter the Terminal or Union Station yard. The jury found a verdict for the plaintiffs, and assessed the damages at \$12,500.00, upon which a judgment was entered, which is here for review on writ of error.

On the 10th of July, 1910, Dartha Carter, one of the plaintiffs, and her son Dahl and daughter Eula bought round trip tickets over the Florida East Coast Railroad from Jacksonville to Pablo Beach, in Duval County, Florida. They went to Pablo in the morning, and about 4:45 o'clock P. M. boarded the train to return to Jacksonville. The track of the defendant railroad crosses the St. Johns river on the drawbridge, proceeds westward in the city, and under what is familiarly called in these proceedings the *viaduct*, being a part of a street leading to Bay street. The defendant's track goes from the viaduct in a westerly direction to the Union or Terminal Station, which is about 200 yards from the viaduct. Between the viaduct and the Terminal Station the Florida [342] East Coast Line crosses the tracks of the Atlantic Coast Line Railway and the Seaboard Air Line Railway. The Florida East Coast Railway is obliged by law to stop its trains before making these crossings. It maintains a ticket office underneath the viaduct and keeps a notice posted over the gate of the steps leading from the viaduct to the station below that passengers will not be received or discharged on Sundays. The time table published in the "Times-Union" and "Metropolis," newspapers published in the City of Jacksonville, also state that passengers are not taken on or discharged at the viaduct on Sundays. But the trains are obliged to stop there on Sundays because of the State law with reference to crossings, and the situation because of its easy access to the viaduct street presented some temptation to passengers to alight there, rather than to await the cars' arrival at the Terminal Station.

It was proven when the train was on the return trip from Pablo neither the conductor nor any other servant of the company called out the viaduct station before reaching it, as is usual, to give notice to passengers who desire to alight, and have a right to alight at a station. The defendant in error admitted that she did not make any inquiry of the depot agent at Jacksonville, the conductor, or any other officer or agent of the railway company about the schedule of the railroad, or whether her train would stop at the viaduct.

In the case of *McRae v. Wilmington*, etc. R. Co. 88 N. C. 526, 43 Am. Rep. 745, it is held: "Railroad companies have the power to make reasonable regulations for the management of their trains, and one who buys a

ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. It follows that where a passenger purchases a [343] ticket, he only acquires the right to be carried according to the custom of the road. When he purchases such a ticket, he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable, he should conform to it. The requisite information can always be obtained from the agent from whom the ticket is procured, and it is but reasonable to require passengers to obtain the information and to act upon it." (Authorities cited are omitted.)

It is the duty of a person about to take passage on a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the railroad company. *Beauchamp v. International, etc. R. Co.* 56 Tex. 239; *Summitt v. State*, 8 Lea (Tenn.) 413, 41 Am. Rep. 637.

On Sundays the train from Pablo to Jacksonville consists of from ten to twelve cars; on week days of from five to six cars. On this particular Sunday the train consisted of about twelve cars. As the cars stopped at the viaduct on the return trip, without being in any way invited by the officers or the servants of the company to alight, and the station not having been called, the defendant in error and her son and daughter arose from their seats at the back part of the car and immediately walked to the platform—the daughter Eula in front, Mrs. Carter next behind her, and her son Dahl next to her. Eula, who was a small girl, went down the steps and in attempting to get off fell to her knees. Mrs. Carter reached the lower step and was standing square on it *and was not holding to either railing*. The car jerked and started, and she was thrown to the ground and seriously injured. It does not appear that the jerk was unusual in starting a long train of twelve cars. It is the duty of a passenger to exercise reasonable and ordinary care for [344] his own safety in boarding or alighting from a train. 4 *Elliott on Railroads*, top page 499. See also *Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963. Railroad companies have a general power to make reasonable rules and regulations for the government of their business, of which passengers must take notice, and courts will not interfere with. 4 *Elliott supra*, top page 368. See *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 11 So. Rep. 506, 32 Am. St. Rep. 17, 16 L.R.A. 631. "If carriers are held to the highest degree of care for the safety of passengers, passengers ought to be held to the exercise of ordinary care to protect themselves, more especially while railroad companies as a general rule are required to

provide means of access to and egress from their trains and stations which can be used without danger. A passenger who leaves a train at a place which is not a regular station, is held to the duty of exercising diligence in observing the surroundings in order that he may reasonably determine whether the train has arrived at the place where the company intended him to alight. He must take the responsibility of ordinary incidents of travel, including the stoppage of cars required by statute at railway junctions, and must govern himself accordingly."

According to the statement of the defendant she was riding in a coach near the center of the train. The engine was near the railroad crossing a hundred yards or more west from the viaduct; at the place where she got off there was no platform or other indications that it was a place where passengers were expected to alight. Mrs. Carter says she took the Times-Union, but never took the trouble to examine the railroad time tables to see whether the cars stopped at the viaduct to deliver passengers on Sundays. The conductor of the train testified that he was not permitted to lock the doors of the [345] cars, and that he could not prevent passengers, when the cars stopped at any crossing, the viaduct station or anywhere else, from jumping off the trains if they wanted to do so. The accommodations for discharging passengers at the Union Station are apparently sufficient, and there is no complaint that they were insufficient or dangerous. Dahl Carter testified that he wanted to get off at the viaduct because the street cars were generally less crowded than at the Union Station.

From the testimony of the engineer of the train, it is shown that there is always some jerking in starting a long train of cars. This is not denied, and it is not shown that the jerking in this instance was unusual. It is contended by the defendant in error that inasmuch as the railroad company did not enforce the rule against passengers getting off at the viaduct station on Sundays, such conduct may be regarded by the traveling public as a license to get off when the train stopped. Paragraphs 201, 202, 202a, 1 *Elliott on Railroads*. In section 202a, *supra*, it is said: "By-laws may often be waived, and so too in some instances at least, may a rule of a railroad company. By failing to enforce a rule the company may allow it to become a dead letter, and in effect waive, abandon or abrogate it." We think this is a sound principle of law. *Britton v. Atlanta, etc. Air Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749. The case of *Mercher v. Texas Midland R. Co.* (Tex.) 85 S. W. 468, is somewhat similar to this. The trial judge in this case sustained a general demurrer to the complaint, and the

plaintiff not amending, a final judgment was entered dismissing the case. The second headnote is as follows: "Where a passenger attempted to alight from a train at a crossing without notifying those in charge of the train, the facts that it was known custom for passengers to [346] alight at the crossing, and that the train started with a jerk which threw the passenger from the step, did not relieve him from the effect of his own contributory negligence." The case is not controlling because of our statute (paragraph 3149 Gen. Stats. of 1906). Here contributory negligence does not prevent recovery. The case at bar seems to be an unusual case. There was a station used in the week days under the viaduct for selling tickets and receiving and discharging passengers. The railroad gave notice it would not be used on Sundays. It was near the railroad crossing, and for that reason the cars were obliged to stop before making the crossing into the Terminal Station, which was near by. In spite of the notice that the railroad would not receive or discharge passengers on Sunday, passengers habitually got off there on Sunday. But no officer or agent of the company was present to see that they safely alighted, or that the rule was enforced. It was under such circumstances that Mrs. Carter was injured in alighting from the train. We think she was justified in thinking, if she knew of it, that the rule was abandoned or waived. Under such circumstances it was the duty of the company to see that she had an opportunity to safely alight from the train. 6 Cyc. 613, 614. The situation of the viaduct station appears to have been peculiarly tempting to many passengers to alight there.

#### *Twelfth Assignment of Error.*

The defendant moved the court to instruct the jury to find it not guilty, which motion was denied, and this affords the ground of the most important assignment of error. There is no doubt in our mind that the plaintiff is shown to be guilty of contributory negligence in several [347] particulars. She took no pains to inform herself whether the train stopped at the viaduct station to deliver passengers, and she was not so informed by the conductor or other agent of the company. Nothing in the immediate surroundings where she got off indicated it. But we cannot say that her negligence was the sole proximate cause of her injury. Under the peculiar circumstances of this case, we think it was peculiarly the province of the jury to determine whether "the company made it appear that their agents exercised all ordinary and reasonable care and diligence, the presumption being against the company." Sec. 3148 Gen. Stats. of 1906. The company knew that

their rule not to discharge passengers on Sunday at the viaduct station was habitually violated. No apparently effective means to prevent such violation was attempted so far as the record shows. Numbers of passengers seem to have treated it as waived or abandoned. It would seem then that it was the duty of the company to adopt some means to prevent injury to passengers who attempted to alight there. *McDonald v. Long Island R. Co.* 116 N. Y. 546, 22 N. E. 1068, 15 Am. Rep. 437; *Poole v. Consolidated St. R. Co.* 100 Mich. 379, 59 N. W. 390, 25 L.R.A. 744.

The case of *Mercher v. Texas Midland R. Co.* (Tex.) 85 S. W. 468, is relied on by the defendant company. The case in some respects is like the instant one, and the court held that the contributory negligence prevented recovery by him. But under our statute, section 3149 Gen. Stats. of 1906, it is not a bar to recovery. If the plaintiff and the company are both at fault, the plaintiff may recover, but the damages are to be increased or diminished by the jury in proportion to the amount of default attributable to him. We are not able to say that the negligence of the plaintiff was the sole proximate [348] cause of her injury. That was a question for the jury. What we have said also applies to the thirteenth assignment, which is based on the refusal of the court to instruct the jury to find the defendant not guilty.

The fourth assignment of error does not appear to be very important, as neither in brief or on the assignment is there any reference to the page or pages of a long record of nearly 500 pages where the facts upon which it is based are to be found.

The sixth and seventh assignments of error relate to the refusal of the court to admit in evidence a statement made by W. M. Wadsworth and signed by him prior to his death, purporting to give what Mrs. Carter said to him as to how she was injured. This tended to contradict her statement as a witness on the trial. It is admitted that this statement by Mr. Wadsworth is not unusually regarded as competent evidence. We discover no sufficient reason in this instance to depart from the rule excluding such a statement, if it should ever be done. Mr. Wadsworth was sick for several months before his death, and no effort was made to take his deposition.

The eighth assignment of error is based on the action of the court overruling an objection of the defendant to a question propounded by plaintiff's attorney to Mr. Stillman, on cross-examination. The question was: "For the real purpose of making a better defense for the railroad company as their Claim Adjuster, was it not?" Mr. Stillman called on Mrs. Carter the day after she was injured. She was then in bed. He tes-

tified that he wanted to see if he could help her, as she was in destitute circumstances. He also said he wanted to get the real facts to report to his company. He was its Claim Adjuster. He said he took a statement from her of the facts of her injury. We do not think the court committed reversible [349] error in permitting the question. The circumstances of the Claim Adjuster going to her home so soon after she was injured and asking from her a written statement of the facts warranted a rigid examination into his motives.

The tenth and eleventh assignments question the action of the court in overruling the objections of the defendant to questions propounded to the plaintiff, Mrs. Carter, as to whether or not at the time she got off the train she knew of any rule or regulation of the railroad company that passengers were not to get off at that station, or if she had ever heard of any such rule or regulation in any way whatever, referring to rules and regulations as to stopping of the trains. Mrs. Carter answered both questions in the negative. It is contended that permitting these questions released the plaintiff from the duty of ascertaining whether or not the defendant's train stopped at or near the viaduct station for the purpose of receiving or delivering passengers on that day. The plaintiff justifies the questions on the ground that the special pleas of the defendant alleged that Mrs. Carter *knew full well* that the place at which the train was temporarily stopped was not a place on that day at which passengers were invited or authorized to alight from defendant's cars." Her actual knowledge as distinguished from her duty to inform herself seems to have been made an issue by the defendant. We cannot therefore say the court erred in permitting the questions. Taken in connection with the instructions given to the jury at the request of the defendant setting forth the duty of a passenger to advise himself as to the stopping places of the train and whether he is invited or expected to alight from a train at a particular stopping place, we do not see how the defendant was injured by the action of the court.

[350] The fourteenth assignment of error is based on a portion of the charge which is as follows: "You are entitled to take into consideration any money paid out by the plaintiff in endeavoring to have the plaintiff, Dartha Carter, healed or cured; any *loss of time*."

There was no proof of any money paid out in having Mrs. Carter healed or cured, and no proof of what time she lost. There is proof that she was attended by physicians. This court has held that the charges of a trial judge should be confined to the evidence in the case. *Livingstone v. Anderson*, 30

Fla. 117, 11 So. 270; *Judge v. Moore*, 9 Fla. 269, 11 Enc. Pl. & Pr. 158.

What effect this charge had upon the jury in estimating damages, we are unable to say. The jury knew from the evidence that Mrs. Carter had been attended by the physicians, and might reasonably infer that they had been paid for their services, or that they expected to be paid, but there is no evidence of any amount paid, or what they expected to be paid. Nor is there any proof of how much time Mrs. Carter lost by reason of her injury, or its value. The jury were apparently invited to take these matters into consideration and may have construed the charge as permitting them to make their own estimate of what should be allowed. This seems to be the view of the attorney for the plaintiff. We cannot agree to this view of the matter. Of course a jury is not obliged to adopt literally the testimony of any witness, but they should be given some substantial evidence upon questions that are not matters of common knowledge, and physicians' charges and the quantity of time lost and its value in a case like this cannot be considered as matters of common knowledge. We are unable to say affirmatively that this charge was not misleading and prejudicial to the defendant. A charge must be confined to [351] the issues made by the pleadings (*Mullikin v. Harrison*, 53 Fla. 255, 44 So. 426) and the facts in evidence (*South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436).

The fifteenth assignment is based on a portion of the Judge's charge that in substance required the plaintiff to show "by a preponderance of the evidence she was injured as alleged in the declaration, and that being shown, it was the duty of the defendant to show, by a preponderance of the evidence that its agents and servants used all due prudence and care to prevent the happening of the accident; and if you find that due care and prudence was used, then you will find the defendant not guilty. If the plaintiff was injured as alleged, and the defendant does not show by a preponderance of the evidence that its agents and servants used due diligence and care to avoid the injury and accident you should find for the plaintiff and assess the damages as I have stated." The charge seems to be based on Section 3148 Gen. Stats. of 1906, to which we have referred. The contention in favor of the assignment is that it is the duty of the trial judge to pass upon the preponderance of the evidence under the authority given by Chapter 6220 Laws of 1911, amending Section 1406 Gen. Stats. of 1906. We do not construe this act as applying to any case except when the evidence of all the parties shall have been submitted it is apparent to the judge that no sufficient evidence has been



submitted upon which the jury could legally find a verdict for one party, the judge may direct a verdict for the opposite party. It could not have been the purpose of the statute to take from the jury the right and duty of passing upon conflicts in the testimony, and of determining the weight and preponderance of the evidence. If the effect of section 3148 is not to require the defendant, [352] injury having been shown, to show by the preponderance of the evidence that its agents exercised all ordinary and reasonable care and diligence, the presumption being against the defendant, the then statute is without meaning.

The sixteenth assignment is based on the 8th paragraph of the Judge's charge. The defendant seems to proceed on the theory that when the railroad company had given notice in the newspapers, and posted a notice at the top of the viaduct that passengers would not be received or discharged at the viaduct station, it had discharged its duty to the traveling public. The argument presented here by it in support of the assignments of error seems to disregard the doctrine that though a railroad company has the right to make reasonable rules and regulations they are not inflexible, but may be waived or abandoned by the conduct of the company, and if it permits its rules to be habitually violated by passengers, they may be treated as waived or abandoned. The evidence abundantly shows that this was the case with reference to the rule about receiving and delivering passengers at the viaduct station on Sundays. The conductor of the train on the particular Sunday when Mrs. Carter was injured stated that passengers habitually got off there in numbers when the train stopped, and he had no means of preventing them. Other witnesses testified to the same effect. The eighth paragraph of the charge which is here involved is as follows:

"Gentlemen, if you find from the evidence that the viaduct station, where the train of the defendant is alleged to have stopped on the afternoon of the alleged injury to the plaintiff Dartha Carter, was a regular station of the defendant for the taking on or discharging of passengers by some of its trains, or on certain days, and if [353] you further find from the evidence that the train on which the plaintiff Dartha Carter was then a passenger actually did stop at the said station long enough and under such circumstances as to lead an ordinarily prudent person to believe that such stop was for the purpose of discharging passengers; then it became the duty of the defendant's agents and employees in charge of such train to use care and prudence in again starting the train to see that passengers alighting from said train would not be injured by such starting.

If under such circumstances they failed to use such care and prudence, they were guilty of negligence, and if such negligence contributed to the injury of the plaintiff Dartha Carter, if you find that she was injured as alleged in the declaration, then you should find for the plaintiffs and assess their damages according to the rule of damages already given you in charge by the court, making proper reduction in the amount on account of any contributory negligence on the part of the plaintiff Dartha Carter, if you find she was guilty of such contributory negligence. But if you find from the evidence that the plaintiff Dartha Carter actually knew that such stop was not made for the purpose of permitting passengers to alight from said train, and that notwithstanding such knowledge on her part, she nevertheless attempted to leave the train at that point, and alighted from it while it was in motion, and that she was injured solely as a result of so alighting, then you will find the defendant not guilty." It seems to us that this paragraph fairly states the law and we find no reversible error in it.

The seventeenth assignment of error is based on the following instruction to the jury at plaintiff's request: "You will determine from all the facts and circumstances in the case whether the plaintiff had reasonable ground [354] to suppose that when the train stopped, as it did, that it was for the purpose of permitting passengers to alight, for whether the plaintiff was herself negligent is to be determined by whether she acted as an ordinarily prudent person in like circumstances would act." Under the circumstances of this case, we find in it no reversible error.

The eighteenth assignment of error is based on the third instruction given at the request of the plaintiff. It is as follows: "Again, you will determine from all the facts and circumstances of the case whether the railroad company knew, or reasonably ought to have known, that passengers upon the train would suppose from all the facts and circumstances of the case, that when the train stopped, as it did stop, that it was for the purpose of permitting them to alight from the train. If they knew, or reasonably ought to have known, that passengers would have so supposed, then it was the duty of the railroad company to take reasonable care and precaution that the train was not started under such circumstances as to imperil a passenger alighting from the train." We do not agree with the contention that there is no evidence to support this construction, and that it is in conflict with it. There is abundant evidence that passengers got off the train on Sundays at this place, and had been doing so some time. There is no evidence that they were ever interrupted in doing so,

or ever attempted to be prevented. We cannot affirmatively say that they might not have supposed they had the right to alight, or at least might alight if so inclined.

The twentieth and twenty-first assignments of error are based on the refusal of the court to give the first and fourth instructions requested by the defendant. They are as follows:

[355] "1. If the jury believe from the preponderance of the evidence that on the day of the alleged injury defendant's train was stopped for the purposes of receiving the signal to proceed into the Union Station; and, if the jury believe from the preponderance of the evidence that the plaintiff was not expected nor invited to alight at the place where the train was stopped; and, if the jury further believe from the preponderance of the evidence that, without knowledge of, or notice from the plaintiff to, any of the employees of the defendant in charge of the train, the plaintiff voluntarily attempted to alight from the train after it had started for the Union Station, then in that event it is the duty of the jury to find the defendant not guilty."

"4. To enable the plaintiff to recover it is essential for her to prove that on the day of the happening of the injury the train was stopped at a place where she, as well as other passengers, were invited and expected to alight and that sufficient time was not afforded for her to safely alight from the train."

These instructions are based on the assumption that the undisputed evidence showed that the railroad company owed no duty to a passenger under the conditions we have heretofore referred to, and could not by the jury have been considered as guilty of contributory negligence. We think the instructions were properly refused. The same objection applies to the twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh assignments of error.

The twenty-eighth assignment of error is based on the refusal of the court to give instruction No. 17 requested by the defendant. This instruction recites that certain facts in evidence were sufficient to charge the plaintiff with knowledge that she was not expected or invited to [356] alight from the train on Sunday at a place where the car stopped. We do not think the court erred in refusing to give this instruction because, under all the facts it might have been misleading. It does not follow because a passenger is informed she is not invited to alight at a particular place and other passengers alight there under circumstances which tend to make it appear they are permitted to do so, that the railroad company owes no duty to the passenger alighting or attempting to alight under these circumstances.

The twenty-ninth assignment is based on the refusal of the court to give the nineteenth instruction requested by the defendant. This instruction is practically embraced in instruction No. 22 and additional instruction No. 2 requested by the defendant, which were given, which assert that a railroad company has the right to specify on what days any one or more of its trains will stop at any particular point for the delivery or reception of passengers, and it is the duty of the traveling public to ascertain the rules, regulations and schedules of a company in this particular. A judge is not to be held in error for not in distinct instruction repeating substantially the same proposition. There ought to be some reasonable limit in asking instructions.

We find no reversible error under the thirtieth assignment.

The thirty-second assignment of error is based on the refusal of the judge to charge that "the statement of an injured person made soon after the happening of the alleged injury giving an account of the manner and means whereby such injury was obtained and reduced to writing and read to the injured person and acknowledged by him or her to be correct and signed by the injured person is held in law to be the highest order of evidence as to [357] how the injury was obtained." No authority is referred to sustain this instruction. Under our law a judge is not permitted to comment on the evidence, or give to the jury his views of its weight. See 1496 Gen. Stats. of 1906.

The thirty-third assignment does not appear to be argued by the defendant.

The thirty-fourth assignment is based upon the refusal of the court to give the thirtieth instruction requested by the defendant, which in effect seems to be intended as a direction to the jury as to the effect they should give to certain evidence. We see no error in its refusal.

The thirty-fifth and thirty-sixth assignments of error are based on the refusal of the court to give instructions upon matters which may or may not have occurred on the trial. No reference is made in the brief of defendant to the record where they may be found.

Assignments 37, 38, 39, 40, 41, 42, 43 and 44 are based on the refusal of the judge to grant a new trial because of certain remarks and comments by one of the attorneys for the plaintiff upon some of the witnesses of the defendant. They are set forth in the motion and supported by affidavit, but the bill of exceptions certified by the judge does not show that any such remarks were made. Facts which occur in the trial of a case can only be brought to this court for review by bill of exceptions certified by the trial judge.

The only other assignment we deem it necessary to consider, is based on the overruling of the motion for a new trial, wherein the action of the trial judge in charging the jury they "were entitled to take into consideration any money paid out by the plaintiffs in endeavoring to have the plaintiff Dartha Carter healed or cured; any loss of time" is challenged, there being no substantial evidence [358] to justify this charge. As before said, we think this was reversible error.

Where a charge given is in material substance not applicable to the pleadings or to the evidence, and it appears that such charge may reasonably have misled the jury to the injustice of the party duly complaining thereof, it may constitute reversible error.

The plaintiff, Dartha Carter, began her round trip on the defendant's train on Sunday, taking passage at the Terminal Station. In returning the same day the train stopped in obedience to the statute at a railroad crossing just before reaching the Terminal Station. This stop happened to be at or near a point where the defendant had a station under a viaduct that was used for passengers on week days, but not on Sundays. The non-use of this viaduct station on Sundays was duly advertised and posted. Persons habitually alighted from the train on Sundays at this point, while the stop was being made for the railroad crossing. There was no announcement made on the train on which plaintiff was a passenger that the train would stop at the viaduct station, and the stop at or near such station was made on account of the railroad crossing as required by the statute. At the point where Mrs. Carter was in the act of alighting from the car there was no station platform and nothing to indicate an invitation to alight there, or that persons were expected to alight there. It was not the station at which she took passage, and she made no enquiry as to whether she could properly or safely leave the train at that point. Her little daughter fell to the ground in alighting just in front of its mother; and the mother standing on the bottom step without holding on to either of the rails on the platform of the car, was thrown to the ground as the train started, after the brief stop required by law [359] just before reaching the railroad crossing. These and other circumstances shown by the transcript were to be considered by the jury in determining whether there was contributory negligence requiring the damages to be diminished as provided by the statute.

There being evidence of contributory negligence, and no evidence of money paid out, or indebtedness incurred in endeavoring to have the injured party cured, and no evidence of the extent and value of the loss of

service or time, the amount of the verdict indicates harmful error in the charge that the jury "are entitled to take into consideration any money paid out by the plaintiff in endeavoring to have the plaintiff, Dartha Carter, healed or cured; any loss of time."

The judgment of the Circuit Court is reversed.

Taylor and Whitfield, J. J., concur.

COCKRELL, J. (*dissenting*).—I fail to find reversal compelling error in giving the charge for which this case is reversed. It confines the damages to expenses actually paid, excluding those incurred, and of this the guilty corporation may not complain. The verdict in this case does not indicate that an intelligent jury went out of its way to include expenses not proven to be paid, or allowed one dollar for expenses incurred or paid.

As to the item "loss of time," as an element of damage to the husband, who has been wrongfully deprived of the services of the wife and mother, there is evidence that before the accident she did much of the housework and supervised the upbringing of their numerous small children, and they were people of meagre means. The court does not indicate in what respect this portion of the [360] charge is defective, and I know of no one more expert or skilled than a jury drawn from all ranks of life.

Should I be mistaken, however, in my view of this charge and it be error, yet this single error enters not at all into the question of liability, but only as to the quantum of damages, and therefore it seems peculiarly the case contemplated by the legislature in enacting Chapter 6467, Laws of 1913. "That hereafter an Appellate Court in reversing a judgment of a lower court brought before it for review by writ of error may, by the order of reversal, if the error for which reversal is sought is such as to require a new trial of the action in the court below, direct that a new trial shall be had on all the issues shown by the record or upon a part of such issues only, and when a reversal is had with the direction for a new trial to be had on a part only of the issues, all other issues shall be deemed to be settled conclusively in favor of the defendant in error."

There has been a fair submission of the question of negligence to the jury, without error in that submission by court or jury, and this court, acting under that authority, which is in line with the most enlightened public opinion of the day, justly decrying against the expense and delays of the courts, should accept this its first opportunity to declare itself in sympathy with such legislation.

Shackleford, C. J., concurs in this dissent.

Rehearing denied May 9, 1914.

**NOTE.****Failure of Carrier to Enforce Rule as Affecting Contributory Negligence of Passenger in Violation Thereof.**

If a carrier so habitually fails to enforce a rule affecting the conduct of passengers that the rule becomes practically a dead letter it is deemed to be abrogated or abandoned, and the carrier cannot predicate an assertion of negligence on the part of a passenger on his violation thereof. *Chicago, etc. R. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 U. S. (L. ed.) 131; *Capital Traction Co. v. Brown*, 29 App. Cas. (D. C.) 473, 10 Ann. Cas. 813, 12 L.R.A. (N.S.) 831; *Hart v. Capital Traction Co.* 35 App. Cas. (D. C.) 502; *Chicago, etc. R. Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380; *Coburn v. Moline, etc. R. Co.* 149 Ill. App. 132, *affirmed* 243 Ill. 448, 90 N. E. 741, 134 Am. St. Rep. 377; *Jones v. Chicago, etc. R. Co.* 43 Minn. 279, 45 N. W. 444; *Huelsenkamp v. Citizens' R. Co.* 37 Mo. 537, 90 Am. Dec. 399; *St. Louis Southwestern Ry. Co. v. Morgan*, 44 Tex. Civ. App. 155, 98 S. W. 408; *Beaumont Traction Co. v. Happ*, 57 Tex. Civ. App. 427, 122 S. W. 610; *Houston, etc. R. Co. v. Norris (Tex.)* 41 S. W. 708; *San Antonio, etc. R. Co. v. Lynch (Tex.)* 55 S. W. 517. See also *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L.R.A. 631. And see the reported case.

In *Sweetland v. Lynn, etc. R. Co.* 177 Mass. 574, 59 N. E. 443, 51 L.R.A. 783, the rule was stated as follows: "We have no doubt that a railroad company, after making a rule in regard to the conduct of passengers, may waive and abandon it, and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If a railroad company does this, it cannot set up the rule to defeat the rightful claim of a passenger who has acted in the well warranted belief that the rule is not in force. *Chicago, etc. Ry. v. Lowell*, 151 U. S. 209 [14 S. Ct. 281, 38 U. S. (L. ed.) 131]; *Dublin, etc. R. Co. v. Slaterry*, 3 App. Cas. (Eng.) 1155; *Jones v. Chicago, etc. R. Co.* 43 Minn. 279; *New York, etc. R. Co. v. Ball*, 53 N. J. L. 283, 286. If such signs as this are placed over the front platform of cars, and if afterwards the persons in charge of the cars are accustomed to receive passengers upon the cars in such numbers as to crowd the front and rear platforms, as well as the other parts of the cars, and the passengers are permitted to ride freely and without question upon the front platforms, paying for so riding the usual fare, the passengers may well believe, and the jury may well find, that the notice was not intended as a rule to be obeyed, and that the front platforms were intended by the company to be used by passengers. The officers of the

company might be supposed to know the habitual methods of their servants in managing their cars. We are of opinion that the instructions were correct, and that the evidence well warranted the submission of the questions to the jury."

In *Chicago, etc. R. Co. v. Lowell*, 151 U. S. 209, 14 S. Ct. 281, 38 U. S. (L. ed.) 131, wherein it appeared that the plaintiff while alighting from a train at a station turned to cross the railroad tracks in a direction contrary to a printed rule, which was, however, habitually disregarded with the acquiescence of the company, it was held that the plaintiff could maintain his action. The court said: "We are of the opinion that there was no absolute obligation on the part of the plaintiff to cross the track by way of the ravine known as Victoria Street. To do this would have required him to descend a flight of steps at the east end of the station, about fifteen feet to the level of the street, which was not graded or in any way improved, but was a natural ravine passing under the tracks at this point. There was a stream of water varying in width from two to six feet, and in depth from two or three inches to two feet, running over the surface of the street under such tracks. The ground beneath the tracks was marshy, muddy, and wet at the time; the street was uneven and irregular, and there were no lights or other illumination along the street at that point, and the night was dark. It seems to have been the universal custom for all persons living on the south side of the tracks to cross over the tracks in going to their homes, and not under the tracks by Victoria Street. Under such circumstances, the plaintiff had a right to make use of the customary mode of alighting and reaching his home. The case resolves itself into the question, then, whether the plaintiff was, as matter of law, guilty of negligence in failing to get off the train on the north side, there being in the opinion of the court no question that if he had alighted upon the platform and waited until the train passed he would not have been injured. There was, it is true, a notice conspicuously posted at each end of the smoking car, in which plaintiff was riding, requiring passengers leaving the car at the forward end to turn to the right and at the rear end to turn to the left, and avoid danger from the trains on the opposite track. There was testimony tending to show that this notice had never been read by the plaintiff. Assuming, however, that he was bound to read it, and was chargeable with knowledge of its contents, there was other testimony tending to show that it was habitually disregarded by passengers with the acquiescence of the conductor and the servants of the road about the station. There was evidence that plaintiff and

his companion . . . were met upon the platform of the car by the collector, who asked for their tickets, which were delivered to him; that the collector saw them get off on the south side and said nothing to them, but immediately upon receiving their tickets entered the smoking car; that no objection was raised to their getting off upon the south side, and that other people were in the habit of getting off in the same way. Now if the custom of passengers to disregard the rule was so common as to charge the servants of the road with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it. A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting the requirement to be generally disregarded, and then proceeding upon the theory that every one is bound to comply with it. If, in such case, an accident occur, the defendant should not be allowed to rely exclusively upon a breach of its regulation."

In *Coburn v. Moline R. Co.* 149 Ill. App. 132, affirmed 243 Ill. 448, 90 N. E. 741, it was said: "Appellants proved by the conductor and the motorneer of another car that appellee had frequently ridden upon the car in their charge, and had frequently gotten into the front vestibule and had been excluded therefrom by the conductor, and that on one such occasion the conductor pointed out to him a like notice in that vestibule and read it to him, though the motorneer retracted some of his testimony after leaving the stand and reading a transcript of his testimony on the former trial. Appellee testified that he never was excluded from the vestibule by said conductor or motorneer and that such notice was never read to him. By an appropriate question and by an offer of proof appellee sought to show in rebuttal that before this accident he had several times ridden on the platform of other cars of appellants, and that

his attention had never been called to this rule, and that he had never been requested to leave the platform, and that on many occasions before the accident he had seen other passengers riding on the front platform of vestibuled cars. Appellants object to this proof and the court sustained the objection, and cross errors are assigned upon this ruling. No reason appears to us why this proof was not competent as tending to rebut appellants' claim that appellee was negligent in riding upon the front platform, and also as tending to show that the rule had been practically abandoned by the company. Abrogation of a rule may be shown by proof of its habitual violation with knowledge of the party establishing the rule, and such knowledge may be constructive as well as actual, and if the practice to violate the rule is continued for such a length of time that the maker of the rule might reasonably have known of it, the knowledge of such maker will be presumed. *Hampton v. Chicago, etc. R. Co.* 236 Ill. 249; *Chicago, etc. R. Co. v. Flynn*, 154 Ill. 448, and cases there cited. Appellee was not required to introduce this evidence in chief. It was properly rebuttal after appellants had shown their reliance upon the rule as a defense. It may well be that if the introduction of this testimony had been permitted it would have appeared that in actual practice appellants had treated the rule as abrogated. The conductor of the car in question testified that he was in the habit of directing passengers who had packages to go upon the front vestibule. In view of this conflicting testimony, and of the fact that appellee went into the front vestibule by express direction of appellants' conductor in charge of the car, and in view of the darkness in the vestibule of the testimony by appellee that he did not see the rule there posted, we are of opinion that the jury were not required to find that appellee could not recover because of that rule posted in that vestibule, or otherwise known to appellee."



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